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on behalf of herself and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO – HALL OF JUSTICE**

ALEXANDRIA ILENE KABITZKE on behalf
of herself and all others similarly situated,

Plaintiff,

v.

CENTRO DE SALUD DE LA COMUNIDAD
DE SAN YSIDRO d/b/a SAN YSIDRO
HEALTH, a California corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No. 37-2022-00046873-CU-OE-CTL

Judge: Hon. Gregory Pollack
Action Date: November 18, 2022
Trial Date: Not Set

**PLAINTIFF'S UNOPPOSED NOTICE OF
SECOND AMENDED MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT**

SUPPORTING DOCUMENTS:
DECLARATIONS OF JAMES R. HAWKINS
AND MARIA C. ROBERTS; (PROPOSED)
ORDER

Date: April 26, 2024
Time: 9:30 a.m.
Dept.: C-71

1 **PLEASE TAKE NOTICE THAT** on April 26, 2024 at 9:30 a.m. in Department 71 of the
2 above-entitled court located at 330 W Broadway, San Diego, California 92101, Plaintiff Alexandria Ilene
3 Kabitzke will and hereby does move the Court for an Order: (1) preliminarily certifying the Class for
4 Settlement purposes only; (2) preliminarily approving James Hawkins, Isandra Fernandez and
5 Lance Dacre from the law firm of James Hawkins, APLC, as Class Counsel for Plaintiff and the
6 Class Members in this matter; (3) preliminarily approving Alexandria Ilene Kabitzke as the Class
7 Representative; (4) approving ILYM, Group Inc. as the Settlement Administrator; (5)
8 preliminarily approving the class action settlement; and (6) approving and directing distribution
9 of Notice of Class Action and PAGA Settlement (“Notice of Class Action”).

10 This unopposed motion is made pursuant to Rule 3.769 of the California Rules of Court
11 and Labor Code section 2699(1)(2), which provides for court approval of the settlement of PAGA
12 claims and class actions and which allows the Court to preliminarily certify a class for settlement
13 purposes. The basis for this motion is that the proposed Settlement is fair, adequate, and
14 reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity of
15 Class Members to participate in, opt out of, or object to the Settlement.

16 This unopposed motion will be based on the attached Memorandum of Points and
17 Authorities, the declarations of James R. Hawkins and Maria. C. Roberts, the Stipulation of
18 Class Action and PAGA Settlement and the Addendum thereto, and the Joint Prosecution
19 Agreement, attached to the Declaration of James R. Hawkins as Exhibits 1-3 respectively, and
20 upon the oral arguments of counsel (if any) and upon the complete records and file herein.

21 Dated: March 22, 2024

JAMES HAWKINS, APLC



James R. Hawkins

Isandra Y. Fernandez

Lance Dacre

Attorneys for Plaintiff Alexandria Ilene Kabitzke

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On September 8, 2022, Plaintiff Alexandra Ilene Kabitzke (“Plaintiff”) filed a putative
4 wage and hour class action complaint on behalf of herself and all current/former non-exempt
5 employees of Defendant Centro de Salud de la Comunidad de San Ysidro, dba San Ysidro
6 Health (“Defendant” and/or “SYH”), who worked in California. The lawsuit seeks recovery of
7 alleged unpaid wages, premium wages and penalties pursuant to California Labor Code,
8 Industrial Welfare Commission (“IWC”) Wage Order No. 5-2001, Bus. & Prof. Code § 17200.
9 On November 18, 2022, Plaintiff filed a separate action against SYH alleging PAGA violations.
10 SYH denies the claims pled in these cases and disputes liability for the damages sought.

11 After engaging in extensive informal exchange of documents and information and
12 participating in a full day mediation and post-mediation dialogue and subject to court approval,
13 Plaintiff and SYH (collectively the “Parties”) have reached a classwide and PAGA settlement on
14 behalf of the putative class and all aggrieved employees for a total of Two Million Nine Hundred
15 Thousand Dollars (\$2,900,000.00), (“Maximum Settlement Amount”). The Maximum
16 Settlement Amount (“MSA”) includes individual settlement payments to class members and
17 aggrieved employees, attorneys’ fees and costs, named plaintiff/class representative
18 enhancement payment, the costs of the settlement administrator, and payment to the California
19 Labor Workforce Development Agency (“LWDA”) under PAGA. All of this is memorialized in
20 the Stipulation of Class Action and PAGA Settlement and Addendum thereto (the “Settlement”
21 or “Settlement Agreement”).

22 **This is a non-reversionary cash settlement.** Every Class Member who does not opt out
23 of the Settlement will automatically be mailed an individual settlement payment. Every Class
24 Member who falls within the PAGA group will be mailed an individual settlement payment
25 associated with the PAGA penalty portion of the settlement, regardless of opt-out status. There is
26 no claim filing process, and Class Members do not have to file a claim to be mailed a payment.

27 As shown, the proposed Settlement satisfies all of the criteria for preliminary settlement
28 approval under California law and the mandates of PAGA and falls well within the range of

proper approval. As such, Plaintiff moves this court to: (i) preliminarily certify the proposed Class; (ii) preliminarily approve James R. Hawkins, Isandra Fernandez, and Lance Dacre of James Hawkins APLC, as class counsel for Plaintiff and the Class in this matter; (iii) preliminarily approve Alexandra Ilene Kabitzke (“Plaintiff”) as Class Representative; (iv) appoint ILYM Group, Inc. as the settlement administrator; (v) grant preliminary approval of the Stipulation of Class Action and PAGA Settlement (“Settlement Agreement”); (vi) direct distribution of the Notice of Class Action and PAGA Settlement (“Class Notice”) on the terms of the Settlement Agreement; and (vii) schedule a final approval hearing.

II. FACTUAL BACKGROUND

A. Pleadings

On September 8, 2022, Plaintiff filed a putative wage and hour class action complaint against SYH in San Diego Superior Court, alleging claims for failure to: (1) Pay Lawful Wages; (2) Provide Lawful Meal Periods or Compensation in Lieu Thereof; (3) Provide Lawful Rest Periods or Compensation in Lieu Thereof; (4) Pay Employee Expenses; (5) Timely Pay Wages During Employment; (6) Timely Pay Wages at Termination; (7) Provide Accurate, Itemized Wage Statements; and for (8) Violations of the Unfair Competition Law. Declaration of James R. Hawkins in Support of Second Amended Motion for Preliminary Approval of Class Action and PAGA Settlement (“Hawkins Decl.”), ¶2; Declaration of Maria C. Roberts in Support of Unopposed Second Amended Motion for Preliminary Approval of Class and PAGA Settlement (“Roberts Decl.”), ¶3.)

On November 9, 2022, SYH removed this case to the Southern District of California under CAFA, Case No. 3:22-cv-01752-H-BGS (hereafter the “Class Case”). On September 8, 2022, Plaintiff provided notice to the Defendant and to the Labor and Workforce Development Agency (“LWDA”) of their intent to allege claims under Labor Code Sections 2699, *et seq.* the Private Attorney General Act (“PAGA”). On November 18, 2022, Plaintiff filed a separate complaint in San Diego Superior Court, which asserted a single claim for alleged Labor Code violations and seeking penalties under PAGA, Case No. 37-2022-0046873 (Hawkins Decl, ¶ 2, Exh. 4). On August 22, 2023, Plaintiff filed a First Amended Complaint (“FAC”) adding class

1 action claims, which is the operative complaint in this matter (*Id.*).

2 Two other lawsuits were previously filed against SYH alleging overlapping claims for an
3 overlapping time period. These lawsuits are *Jaqueline Hernandez v. Centro de Salud de la*
4 *Comunidad de San Ysidro, Inc.*, San Diego Superior Court Case No. 37-2021-00017369
5 (*Hernandez*), and *Audrey Heredia v. Centro de Salud de la Comunidad de San Ysidro, Inc.*, San
6 Diego Superior Court Case No. 37-2020-00046387 (“*Heredia*”) (referred to as Intervenor’s
7 Actions)

8 Throughout this litigation and the Intervenor’s Actions, SYH has denied the allegations
9 against it and raised defenses to the claims pled, individually and on a class wide basis. SYH
10 maintains that its policies and practices meet the requirements of the Labor Code and applicable
11 Wage Orders. (Hawkins Decl. ¶3; Roberts Decl., ¶4.) To date, no motion for class certification
12 has been filed in this case, no class has been certified, and the Court has not made any findings
13 that SYH engaged in a violation of any law, rule or regulation, with respect to the issues
14 presented in the litigation. (Hawkins Decl. ¶4.)

15 **B. Discovery and Mediations**

16 Through exchange of informal discovery, SYH produced to Plaintiff more than 100,000
17 pages of documents, including all of its pertinent policies, handbooks, the time and wage records
18 for more than 1,100 putative class members dating back as far as 2016, copies of its arbitration
19 policies, and copies of all pleadings, motions, court orders, depositions, discovery requests and
20 responses and everything produced in discovery in Intervenor’s Actions, which involve over-
21 lapping putative class and PAGA claims against SYH, as well as a list of pay rates and dates of
22 employment for the approximate 3700 putative class members and the aggrieved employees.
23 SYH also produced nearly 100 affidavits signed by current/former nonexempt employees and
24 others, which supported SYH’s position that the wage and hour /PAGA claims pled against it
25 were not supported and contrary to their experience working for SYH. (Hawkins Decl. ¶5;
26 Roberts Decl., ¶5.) SYH also provided all briefing and a related court order issued by the
27 Superior Court in early 2023 denying certification on all putative class claims pled in one of
28 Intervenor’s Actions, the *Hernandez* case. (Roberts Decl., ¶6.)

1 After conducting extensive informal discovery, exchanging hundreds of thousands of
2 pages of relevant documents and records, having that information reviewed and analyzed by
3 Plaintiff's counsel and by their experts, and engaging in numerous discussions regarding the
4 claims alleged, on March 21, 2023, the Parties attended mediation with Hon. Ronald M. Sabraw
5 (Ret.), an experienced wage and hour class action mediator and former Supervising Judge of the
6 Complex Division of the Alameda Superior Court. (Hawkins Decl. ¶ 6.) Through mediation, the
7 Parties exchanged further information concerning the putative class and PAGA claims and
8 SYH's defenses, but did not settle. But the dialogue continued, and ultimately a mediator's
9 proposal was made and accepted on March 24, 2023. (Hawkins Decl. ¶ 7; Roberts Decl., ¶7)

10 The March 2023 mediation with Judge Sabraw followed months of efforts by SYH in
11 2022 to settle Intervenor's Actions, with the assistance of mediator, Hon. William Pate (ret.) over
12 a 7-month period. Despite these efforts (which cost SYH more than \$50,000 in fees and costs)
13 and Defendant's willingness to pay millions of dollars to buy its peace in cases in which it denies
14 liability, the cases did not resolve. (Roberts Decl., ¶7.)

15 After the Parties reached a settlement in principle in the instant case, their counsel spent
16 months in continued negotiations about the settlement terms and in the process exchanged
17 additional detailed information pertinent to the settlement. (Hawkins Decl., ¶8; Roberts Decl.,
18 ¶8.) Beginning in early April 2023, the Parties exchanged numerous drafts of the long-form
19 Settlement Agreement and notice and had multiple calls and e-mail communications regarding
20 the terms of the documents and revisions thereto. (Hawkins Decl. ¶9.) The principal terms and
21 provisions of the settlement were finally approved by the Parties on or about July 25, 2023, and
22 the Settlement Agreement was fully executed as of August 7, 2023. (Hawkins Decl. ¶10.) It is
23 this Settlement Agreement that is now before this Court for preliminary approval. (Hawkins
24 Decl. ¶11, Exh. 1.) Plaintiff and Intervenor's also reached a settlement with the assistance of
25 mediator Hon. William Pate (ret.) on the issues of fees and costs, which is memorialized in
26 Exhibits 2 and 3. (Hawkins Decl., ¶ 12.)

27 Based on their own respective independent investigations and evaluations and after
28 considering the sharply disputed factual and legal issues involved in this matter, the risks

1 attending further prosecution in light of certification issues faced due to the *Brinker Rest. Corp.*
2 *v. Super. Ct.*, (2012) 53 Cal. 4th 1004 (“*Brinker*”) decision, the discovery, and investigation
3 conducted to date and the benefits received under the settlement, Class Representative and her
4 counsel are of the opinion that settlement for the consideration and on the terms set forth in the
5 Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the Class
6 Representatives and the Class Members. (Hawkins Decl. ¶ 12.)

7 After the motion for preliminary approval was filed in this case, Intervenor moved to
8 intervene and the Court recommended that Plaintiff’s counsel and the lawyers for Intervenor
9 mediate the allocation of the proposed attorneys’ fees in this case. On January 26, 2024, counsel
10 for all Plaintiff and Intervenor mediated with Judge Pate and thereafter reached a settlement that
11 is memorialized in a Joint Prosecution Agreement (“JPA”), which is part of a joint effort to seek
12 approval of the Settlement Agreement and Addendum thereto in this case. (Hawkins Decl., ¶12;
13 Exhs. 1-3.)

14 **III. SUMMARY OF SETTLEMENT TERMS¹**

15 **A. Class Members**

16 The “Class” includes all persons employed by SYH as non-exempt employees from
17 December 15, 2016, to March 24, 2023 (the “Class Period”), and also includes the PAGA Period
18 from April 20, 2020 through March 24, 2023 (“PAGA Period”). (Exh. 1, p. 2, ¶ 8, p. 4, ¶ 26.)

19 **B. Allocation of Settlement Amount**

20 1. The Maximum Settlement Amount (“MSA”) is Two Million Nine Hundred
21 Thousand Dollars (\$2,900,000) to be paid by SYH pursuant to this Settlement. The MSA
22 includes, but is not limited to Individual Settlement Payments, Attorneys’ Fees and Costs, the
23 Class Representative Service Award, Settlement Administration Costs, and the PAGA Payment,
24 including the LWDA Payment, subject to Court approval and the terms of this Stipulation. (Exh.
25 12, p. 3, ¶ 21.) The MSA shall not include SYH’s share of employer payroll taxes on the wage
26 portion of the Individual Settlement Payments, which will be paid by SYH separately and in

27
28 ¹ To effectuate the settlement reached, the Parties have stipulated that, for purposes of the settlement, Plaintiff filed an amended complaint in this case to add the putative class claims being resolved and to ensure all claims being resolved match the claims pled.

1 addition to the MSA. (Exh. 1, p. 2 ¶ 21.)

2 2. Subject to Court approval, Class Counsel shall be paid up to One Million One
3 Hundred Sixty Thousand Dollars (\$1,160,000) in attorneys' fees (i.e., 40% of the Maximum
4 Settlement Amount) and actual costs not to exceed: \$26,500 to counsel for Kabitzke, \$119,000 to
5 counsel for Heredia, \$30,000 to counsel for Hernandez. (Exh. 2, ¶ 6.) Pursuant to the JPA and
6 Addendum, 55% of the fee award will be allocated to counsel for Kabitzke, with 27% to
7 Heredia's counsel and 18% to counsel for Hernandez. (Hawkins Decl., ¶12; Exh. 3.)

8 3. Subject to Court approval, the Named Plaintiff Alexandra Kabitzke shall be paid a
9 Class Representative Service Award not to exceed \$10,000 for her time and effort in bringing
10 and presenting the Action, serving as class representative and releasing her Released Claims.
11 (Exh. 1, p. 17, ¶ 56(b).) Subject to Court approval, Intervenor Audrey Heredia and Jacqueline
12 Hernandez shall each be paid a Class Representative Service Award not to exceed \$20,000 each
13 for their time and effort in brining and presenting the Action, serving as class representatives and
14 releasing their Released Claims. (Hawkins Decl., ¶12; Exhs. 2 ¶ 5 and 3).

15 4. Subject to Court approval, \$30,000 will be set aside from the MSA to cover the
16 Settlement Administrator's costs of administering this Settlement ("Administrator Expenses
17 Payment"). (Exh. 1, p.18, ¶ 54(e).)

18 5. Subject to Court approval, \$100,000 will be set aside from the MSA for the
19 PAGA Penalties, out of which 75% (\$75,000) will be paid to the LWDA and 25% (\$25,000) will
20 be distributed among the Aggrieved Employees ("Individual PAGA Payment"). (Exh. 1, pp.15-
21 16, ¶ 54(a)(ii).)

22 6. Individual PAGA Payment to each Class Member: Each Participating Class
23 Member will be entitled to a *pro rata* share of the portion of the PAGA Payment allocated to
24 aggrieved employees. The Settlement Administrator shall divide a 25% portion of the PAGA
25 Payment amount by the total number of Compensable pay periods during the PAGA Period.
26 ("Pay Period Value"). The Settlement Administrator shall then multiply the number of
27 Compensable pay periods for each Aggrieved Employee by the Pay Period Value. (Exh. 1,
28 pp.15-16, ¶ 54(a)(ii).)

1 7. Tax allocation of Individual Class Payments shall be: one-fourth (1/4) as wages
2 subject to all applicable tax withholdings, one-half (1/2) as non-wage penalties not subject to
3 payroll tax withholdings, and one-fourth (1/4) non-wage interest not subject to payroll tax
4 withholdings. The Settlement Administrator shall issue an IRS Form W-2 to each Class Member
5 for the portion of each Individual Settlement Payment allocated as wages and subject to all
6 applicable tax withholdings. The Settlement Administrator shall issue an IRS Form 1099 to each
7 Class Member for the portions of each Individual Settlement Payment allocated as non-wage
8 penalties and interest and not subject to payroll tax withholdings. (Exh. 1, p.16, 54(a)(iv).)

9 There are approximately 3,700 putative Class Members and thus the average net recovery
10 per Class Member is estimated to be a minimum of \$414.86¹ if the Court approves the amounts
11 set forth above. This average recovery is significantly more than other wage and hour class
12 action settlements approved by California state and federal courts. (See, e.g., *Ressler v.*
13 *Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net
14 recovery of about \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx
15 (C.D. Cal.) (average net recovery of approximately \$65); *Sorenson v. Defendants, Inc.*, Case No.
16 2:06-CV-02674-JAM-DAD (E.D.Cal.) (average net recovery of approximately \$60); *Lim v.*
17 *Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net
18 recovery of approximately \$35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A.
19 Super. Ct.) (average net recovery of approximately \$20); and *Jones v. Bath & Body Works, Inc.*,
20 No. 2:13-cv-05206-FMO-AJW (C.D. Cal.) (average net recovery of approximately \$50).)

21 **C. Released Claims Summary**

22 **1. Release as to Plaintiff and All Class Members.**

23 Upon the Effective Date, Plaintiff, Intervenor and all Participating Class Members shall
24 be deemed to have fully released the Released Parties from any and all claims, wages, penalties,
25 interest, debts, demands, rights, liabilities, costs, compensation, damages, attorneys' fees,
26 actions, and/or causes of action that were pleaded or could have been pleaded based upon the

27 ¹ This figure is calculated based on the NSA (\$1,535,000) divided by the number of putative Class Members
28 (3,700). The NSA is calculated by starting with \$2,900,000 and subtracting: (1) \$50,000 (for Plaintiffs' Service Awards); (2) \$30,000 (for estimated settlement administration costs); (3) \$1,160,000 (for attorney's fees), (4) \$50,000 (for litigation costs), and (5) \$75,000 (for recovery paid to the LWDA).

1 factual allegations set forth by Plaintiff in her original and/or FAC filed in this Action and arising
2 at any time during the Class Period, including any and all claims for and/or related to the causes
3 of action pled for alleged failure to: (1) Pay Lawful Wages; (2) Provide Lawful Meal Periods or
4 Compensation in Lieu Thereof; (3) Provide Lawful Rest Periods or Compensation in Lieu
5 Thereof; (4) Pay Employee Expenses; (5) Timely Pay Wages During Employment; (6) Timely
6 Pay Wages at Termination; (7) Provide Accurate, Itemized Wage Statements; and for (8)
7 Violations of the UCL (Exh. 1, p. 10, ¶ 51.)

8 **2. Aggrieved Employees Release of PAGA Claim**

9 Upon entry of Final Judgment and funding of the Gross Settlement Amount, all
10 Aggrieved Employees (regardless of whether they are Participating Class Members or Non-
11 Participating Class Members) will be deemed to release, on behalf of themselves and their
12 respective former and present representatives, agents, attorneys, heirs, administrators, successors,
13 and assigns, the Released Parties from all claims for PAGA penalties that were alleged in the
14 complaints in the Actions and those based solely upon the facts alleged in the complaints in the
15 Actions, including, e.g., PAGA penalties for meal break violations, rest break violations, unpaid
16 wages, off the clock work, wage statement violations, failure to reimburse necessary expenses,
17 failure to keep required records, waiting time penalties and failure to pay or to timely pay all
18 wages due during employment and/or upon termination, and California Labor Code sections
19 201-204, 210, 221, 223, 224, 225.5, 226, 226(a), 226.3, 226.7, 510, 512, 558, 558.1, 1174,
20 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2802, and 2698, *et seq.* The release by Aggrieved
21 Employees who are also Non-Participating Class Members is limited to claims under the PAGA
22 arising during the PAGA Period. (Exh. 1, pp. 10-11, ¶ 52.)

23 **D. Notice Procedure**

24 Subject to Court approval of the Settlement, within 14 days after entry of the Preliminary
25 Approval Order, SYH shall provide the Settlement Administrator with Class Information for
26 purposes of mailing Class Notices to Class Members. (Exh. 1, p. 11, ¶ 53 (a).) Upon receipt of
27 the Class Information, the Settlement Administrator shall perform a search based on National
28 Change of Address Database maintained by the United States Postal Service to update and

1 correct any known or identifiable address changes. Class Notices returned as non-delivered on or
2 before the Response Deadline shall be re-mailed to the forwarding address affixed thereto or any
3 updated address obtained through skip-tracing, or other automated search, the deadlines for Class
4 Members' written Objections and Requests for Exclusion is forty-five (45) days ("Response
5 Deadline"). Class Members who are sent a re-mailed Class Notice shall have their Response
6 Deadline extended by fifteen (15) days from the date the Settlement Administrator re-mails the
7 Notice. (Exh. 1, p.5, ¶ 34.)

8 The Class Notice informs the Class Members of the terms of the Settlement, the date and
9 location of the final approval hearing, the deadline and requirements to object to the Settlement
10 and of their right to opt out of the Settlement, the process for doing so, including the deadline to
11 opt out, and provides a list of frequently asked questions and responses related to the Settlement
12 and process. (Exh. 1, pp.11- 14 ¶ 53(a).)

13 **IV. CALIFORNIA RULES OF COURT §3.769 APPROVAL PROCESS**

14 A class action may not be dismissed, compromised or settled without approval of the
15 Court. (*Wershba v Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 240; Cal. Rules of Court,
16 Rule 3.769.) The approval or rejection of the proposed settlement is committed to this Court's
17 sound discretion. (*Wershba*, 91 Cal.App.4th at pp. 234-235.) A court's decision to approve a
18 class action settlement may be reversed only upon a strong showing of "clear abuse of
19 discretion." (*Class Plaintiff v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276.) The purpose
20 of the court's preliminary evaluation of the proposed settlement is to determine whether it is
21 within the "range of reasonableness" and thus, whether the notice to the class is appropriate.
22 (NEWBERG, §11.25 at 11-36-37.)

23 According to this procedure, Plaintiff requests that this Court provisionally certify the
24 proposed Class for settlement purposes – conditional upon final approval of the settlement. The
25 practical purpose of provisional class certification is to facilitate distribution to all Class
26 Members of notice of the terms of the proposed Settlement and the date and time of the final
27 approving hearing. Plaintiff also requests the Court preliminarily approve the Settlement as fair,
28 adequate and reasonable as set forth below.

1 **V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE**

2 The law favors settlement, particularly in class actions and other complex cases in which
3 substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation.
4 (*City of Seattle* 955 F.2d at p. 1276; *Potter v Pacific Coast Lumber Company* (1951) 37 Cal. 2d.
5 592, 602-603; 4 NEWBERG § 11.41.) To grant preliminary approval of this class settlement,
6 the Court need only find that the settlement falls within the range of reasonableness. (*North Cty.*
7 *Contractor's Ass. Inc. v. Touchstone Ins. Svcs.* (1994) 27 Cal. App. 4th 1085, 1089-1090.) In
8 determining whether a class settlement is fair, adequate and reasonable, courts must consider the
9 following relevant factors: the strength of the case, the risk, expense, complexity and likely
10 duration of further litigation, the risk of maintaining class action status through trial, the amount
11 of offered settlement, the extent of discovery completed and range of the proceedings, and
12 experience and views of counsel. (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801;
13 *Clark v American Resid. Svcs. LLC* (2009) 175 Cal. App. 4th. 785, 799.) The list of factors is not
14 exclusive, and courts are free to balance and weigh factors depending on the circumstances of
15 each case. (*Clark*, 175 Cal. App. 4th at p. 799; *Wershba*, 91 Cal. App. 4th at p. 245.)

16 Courts must give “proper deference to the private consensual decision of the parties,”
17 since “the court’s intrusion upon what is otherwise a private consensual agreement negotiated
18 between the Parties to a lawsuit must be limited to the extent necessary to reach a reasoned
19 judgment that the agreement is not the product of fraud or overreaching by, or collusion between,
20 the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate
21 to all concerned.” (*Hanlon v Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027.)

22 **A. The Terms of the Proposed Settlement Are Fair**

23 The terms of the Settlement Agreement demonstrates that it is fair and reasonable. By
24 law, a presumption of fairness exists where: 1) the settlement is reached through arms-length
25 negotiations; 2) investigation and discovery are sufficient to allow counsel and the court to act
26 intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is
27 small. (*Dunk v. Ford Motor Co.*, supra, at p. 1802.) The first three factors apply at preliminary
28 approval, while the percentage of objectors is considered at final approval.

1 1. The Settlement Was Reached By Extensive Arm's Length Negotiation

2 As shown, prior to attending mediation, the Parties exchanged more than 100,000 pages
3 of documents related to the claims and defenses to the claims pled by Plaintiff and as pled in the
4 *Heredia* and *Hernandez* cases, 100 employee declarations that refute the claims pled, as well as
5 copies of all pleadings and all discovery from the *Heredia* and *Hernandez* cases. (Roberts Decl.,
6 ¶¶5-6.) The Parties then participated in a full day mediation on March 21, 2023, with Judge
7 Sabraw. (Hawkins Decl. ¶¶5, 6; Roberts Decl., ¶7.) Following an unsuccessful mediation, the
8 Parties received and accepted a mediator's proposal from Judge Sabraw for resolution of all
9 claims. (*Id.*) In sum, armed with all of the relevant information and the help of a highly
10 experienced mediator, counsel for the Parties engaged in lengthy, serious, and meaningful
11 negotiations which has resulted in the Settlement Agreement. Plaintiff's counsel and Intervenor's
12 counsel attended mediation and agreed to the allocation of the proposed attorney's fee award and
13 service awards and have consequently entered into a JPA and an Addendum to the Settlement
14 Agreement (Hawkins Decl., ¶12; Exhs. 2-3.)

15 2. Investigation and Extensive Informal Discovery Were Sufficient for the Parties to
16 Evaluate the Risks Intelligently

17 As discussed herein, Plaintiff conducted significant investigation of the facts, evidence
18 and law both before and since this case was filed. Defense counsel provided more than 100,000
19 pages of time and wage records, policies, handbooks, arbitration agreements, 100 employee
20 affidavits, many motions, pleadings, court orders, hundreds of pages of discovery requests and
21 responses, depositions taken in the *Heredia* and *Hernandez* cases, for Plaintiff's review in
22 preparation for the mediation. (Hawkins Decl. ¶ 5.) Plaintiff provided many of these records to
23 an expert for analysis. (*Id.*)

24 3. Plaintiff's Counsel is Experienced in Similar Litigation

25 Counsel for Plaintiff and SYH have represented, mediated, and settled many other class
26 actions filed by employees alleging wage and hour violations and have knowledge of the
27 strengths and weaknesses of the claims pled and defenses available in this case and the benefits
28 of the proposed Settlement under the circumstances of the case. (Hawkins Decl. ¶¶ 13, 25-28;

1 Roberts Decl., ¶2.)

2 **B. The Settlement Provides for Reasonable Compensation to Class Members**

3 In seeking approval, a settling party must provide sufficient information to “enable the
4 court to make an independent assessment of the adequacy of the settlement terms.” (*Kullar v.*
5 *Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 131-32 (2008).) However, “[i]t is well-settled
6 law that a cash settlement amounting to only a fraction of the potential recovery will not per se
7 render the settlement inadequate or unfair.” (*See, Officers for Justice v. Civil Serv. Comm’n of*
8 *City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982).) “The proposed settlement is
9 not to be judged against a hypothetical or speculative measure of what might have been achieved
10 by the negotiators.” (*Id.* at 625.) “Estimates of a fair settlement figure are tempered by factors
11 such as the risk of losing at trial, the expense of litigating the case, and the expected delay in
12 recovery (often measured in years).” (*In re Toys R Us-Delaware, Inc.-- Fair & Accurate Credit*
13 *Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014).) In other words, when
14 valuing claims within a realistic range of outcomes, a settling plaintiff should discount the value
15 of settled claims based the risk of changes in the law, probability of success, and like factors.

16 Settling parties are not required to partake in a hypothetical accounting exercise: “**Kullar**
17 **does not ... require any such explicit statement of [maximum] value;** it requires a record
18 which allows ‘an understanding of the amount that is in controversy and the realistic range of
19 outcomes of the litigation.’” (*Munoz v. BCI Coca-Cola Bottling Co.*, (2010), 186 Cal. App. 4th
20 399, 409-10 (citing *Kullar*, 168 Cal. App. 4th at 120 (emphasis added).) Overall, “the most
21 important factor” in determining “whether a settlement is fair and reasonable” is the “strength of
22 the case for Plaintiff on the merits, balanced against the amount offered in the settlement.” (*Id.* at
23 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at 130).) As shown below, the recovery of \$2,900,000
24 for the Class is well within the range of reasonableness and undeniably fair, adequate and
25 reasonable, considering the risks and hurdles of litigation.

26 The damage model used in calculating potential liability was largely based on the number
27 of class members (broken down into current and former employees), the number of pay periods,
28 the average rate of pay and a random sample of time records, wage statements and documents

1 produced by SYH in preparation for mediation. Based on the information provided, the estimated
2 number of work weeks is 320,000 during the Class Period and 40,926 pay periods during the
3 PAGA Period. The average hourly rate of pay is approximately \$21.73. The estimated ranges for
4 potential violations were calculated as follows: (Hawkins Decl. ¶14.)

5 a. SYH's Binding Arbitration Policy and Class Waiver

6 As a threshold matter, at least 60% of the putative class (including the Plaintiff in this
7 case) are subject to SYH's Binding Arbitration Policy, which went into effect in February 2021.
8 This policy included a class action waiver and delegated the "gateway" question of arbitrability
9 and enforceability of the policy "exclusively to [the] arbitrator." (Roberts Decl., ¶9.) Thus,
10 many, if not most, of the putative class members are required to litigate their claims on an
11 individualized basis through binding arbitration per SYH's arbitration policy. (*Id.*) This alone
12 poses a substantial defense and risk to class certification and the viability of certification.
13 (*O'Connor v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087, 1094–1095 [class cannot
14 be certified if it includes individuals who are required to arbitrate their claims and cannot
15 participate in a class or representative action]; *Vigueras v. Red Robin Int. Inc.* (C.D. Cal., July
16 22, 2020, No. SACV171422JVSDFMX) 2020 WL 13042722, at *8 [noting court decertified the
17 class as to class members who signed arbitration agreements].)

18 b. Failure to Pay Lawful Wages

19 Plaintiff's claim for failure to pay lawful wages is based on allegations that she and
20 putative class members were not paid for the time spent "off the clock" under the direction and
21 control of SYH prior to the start of their shifts. For instance, Plaintiff Kabitzke alleges that, while
22 clocked out for her meal breaks, she had to continue to answer phone calls or remain on the line
23 even while clocked out. Likewise, at the end of the shift, Plaintiff was frequently required to
24 clock out but continue to perform job duties for approximately fifteen (15) minutes or longer
25 after clocking out, including needing to answer calls, assist patients, and remain on the line or
26 on-call while clocked out. Plaintiff alleges that she and Class Members were not compensated
27 for this time and therefore not paid all lawful wages earned during the liability period. Thus,
28 Plaintiff and class members who were required to work more than eight (8) hours in a day or

1 more than forty (40) hours in a workweek without proper overtime compensation. Plaintiff also
2 contends SYH also failed to pay minimum wages for work performed “off the clock.”

3 SYH disputes allegations that its employees were ever required to perform any work
4 “off the clock,” pointed to long-standing policies that prohibit off-the-clock work and that
5 require employees to review and verify the accuracy of their time punches every single pay
6 period. SYH also provided nearly 100 employee declarations that refute this claim. SYH’s
7 binding arbitration policy applies to all employment disputes and most of the putative class
8 members, and includes class waivers applies to this claim. SYH also contends this claim would
9 be difficult to certify given the predominance of the individualized inquiry as to whether, and to
10 what extent, any Class Member ever performed work “off the clock” In violation of SYH’s
11 policies. (Roberts Decl., ¶10.)

12 Based on the documents and information produced by SYH in preparation for mediation
13 and during settlement negotiations, Plaintiff’s counsel estimated maximum potential liability of
14 \$6,953,600 based on an estimated one (1) hour per work week at the average hourly rate of
15 \$21.73 for 320,000 workweeks. However, taking into account the nature of the claim and
16 defenses thereto, including the inability to establish the violation with respect to the majority of
17 the Class Members, this claim was valued between \$695,360 (10%) and \$347,680 (5%).

18 c. Meal Period Claim - The meal break violation claim is based primarily on SYH’s
19 alleged failure to provide Plaintiff and class members with complete duty-free meal periods in
20 violation of Labor Code §§ 226.7 and 512 and IWC Wage Order 5-2001, which require
21 employers to provide required meal periods in accordance with the Wage Order or pay the
22 employee one hour of pay at the employee’s regular rate of compensation for each workday a
23 meal period was not provided. (IWC Wage Order 5-2001(11)(D); Cal. Lab. Code § 226.7.)
24 Plaintiff asserts that meal breaks were late or cut short due to mandatory meetings.

25 SYH denies Plaintiff’s meal break allegations in their entirety and maintains that, per its
26 long-standing policies, all non-exempt employees were provided with full, timely and
27 uninterrupted meal periods of 30 to 60 minutes. All putative class members were also required
28 to verify every pay period that they had taken all of their breaks in that pay period or had advised

1 their supervisor of any missed breaks. Also, under the holding in *Brinker* and other pertinent
2 decisions, SYH fulfilled its legal obligations to provide timely and proper meal periods. SYH
3 produced policies, nearly 100 employee declarations that refute this claim and pointed to its
4 binding arbitration policy that applies to all employment disputes and includes class waivers.
5 (Roberts Decl., ¶11.)

6 Based upon review of the documents and information provided in anticipation of
7 mediation, including the random sample of time records, Plaintiff's counsel estimated the
8 maximum potential liability on the meal break claim was \$607,940. This was determined by
9 taking the estimated unique number of meal break violations, 27,977, and multiplying by the
10 average hourly rate of \$21.73 (27,977 x \$21.73 = \$607,940). Taking into consideration the
11 nature of the claim, SYH's defenses and issues faced based on the binding arbitration policy and
12 the holding in *Brinker*, the meal break claim was valued between an estimated maximum of
13 \$60,794 (10%) and \$30,397 (5%). (Hawkins Decl., ¶15.)

14 d. Rest Break Claim - The rest break claim is premised on allegations that Plaintiff
15 and putative class members were not provided with compliant rest breaks as a result of SYH's
16 practice and policies. Plaintiff alleges SYH did not provide a second or third minimum ten-
17 minute rest break when due and that rest breaks were frequently skipped or interrupted due to
18 patient demands and other job duties. Plaintiff and Class Members allege they were not
19 compensated one (1) hour of pay at regular rate of compensation for each work-day that a rest
20 period was not provided. (Hawkins Decl., ¶16.)

21 SYH again disputes Plaintiff's allegations regarding rest break violations and asserts that
22 its policies required employees to take timely, uninterrupted rest breaks of at least 10-minutes
23 and to verify every pay period that they had taken all of their breaks. (Roberts Decl., ¶12.)
24 SYH's pointed to its policies and nearly 100 employee declarations that refute this claim, as well
25 as its binding arbitration policy that applies to all employment disputes and to most of the
26 putative class members and which includes a class action waiver.

27 Based on the information and records provided by SYH, Plaintiff estimated the maximum
28 potential liability at \$17,946,568. The maximum estimated liability for this claim was based on a

1 100% violation rate and was determined by taking all shifts over 3.5 hours, 825,889, and
2 multiplying by the average hourly rate of \$21.73, is approximately \$17,946,568 (825,889 shifts x
3 \$21.73 = \$17,946,568). However, given SYH's defenses to this claim, including having a valid
4 break policy and binding arbitration policy, as well as certification issues faced due to the
5 *Brinker* decision, the rest break claim was valued between and estimated maximum \$1,794,657
6 and \$0. (Hawkins Decl., ¶17.)

7 e. Failure to Provide Accurate Itemized Wage Statements - Under Labor Code
8 §226(e), an employee suffering "injury as a result of a knowing and intentional failure by an
9 employer" to provide accurate wage statements is entitled to \$50 for the initial violation and
10 \$100 for each subsequent violation up to \$4,000.

11 SYH contends its wage statements complied fully with Labor Code section 226 and
12 disputes that any wages are due to Plaintiff or the putative class and, therefore, there can be no
13 derivative penalties. SYH also disputes that it did "knowingly and intentionally" failed to
14 provide accurate wage statements, or caused Plaintiff or the class any "injury." SYH also
15 produced nearly 100 current/former employee affidavits refute this claim and pointed to its
16 binding arbitration policy that applies to all employment disputes and the claims of most of the
17 putative class members, and which included class waivers and required each individual
18 employee's claims be submitted to binding arbitration. The estimated maximum potential
19 liability for this claim was calculated at \$12,520,000 based on an estimated 3,130 employees x
20 \$4,000. For purposes of settlement negotiations, said claim was valued between an estimated
21 maximum of \$1,878,000 (15%) and \$626,000 (5%). (Hawkins Decl., ¶18.)

22 f. Failure to Timely Pay Wages - This claim is derivative of the other claims
23 asserted. Pursuant to Labor Code sections 201, 202 and 203, each employee in the relevant
24 statutory period (i.e., three years before the filing of the initial Complaint) is entitled to 30 days'
25 of wages as a waiting time penalty for intentionally not being paid all wages due at separation.
26 Plaintiff alleges penalties are owed under Labor Code section 203 due to SYH's failure to pay
27 wages for all hours worked and for failure to pay premium wages. With respect to Lab. Code §
28 203 claim, there were an estimated 2,150 Class Members to whom this claim applied.

1 SYH once again defends that no unpaid wages are owed as it did not fail to pay the
2 correct overtime wages, nor accrued vacation pay. SYH also asserts that its action were not
3 willful as required for penalties to issue and that, thus, waiting time penalties cannot be awarded.
4 SYH also produced about 100 current/former employee declarations and more than 100,000
5 pages of time and wage records that refute this claim. SYH also pointed to its arbitration policy
6 that applies to all employment disputes and to most putative class members, included class
7 waivers and requires such claims be submitted to binding arbitration. (Roberts Decl., ¶¶5, 13.)

8 The estimated maximum potential liability was determined to be \$10,932,363 using the
9 formula (# of terminated/former employees) x (30 x average hourly rate x average number of
10 hours worked per day). (2,150 x (30 x \$21.73 x 7.8). For purposes of settlement negotiations,
11 said claim was valued between an estimated maximum of \$1,093,236 (10%) and \$546,618 (5%).
12 (Hawkins Decl., ¶19.)

13 g. Bus. & Prof. Code § 17200 et seq. (“UCL”) Claim - The only remedies available
14 under the unfair competition law (“UCL”) Business and Professions Code Section 17200 et seq.
15 are restitution and injunction, as opposed to damages *Clark v. Superior Court*, (2010) 50 Cal.
16 4th605, 610. The UCL provides that “[t]he court may make such orders or judgments ... as may
17 be necessary to restore to any person in interest any money or property, real or personal, which
18 may have been acquired by means of such unfair competition.” (Bus. & Prof. Code, § 17203.)
19 Restitution under the UCL includes “earned wages.” *Cortez v. Purolator Air Filtration Prods.*
20 *Co.*, (2000) 23 Cal. 4th 163, 177-78.

21 Here, Plaintiff’s UCL claim is solely premised on the failure to pay lawful wages and
22 premium wages claims discussed above. Class Counsel assigned a zero-dollar value to the UCL
23 claim because it does not provide any additional value in this Action other than to increase the
24 statute of limitations to four years for the underlying claims. Therefore, there is no additional or
25 separate monetary value that this statute provides based on the facts of this Action (*Id.*).

26 h. Lab. Code § 2699 (PAGA Claim) - Plaintiff’s claims under PAGA are predicated
27 on or derivative of the claims discussed above. The estimated maximum PAGA penalty was
28 calculated as \$4,092,600, which attributes a \$100 penalty to each of the estimated 40,926 pay

1 periods in the PAGA Period. This figure assumes a 100% violation rate during the PAGA
2 Period, such that every single pay period in question involved at least one Labor Code violation,
3 despite disputes regarding Defendant's liability. However, PAGA claims under the facts and
4 circumstances of this case may result in no award or at best a very minimal award by the trial
5 court. Section §2699(e)(2) states in its pertinent part: "... a court may award a lesser amount than
6 the maximum civil penalty amount specified by this part if, based on the facts and circumstances
7 of the particular case, to do otherwise would result in an award that is unjust, arbitrary and
8 oppressive, or confiscatory."

9 Further, in *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a
10 federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%,
11 because the court found maximum penalties "unjust" because the employees had suffered no
12 injuries. Other courts have awarded no civil penalties, even when Labor Code violations are
13 established. *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of App. Mar.
14 6, 2016) (no PAGA penalties were awarded by the Los Angeles County Superior Court)
15 (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557,
16 *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial). To recover any PAGA
17 penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code
18 violations. *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal.
19 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of
20 individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
21 defendant."). Plaintiff must also prove that each PAGA Aggrieved Employee suffered violation
22 in each pay period the employee worked. However, the nature of the PAGA based claims (i.e.
23 rest break, meal period, wage statements, failure to pay all wages owed and to timely pay wages)
24 and SYH's defenses thereto present a strong risk that PAGA penalties may not be awarded at all.
25 (Hawkins Decl., ¶20.)

26 SYH denies that a violation for each pay period can be established, because the PAGA
27 claims are essentially derivative of the class claims and are subject to the same defenses. For
28 many of the same reasons the class claims fail, SYH believes the PAGA claim fails as well.

1 SYH also points out there is no evidence of any Labor Code violations by SYH that are knowing
2 or intentional, such that PAGA penalties would be justified. Therefore, SYH contends an award
3 of PAGA penalties is discretionary, unlikely to be awarded by the Court, as that would constitute
4 an unjust, arbitrary, oppressive, or confiscatory double recovery. (Roberts Decl., ¶14.)

5 Thus, Class Counsel believes it to be likely that if there were any award it would be a
6 minimal amount. Therefore, the amount of \$100,000 (which has been reserved for the PAGA
7 claim) is both fair and reasonable. (Hawkins Decl., ¶ 20.)

8 i. Failure to Reimburse Employee Expenses – The business expense reimbursement
9 claim is based on allegations that Plaintiff and class members were required to provide their own
10 tools for the performance of their job duties without being reimbursed by SYH, including use of
11 personal vehicles and cell phones. In response, SYH noted its practice and policy was to always
12 provide Plaintiff and Class Members with all required equipment, materials, and tools to perform
13 their duties and to reimburse for any personal equipment used. SYH also produced nearly 100
14 employee declarations that refute this claim and its binding arbitration policies that applies to this
15 claim. (Roberts Decl., ¶15.)

16 Plaintiff calculated a maximum potential liability at \$2,949,925 assuming \$50 monthly
17 reimbursement for phone use and estimated average monthly equipment and mileage (5 miles
18 per week) cost. However, this claim would be difficult to certify given the predominance of the
19 individualized inquiry as to whether and to what extent each class member used their personal
20 tools and phones in the performance of their job duties as well as the defenses raised. As such,
21 for purposes of settlement, this claim was valued at \$0. (Hawkins Decl., ¶21.) This took into
22 consideration the significant risks that class certification could be denied on the central claim,
23 that the claims would be referred to individual binding arbitration for the majority of the putative
24 class members and/or that a merits decision on the central claim would not favor the Class.

25 Plaintiff has considered the expense and length of continued proceedings necessary to
26 continue the Action against SYH through trial and any possible appeals. Plaintiff is also aware of
27 the burdens of proof necessary to establish liability for the claims asserted in the Action, SYH's
28 defenses thereto, and the difficulties in establishing Plaintiff's damages. (Hawkins Decl. ¶ 22.)

1 The proposed Settlement requires Defendant to pay each Class Member who does not opt out a
2 portion of the Net Settlement Amount as specifically set forth in the Settlement Agreement.
3 (Hawkins Decl. ¶ 23.) The amount to be paid to the Class is undoubtedly fair, adequate and
4 reasonable especially in light of the significant risk to Plaintiff and Class Members in continuing
5 with the litigation and not prevailing on class certification or at trial, and thus leaving employees
6 with no recovery. (*Id.*)

7 For all the foregoing reasons, the proposed Settlement Agreement is fair, adequate and
8 reasonable, and is in the best interests of the Class Members.

9 C. **The Class Representative Service Payments and Class Counsel Fees Are**
10 **Reasonable and Should be Awarded**

11 The Settlement Agreement and the Addendum to it, provide for an award to be paid to
12 the Plaintiff as the Class Representative, the primary purpose of which is to provide Plaintiff an
13 enhancement award, taking into consideration the risks, time, effort and expenses incurred by her
14 in coming forward to provide invaluable information and litigate this matter on behalf of all
15 Class Members and Aggrieved Employees. Plaintiff has actively participated in this case by
16 providing information and documentation and assisting Class Counsel in developing information
17 necessary to litigate and settle this case which has resulted in a favorable settlement for the
18 putative Class Members and Aggrieved Employees. (Hawkins Decl., ¶24.) Thus, the payment of
19 up to \$10,000.00 to Plaintiff Alexandria Ilene Kabitzke represents a small portion of the
20 aggregate settlement amount and should be awarded. (*Id.*) Similarly, the payment of \$20,000
21 each to Intervenor, Heredia and Hernandez, represents a small portion of the overall settlement
22 that is fair and reasonable to compensate them for the time spent litigating the claims on behalf
23 of the class.

24 Further, as will be discussed in more detail in Plaintiff's motion for final approval of the
25 Settlement, Class Counsel Fees Payment in the amount of \$1,160,000 (40% of the GSA) is
26 reasonable within California's standard benchmark and well within the range customarily
27 approved by the California courts in comparable class actions where there are multiple law firm
28 involved representing the class in several pending lawsuits.

1 **VI. PRELIMINARY CLASS CERTIFICATION IS APPROPRIATE**

2 In addition to such terms as class definition, settlement amounts and payment procedures,
3 the Settlement Agreement reached between the Parties contains a provision to which the parties
4 stipulate to the Court's preliminary certification of the Class but do so for the purposes of this
5 settlement only. Plaintiff now requests this Court to preliminarily certify the Class.

6 It is well established that trial courts should use a lower standard for determining the
7 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
8 *Co.* (1996) 48 Cal.App.4th at 1794, 1807, fn. 19. Under California law, a class action is proper
9 where the Class is ascertainable and there is a "well defined community of interest in the
10 questions of law and fact affecting the parties to be represented." (Code Civ. Proc., §382; *Dunk*,
11 48 Cal. App. 4th at p. 1806.) State law requirements under California Code of Civil Procedure
12 section 382 for class certification largely mirror Federal Rules of Civil Procedure Rule 23 –
13 namely, numerosity, typicality of the class representative's claims, adequacy of representation,
14 predominance of common issues and superiority. As discussed below, although Defendant
15 disputes Plaintiff's ability to certify a litigation class, all of the requirements of certification for
16 settlement purposes are met for the proposed Settlement Class.

17 **A. The Proposed Settlement Class is Ascertainable**

18 Here, the proposed class is ascertainable because all of the Class Members are/were
19 employed directly by Defendant and received their compensation directly from Defendant. The
20 Class Members have been identified through Defendant's employee and personnel files. *See*
21 *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932.

22 **B. Numerosity of the Proposed Settlement Class is Satisfied**

23 If the class is sufficiently large that joinder of all members is impractical or that
24 individual joinder is impractical, the numerosity requirement is met *Hebberd v. Colgrove* (1972)
25 28 Cal. App. 3d 1017, 1030. Here, the proposed class consists of 3,700 class members,
26 including current and former employees of Defendant. Therefore, joinder of individual claims
27 would be impractical and the numerosity requirement is met.

28 **C. Common Questions of Law and Fact Apply to the Proposed Settlement Class**

Commonality is met if there are common questions of fact and law to the class. *Hanlon*, 150 F.3d at p.1019 [“The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class”].) Here, Plaintiff alleges that the proposed Class Members’ claims all stem from the same alleged conduct. Specifically, Plaintiff alleges that Defendant violated California wage and hour law because they: (1) failed to pay all lawful wages owed including overtime compensation; (2) failed to provide statutorily compliant rest and meal periods and/or to pay one (1) hour of pay at the employees regular rate of compensation for each workday that a compliant meal period and/or rest period was not properly provided; (3) failed to timely pay all wages owed at the termination of the Class Members’ employment; (4) failed to provide accurate itemized wage statements. Plaintiff seeks recovery of alleged premium wages, penalties and interest pursuant to the California Labor Code, the California Industrial Welfare Commission (“IWC”) Wage Orders, Business and Professions Code § 17200 and PAGA. Although Defendant disagrees with Plaintiff’s contentions for purposes of certifying a litigation class, for purposes of a settlement class, these circumstances create questions of law/fact common to all proposed Class Members.

D. The Typicality Requirement is Met as to the Proposed Settlement Class

The typicality requirement is met if the claims of the Plaintiff are typical of those of the class, though “they need not be substantially identical.” (*Hanlon*, 150 F.3d at p. 1020.) Factual differences may exist between the Class and the Class Representative(s) so long as the claims arise from the same events or course of conduct and are based on the same legal theories. (*Id.*) Here, as set forth in the operative complaint, the claims of the Class Representatives are typical of the other Class Members they represent because they arise from the same factual basis and are based on the same legal theories as those applicable to all Class Members. (*Wherner v. Syntex*, (N.D. Cal. 1987) 117 F.R.D. 641, 644.) For purposes of a settlement class, typicality is met.

E. The Adequacy Requirement is Met as to the Proposed Settlement Class

If the named representative and her counsel have no interests adverse to the interest of the proposed class members and are committed to vigorously prosecuting the case on behalf of the class, then the adequacy requirement is met. (*McGhee v. Bank of America* (1976) 60 Cal.

App.3d 442, 450.) Here, under the proposed Settlement, the Class Representative will receive a fair award for her time and effort assisting counsel with factual issues surrounding the case and risk incurred in bringing this action on behalf of the Class Members. Other than this specific payment, all Class Members who do not opt out of the Settlement will receive a percentage of the NSA based on the number of weeks each Class Member worked during the class period. Therefore, no “settlement allocation” questions are raised. (*Hanlon*, 150 F.3d at p.1020.)

Finally, Class Members who wish to exclude themselves from the Settlement may do so. (Settlement Agreement, pp.13-14, ¶ 53(e); Exhibit 1 to the Settlement Agreement.) As a result, there is no conflict of interest between the Plaintiff and the Class Members. Additionally, the Plaintiff and their counsel have prosecuted this action vigorously on behalf of the Class.

F. Common Issues Predominate and a Class-Wide Settlement is Superior to Other Available Methods of Resolution

Class certification is authorized where common questions of law and fact predominate over individual questions and where class-wide treatment of a dispute is superior to individual litigation. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) The test is whether the proposed class is sufficiently cohesive to warrant adjudication by representation. (*Hanlon, supra*, at 1022.) Plaintiff contends that the proposed Class in this case is sufficiently cohesive, since all Class Members share a “common nucleus of facts and potential legal remedies.” Specifically, Plaintiff asserts that because all of the Class Members and the Class Representatives seek compensation for alleged premium wages for failure to provide compliant meal and rest breaks, as well as penalties and interest for the allegations described herein; common questions about compensation or lack thereof for worked performed by Class Members predominate over individual questions, and Class Members’ potential legal remedies are identical. Although Defendant disagrees with Plaintiff’s contentions, it has agreed to certification for settlement only.

Additionally, particularly in the settlement context, class resolution is superior to other methods for the fair and efficient adjudication of the controversy. (*Hanlon*, 150 F. 3d at 1023; *Dunk, supra*, 45 Cal. App. 4th at 1087.) The superiority requirement involves a “comparative evaluation of alternative mechanisms of dispute resolution.” (*Hanlon, supra*, at 1023.) Here,

1 the alternative methods of resolution are a plethora of individual claims from potentially over
2 689 Plaintiffs. The class action device can thus conserve judicial resources by avoiding the
3 waste and delay of repetitive proceedings and prevent inconsistent adjudication of similar issues
4 and claims. (*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 Cal. 4th 319, 340; *Bell v*
5 *Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 741.) Thus, a classwide settlement is
6 superior.

7 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

8 The Court Approved Notice of Class Action and PAGA Settlement ("Class Notice") is
9 attached as Exhibit 1 to the Settlement Agreement. Should a Class Member wish to exclude
10 himself/herself from the Settlement, he/she can send a request for exclusion to the Settlement
11 Administrator as detailed in the Class Notice. Should a Class Member wish to object to the
12 Settlement, he/she can object as described in the Class Notice. If a Class Member does nothing
13 in response to the Class Notice, Class Members will be mailed individual settlement payments.

14 **A. The Proposed Class Notice Satisfies Due Process**

15 California statutory and case law vests the Court with broad authority to fashion an
16 appropriate notice process. (Cal. Rules of Court, Rule 3.760 *et seq.*) A proposed method of
17 notice of a proposed settlement is fair, adequate, and reasonable if it has "a reasonable chance of
18 reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50
19 Cal.App.3d 960, 974. The procedure for notice to Class Members described herein entails
20 mailing the Class Notice to all known and reasonably ascertainable Class Members based on
21 Defendant's payroll records and provides for a reasonable chance of reaching a significant
22 percentage of Class Members (Exh. 1, pp. 11-12 ¶ 53.) Further, such individual notice by first
23 class mail is routinely approved as consistent with due process. (See, e.g., MANUAL FOR
24 COMPLEX LITIGATION (THIRD) (1995) (hereinafter "the MANUAL") §30.41; Wright &
25 Miller, Fed. Practice & Procedure §1797.6 ["Of course, notice by mail to all of the identified
26 class members . . . will suffice"] (citing cases).) Notice by mail is consistent with certification
27 notices approved by numerous state and federal courts and is the best notice practicable under
28 circumstances of this case. Other potential alternatives, such as publication of notice in a

1 newspaper, or electronic dissemination of notice through email, are unlikely to be as effective as
2 mail notice. Given the geographic range of Class Members, and the lack of email data on Class
3 Members, neither publication nor email notice is feasible or reasonable to satisfy due process.

4 **B. The Proposed Class Notice Is Accurate and Informative**

5 Not only is the manner of the proposed Class Notice proper, so too is the content of the
6 said notice. The proposed Class Notice provides information on the meaning and the nature of
7 the proposed Settlement, the terms and provisions of the Settlement (and where it may be found),
8 the relief the Settlement will provide the Class Members, the application of Plaintiff's counsel
9 for reimbursement of costs and attorneys' fees from the Settlement amount, the date, time and
10 place of the final fairness and approval hearing, and the procedure and deadlines for opting out
11 of the Settlement and for submitting objections. Counsel for Plaintiff and Defendant have spent
12 considerable time attempting to draft a Class Notice likely to be understood by Class members.

13 The Class Notice also fulfills the requirement of neutrality in class notice. (2 NEWBERG
14 §8.39.) It summarizes the proceedings to date and the terms and conditions of the Settlement in an
15 informative and coherent manner, in compliance with the MANUAL'S statement, "the notice
16 should be accurate, objective, and understandable to class members..." (MANUAL at §30.21.)
17 The Class Notice clearly states the settlement does not constitute an admission of liability by
18 Defendant and recognizes the Court has not ruled on the merits. It also states the final settlement
19 approval decision has yet to be made, and that any final determination of that issue will be made at
20 the final approval hearing. Thus, the Class Notice complies with the standards of fairness,
21 completeness and neutrality required of class notice disseminated under the authority of the Court.

22 Moreover, the class notice comports with CA Rules of Court, Rule 3.766 (d). As per Rule
23 3.766, the contents of the class notice that provides for an opt out procedure for the class
24 members must include the following:

- 25 (1) A brief explanation of the case, including basic contentions/denials of the parties;
26 (2) A statement that the Court will exclude members if requested by a specified date;
27 (3) A procedure for the member to follow in requesting exclusion from the class;
28 (4) A statement the judgment, favorable or not, will bind members who do not opt-out;

1 (5) A statement that any member who does not request exclusion may, if the member so
2 desires, enter an appearance through counsel.

3 The Proposed Class Notice contains the information required under Rule 3.766 (d). (See
4 Exhibit 1 attached to Settlement Agreement.)

5 **VIII. CONCLUSION**

6 Based on the foregoing, Plaintiff respectfully requests that the Court enter the Proposed
7 Order Granting Preliminary Approval of the Class and PAGA Settlement and the Addendum
8 thereto submitted concurrently herewith, and thus:

- 9 1. Grant preliminary approval of the Settlement Agreement (including the
10 Addendum), and certify the Settlement Class for the purposes of settlement only;
11 2. Confirm Plaintiff Alexandria Ilene Kabitzke as Class Representative;
12 3. Confirm James R. Hawkins, Isandra Fernandez, and Lance Dacre of James
13 Hawkins APLC, preliminarily as Class Counsel;
14 4. Approve and appoint ILYM Group, Inc. as Settlement Administrator;
15 5. Enter an Order preliminarily approving the proposed Settlement and approving of
16 the Class Notice; and
17 6. Schedule the Final Fairness Hearing Date on _____ (to be determined by
18 the Court at the hearing for preliminary approval of settlement).

19 Respectfully submitted,

20 Dated: March 28, 2024

JAMES HAWKINS, APLC

21 
22 James R. Hawkins, Esq.
23 Isandra Fernandez, Esq.
24 Anthony L. Draper, Esq.
25 Lance Dacre, Esq.
26 Attorneys for Plaintiff
27 Alexandria Ilene Kabitzke
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