

1 James R. Hawkins (SBN 192925)  
james@jameshawkinsapl.com  
2 Christina M. Lucio (SBN 253677)  
christina@jameshawkinsapl.com  
3 Mitchell J. Murray (SBN 285691)  
mitchell@jameshawkinsapl.com  
4 JAMES HAWKINS APLC  
9880 Research Drive, Suite 200  
5 Irvine, CA 92618  
Tel: (949) 387-7200  
6 Fax: (949) 387-6676

7 Attorneys for Plaintiffs MANUEL VIGUERAS and GENNY VASQUEZ,  
8 on behalf of themselves and all others similarly situated

9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

12 MANUEL VIGUERAS, on behalf of  
13 himself individually and all others  
14 similarly situated,

15 Plaintiff,

16 v.

17 RED ROBIN INTERNATIONAL,  
18 INC. WHICH WILL DO BUSINESS  
19 IN CALIFORNIA AS RED ROBIN  
BURGER SPIRITS EMPORIUMS, a  
Nevada corporation; and DOES 1  
through 100, inclusive,

20 Defendants.

Case No: 8:17-cv-01422-JVS (DFMx)

[Originally Orange County Superior  
Court Case No.: 30-2017-00931770-CU-  
OE-CXC]

Assigned to Hon. James V. Selna

**MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS AND REPRESENTATIVE  
ACTION SETTLEMENT**

Hearing Date: July 20, 2020  
Hearing Time: 1:30 p.m.  
Courtroom: 10C

Complaint Filed: July 14, 2017  
Trial Date: February 25, 2020

TABLE OF CONTENTS

1

2 I. INTRODUCTION..... 1

3 II. THE PARTIES AND SETTLEMENT CLASS..... 2

4 A. Plaintiffs..... 2

5 B. Defendant..... 2

6 C. The Settlement Class..... 3

7 III. PROCEDURAL AND LITIGATION HISTORY ..... 4

8 A. *Vigueras I* Action..... 4

9 B. *Vigueras II* Action..... 4

10 C. Class Certification..... 5

11 D. Decertification..... 5

12 E. *Vigueras I* Motions for Summary Judgment/Adjudication. .... 5

13 F. *Vigueras II* Motion for Summary Adjudication. .... 5

14 G. Mediations..... 6

15 H. *Vigueras I* Trial..... 6

16 IV. DISCOVERY HISTORY..... 6

17 V. SUMMARY OF PROPOSED SETTLEMENT TERMS ..... 7

18 A. The Gross Settlement Amount..... 7

19 B. The Net Settlement Amount. .... 8

20 C. Formula for Calculation of Individual Settlement Payments to  
21 Participating Class Members. .... 8

22 D. Formula for Calculation of Individual PAGA Payments to PAGA  
23 Group Members. .... 9

24 E. The Settlement Administrator and Notice to the Class. .... 10

25 F. The Released Claims..... 11

26 VI. SUMMARY OF PROPOSED SETTLEMENT TERMS THE CLASS  
27 HAS BEEN CERTIFIED..... 12

28 VII. THE COURT SHOULD PRELIMINARILY APPROVE THE CLASS  
ACTION SETTLEMENT AND SET A FINAL APPROVAL  
HEARING ..... 12

1	A.	Strength of Plaintiffs’ Case and the Risk, Expense, Complexity and Likely Duration of Further Litigation. ....	14
2			
3	B.	The Extent of Discovery and Stage of the Proceedings Support the Settlement.....	15
4	C.	The Settlement is the Product of Serious, Informed and Non-Collusive Negotiations between Experienced Wage and Hour Counsel.....	16
5			
6	D.	The Proposed Settlement is a Reasonable Compromise of Claims....	17
7	1.	Plaintiffs’ Meal and Rest Period Claims .....	19
8	2.	Plaintiffs’ Unreimbursed Expenses Claim .....	21
9	3.	Plaintiffs’ PAGA Claim.....	21
10	VIII.	CLASS COUNSELS’ ATTORNEYS’ FEES REQUEST AND CLASS ENHANCEMENT PAYMENTS.....	23
11			
12	A.	Motion for Award of Attorneys’ Fees and Litigation Costs.....	23
13	B.	Class Representatives Enhancement Payments.....	24
14	IX.	CONCLUSION .....	25

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**CASES**

*Armstrong v. Bd. of Sch. Directors*,  
616 F.2d 305 (7th Cir. 1980) ..... 13

*Berry v. School Dist. of City of Benton Harbor*,  
184 F.R.D. 93 (W.D. Mich. 1998)..... 13

*Boyd v. Bechtel Corp.*,  
485 F. Supp. 610 (N.D. Cal. 1979)..... 16, 17

*Brinker v. Superior Court*,  
53 Cal. 4th 1004 (2012)..... 14, 17, 20

*Brotherton v. Cleveland*,  
141 F. supp. 2d 907 (S.D. Ohio 2001)..... 24

*Caliber Bodyworks, Inc. v. Superior Court*,  
134 Cal. App. 4th 365 (2005)..... 21

*Cardenas v. McLane Foodservice, Inc.*,  
2011 U.S. Dist. LEXIS 13126, (C.D. Cal. 2011) ..... 22

*Carrington v. Starbucks Corp.*,  
30 Cal. App. 5th 504 (2018)..... 22

*Dunleavy v. Nadler*,  
213 F.3d 454 (9th Cir. 2000) ..... 12

*Ellis v. Naval Air Rework Facility*,  
87 F.R.D. 15 (N.D. Cal. 1980), ..... 17

1	<i>Felzen v. Andreas,</i>	
2	134 F.3d 873 (7th Cir. 1998) .....	13
3		
4	<i>Fischel v. Equitable Life Assur. Soc’y of U.S.,</i>	
5	307 F.3d 997 (9th Cir. 2002).....	23
6		
7	<i>Fisher Bros. v. Cambridge Lee Industries, Inc.,</i>	
8	630 F.Supp. 482 (E.D. Pa. 1985).....	17
9		
10	<i>Fleming v. Covidien,</i>	
11	2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	22
12		
13	<i>Glass v. UBS Financial Services,</i>	
14	2007 U.S. Dist. LEXIS 8476, (N.D. Cal. Jan. 26, 2007) .....	24
15		
16	<i>Hamilton v. Wal-Mart Stores, Inc.,</i>	
17	2019 U.S. Dist. LEXIS 77699 (C.D. Cal. Mar. 4, 2019) .....	20
18		
19	<i>Hanlon v. Chrysler Corp.,</i>	
20	150 F.3d 1011 (9th Cir. 1998).....	13
21		
22	<i>In re Mego Fin. Corp. Sec. Litig.,</i>	
23	213 F. 3d 454 (9th Cir. 2000).....	19
24		
25	<i>In re Mid-Atlantic Toyota Antitrust Litig.,</i>	
26	564 F. Supp. 1379 (D. Md. 1983).....	13
27		
28	<i>In re Omnivision Technologies, Inc.,</i>	
	559 F. Supp. 2d 1036 (N.D. Cal. 2007).....	17, 19

1 *In re Pac. Enters. Sec. Litig.*,  
 2 47 F.3d 373 (9th Cir. 1995) .....23  
 3  
 4 *In re Taco Bell Wage & Hour Actions*,  
 5 2016 U.S. Dist. LEXIS 48557, (E.D. Cal. Apr. 6, 2016) .....22  
 6  
 7 *Linney v. Cellular Alaska Partnership*,  
 8 151 F.3d 1234 (9th Cir. 1998) ..... 12, 19  
 9  
 10 *Makabi v. Gedalia*,  
 11 2016 Cal. App. Unpub. 1489, (2nd Dist. Ct. of App. Mar. 6, 2016).....22  
 12  
 13 *Officers for Justice v. Civil Serv. Comm’n*,  
 14 688 F.2d 615 (9th Cir. 1982) ..... 19  
 15  
 16 *Rodriguez v. W. Publ’g Corp.*,  
 17 No. CV-05-3222 R(MCx), 2007 U.S. Dist. LEXIS 74849, (C.D. Cal. Aug. 10,  
 18 2007) ..... 16  
 19  
 20 *Singer v. Becton Dickinson & Co.*,  
 21 2010 U.S. Dist. LEXIS 53416 (S.D. Cal. June 1, 2010) .....24  
 22  
 23 *Six Mexican Workers v. Ariz. Citrus Growers*,  
 24 904 F.2d 1301 (9th Cir. 1990) .....23  
 25  
 26 *Staton v. Boeing Corp.*,  
 27 327 F.3d 938 (9th Cir. 2003) .....24  
 28  
 29 *Torrisi v. Tucson Elec. Power Co.*,  
 30 8 F.3d 1370 (9th Cir. 1993) ..... 13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Van Vranken v. Atlantic Richfield Co.,*

901 F. Supp. 294 (N.D. Cal. 1995).....24

**STATUTES**

Cal. Lab. Code § 226.7 ..... 14, 19

Cal. Lab. Code § 2699 ..... 8

Cal. Lab. Code § 2699(e)(1).....21

Cal. Lab. Code § 2699(f) .....21

Cal. Lab. Code § 2699(g) .....21

Cal. Lab. Code § 512 ..... 14, 20

FRCP 23(e) ..... 12, 13

Wage Order No. 5-2001 ..... 14

**TREATISES**

Alba Conte & Herbert Newberg, *4 Newberg on Class Actions* (2002)..... 12, 13

1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a certified wage and hour class  
3 and representative action settlement by and between Plaintiffs Manuel Viguera and  
4 Genny Vasquez, on behalf of themselves and all others similarly situated  
5 (“Plaintiffs”), and Defendant Red Robin International, Inc. (“Defendant” or “Red  
6 Robin”). The proposed settlement resolves the present action pending before this  
7 Court, titled *Manuel Viguera v. Red Robin International, Inc.*, Case No. 8:17-cv-  
8 01422-JVS (DFMx) (“*Viguera I*”) and the pending civil action pending before the  
9 Superior Court of California for the County of Orange, titled *Manuel Viguera, et*  
10 *al. v. Red Robin International, Inc.*, Case No. 30-2017-00945592-CU-OE-CXC  
11 (“*Viguera II*”) (collectively, the “Actions”)<sup>1</sup>.

12 The Joint Stipulation of Class and Representative Action Settlement  
13 (“Settlement Agreement”) provides for a Gross Settlement Amount of  
14 \$8,500,000.00 to all persons who were employed by Red Robin International, Inc.  
15 as non-exempt, hourly employees at Red Robin’s restaurants in California from July  
16 14, 2013 to October 23, 2018 (the “Class Period”) and who were not excluded as  
17 part of Defendant’s motion to decertify the class based upon pre-dispute arbitration  
18 agreements signed before July 14, 2017 (the “Class” or “Class Members”). The  
19 Gross Settlement Amount includes a PAGA Penalty Payment of \$250,000.00 to all  
20 persons who were employed by Red Robin International, Inc. as non-exempt,  
21 hourly employees at Red Robin’s restaurants in California from September 21, 2016  
22 to July 15, 2020 (the “PAGA Group Members”) (the Class Members and PAGA  
23 Group Members are collectively referred to as the “Settlement Class” or  
24 “Settlement Class Members”). The Settlement Agreement is attached as Exhibit A  
25 to the Declaration of Christina M. Lucio (“Lucio Decl.”).

26 After deductions for requested attorney’s fees of \$2,833,050.00 (33.33% of  
27

28 <sup>1</sup> Pursuant to the Settlement Agreement, Plaintiff will file the Consolidated Amended Complaint combining the allegations, violations, and causes of action

1 the GSA), litigation costs not to exceed \$375,000.00, class representative  
2 enhancements payments of \$37,500.00 to Plaintiff Viguera and \$17,500.00 to  
3 Plaintiff Vasquez, Private Attorneys General Act (“PAGA”) Penalty Payment for  
4 the settlement claims under PAGA of \$250,000.00 to be distributed to PAGA Group  
5 Members, and estimated settlement administration costs of \$135,000.00, the Net  
6 Settlement Amount (“NSA”) to be distributed to the Class Members totals  
7 approximately \$4,851,950.00.

8 As discussed in detail below, Plaintiffs seek approval of the proposed  
9 settlement as fair, reasonable and adequate and ask the Court to set dates for  
10 providing notice of settlement, requests for exclusion or objection, a final approval  
11 and fee hearing date, along with a briefing schedule.

## 12 **II. THE PARTIES AND SETTLEMENT CLASS**

### 13 **A. Plaintiffs.**

14 Plaintiff Manuel Viguera is a current hourly, non-exempt restaurant  
15 employee of Red Robin. He was hired in or about February 2014. He has worked  
16 as a server, bartender, expediter, cocktail server, FOH trainee, and shift supervisor  
17 for the company. While he was primarily based at the Irvine Spectrum, he has also  
18 worked at other locations, including Cypress, Santa Ana, and Foothill Ranch. Lucio  
19 Decl. ¶ 6.

20 Plaintiff Genny Vasquez is a former hourly, non-exempt employee of Red  
21 Robin, who has worked as a server and bartender primarily at Defendant’s Irvine  
22 Spectrum location. She was employed by Red Robin from approximately 2008 to  
23 2018. Id. at ¶ 7.

### 24 **B. Defendant.**

25 Defendant Red Robin is a Nevada corporation which operates a chain of  
26 casual dining restaurants throughout California and the United States. It is

27  
28 

---

set forth in *Viguera I* and *Viguera II* attached as Exhibit A to the Settlement Agreement.

1 headquartered in Colorado. Red Robin operated approximately 71 restaurants in the  
2 state of California during the Class Period. Id. at ¶ 9.

3 **C. The Settlement Class.**

4 On October 23, 2018, the Court certified the following class:

5 All persons who were employed by Defendant as non-  
6 exempt, hourly employees, however titled, in  
7 Defendant's restaurants in the State of California from  
8 July 14, 2013 to October 23, 2018.

9 On February 21, 2019, the Court decertified the Class as to the 2,612  
10 Arbitration Subclass members who signed an arbitration agreement prior to the  
11 filing of this action on July 14, 2017.

12 Thus, the Class is defined as follows:

13 All persons who were employed by Red Robin  
14 International, Inc. as non-exempt, hourly employees at  
15 Red Robin's restaurants in California from July 14, 2013  
16 to October 23, 2018 and who were not excluded as part of  
17 Defendant's motion to decertify the class based upon pre-  
18 dispute arbitration agreements signed before July 14,  
2017.

19 Settlement Agreement ¶ 7.

20 The PAGA Group is defined as follows:

21 All persons who were employed by Red Robin  
22 International, Inc. as non-exempt, hourly employees at  
23 Red Robin's restaurants in California from September 21,  
24 2016 to the date the Court grants preliminary approval of  
the Settlement or June 30, 2020, whichever is earlier.

25 Id. ¶ 8.

26 Collectively, the Class Members and PAGA Group Members comprise the  
27 Settlement Class. Id. ¶ 33. There are an estimated 16,790 Class Members and  
28

1 14,500 PAGA Group Members. Lucio Decl. ¶ 8. Some Class Members are also  
2 PAGA Group Members. Id.

3  
4 **III. PROCEDURAL AND LITIGATION HISTORY**

5 **A. *Vigueras I Action.***

6 On July 14, 2017, Plaintiff Manuel Vigueras filed a class action complaint  
7 against Red Robin in Orange County Superior Court alleging that Defendant (1)  
8 failed to pay all wages owed, including overtime; (2) failed to provide meal periods  
9 for class members; (3) failed to authorize and permit rest periods for the class; (4)  
10 knowingly and intentionally failed to comply with itemized wage statement  
11 provisions; (5) failed to timely pay wages due at termination; and (6) violated the  
12 Unfair Competition Laws. On August 16, 2017, Defendant filed its answer.  
13 Defendant then removed the case to the United States District Court for the Central  
14 District of California, Southern Division and it was assigned Case No. 8:17-Cv-  
15 01422-JVS (DFMX). Id. at ¶ 9.

16 On November 1, 2017, Plaintiff filed a First Amended Complaint alleging  
17 claims for: (1) failure to pay all wages owed, including overtime; (2) failure to  
18 provide lawful meal periods; (3) failure to authorize and permit lawful rest periods;  
19 (4) knowing and intentional failure to comply with itemized employee wage  
20 statement provisions; (5) violations of the unfair competition law. Id. at ¶ 10.

21 **B. *Vigueras II Action.***

22 On September 21, 2017, Plaintiff filed a separate complaint against  
23 Defendant in the Orange County Superior Court alleging a single cause of action  
24 under the Private Attorneys General Act, Labor Code section 2698 *et seq.* seeking  
25 civil penalties based on alleged violations of California Labor Code sections 201,  
26 202, 203, 204, 218.5, 218.6, 221-224, 226, 226.3, 226.7, 510, 512, 558, 1174,  
27 1174.5 1194, 1197, 1198, 2698 *et seq.*, 2802 and Wage Order No. 5. On February  
28 20, 2018, Plaintiffs amended the complaint to add Genny Vasquez as a

1 representative. The factual allegations in *Vigueras II* are substantially similar to  
2 the factual allegations alleged in *Vigueras I*. *Id.* at ¶¶ 11-12.

3 **C. Class Certification.**

4 On October 23, 2018, the Court granted Plaintiff’s Motion for Class  
5 Certification. The Court certified the following class: “All persons who are  
6 employed or have been employed by Defendant as non-exempt, hourly employees,  
7 however titled, in Defendant’s restaurants in the state of California from July 14,  
8 2013 to the present.” The Court also certified six subclasses: First Meal Period  
9 Subclass, Second Meal Period Subclass, Rest Period Subclass, Indemnification  
10 Subclass, Unfair Business Practices Subclass, and Arbitration Subclass. *Id.* at ¶ 13.

11 **D. Decertification.**

12 On February 21, 2019, the Court granted Defendant’s motion to decertify  
13 as to the 2,612 Arbitration Subclass members who signed arbitration agreements  
14 before the Complaint in *Vigueras I* was filed on July 14, 2017. On October 21,  
15 2019, the Court denied Defendant’s second motion to decertify the certified class  
16 or modify the subclasses. *Id.* at ¶ 14.

17 **E. *Vigueras I* Motions for Summary Judgment/Adjudication.**

18 On June 24, 2019, Defendant filed a Motion for Summary Judgment, or in  
19 the Alternative Partial Summary Judgment, as to Plaintiff’s individual and class  
20 claims. On July 8, 2019, Plaintiff filed a Motion for Partial Summary Judgment as  
21 to Plaintiff’s meal period claim, rest period claim, expense reimbursement claim,  
22 and unfair competition claim. On August 19, 2019, the Court denied Plaintiff’s  
23 Motion for Partial Summary Judgment and denied Defendant’s Motion for  
24 Summary Judgment except for Plaintiff’s claim for failure to reimburse expenses  
25 for uniforms from August 2015 to the end of the Class Period. *Id.* at ¶ 15.

26 **F. *Vigueras II* Motion for Summary Adjudication.**

27 On September 19, 2019, Plaintiffs filed a Motion for Summary  
28 Adjudication on certain of Defendant’s affirmative defenses in *Vigueras II*. On

1 December 5, 2019, the state court denied summary adjudication. Id. at ¶ 16.

2 **G. Mediations.**

3 The Parties attended three full day mediation sessions. The first mediation  
4 took place with experienced wage and hour mediator Joel Grossman on March 29,  
5 2018 in Los Angeles, California. The second mediation took place with  
6 experienced wage and hour mediator David Rotman on March 21, 2019 in San  
7 Francisco, California. In addition, the week before trial, the Parties attended a third  
8 full day mediation session with experienced wage and hour mediator Mark Peters  
9 in San Francisco, California. The Parties were unable to reach a settlement at the  
10 mediations, however they continued to discuss possible settlement throughout the  
11 litigation and during trial. Id. at ¶ 21.

12 **H. *Vigueras I* Trial.**

13 On February 25, 2020, Plaintiff and Defendant began a jury trial in this  
14 Court. The Court ruled on the Parties' motions in limine, impaneled a jury and the  
15 Parties gave their opening statements. Plaintiff was called to testify and Defendant  
16 cross-examined Plaintiff. On February 28, 2020, the Parties reached a global  
17 settlement of the claims in *Vigueras I* and *Vigueras II* for \$8,500,000.00. The  
18 Parties informed the Court that they would present a long-form Settlement  
19 Agreement to the Court for approval. The Settlement which was memorialized on  
20 the record is now the subject of the proposed Settlement Agreement. Id. at ¶ 17.

21 **IV. DISCOVERY HISTORY**

22 The Parties conducted significant investigation of the facts and law in this  
23 case. Such discovery and investigation included but was not limited to the  
24 exchange of information through informal and formal discovery; extensive  
25 written discovery and law and motion practice; numerous conferences between  
26 Class Counsel and Defendant's counsel throughout the litigation and in advance  
27 of trial; multiple PMQ and corporate management depositions including the  
28 depositions of Andy Mulz (Director of Operations), Matthew Chaffee (Business

1 Solution Architect for Human Resources), Karin Davie (Human Resources  
2 Business Partner) (twice), Peter Owens (Labor Management), Claire Helen  
3 Simpson (Human Resources Director), Adin Philleo (Plaintiff's manager),  
4 Deepal Liyange (Plaintiff's Assistant Manager); Expert depositions; Plaintiffs'  
5 depositions; multiple class member depositions throughout the State of  
6 California; substantial document production; and interviews of class member  
7 percipient witnesses. Defendant also produced a large volume of documents and  
8 data concerning the putative class members prior to multiple mediations. The  
9 Parties also retained experts to assist in their respective investigations and had  
10 them deposed during the Actions. Counsel for the Parties investigated the law  
11 as applied to the facts discovered regarding the alleged claims of the Settlement  
12 Class Members and potential defenses thereto, and the damages and penalties  
13 claimed by the Settlement Class Members. Id. at ¶¶ 19-20.

## 14 **V. SUMMARY OF PROPOSED SETTLEMENT TERMS**

### 15 **A. The Gross Settlement Amount.**

16 The Parties have agreed (subject to Court approval), that the Settlement Class  
17 claims be settled and compromised for the Gross Settlement Amount of  
18 \$8,500,000.00, no part of which may revert to Defendant, and which includes (a)  
19 Participating Class Members' Individual Settlement Payments; (b) attorneys' fees  
20 of up to \$2,833,050.00 (33.33% of GSA) to compensate Class Counsel for all work  
21 performed and all work remaining to be performed in finalizing and administering  
22 the Settlement and securing final Court approval; (c) Class Counsel's actual  
23 litigation costs and expenses not to exceed \$375,000.00; (d) Class Representative  
24 Enhancement Payments of \$37,500.00 to Plaintiff Manuel Vigueras and \$17,500.00  
25 to Plaintiff Genny Vasquez, in consideration of their initiation and prosecution of  
26 the Actions, serving as Class Representatives, work performed, risks undertaken for  
27 the payment of costs in the event the cases had not successfully concluded, the  
28 substantial benefits conferred on the Settlement Class, and a general release of all

1 claims; (e) PAGA Penalty Payment of \$250,000.00 attributable to Plaintiffs' claims  
2 pursuant to PAGA<sup>2</sup>; and (f) Settlement Administrator expenses to ILYM Group,  
3 Inc. of up to \$135,000.00, to provide notice of the settlement and distribute  
4 settlement payments to the Settlement Class. Id. at ¶ 24. In addition to the Gross  
5 Settlement Amount, Red Robin will pay the employer's share of payroll taxes. Id.

6 **B. The Net Settlement Amount.**

7 After all Court-approved deductions, the remaining Net Settlement Amount  
8 is estimated to be \$4,851,950.00 will be distributed to all Participating Class  
9 Members (i.e. Class Members who do not exclude themselves or "opt-out" of the  
10 Settlement) based proportionately on the number of weeks worked and the number  
11 of shifts worked over five hours for Red Robin during the class period in relation to  
12 all Participating Class Members. The Settlement further provides that Participating  
13 Class Members will receive their share of the NSA automatically without having to  
14 return a claim form. Id. at ¶ 25.

15 The non-reversionary nature of the Settlement guarantees that any amounts  
16 not distributed to Class Counsel for attorneys' fees and costs, to the Settlement  
17 Administrator for administration costs, or to the Class Representatives for  
18 enhancement payments will remain part of the NSA and be distributed among the  
19 Participating Class Members. In other words, no portion of the Settlement will  
20 revert to Defendant under any circumstances. All uncashed Individual Settlement  
21 Payment checks will be sent to the California State Controller's Office Unclaimed  
22 Property Fund. Id. at ¶ 28.

23 **C. Formula for Calculation of Individual Settlement Payments to**  
24 **Participating Class Members.**

25 The Settlement Administrator will calculate the Individual Settlement  
26 Payment amount for each Participating Settlement Class Member. To make this

27 \_\_\_\_\_  
28 <sup>2</sup> California Labor Code Section 2699(1)(2) provides as follows: "The superior court shall review and approve any settlement of any civil action filed pursuant to this part."

1 calculation, the Settlement Administrator shall use the following formula:

2 (a) One point for each workweek a Class Member worked a shift as a  
3 non-exempt restaurant employee on the payroll of Defendant at any time during  
4 the Class Period (“Individual Workweeks”).

5 (b) One additional point for each shift a Class Member worked over five  
6 hours (“Over 5 Hour Shifts”).

7 The Settlement Administrator will calculate each Class Member’s  
8 individual share of the NSA as follows: 1) The total number of points earned by  
9 all Class Members that were employed in the Class Period based on the  
10 information provided to the Settlement Administrator will be added together,  
11 which sum is referred to as the “Total Class Points;” (2) The Individual Points of  
12 each Class Member will be calculated by adding together the points earned based  
13 upon the Class Member’s number of workweeks and shifts specified in Paragraphs  
14 52(a) and/or (b); (3) The Total Individual Points of each Class Member will be  
15 divided by the Total Class Points, and the result is referred to as the Class  
16 Member’s “Percentage Share;” and (4) The Net Settlement Amount shall be  
17 multiplied by each Class Member’s Percentage Share, and the result of this  
18 multiplication is the Class Member’s Individual Settlement Payment. The  
19 Individual Settlement Payments will be reduced by any required deductions for  
20 each Class Member as set forth in this Settlement Agreement. For example, Jane  
21 Doe Settlement Payment = [(Jane Doe Individual Points / Total Class Points) x  
22 Net Settlement Amount] less required withholdings]. Id. at ¶ 29.

23 **D. Formula for Calculation of Individual PAGA Payments to**  
24 **PAGA Group Members.**

25 All PAGA Group Members will receive their individual share of the PAGA  
26 Penalty Payment proceeds automatically, without the requirement for the return  
27 of a claim form. Each PAGA Group Member will receive an Individual PAGA  
28 Payment which is a share of the PAGA Penalty Payment calculated as follows:

1 (a) For each PAGA Group Member, the Settlement Administrator will  
2 calculate the number of workweeks the PAGA Group Member  
3 worked at least one shift as a non-exempt restaurant employee on the  
4 payroll of Red Robin at any time during the PAGA Period  
5 (“Individual Qualifying Workweeks”).

6 (b) The value of each Individual Qualifying Workweek shall then be  
7 determined by dividing the portion of PAGA Penalty Payment to be  
8 paid to PAGA Group Members by the Total Qualifying Workweeks  
9 for all PAGA Group Members, resulting in the “Qualifying  
10 Workweek Value.” Each PAGA Group Member’s Individual PAGA  
11 Payment shall then be determined by multiplying the PAGA Group  
12 Member’s Individual Qualifying Workweeks by the Qualifying  
13 Workweek Value.

14 Id. at ¶ 30. These formulas provide a fair and adequate method of distribution of  
15 the Settlement proceeds to the Settlement Class Members in this case. Id. at ¶ 31.

16 **E. The Settlement Administrator and Notice to the Class.**

17 ILYM Group, Inc., the Settlement Administrator selected by the Parties to  
18 administer the Settlement, will conduct a search of the National Change of Address  
19 database to update Settlement Class Member addresses, and will thereafter mail to  
20 each Settlement Class Member identified on the Class List a Notice of Settlement  
21 of Class and Representative Action Lawsuit (the “Class Notice”). Id. at ¶ 32; Exhibit  
22 B to Settlement Agreement.

23 The Class Notice shall provide (1) information regarding the nature of the  
24 Actions, (2) a summary of the Settlement’s principal terms, (3) the Class Member  
25 and PAGA Group Member definitions, (4) his or her Individual Points as a Class  
26 Member and/or Individual Qualifying Workweeks as a PAGA Group Member, (5)  
27 each Settlement Class Member’s estimated Individual Settlement Payment and/or  
28 Individual PAGA Payment and the formula for calculating the Settlement

1 Payments, (6) the dates which comprise the Class and PAGA Group periods, (7)  
2 instructions on how to submit valid Requests for Exclusion or objections for Class  
3 Members only, (8) the deadlines by which the Class Member must fax or postmark  
4 a Request for Exclusion or file and serve objections to the Settlement, and (9) the  
5 claims to be released, as set forth in this Settlement Agreement. Id. at ¶ 33; Exhibit  
6 B to Settlement Agreement.

7 **F. The Released Claims.**

8 All Class Members who do not submit a valid and timely request for  
9 exclusion will release the following claims against the Released Parties:

10  
11 Release of Claims by All Class Members. Upon the Effective  
12 Date, each and every Participating Class Member shall be  
13 deemed to have fully, finally and forever released, settled,  
14 compromised, relinquished and discharged any and all of the  
15 Released Parties of and from any and all Released Class  
16 Claims, and shall be permanently barred and enjoined from the  
17 institution or prosecution of any and all Released Class Claims  
18 against the Released Parties, except as to such rights or claims  
19 as may be created by the Settlement, subject to the continuing  
20 jurisdiction of the Court.

21 All PAGA Group Members will release the followings claims against the  
22 Released Parties:

23 Release of Claims by All PAGA Group Members. Upon the  
24 Effective Date, each and every PAGA Group Member shall be  
25 deemed to have fully, finally and forever released, settled,  
26 compromised, relinquished and discharged any and all of the  
27 Released Parties of and from any and all Released PAGA  
28 Claims, and shall be permanently barred and enjoined from the  
institution or prosecution of any and all Released PAGA  
Claims against the Released Parties, except as to such rights or  
claims as may be created by the Settlement, subject to the  
continuing jurisdiction of the Court.

1 Lucio Decl. ¶¶ 34-35. In addition to the Released Claims above, Plaintiffs will  
2 give an individual general release of all claims against the Released Parties. Id. ¶  
3 36.

#### 4 **VI. THE CLASS HAS BEEN CERTIFIED.**

5 On October 23, 2018, the Court certified the Class, finding that Plaintiff  
6 met the class certification requirements of Rule 23 of the Federal Rules of Civil  
7 Procedure. Doc. No. 48. On February 21, 2019, the Court decertified the Class as  
8 to the 2,612 Arbitration Subclass members who signed an arbitration agreement  
9 prior to the filing of this action on July 14, 2017. (Doc. No. 73). Thus, the Class  
10 defined in the Settlement Agreement is consistent with the Court's prior  
11 certification of the Class and decertification as to those Class Members who  
12 signed arbitration agreements prior to the filing of this action.

#### 13 **VII. THE COURT SHOULD PRELIMINARILY APPROVE THE CLASS** 14 **ACTION SETTLEMENT AND SET A FINAL APPROVAL HEARING**

15 Class action settlements are subject to court review and approval under the  
16 Federal Rules of Civil Procedure. A class action may not be dismissed,  
17 compromised, or settled without the approval of the Court. FRCP Rule 23(e). The  
18 decision to approve or reject a proposed settlement is committed to the Court's  
19 sound discretion. *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000), citing  
20 *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238 (9th Cir. 1998).

21 This procedure safeguards Class Members' due process rights and enables  
22 the Court to fulfill its role as the guardian of class interests. *See* Alba Conte &  
23 Herbert Newberg, *4 Newberg on Class Actions* (2002) ("*Newberg*"), §§ 11.22, *et*  
24 *seq.* The purpose of the Court's preliminary evaluation of the proposed Settlement  
25 is to determine whether it is within the "range of reasonableness," and whether  
26 notice to the Class and a formal fairness hearing are appropriate. *See Newberg* §  
27 11.25.

28 At this stage, the Court is not making a final determination on whether the

1 settlement is fair, reasonable, and adequate, as is ultimately required by FRCP Rule  
2 23(e) Rather, the Court need only decide whether the settlement “appears to fall  
3 within the range of possible approval.” *Armstrong v. Bd. of Sch. Directors*, 616 F.2d  
4 305, 314 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134  
5 F.3d 873 (7th Cir. 1998); *see also Berry v. School Dist. of City of Benton Harbor*,  
6 184 F.R.D. 93, 97 (W.D. Mich. 1998) (the court first must determine “whether the  
7 proposed settlement is potentially approvable”); *In re Mid-Atlantic Toyota Antitrust*  
8 *Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (likening preliminary approval to a  
9 finding there is “probable cause” to submit the settlement to the class and to hold a  
10 full-scale final approval hearing); *Newberg* § 11.25.

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

18 The Court’s determination of whether a proposed settlement is fair, adequate,  
19 and reasonable is often said to require a balancing of several factors. These factors  
20 may include, among others: “the strength of plaintiff’s case; the risk, expense,  
21 complexity, and the likely duration of further litigation; the risk of maintaining class  
22 action status throughout the trial; the amount offered in settlement; the extent of  
23 discovery completed, and the stage of the proceedings; the experience and views of  
24 counsel; the presence of a governmental participant; and the reaction of the class  
25 members to the proposed settlement. This list is not exclusive and different factors  
26 may predominate in different factual contexts.” *Torrissi v. Tucson Elec. Power Co.*,  
27 8 F.3d 1370, 1385 (9th Cir. 1993) (citation and internal quotations omitted). A  
28

1 discussion of these factors supports the conclusion the proposed Settlement is “fair,  
2 adequate and reasonable.”

3 **A. Strength of Plaintiffs’ Case and the Risk, Expense, Complexity**  
4 **and Likely Duration of Further Litigation.**

5 Plaintiffs recognized the inherent risks and uncertainty of litigation,  
6 including that the Settlement Class could receive nothing, and understand the  
7 benefit of providing a significant settlement sum now. The specific risks include:  
8 (i) the possibility of decertification of all or part the Class at trial; (ii) the need for  
9 a unanimous jury; (iii) the possibility of an unfavorable, or less favorable, verdict  
10 at trial; (iv) the likely possibility that post-trial motions may result in an  
11 unfavorable, or less favorable, result at trial; and/or (v) the possibility of an  
12 unfavorable, or less favorable result on appeal, and the certainty that the appeal  
13 process would be lengthy. Lucio Decl. ¶ 37; Declaration of James R. Hawkins  
14 (“Hawkins Decl.”) ¶ 7.

15 Plaintiffs’ claims involve complex and disputed legal issues and fact-specific  
16 arguments which the Parties have litigated heavily since inception of the Actions.  
17 While Plaintiffs firmly believe in the strength of their claims, Red Robin has strong  
18 defenses to Plaintiffs’ claims, and those defenses created a real possibility that the  
19 jury would not have unanimously found in favor of Plaintiffs and the Class if the  
20 trial had proceeded to a verdict. Lucio Decl. ¶ 38; Hawkins Decl. ¶ 8.

21 The essence of the Actions is that Plaintiffs contend that Defendant  
22 maintained illegal policies and practices that did not provide and/or authorize and  
23 permit its employees meal and rest periods absent request. Plaintiffs contended  
24 that Defendants Just Say Yes poster stating the policy and practice of “request then  
25 provide” or “request then authorize and permit” violated California law. As a  
26 result, Plaintiffs asserted that Defendants policies did not provide for meal or rest  
27 periods as required by Labor Code §§ 512, 226.7, Wage Order No. 5-2001, as well  
28 as *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) (*Brinker*). Furthermore,

1 Plaintiffs contended that Defendant had failed to provide any mechanism for the  
2 reimbursement of expenses to employees, even though employees routinely  
3 incurred expenses for items such as pens, pencils, aprons, notepads, server books  
4 and other work related items. Lucio Decl. ¶ 43.

5 Defendant presented arguments to all contentions made by Plaintiffs as to  
6 certification, liability, and damages. Defendant argued that its meal and rest period  
7 policies set forth in the California Addendum to its Employee Handbook  
8 indisputably complied with California law. Defendant argued that although the  
9 Just Say Yes poster did apply to all Class members, it does not result in any  
10 violation of the law. Defendant argued that the Just Say Yes policy demonstrates  
11 Red Robin's proactive commitment to providing Team Members with breaks  
12 anytime they want one and instructing managers to "just say yes, no matter the  
13 circumstances." Defendant's further argued that Plaintiff's testimony and the  
14 declarations of more than 200 Class members revealed that Red Robin never  
15 rejected a request by a Class member to take a meal period. Id. ¶ 44.

16 Proceeding through trial would impose a significant risk of no recovery. If  
17 the proposed Settlement had not been achieved, continued trial of the class claims  
18 in this action and the PAGA claims in the related action carried the possibility that  
19 no benefit would be conferred upon the Settlement Class. By contrast, the  
20 Settlement will yield a prompt, certain, and substantial recovery for the Settlement  
21 Class, without the need for additional time or judicial resources including the strong  
22 possibility of an appeal. Id. ¶ 39; Hawkins Decl. ¶ 9.

23 In the face of these uncertainties, the Parties agreed to a non-reversionary  
24 settlement of \$8,500,000.00 during trial. This recovery is certain and substantial  
25 for the Settlement Class. Lucio Decl. ¶ 50; Hawkins Decl. ¶ 9.

26 **B. The Extent of Discovery and Stage of the Proceedings Support the**  
27 **Settlement.**

28 As shown by the litigation and discovery histories, the Parties thoroughly

1 investigated and evaluated the case and engaged in sufficient investigation and  
2 discovery to support the Settlement. Lucio Decl. ¶ 40. The litigation has reached  
3 the stage where the parties have a clear view of the strengths and weaknesses of  
4 their cases sufficient to support the Settlement. *Boyd v. Bechtel Corp.*, 485 F. Supp.  
5 610, 622 (N.D. Cal. 1979).

6 With exhaustive discovery completed, voluminous documents reviewed and  
7 analyzed, class certification, multiple Rule 30(b)(6) and party depositions  
8 completed, mediation, and the beginning of the trial, it is clear that the case reached  
9 a stage supporting settlement. *Id.*

10 **C. The Settlement is the Product of Serious, Informed and Non-**  
11 **Collusive Negotiations between Experienced Wage and Hour Counsel**

12 “In the Ninth Circuit, a Court affords a presumption of fairness to a  
13 settlement, if: ‘(1) the negotiations occurred at arm’s length; (2) there was sufficient  
14 discovery to allow counsel to act and the Court to review their actions in an  
15 informed manner; (3) the proponents of the settlement are experienced in similar  
16 litigation; and (4) only a small fraction of the class objected.’” *Rodriguez v. W.*  
17 *Publ’g Corp.*, No. CV-05-3222 R(MCx), 2007 U.S. Dist. LEXIS 74849, at \*33  
18 (C.D. Cal. Aug. 10, 2007). Three out of the four factors are clearly met, and the  
19 fourth must be evaluated after preliminary approval and notice to the Class.

20 The proposed Settlement was reached through a fair compromise of disputed  
21 claims arrived at through substantial exchange of information, exhaustive analysis,  
22 extensive investigation, and arm’s-length negotiations through the assistance of  
23 three separate mediators and counsel.

24 Class Counsel, James Hawkins, APLC, has significant experience in  
25 litigating minimum wage, overtime, and rest and meal period cases, and other wage  
26 and hour class cases. Hawkins Decl. ¶¶ 3-5; Lucio Decl. ¶ 41. Likewise,  
27 Defendant’s counsel, Fisher & Phillips, LLP, are also well experienced in wage and  
28

1 hour employment law and class actions. Id.

2 Experienced counsel, operating at arm's-length, have weighed the strengths  
3 of the case and examined all of the issues and risks of litigation and endorse the  
4 proposed Settlement. The view of the attorneys actively conducting the litigation  
5 "is entitled to significant weight" in deciding whether to approve the settlement.  
6 *Fisher Bros. v. Cambridge Lee Industries, Inc.*, 630 F.Supp. 482, 488 (E.D. Pa.  
7 1985); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*.  
8 661 F.2d 939 (9th Cir. 1981). "The recommendations of plaintiffs' counsel should  
9 be given a presumption of reasonableness" *In re Omnivision Technologies, Inc.*,  
10 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007), citing *Boyd v. Bechtel Corp.*, *supra*,  
11 485 F.Supp. 610, 622.)

12 Class Counsel, having prosecuted many wage and hour class actions, are  
13 experienced and qualified to evaluate the Settlement Class claims and to evaluate  
14 the risks and potential outcome of further litigation and the propriety of settlement  
15 on a fully informed basis. Hawkins Decl. ¶¶ 3-5.

16 Counsel on both sides share the view this is a fair and reasonable settlement  
17 in light of the complexities of the case, the state of the law including *Brinker*, and  
18 of the uncertainties of the outcome of litigation. The opinion of counsel in support  
19 of the proposed Settlement is based on a realistic assessment of the strengths and  
20 weaknesses of their respective cases, extensive legal and factual research, and the  
21 substantial discovery detailed above. The opinion of counsel is also based on an  
22 assessment of the risks of proceeding with the litigation through the end of trial and,  
23 if a verdict were recovered, through appeal as compared to the value of a settlement  
24 at this time. Given the risks inherent in litigation and the defenses asserted, this  
25 Settlement is fair, adequate, and reasonable and in the best interests of the  
26 Settlement Class and should be preliminarily approved. Lucio Decl. ¶ 42.

27 **D. The Proposed Settlement is a Reasonable Compromise of Claims.**  
28

1 Class Counsel believes the proposed Settlement is in the best interest of the  
2 Settlement Class based on detailed knowledge of the factual and legal issues  
3 presented in the Actions. Counsel considered, among other issues, the risks of  
4 obtaining a unanimous verdict at trial and the possibility of appeals that affect the  
5 value of the claims in reaching the proposed Settlement. Class Counsel also  
6 considered that a potential unfavorable result at trial in *Vigueras I* could result in a  
7 dismissal or compromise of the PAGA claims in *Vigueras II*. Id. at ¶ 49.

8 Plaintiffs' main class claims against Defendant have been for unpaid  
9 premiums for missed meal periods and rest breaks and unreimbursed expenses.  
10 Plaintiffs allege Defendant did not provide Class Members meal periods in the first  
11 instance because Class Members had to request a meal period before one was  
12 provided. Plaintiffs also alleged that Defendant failed to reimburse Class Members  
13 for expenses incurred for pens, pencils and notepads needed to do their job.  
14 Moreover, Plaintiffs have alleged derivative claims failure to provide accurate  
15 itemized wage statements, waiting time penalties, and unfair competition. In  
16 addition, Plaintiffs alleged violation of PAGA for the underlying labor code  
17 violations. Lucio Decl. ¶¶ 43-47

18 Accordingly, Plaintiffs' counsel gave serious consideration to all facts and  
19 arguments and concluded the terms and amount of the Settlement are fair and  
20 reasonable. As discussed above, Defendant asserted multiple defenses, and have  
21 expressly denied and continue to deny any wrongdoing or legal liability arising out  
22 of any of the facts or conduct alleged in the Actions. Plaintiffs' counsel analyzed  
23 the merits of the class claims, and each one presented significant hurdles. The  
24 recovery of \$8,500,000.00 for the Settlement Class is an excellent result,  
25 considering the risks of maintaining class action status through trial and after  
26 appeal, and the possibility Plaintiffs would not unanimously prevail at trial, or  
27 would not obtain all damages claimed, as well as the delay and duration of the  
28

1 litigation and appeals. *Id.* at ¶ 49.

2 A settlement is not judged *solely* against what might have been recovered had  
3 plaintiff prevailed at trial, nor does the settlement have to provide 100% of the  
4 damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*,  
5 151 F. 3d 1234, 1242 (9th Cir. 1998); *In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d  
6 454, 459 (9th Cir. 2000). The adequacy of the amount recovered must be judged as  
7 “a yielding of absolutes. . . Naturally, the agreement reached normally embodies a  
8 compromise; in exchange for the saving of cost and elimination of risk, the parties  
9 each give up something they might have won had they proceeded with litigation . .  
10 .” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982)  
11 (citation omitted), “It is well-settled law that a cash settlement amounting to only a  
12 fraction of the potential recovery does not . . . render the settlement inadequate or  
13 unfair”, “*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) at 628; see also  
14 *In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist LEXIS 95616,  
15 at p. 21, noting that certainty of recovery in settlement of 6% of maximum potential  
16 recovery after reduction for attorney’s fees was higher than median percentage for  
17 recoveries in shareholder class action settlements, averaging 2.2%-3% from 2002  
18 through 2006.) Accordingly, the proposed Settlement is not to be judged against a  
19 speculative measure of what might have been achieved.

20 In light of all the information provided above, the proposed Settlement  
21 reflects an excellent recovery for the Settlement Class and is well within the  
22 “ballpark” of reasonableness and should be granted preliminary approval. Lucio  
23 Decl. ¶ 50; Hawkins Decl. ¶ 9.

### 24 **1. Plaintiffs’ Meal and Rest Period Claims**

25 Plaintiffs argued that Red Robin failed to authorize and permit and separately  
26 compensate Class Members for rest periods. Under Labor Code § 226.7, one hour  
27 of wages at an employee’s regular rate must be paid if a rest period is not provided.  
28 Plaintiffs estimated one unpaid rest period premium per shift and projected damages

1 for unpaid rest period premiums to be \$24,831,285. Plaintiff also estimated one  
2 unpaid rest period premium for each shift longer than five hours and projected  
3 damages for unpaid meal period premiums to be \$20,036,335. The parties  
4 fundamentally disagreed over the employer’s obligation to “provide” meal periods  
5 in accordance with Labor Code § 512 and *Brinker Rest. Corp. v. Superior Court*,  
6 53 Cal. 4th 1004 (2012). Plaintiff contends that Defendant violated the mandates of  
7 Labor Code § 512 by (1) failing to provide meal periods in the first instance absent  
8 request, (2) impeding or discouraging the taking of lawful meal periods, and (3)  
9 purporting to allow employees to waive meal periods on shifts over six hours.

10 Defendant argued that to prove a violation under *Brinker*, an employee must  
11 show that an employer actually prevented the employee from taking breaks and that  
12 *Brinker* only requires that meal periods be made available. Defendant argued that  
13 Red Robin’s Meal and Rest Period policy is set forth in its California Addendum to  
14 its Team Member Handbook. They contend that the policy indisputably complies  
15 with California law as it provides Team Members who work a shift of five (5) hours  
16 or more with a meal period of at least thirty (30) minutes, during which they are  
17 “completely relieved from duty,” and authorizes and permits one ten (10) minute  
18 break for every four (4) hours worked or major fraction thereof.

19 However, Plaintiff argued that the statute and the California Supreme Court  
20 do not agree. Rather, the law imposes an actual affirmative obligation on the  
21 employer to “provide” meal periods to employees. *See, Hamilton v. Wal-Mart*  
22 *Stores, Inc.*, 2019 U.S. Dist. LEXIS 77699 at \*14 (C.D. Cal. Mar. 4, 2019); *see also,*  
23 *Hamilton v. Wal-Mart Stores, Inc.* 5:17- cv-01415-AB-KK, DE 350, p. 16-17 (C.D.  
24 Cal. Feb. 11, 2020 [rejecting defendant’s argument that plaintiff must show that the  
25 subject practice “actually prevents employees from taking meal breaks or off-site  
26 meal breaks,” reasoning that *Brinker* instead mandates that ‘Plaintiffs need only  
27 present evidence from which a jury could conclude that the security check impedes  
28

1 or discourages them from doing so.”].

## 2 **2. Plaintiffs’ Unreimbursed Expenses Claim**

3 Labor Code section 2802(a) requires that “[a]n employer shall indemnify his  
4 or her employee for all necessary expenditures or losses incurred by the employee  
5 in direct consequence of the discharge of his or her duties, or of his or her obedience  
6 to the directions of the employer...” Plaintiffs argued that Defendant had no policy  
7 or mechanism for reimbursement of expenses incurred by the Settlement Class  
8 including pens, paper, and uniforms. Defendant argued that Plaintiff did not submit  
9 a single receipt for reimbursement during the entire litigation and that it reimbursed  
10 all expenses. Based on Plaintiffs’ expert’s questionnaire, Plaintiffs estimated  
11 damages for unreimbursed writing pads and instruments to be \$4,554,639.  
12 However, Defendant filed a motion in limine challenging the reliability of  
13 Plaintiffs’ expert’s questionnaire. Lucio Decl. ¶ 47.

## 14 **3. Plaintiffs’ PAGA Claim**

15 The Private Attorneys General Act of 2004 (“PAGA”) allows an aggrieved  
16 employee to bring suit against an employer for violations of most Labor Code  
17 provisions. Suits brought under PAGA do not affect the employee’s right to recover  
18 other remedies under state or federal law. Labor Code § 2699(g); *Caliber*  
19 *Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 375 (2005). The statute  
20 of limitations for PAGA suits is one year. The penalties available under PAGA are  
21 those provided in the underlying Labor Code provision that is violated or, if no  
22 penalty is expressly provided, those provide by PAGA itself. Where the Labor Code  
23 does not provide for a penalty, PAGA establishes a civil penalty of \$100 for each  
24 aggrieved employee per pay period for the initial violation and \$200 for each  
25 aggrieved employee per pay period for each subsequent violation. Labor Code §  
26 2699(f). Wherever the Labor Code gives the Labor and Workforce Development  
27 Agency discretion to assess a civil penalty, a court is authorized to exercise the same  
28 discretion. Labor Code § 2699(e)(1). However, Section 2699(e)(1) permits a Court

1 to award a lesser amount than the maximum civil penalty if based on the facts and  
2 circumstances to do otherwise would result in an award that is "unjust, arbitrary and  
3 oppressive or confiscatory."

4 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of  
5 Appeal affirmed a judgment after trial which only provided for a PAGA penalty of  
6 \$5 per pay period. Therefore, at trial, any PAGA penalties awarded could be  
7 significantly less than the agreed upon amount of \$250,000.00 even where Plaintiffs  
8 prevailed on the PAGA claim.

9 Under PAGA, Courts have considerable discretion to reduce the penalty  
10 award. In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a  
11 federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of  
12 82.2%, because the court found maximum penalties "unjust" because the employees  
13 had suffered no injuries. Some trial courts have actually awarded no civil penalties,  
14 even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016  
15 Cal. App. Unpub. 1489, \*5 7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA  
16 penalties were awarded by the Los Angeles County Superior Court) (unpublished  
17 decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557,  
18 \*40 43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

19 In order to recover any PAGA penalties, Plaintiffs would be required at trial  
20 to prove each of the underlying Labor Code violations. See *Cardenas v. McLane*  
21 *Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, \*10 (C.D. Cal. 2011) ("Given the  
22 statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals  
23 whom the plaintiff has not proven suffered a violation of the Labor Code by the  
24 defendant."). Here, Plaintiffs would need to prove that each PAGA Group Member  
25 suffered all violations for each pay period the employee worked.

26 Given Defendant's potential defenses to the violations at issue, the risks and  
27 costs of continued litigation, Plaintiffs and Class Counsel believe that the PAGA  
28

1 Penalty Payment is fair and reasonable allocation of the GSA. Lucio Decl. ¶ 48.

2 1. As set forth in the accompanying proof of service, the LWDA has been  
3 provided notice of this motion and the PAGA settlement. The decision of LWDA to  
4 accept the PAGA settlement and not oppose the motion should be given considerable  
5 weight as the decision of LWDA to accept the PAGA settlement and not oppose the  
6 motion should be given considerable weight as the LWDA is a sophisticated  
7 government entity that is more than able to look out for its own rights. Lucio Decl.  
8 ¶ 48.

9 **VIII. CLASS COUNSELS’ ATTORNEYS’ FEES REQUEST AND CLASS**  
10 **ENHANCEMENT PAYMENTS.**

11 **A. Motion for Award of Attorneys’ Fees and Litigation Costs.**

12 In the Ninth Circuit, a district court has discretion to apply either a lodestar  
13 method or a percentage-of-the-fund method in calculating a class fee award in a  
14 common fund case. *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997,  
15 1006 (9th Cir. 2002). When applying the percentage-of-the-fund method, an  
16 attorneys’ fees award of “twenty-five percent is the ‘benchmark’ that district courts  
17 should award.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)  
18 (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.  
19 1990)). However, a district court “may adjust the benchmark when special  
20 circumstances indicate a higher or lower percentage would be appropriate.” *Id.*  
21 (citing *Six Mexican Workers*, 904 F.2d at 1311). “Reasonableness is the goal, and  
22 mechanical or formulaic application of either method, where it yields an  
23 unreasonable result, can be an abuse of discretion.” *Fischel*, 307 F.3d at 1007.

24 Here, Class Counsel will file a motion at the time of final approval requesting  
25 reimbursement of their litigation expenses of up to \$375,000.00 and an award of  
26 attorneys’ fees not to exceed \$2,833,050.00 or 33.33% of GSA, which Defendant  
27 does not oppose. Class Counsel’s fee request of 33.33% of the GSA constitutes a  
28 reasonable fee and any upward departure from the benchmark is warranted given

1 the procedural history detailed above and Class Counsel’s undertaking of a  
2 complex, risky, expensive, and time-consuming case to trial on a contingency fee  
3 basis. Lucio Decl. ¶ 51.

4 **B. Class Representatives Enhancement Payments.**

5 Class representatives “are eligible for reasonable incentive payments. The  
6 district court must evaluate their awards individually, using ‘relevant factors  
7 including the actions the plaintiff has taken to protect the interests of the class, the  
8 degree to which the class had benefited from those actions, the amount of time and  
9 effort the plaintiff in pursuing the litigation.” *Staton v. Boeing Corp.*, 327 F.3d 938,  
10 977 (9th Cir. 2003) [citations and internal alterations omitted].

11 Subject to the Court’s approval at the time of the final approval hearing, Class  
12 Plaintiffs will request \$37,500.00 to Manuel Viguera and \$17,500.00 to Genny  
13 Vasquez for their time, effort, risks undertaken for the potential payment of costs in  
14 the event the Actions had been unsuccessful, possible retaliation by employers, for  
15 a general release of all claims, and termination of Viguera’s employment. The  
16 requested enhancement payments are fair and reasonable because Plaintiffs were  
17 instrumental in achieving the Settlement in the Actions. Plaintiffs invested a great  
18 deal of time and effort into the investigation, prosecution, and the settlement of the  
19 Actions, as will be set forth in their declarations to be filed in conjunction with the  
20 motion for final approval of class action settlement. Lucio Decl. ¶ 52. See, e.g.,  
21 *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416 at \*24-26 (S.D.  
22 Cal. June 1, 2010) (“The \$25,000 incentive award is ... well within the acceptable  
23 range awarded in similar cases.”]; discussing, *Brotherton v. Cleveland*, 141 F. supp.  
24 2d 907, 913-14 (S.D. Ohio 2001) [approving \$50,000 class representative payment  
25 to named plaintiff]; and *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294,  
26 299 (N.D. Cal. 1995) (same); *Glass v. UBS Financial Services*, 2007 U.S. Dist.  
27 LEXIS 8476, 50-52 (N.D. Cal. Jan. 26, 2007) (approving \$25,000 class  
28

1 representative payment).

2 **IX. CONCLUSION**

3 Plaintiffs respectfully request the Court preliminarily approve the proposed  
4 Settlement, approve a appoint ILYM Group, Inc. as the Settlement Administrator,  
5 approve the Class Notice, and set a hearing date for final approval and Plaintiffs'  
6 request for award of attorneys' fees, costs and Class Representative enhancement  
7 payments.

8 Respectfully submitted,

9 **JAMES HAWKINS APLC**

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Dated: June 19, 2020

By: s/ Christina M. Lucio \_\_\_\_\_

James R. Hawkins  
Christina M. Lucio  
Mitchell J. Murray

Attorneys for Plaintiffs and the  
Settlement Class