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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ROSIE SHRAMEK, individually and on
behalf of all similarly situated individuals,

Plaintiff,

v.

MARBLE USA, INC., a California
corporation, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 37-2020-00031880-CU-OE-CTL

Assigned to the Hon. Kenneth J. Medel, Dept. C-66

CLASS ACTION

**NOTICE OF UNOPPOSED MOTION AND
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

**Date: November 5, 2021
Time: 9:30 a.m.
Dept.: C-66**

Reservation Number: 2380529

Complaint Filed: September 11, 2020

1 **PLEASE TAKE NOTICE THAT** on November 5, 2021 at 9:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department C-66 of the above-entitled Court, located at 330 West
3 Broadway, San Diego, California 92101, Plaintiff Rosie Shramek will and hereby does move
4 unopposed for an Order (1) preliminarily approving the proposed class action settlement in the
5 above-captioned case, (2) provisionally certifying a settlement class, (3) provisionally approving
6 the appointment of Rosie Shramek as Class Representative, (4) provisionally approving the
7 appointment of Gaines & Gaines, APLC as Class Counsel, (5) provisionally approving the
8 appointment of ILYM Group, Inc. as settlement administrator, (6) approving and directing
9 distribution of notice to the settlement class, and (7) setting a final fairness and approval hearing.

10 This unopposed Motion is made pursuant to Rule 3.769 of the California Rules of Court,
11 which provides for court approval of the settlement of a purported class action and allows the Court
12 to preliminarily certify a class for settlement purposes only.

13 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
14 reasonable and in the best interests of the settlement class as a whole, and that the procedures
15 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,
16 opt out of, or object to the settlement.

17 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
18 the Joint Stipulation for Settlement of Class and PAGA Representative Action and Release of
19 Claims, the Declaration of Daniel F. Gaines, such evidence or oral argument as may be presented
20 at the hearing, and on the complete record and file herein.

1 DATED: May 21, 2021

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Rosie Shramek and Proposed
8 Class Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Joint
4 Stipulation for Settlement of Class and PAGA Representative Action and Release of Claims (the
5 “Settlement Agreement”) for the Court’s approval. The Settlement is made and entered into by and
6 between Rosie Shramek (“Shramek” or “Plaintiff” or “Class Representative”), individually and on
7 behalf of all others similarly situated, and Defendant Marble USA, Inc. (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02.

13 For the foregoing reasons, Plaintiff respectfully requests that the Court: (a) grant
14 preliminary approval of the Settlement Agreement, (b) conditionally grant certification of the
15 proposed Settlement Class, (c) provisionally approve the appointment of Rosie Shramek as Class
16 Representative, (d) provisionally approve the appointment of Gaines & Gaines, APLC as Class
17 Counsel, (e) approve appointment of the settlement administrator, (f) authorize the mailing of the
18 proposed class action notice packet; and (g) schedule a final fairness and approval hearing.

19 **II. BACKGROUND AND PROCEDURAL HISTORY**

20 On September 11, 2020, Plaintiff Shramek exhausted the pre-filing requirements of the
21 California Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (“PAGA”).
22 Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

23 On September 11, 2020, Plaintiff Shramek initiated this Action in the San Diego County
24 Superior Court by filing a class action complaint on behalf of herself and all other non-exempt
25 California employees. As subsequently amended on May 5, 2021, the Action asserts class and
26 representative action claims against Defendant for (1) failure to provide rest periods of
27 compensation in lieu thereof in violation of Labor Code § 226.7 and IWC Wage Order 5-2001; (2)
28 failure to provide meal periods of compensation in lieu thereof in violation of Labor Code §§ 226.7,

1 512, and 1194 and IWC Wage Order 5-2001; (3) failure to pay all overtime wages due in violation
2 of Labor Code §§ 510 and 1194; (4) knowing and intentional failure to comply with itemized
3 employee wage statement provisions in violation of Labor Code § 226(a), (e), and (h); (5) failure
4 to pay wages due at separation of employment in violation of Labor Code §§ 201-203; (6) violation
5 of California's Unfair Competition Law, Bus. & Prof. Code section 17200 *et seq.*; and (7) PAGA
6 penalties for violations of Labor Code §§ 201, 202, 226(a), 226.3, 226.7, 510, 512, 558 and 1194.
7 Gaines Decl. at ¶ 7.

8 Defendant denies any and all liability or wrongdoing of any kind associated with the claims
9 alleged in the Action, and further denies that the Action is appropriate for class treatment for any
10 purpose other than this settlement. Defendant contends that it has complied at all times with all
11 applicable laws. It is Defendant's position that, if this case were to be litigated, class certification
12 would be inappropriate because there is not an ascertainable class, Plaintiff is not an adequate class
13 representative, Plaintiff's claims are not typical of putative class members, individual issues
14 predominate over class issues, and because a class action is not superior. The Action, the
15 negotiation and execution of this Settlement Agreement, and all acts performed or documents
16 executed pursuant to or in furtherance of the Settlement Agreement (i) shall not be used as an
17 admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not be an admission or
18 evidence of fault on behalf of Defendant in any action before a civil, criminal, or administrative
19 agency; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
20 the appropriateness of these or similar claims for class certification in the Action or with respect to
21 any other proceeding. Gaines Decl. at ¶ 8.

22 The Class Representative contends that Defendant violated the California Labor Code and
23 that this case is appropriate for class certification. Gaines Decl. at ¶ 9.

24 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

25 The Parties have conducted a thorough investigation and analysis of the claims made in this
26 Action. Prior to a mediation, the Parties met and conferred and Defendant agreed to provide
27 Plaintiff with copies of all documents related to policies and procedures, as well as a sampling of
28 time punch and payroll records for 10% of the employees in each of Defendant's restaurants,

1 allowing each side with a reasonable opportunity to assess the respective strengths and weaknesses
2 of their claims and defenses. Gaines Decl. at ¶ 10.

3 On March 31, 2020, the Parties participated a full-day, private mediation with the Honorable
4 Joel Pressman (Ret.), a respected jurist and experienced mediator who is well-versed in putative
5 class and representative actions, and who previously presided over a department in the San Diego
6 County Superior Court. Through the mediation process, with Judge Pressman's assistance, and
7 through a mediator's proposal, the Parties reached an agreement to resolve this Action. Each Party
8 was represented by experienced counsel during the arms'-length, good-faith negotiations facilitated
9 by Judge Pressman. Gaines Decl. at ¶ 11.

10 Based on their own independent investigation and evaluation, Class Counsel are of the
11 opinion that settlement for the consideration and on the terms set forth in the Settlement Agreement
12 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
13 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
14 will not be certified by the Court, and the defenses asserted by Defendant. Gaines Decl. at ¶ 12.

15 The Parties agree that the Settlement Class described herein may be certified for settlement
16 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
17 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
18 certification will have no force or effect and will immediately be revoked. The Parties further agree
19 that certification for purposes of approving the Settlement Agreement is in no way an admission
20 that class certification is proper under the more stringent standard applied for litigation and that
21 evidence of this limited stipulation for settlement purposes only will not be admissible for any
22 purpose in this or any other proceeding. Gaines Decl. at ¶ 13.

23 **IV. LEGAL ANALYSIS**

24 **A. The Proposed Settlement Terms**

25 **1. The Settlement Class**

26 The Parties have agreed to a Settlement Class composed of all current and former employees
27 of Defendant, classified as non-exempt or hourly-paid workers not exempt from overtime, who
28 worked for Defendant in California at any time during the period starting four years before the

1 commencement of this action (September 11, 2016) through and including March 31, 2021.
2 Defendant has represented that there are a total of 2,893 Class Members that meet this definition.
3 Stip. at ¶ 1.3.

4 2. **Allocations to be Paid from the Total Settlement Amount**

5 The Stipulation provides that Defendant shall pay \$1,000,000 in full satisfaction of all
6 claims arising from the Action. This Total Settlement Amount represents the maximum monetary
7 payment Defendant may be required to make to, or for the benefit of, Plaintiff, Class Members, the
8 LWDA, the taxing authorities, and Class Counsel for the Settlement of this action, and this Total
9 Settlement Amount shall be used to cover all Individual Settlement Payments to Class Members,
10 the PAGA Award, the Service Award to Plaintiff, the Class Counsel Fees Award, the Class Counsel
11 Costs Award, Settlement Administration Costs, all Payroll Taxes, and any and all other costs or
12 consideration associated with this Settlement. Stip. at ¶ 3.5.

13 From the Total Settlement Amount, Defendant will not oppose Plaintiff's counsel's
14 application to the Court for up to 35% of the Total Settlement Amount for attorneys' fees.
15 Plaintiff's estimated attorneys' fees to be requested from the Court are \$350,000. Stip. at ¶ 1.6.

16 From the Total Settlement Amount, Defendant will not oppose Plaintiff's counsel's
17 application to the Court for up to \$12,000 in reimbursement of litigation costs and expenses. Stip.
18 at ¶ 3.10.

19 From the Total Settlement Amount, Defendant will not oppose Plaintiff's counsel's
20 application to the Court for a Class Representative Service Award to the Class Representative in
21 the amount of \$12,000. Stip. at ¶ 3.10.10.

22 From the Total Settlement Amount, settlement administration fees paid to ILYM Group,
23 Inc. will be no more than \$25,500. Stip. at ¶ 3.11.

24 From the Total Settlement Amount, the portion to be allocated for settlement of any and all
25 claims for penalties under the PAGA is \$20,000 (75% of which shall be paid to the California Labor
26 and Workforce Development Agency and 25% will be distributed to Class Members as part of the
27 Net Distribution Fund). Stip. at ¶ 1.21.

28 \\\

1 The Net Distribution Fund is defined as the Total Settlement Amount, less the amount that
2 the Court awards for the California Labor & Workforce Development Agency's portion of the
3 PAGA Award, Plaintiff's Service Award, the Class Counsel Fees Award, the Class Counsel Costs
4 Award, Settlement Administration Costs, and any Payroll Taxes. Stip. at ¶ 1.18.

5 3. **Settlement of Claims Pursuant to Labor Code § 2699 et seq. (PAGA)**

6 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Total Settlement Amount
7 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
8 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
9 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
10 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$15,000 – shall
11 be payable to the Labor and Workforce Development Agency. The remaining twenty-five percent
12 (25%), or \$5,000, will be distributed to the California Labor & Workforce Development Agency,
13 and twenty-five percent (25%) will be distributed to Class Members as part of the Net Distribution
14 Fund. Stip. at ¶ 1.21.

15 Concurrently with the filing of this Motion, Plaintiff is transmitting the Settlement
16 Agreement (and these approval documents) to the LWDA, in compliance with Labor Code §
17 2699(l)(2). Gaines Decl. at ¶ 34.

18 **B. Two-Step Approval Process**

19 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
20 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
21 trial court, and (2) a final review after notice has been distributed to the Class Members informing
22 them of the terms of the settlement and allowing them to exclude themselves from, participate in
23 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

24 Approval of class action settlements involves a two-step process.
25 First, counsel submit the proposed terms of settlement and the court
26 makes a preliminary fairness evaluation. If the preliminary
evaluation of the proposed settlement does not disclose grounds to

27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 doubt its fairness or other obvious deficiencies, such as unduly
2 preferential treatment of class representatives or of segments of the
3 class, or excessive compensation for attorneys, and appears to fall
4 within the range of possible approval, the court should direct that
 notice ... be given to the class members of a formal fairness hearing,
 at which arguments and evidence may be presented in support of and
 in opposition to the settlement.

5 Thus, the preliminary approval by the trial court is simply a conditional finding that the
6 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
7 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
8 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
9 may find that the settlement proposal contains some merit, is within the range of reasonableness
10 required for a settlement offer, or is presumptively valid subject only to any objections that may be
11 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
12 (4th ed. 2002).

13 The procedures for the Parties’ submission of a proposed settlement for preliminary
14 approval by the Court also are discussed in 4 *Newberg on Class Actions*:

15 When the parties to an action reach a monetary settlement, they will
16 usually prepare and execute a joint stipulation of settlement, which
17 is submitted to the court for preliminary approval. The stipulation
 should set forth the essential terms of the agreement, including but
 not limited to, the amount of settlement, form of payment, manner of
 determining the effective date of settlement and any recapture clause.

18 *Id.* at § 11.24.

19 Here, the Parties have reached such an agreement and have submitted the Settlement
20 Agreement herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 14.

21 **C. Procedures for Settlement Before Class Certification.**

22 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
23 approval stage, request that the court provisionally approve certification of the class – conditioned
24 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
25 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
26 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
27 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
28

1 Corp. (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
2 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

3 The strength of the findings made by a judge at a preliminary hearing
4 or conference concerning a tentative settlement proposal . . . may be
5 set out in conditional orders granting tentative approval to the various
6 items submitted to the court. Three basic rulings are often
7 conditionally entered at this preliminary hearing. These conditional
8 rulings may approve a temporary settlement class, the proposed
9 settlement, and the class counsel’s application for fees and expenses.

10 4 *Newberg on Class Actions*, at §11.26.

11 1. **The Settlement Class Should Be Certified for Settlement Purposes**

12 It is well established that trial courts should use a lower standard for determining the
13 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal.
14 App. 4th at 1807, n. 19. The reason for this is that no trial is anticipated in a settlement class, so
15 the case management issues inherent in determining if the class should be certified need not be
16 confronted. *Amchem Products, Inc. v. Windsor* (1987) 521 U.S. 591, 620. The proposed
17 Settlement Class meets all requirements for certification, as discussed below.

18 a. **The Settlement Class is Ascertainable**

19 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
20 and the means for identifying the members of the class determine whether the class is ascertainable.
21 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
22 are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class
23 is sufficiently numerous to warrant certification. According to Defendant’s records, the Class
24 contains approximately 2,893 employees. Gaines Decl. ¶ 29.

25 b. **Questions of Law or Fact Common to Members of the Settlement**
26 **Class Predominate**

27 The Class Members’ claims all stem from a common source: members of the Settlement
28 Class allege that Defendant violated the same Labor Code provisions in connection with their
employment. All members of the Class seek the same relief under the same California laws. Under

² In determining the fairness and reasonableness of a proposed settlement, California courts may look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

1 these circumstances, the commonality requirement is satisfied for purposes of certifying the
2 Settlement Class for settlement purposes. Gaines Decl. ¶ 31.

3 c. **The Proposed Class Representative's Claims are Typical of the**
4 **Class Members' Claims**

5 A class representative's claims are typical when they arise from the same event or course
6 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
7 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
8 Class Representative Shramek is a former non-exempt employee who worked for Defendant in the
9 State of California during the Class Period. She contends that Defendant failed to provide meal
10 and rest periods, failed to pay all overtime wages, failed to comply with itemized employee wage
11 statement provisions, and failed to timely pay wages at the separation of employment, in violation
12 of Labor Code §§ 201-203, 226(a), 226.7, 510, 512, 1194, 2698, 2699, and Business & Professions
13 Code § 17200, arising from employment by Defendant during the Class Period. She has the same
14 claims as those that the members of the Settlement Class would reasonably be expected to bring
15 based on the course of conduct alleged herein. Gaines Decl. ¶ 32.

16 Plaintiff Shramek has also demonstrated that she will aggressively and competently assert
17 the interests of the proposed Settlement Class; she has taken an active role in this litigation and has
18 no apparent conflicts with other Class Members. Gaines Decl. ¶ 33. Furthermore, Plaintiff has
19 retained competent counsel, experienced in litigating class action claims in the employment
20 context. *See* Gaines Decl. ¶¶ 2-5.

21 **D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or**
22 **Collusion**

23 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
24 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
25 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
26 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
27 judgment for that of the proponents, particularly where, as here, settlement has been reached with
28 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*

1 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
2 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
3 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
4 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

5 While the recommendations of counsel proposing the settlement are not conclusive, the
6 Court can properly take them into account, particularly where, as here, such counsel have been
7 involved in informal discovery and negotiations for some period of time, appear to be competent,
8 have experience with this type of litigation, and have exchanged substantial evidence with the
9 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
10 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
11 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
12 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
13 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
14 Decl. ¶¶ 2-5, 12-28.

15 Here, the Parties’ counsel have a great deal of experience in class action litigation and
16 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
17 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
18 in a broad exchange of documents, statistics, records and other information. Each side has apprised
19 the other, informally and at a formal mediation, of their respective factual contentions, legal
20 theories and defenses, resulting in extensive arms-length negotiations taking place among the
21 Parties. *See* Gaines Decl. ¶¶ 2-5, 12-28.

22 1. **The Settlement Falls Within The “Ballpark” of Reasonableness**

23 The Court must make an “independent assessment of the reasonableness of the terms of the
24 settlement” prior to granting preliminary and final approval. *Clark v. American Residential*
25 *Services LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
26 Cal.App.4th 116, 127-28, 130, 133. To do so requires the Parties to submit “basic information
27 about the nature and magnitude of the claims in question and the basis for concluding that the
28 consideration being paid for the release of those claims represents a reasonable compromise.”

1 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* “attempt to decide the merits
2 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
3 *Kullar, supra*, 168 Cal.App.4th at 133.

4 Plaintiff’s counsel created a comprehensive damage analysis using sampling information
5 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
6 falls within a realistic range of recovery on class members’ claims. Gaines Decl. ¶ 15.

7 Plaintiff alleges that Defendant failed to permit or authorize Plaintiff and Class Members to
8 take timely, 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor
9 Code §§ 226.7, 512, 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers
10 (like Defendant) may not employ an employee for a work period of more than five hours without
11 providing a 30-minute meal period starting no later than the end of the fifth hour. Plaintiff and Class
12 Members allege that they were frequently unable to take a lawful meal break when they worked
13 shifts in excess of five hours in duration because they were too busy and there were not enough
14 employees to cover the work if one took a meal break. Gaines Decl. ¶ 16.

15 Based on an expert analysis of Defendant’s time data consisting of approximately 61,560
16 workweeks, approximately 30.5% of meal breaks were late, short, or not taken. Plaintiff concluded
17 the maximum value of this claim was \$954,000, but it required a significant discount for settlement
18 purposes due to the risks inherent in further litigation, including class certification risk, and the risk
19 of loss due to Defendant’s numerous defenses on the merits, including that Class Members properly
20 waived their meal breaks and that Defendant paid substantial meal break premiums during the Class
21 Period, demonstrating that it fully intended to, and did, pay any penalties owed based on any late,
22 short, and missed meal periods. Gaines Decl. ¶ 17.

23 Plaintiff further alleges that Defendant failed to provide Plaintiff and Class Members with
24 legally compliant rest periods, or premium wages consisting of one hour’s pay in lieu thereof, as
25 required by Labor Code § 226.7 and Wage Order 4-2001. Because the nature of the work performed
26 by Plaintiff and other Class Members was so busy, and because Defendant failed to staff or employ
27 a sufficient number of people to perform the work, Plaintiff contends that employees were routinely
28 not authorized and permitted to take timely rest periods. When they were able to take a rest period,

1 she contends that they were oftentimes late, interrupted or cut short. Gaines Decl. ¶ 18.

2 Plaintiff contends that Defendant's rest break policy is facially invalid and violates
3 California law, which requires that all non-exempt employees be authorized and permitted to take
4 a paid ten-minute rest break for every four hours of work, or major fraction thereof. 8 C.C.R. §
5 11040, section 12. She also contends that Defendant maintained an improper policy and practice
6 requiring Plaintiff and Class Members to remain on Defendant's premises, resulting in
7 impermissible on-duty rest periods subject to employer control. If Plaintiff could demonstrate a
8 25% violation rate for rest periods, the value of this claim would be approximately \$771,750. It is
9 not clear that Plaintiff could prevail on such a claim because of the risks inherent in class
10 certification, particularly with respect to claims for rest periods, which are not required to be
11 recorded. Rest periods are also subject to waiver, and Defendant argued that any missed rest
12 periods were waived by employees and not denied. Finally, Defendant argues that its policies were
13 always enforced in a manner which complies with California law. Gaines Decl. ¶ 19.

14 Because of the risks of loss on this claim, and the inherent difficulty in proving violations
15 on a class wide basis, a discount was required for settlement purposes; the compromise reached is
16 a fair and reasonable one. Gaines Decl. ¶ 20.

17 Plaintiff alleges that Defendant did not pay approximately \$40,000 in overtime and double
18 time wages due to a small group of Class Members employed as managers and who earned
19 incentive bonuses during their employment. This claim was also subject to defenses which
20 necessitated a compromise to resolve at this juncture, including that all such bonuses were
21 discretionary and therefore not subject to inclusion in the regular rate of pay, such that no overtime
22 or double time was ever underpaid. Gaines Decl. ¶ 21.

23 Class Members also sought wage statement penalties pursuant to Labor Code § 226(e),
24 waiting time penalties pursuant to Labor Code § 203 and PAGA penalties derivative of the
25 underlying violations alleged. The value of these penalties – which are derivative, discretionary,
26 and subject to defenses of their own – could be substantial, but their recovery carried substantial
27 risk. Gaines Decl. ¶ 22.

28 \\\

1 Under new applicable case law, it became unlikely that Plaintiff would recover on his
2 derivative waiting time penalty and wage statement penalty claims because the Court could find
3 that they will not stem from meal and rest break claims (and only a small group of Class Members
4 were denied overtime wages). *See Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th
5 1242, 1261, *review denied* (July 13, 2016). It is also possible that, because these are derivative
6 claims (i.e. Plaintiff must prevail on her underlying unpaid wage, meal and rest break claims to
7 recover on these penalty claims) and subject to defenses to good faith and willfulness, Plaintiff
8 would not recover on them at all even if they were not otherwise barred by applicable case law. As
9 a result, Plaintiff gave them a discounted value for settlement purposes. Gaines Decl. ¶ 23.

10 A discount on the maximum value of Class members' claims was required (and warranted)
11 to resolve the matter at this junction. Class certification is a substantial risk in any class action
12 case. Here, while Plaintiff maintains that the requirements of class certification are met, Defendant
13 proffers various arguments why class treatment is not appropriate here, including but not limited to
14 that individualized inquires among class members predominate over common ones – particularly
15 with respect to Plaintiff's rest period claims. If Defendant were to defeat Plaintiff's class
16 certification motion, there would be no class wide relief whatsoever, and most Class members
17 would likely not file individual claims. Gaines Decl. ¶ 24.

18 Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award
19 on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the
20 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
21 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 25.

22 Defendant strongly contends that its policies and practices do not violate any laws. It
23 contends that its meal and rest break policies properly provided for all meal and rest periods and
24 fully compensated its employees for all time worked. It further contends that the wage statements
25 it provides to its employees are fully compliant with California law. Gaines Decl. ¶ 26.

26 When the costs and risks of non-certification and loss on the merits are considered,
27 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
28 Decl. ¶¶ 15-27.

1 The settlement for each participating Class Member is fair, reasonable and adequate, given
2 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
3 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the
4 Action. Gaines Decl. ¶ 28.

5 2. **Despite the Asserted Fairness of the Settlement Terms, Class Members**
6 **May Request Exclusion From, Or Object To, The Settlement**

7 Despite the asserted fairness of the settlement terms, any potential Class Member who
8 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
9 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the class member would
10 retain any claim he or she may have against Defendant.

11 Moreover, Class Members who do not opt out may, upon providing proper notice to the
12 Parties and the Court, attend the final fairness and approval hearing for the purpose of objecting to
13 one or more of the settlement terms set forth in the Stipulation of Settlement.

14 **V. CONCLUSION**

15 Based on the foregoing, as part of its preliminary approval of the settlement, Plaintiff
16 requests that the Court:

- 17 1. Review the proposed Stipulation of Settlement setting forth the settlement terms.
- 18 2. Consider whether the proposed settlement preliminarily appears to be fair,
19 reasonable and adequate, and whether the proposed Settlement Class preliminarily appears to meet
20 the applicable certification criteria.
- 21 3. Appoint Plaintiff Rosie Shramek as the Class Representative.
- 22 4. Appoint Gaines & Gaines, APLC as Class Counsel.
- 23 5. Approve ILYM Group, Inc. as Settlement Administrator with regard to handling the
24 notice procedure as set forth more particularly in the Stipulation of Settlement.
- 25 6. Enter an Order provisionally approving the proposed Settlement Class on a non-
26 mandatory basis, approve forms to be distributed to the Settlement Class, direct notice to be given
27 to the Settlement Class, and set the following schedule of settlement proceedings:
28

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide the Settlement Administrator a list of all Class Members, including the full name, last known address, social security number, and the total number of workweeks that the Class Member worked for Defendant during the Class Period ("Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of the Settlement Agreement
Last day for Settlement Administrator to mail Notice to Class Members	14 calendar days after Settlement Administrator receives Class Information
Last day for exclusion requests by Class Members to be postmarked to Settlement Administrator	60 calendar days after mailing of Class Notice
Last day for written objections to the settlement by Class Members to be postmarked to Settlement Administrator	60 calendar days after mailing of Class Notice
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	10 calendar days before the final settlement approval hearing date
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days prior to the final settlement approval hearing date
Final settlement approval hearing	_____, 2021, at _____. [approximately 100 calendar days after entry of the Order granting this Motion]

DATED: May 21, 2021

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Rosie Shramek and Proposed Class Counsel