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8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF EL DORADO**
11

12 AARON PAUL, REBECCA JOINER,
individually on behalf of themselves, and on
13 behalf of all similarly situated individuals,

14 Plaintiffs,

15 v.

16 THE RIVA PARTNERS, a California
limited partnership, and DOES 1 through 10,
17 inclusive,

18 Defendants.
19
20

CASE NO: SC20200155

*Assigned to the Hon. Michael J. McLaughlin,
Dept. 4*

CLASS ACTION

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

DATE: December 9, 2022

TIME: 1:30 p.m.

DEPT.: 4

Action Filed: November 2, 2020

1 **PLEASE TAKE NOTICE THAT** on December 9, 2022 at 1:30 p.m., or as soon thereafter
2 as the matter may be heard, in Department 4 of the above-entitled Court, located at 1354 Johnson
3 Boulevard, South Lake Tahoe, California 96150, Plaintiffs Aaron Paul and Rebecca Joiner will and
4 hereby do move unopposed for an Order (1) preliminarily approving the proposed class action
5 settlement in the above-captioned case, (2) provisionally certifying the settlement class, (3)
6 provisionally approving the appointment of Plaintiffs Aaron Paul and Rebecca Joiner as Class
7 Representatives, (4) provisionally approving the appointment of Daniel F. Gaines, Esq. and Alex
8 P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (5) provisionally approving the
9 appointment of ILYM Group, Inc. as settlement administrator, (6) approving and directing
10 distribution of notice to the settlement class, and (7) setting a final fairness and approval hearing.

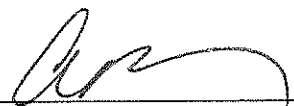
11 This unopposed Motion is made pursuant to Rule 3.769 of the *California Rules of Court*,
12 which provides for court approval of the settlement of a purported class action and allows the Court
13 to preliminarily certify the class for settlement purposes only.

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

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

22
23 DATED: November 8, 2022

GAINES & GAINES, APLC

24
25 By: 

DANIEL F. GAINES

ALEX P. KATOFSKY

Attorneys for Plaintiffs Aaron Paul and Rebecca Joiner
and Proposed Class Counsel

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Case Summary and Procedural History

Plaintiffs Aaron Paul (“Paul”) and Rebecca Joiner (“Joiner”) (together, “Plaintiffs”) and Defendant The Riva Partners (“Defendant”) (collectively, the “Parties”) have reached a resolution of this class action and hereby submit their settlement agreement to the Court for its preliminary approval. Defendant operates a restaurant and Plaintiffs and the class members defined herein are current and former employees employed at that restaurant.

On February 24, 2020, Plaintiffs exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On November 5, 2020, Plaintiffs initiated their Action in the El Dorado County Superior Court by filing a class action and representative action complaint, on behalf of themselves and on behalf of all similarly situated individuals. Thereafter, on February 28, 2022, Plaintiffs filed a First Amended Complaint. Gaines Decl. at ¶ 7.

The Action, as amended, alleges violations of the California Labor Code and California Business and Professions Code. The lawsuit seeks to certify a class of all current and former non-exempt California employees of Defendant at any time between November 5, 2016 and July 15, 2022 (“Class Period”). Specifically, the lawsuit alleges that members of the Class were not paid all wages; were not paid all gratuities; were not provided compliant meal and rest periods or premium compensation in lieu thereof; were not reimbursed for all business-related expenses; were not timely issued final wages upon separation of employment; and were not issued accurate and complete itemized wage statements. It seeks recovery of wages, expense reimbursement, damages, interest, statutory and civil penalties, restitution, attorneys’ fees and costs. Defendant denies all of the material allegations in the lawsuit and denies that it owes Class Members any remedies. The Court has not made a ruling on the merits of the case. Gaines Decl. at ¶ 8.

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Actions, and further denies that the Action is appropriate for class treatment for any purpose

1 other than this settlement. Defendant contends that it has complied at all times with the California
2 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification
3 would be inappropriate because Plaintiffs are not adequate class representatives, Plaintiffs' claims
4 are not typical of putative class members, and individual issues predominate over class issues,
5 among other defenses, including numerosity and commonality. The Actions, the negotiation and
6 execution of this Settlement Agreement, and all acts performed or documents executed pursuant to
7 or in furtherance of this Settlement Agreement (i) shall not be used as an admission, or as evidence
8 of wrongdoing by the Defendant, or for any other purpose whatsoever; (ii) shall not be an admission
9 or evidence of fault on behalf of Defendant in any action before a civil court, criminal court,
10 administrative agency of any type, or other tribunal; and (iii) shall not be deemed to be, and may
11 not be used as, an admission or evidence of the appropriateness of these or similar claims for class
12 certification in the Action or with respect to any other proceeding whatsoever. Gaines Decl. at ¶ 9.

13 The Class Representatives contend that Defendant violated the California Labor Code and
14 Industrial Welfare Commission Wage Order(s) and that this case is appropriate for class
15 certification. Gaines Decl. at ¶ 10.

16 **B. Investigation and Settlement Discussions**

17 Class Counsel conducted a thorough investigation into the facts and law during the
18 prosecution of this class action case, including the exchange of extensive formal and informal
19 discovery and the review and verification of statistical data and other facts and information
20 provided by Defendant. Counsel for the Parties also represent that they have investigated the
21 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
22 potential defenses thereto, and the damages and other losses claimed by Plaintiffs. Gaines Decl. at
23 ¶ 11.

24 On November 2, 2021, following their exchange of information and documents regarding
25 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
26 arm's-length negotiations through a mediation with the assistance of Judge David I. Brown (Ret.).
27 While the initial mediation attempt was unsuccessful, the Parties continued settlement discussions
28

1 with the help of Judge Brown, through which they were able to reach the resolution of the Action
2 set forth herein. Gaines Decl. at ¶ 12.

3 Based on their own independent investigation and evaluation, Class Counsel are of the
4 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
5 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
6 the Settlement Class in light of all known facts and circumstances, including the risk of significant
7 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
8 Defendant. Gaines Decl. at ¶ 13.

9 The Parties agree that the Settlement Class described herein may be certified for settlement
10 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
11 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
12 certification will have no force or effect and will immediately be revoked. The Parties further agree
13 that certification for purposes of the settlement is in no way an admission that class certification is
14 proper under the more stringent standard applied for litigation and that evidence of this limited
15 Stipulation for settlement purposes only will not be admissible for any purpose in this or any other
16 proceeding. Gaines Decl. at ¶ 14.

17 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
18 preliminary approval of the settlement agreement, (b) conditionally grant certification of the
19 proposed settlement class, (c) provisionally approve the appointment of Plaintiffs Aaron Paul and
20 Rebecca Joiner as Class Representatives, (d) provisionally approve the appointment of Daniel F.
21 Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (e) approve
22 appointment of the settlement administrator, (f) authorize the mailing of the proposed class action
23 notice packet; and (g) schedule a final fairness and approval hearing.

24 \\\

25 \\\

26 \\\

27 \\\

28 \\\

1 **II. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 The Parties have agreed upon a settlement class: all individuals who worked for Defendant
4 as a non-exempt employee in California at any time between November 5, 2016 and July 15, 2022.
5 Settlement at ¶ A(5).

6 The Parties stipulate to the conditional certification of the Settlement Class as defined herein
7 for settlement purposes only. Settlement at ¶ B(18).

8 The Settlement Agreement provides that Defendant shall pay the total, non-reversionary
9 sum of \$350,000 to resolve the claims alleged in the Action on behalf of the Settlement Class (the
10 “Gross Settlement Amount”). Stip. at ¶ C(19)(a).

11 Class Members need not submit a claim form to receive their share of the Settlement. Class
12 Members who timely exclude themselves from the Settlement will not be part of the final
13 Settlement Class and not bound by the Settlement’s releases. Stip. at ¶ D(28).

14 The Settlement Agreement further provides that Plaintiffs’ counsel may request an award
15 of attorneys’ fees not to exceed 35% of the Gross Settlement Amount (estimated at \$122,500) and
16 seek reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed
17 \$30,000. Stip. at ¶ C(19)(f) and C(19)(g). It also provides that Plaintiffs will seek, and Defendant
18 will not oppose, a service payment to each of the named plaintiffs, Aaron Paul and Rebecca Joiner,
19 in the amount of \$15,000 (for a total of \$30,000). Stip. at ¶ C(19)(e).

20 The Parties have agreed that ILYM Group, Inc. (“ILYM”), an experienced and competent
21 settlement administration company, will administer the settlement. Up to \$12,000 has been
22 allocated to compensate Phoenix for its work related to the administration. Stip. at ¶ C(19)(h).

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

24 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Gross Settlement Amount
25 will be allocated to settle the claims brought under Labor Code § 2699 *et. seq.* Pursuant to Labor
26 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
27 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
28 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$7,500 – of the

1 PAGA Settlement Amount will be paid to the California Labor and Workforce Development
2 Agency as the Labor and Workforce Development Agency Payment, and Twenty-Five Percent
3 (25%), or Five Thousand Dollars and Zero Cents (\$2,500), shall be included in the Net Settlement
4 Proceeds for payment to Class Members. Stip. at ¶ C(19)(d).

5 As required by Labor Code § 2699(l)(2), concurrent with Plaintiffs' submission of the
6 Settlement Agreement to the Court, they are transmitting it, together with this Motion, to the
7 LWDA. Gaines Decl. at ¶ 29.

8 **C. Two-Step Approval Process**

9 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
10 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
11 trial court, and (2) a final review after notice has been distributed to the Class Members informing
12 them of the terms of the settlement and allowing them to exclude themselves from, participate in
13 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

14 Approval of class action settlements involves a two-step process.
15 First, counsel submit the proposed terms of settlement and the court
16 makes a preliminary fairness evaluation. If the preliminary
17 evaluation of the proposed settlement does not disclose grounds to
18 doubt its fairness or other obvious deficiencies, such as unduly
19 preferential treatment of class representatives or of segments of the
20 class, or excessive compensation for attorneys, and appears to fall
21 within the range of possible approval, the court should direct that
22 notice ... be given to the class members of a formal fairness hearing,
23 at which arguments and evidence may be presented in support of and
24 in opposition to the settlement.

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

¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and 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, Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

1 (4th ed. 2002).

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

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

10 *Id.* at § 11.24.

11 Here, the Parties have reached such an agreement and have submitted the Settlement
12 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
13 See Gaines Decl., Exhibit B; Gaines Decl. ¶ 12.

14 **D. Procedures for Settlement Before Class Certification.**

15 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
16 approval stage, request that the court provisionally approve certification of the class – conditioned
17 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
18 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
19 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
20 the court was satisfied that it was “fair, adequate and reasonable.”). See also *In re Baldwin-United*
21 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
22 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

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

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

It is well established that trial courts should use a lower standard for determining the

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.

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

a. **The Settlement Class is Ascertainable**

The proposed settlement class is ascertainable. The class definition, the size of the class and the means for identifying the members of the class determine whether the class is ascertainable. *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members are identifiable from Defendant's records. Further, the settlement class is sufficiently numerous to warrant certification. According to Defendant's records, the Class is comprised of approximately 583 individuals. Gaines Decl. ¶ 25; Settlement at ¶ 15.

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

The Class Members' claims all stem from a common source: all Class Members allege that Defendant violated the same Labor Code and Wage Order provisions in connection with their work for Defendant at its restaurant. The same Labor Code and Wage Order violations are alleged on behalf of all persons encompassed in the settlement class, arising out of or which could be pled based on the facts and the allegations set forth in the operative complaint in the Action, including but not limited to claims for failure to pay all wages due; failure to pay all gratuities; failure to provide meal periods; failure to provide rest periods; failure to reimburse all business-related expenses; failure to furnish accurate wage statements; failure to timely pay earned wages upon termination or discharge; and unfair competition premised on the claims set forth above. Gaines Decl. ¶ 26.

c. **The Proposed Class Representatives' Claims are Typical of the Class Members' Claims**

A class representative's claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class, and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiffs and

1 proposed Class Representatives Aaron Paul and Rebecca Joiner are former non-exempt employees
2 of Defendant whom, Plaintiffs allege, were not provided with proper uninterrupted (off-the-clock
3 and free of all duties) 30-minute meal periods for every shift they worked which exceeded five
4 hours in duration; were not provided with 10-minute rest breaks as required by California law; were
5 not provided with compliant itemized employee wage statements; and were not timely paid all
6 wages due at termination, among other claims. Plaintiffs allege the same claims as those that the
7 members of the Settlement Class would reasonably be expected to bring based on the course of
8 conduct alleged herein. Gaines Decl. ¶ 27.

9 Plaintiffs have also demonstrated that they will aggressively and competently assert the
10 interests of the proposed Settlement Class; they have taken active roles in the litigation and have
11 no apparent conflicts with other class members. Gaines Decl. ¶ 28. Furthermore, Plaintiffs have
12 retained competent counsel, experienced in litigating class action claims in the employment
13 context. *See* Gaines Decl. ¶¶ 2-5.

14 **E. The Settlement Is Fair and Reasonable and Not the Result of Fraud or**
15 **Collusion**

16 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
17 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
18 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
19 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
20 judgment for that of the proponents, particularly where, as here, settlement has been reached with
21 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
22 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
23 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
24 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
25 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

26 While the recommendations of counsel proposing the settlement are not conclusive, the
27 Court can properly take them into account, particularly where, as here, such counsel have been
28 involved in informal discovery and negotiations for some period of time, appear to be competent,

1 have experience with this type of litigation, and have exchanged substantial evidence with the
2 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
3 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
4 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
5 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
6 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
7 Decl. ¶¶ 2-5, 11-12.

8 Here, the Parties’ counsel have a great deal of experience in class action litigation and
9 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
10 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
11 in a broad exchange of documents, statistics, records and other information. Each side has apprised
12 the other, informally and at a formal mediation, of their respective factual contentions, legal
13 theories and defenses, resulting in extensive arms-length negotiations taking place among the
14 Parties. *See* Gaines Decl. ¶ 2-5, 11-12.

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

16 The Court must make an “independent assessment of the reasonableness of the terms of the
17 settlement” prior to granting preliminary and final approval. *Clark v. American Residential*
18 *Services LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
19 Cal.App.4th 116, 127-28, 130, 133. To do so requires the Parties to submit “basic information
20 about the nature and magnitude of the claims in question and the basis for concluding that the
21 consideration being paid for the release of those claims represents a reasonable compromise.”
22 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* “attempt to decide the merits
23 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
24 *Kullar, supra*, 168 Cal.App.4th at 133.

25 Prior to settlement, Plaintiffs’ counsel created a comprehensive damage analysis using
26 sampling information obtained through informal discovery. This damage analysis reveals that the
27 negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines
28 Decl. ¶ 15.

1 Plaintiffs allege that Defendant failed to pay premium wages to their non-exempt California
2 employees who were denied rest breaks, in violation of Labor Code §§ 226.7 and 558. Plaintiffs
3 and all non-exempt California employees contend that they were routinely unable to take a 10-
4 minute rest break for every four (4) hours of work or major fraction thereof, but were not paid
5 premium wages of one hour's pay for each missed rest break. This violates Labor Code §§ 226.7
6 and 558. They argue that Defendant's policy and practice required employees to remain on the job
7 premises, resulting in impermissible on-duty rest periods subject to employer control. This policy
8 and practice would violate the holding in *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th
9 257, which held that the rest period requirement "obligates employers to permit and authorizes
10 employees to take off-duty rest periods. That is, during rest periods employers must relieve
11 employees of all duties and relinquish control over how employees spend their time." *Id.* at 269.
12 Moreover, Plaintiffs relate that they and most of their co-workers were simply too busy to be able
13 to stop and take a lawful rest break during their shifts. Indeed, when Mr. Paul asked another
14 employee about taking a rest break shortly after he was hired, his co-worker laughed and told him
15 that they do not get breaks. The maximum potential value of this claim is approximately \$260,000
16 based on a projected 25% violation rate; however, in light of the risks inherent in obtaining class
17 certification and prevailing on the merits – particularly where rest breaks need not be recorded, the
18 settlement amount here represents a fair compromise in light of the litigation risks that lied ahead.
19 Gaines Decl. at ¶ 16.

20 Plaintiffs also contend that Defendant failed to pay Plaintiffs and all other non-exempt
21 California employees premium wages for missed meal periods, in violation of Labor Code §§
22 226.7, 512 and 558. Plaintiffs a contend that Class Members were routinely denied a timely,
23 uninterrupted 30 minute off-the-clock meal period for every shift over five hours in duration, but
24 were not paid premium wages of one hour's pay for each missed meal period. This violates Labor
25 Code §§ 226.7, 512 and 558. Based on Plaintiffs' expert's analysis of a sampling of Defendant's
26 time and wage data, the maximum value of this claim is \$813,000. However, risks inherent in
27 further litigated favor the compromised settlement amount, include the proffered defense of waiver,
28 unmanageability as to the class certification hurdle, and other defenses which Defendant proffered.

1 In light of these risks, the settlement amount here represents a fair compromise. Gaines Decl. at ¶
2 17.

3 Plaintiffs contend that Class Members were required to be on-call on the days they were
4 scheduled to work and to call Defendant an hour before their shift starts to see if they were needed.
5 If they were not called in to work, Defendant would not compensate them for any time worked that
6 day. They also maintain that Defendant failed to pay Class Members all wages due during the
7 course of their employment, including, but not limited to, all tip and gratuity wages due, in violation
8 of Labor Code §§ 351, 510 and 1194. Defendant allegedly required Plaintiffs and other employees
9 who earned gratuities to pay a set percentage of their gratuities to each of the other non-gratuity
10 earning employees with whom they worked on every shift. Defendant's policy was allegedly
11 unlawful because it required servers to pay set percentages of their gratuities which were calculated
12 *not* on the total amount of gratuities they received, but rather on their *total food and beverage sales*
13 for that shift. Defendant's policy and practice would purportedly violate Labor Code § 351, which
14 states, in pertinent part, that "[n]o employer or agent shall collect, take, or receive any gratuity or a
15 part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from
16 wages due an employee on account of a gratuity, or require an employee to credit the amount, or
17 any part thereof, of a gratuity against and as a part of the wages due the employee from the
18 employer." Plaintiffs estimate the maximum value of these unpaid wage claims at no more than
19 \$97,000, and potentially far less (because precise records regarding these claims are not in
20 existence). Defendant also maintained numerous defenses to these unpaid wage claims, such that
21 they required a discount for settlement purposes at this junction of the litigation. Gaines Decl. at
22 ¶ 18.

23 Plaintiffs also assert penalty claims for defective wage statements (valued at up to
24 \$557,850), waiting time (up to \$1,240,346), and pursuant to PAGA (up to \$579,200 without
25 stacking multiple violations in the same pay period). Whether Plaintiffs could recover for these
26 penalty claims (and how much they could recover) is unclear, because they are wholly derivative
27 of Plaintiffs' unpaid wage claims, subject to proof of independent elements for recovery, subject to
28 defenses for good faith and proof of injury, and in the case of PAGA penalties, subject to judicial

1 discretion. The compromised settlement amount takes these risks into account. Gaines Decl. at ¶
2 19.

3 A discount on the maximum value of Class members' claims was required (and warranted)
4 to resolve the matter at this stage of the litigation. Class certification is a substantial risk in any
5 class action case. Here, while Plaintiffs maintain that the requirements of class certification are
6 met, Defendant proffers various arguments why class treatment is not appropriate here, including
7 but not limited to that individualized inquires among class members predominate over common
8 ones. If Defendant was to defeat Plaintiffs' class certification motion, there would be no class wide
9 relief whatsoever, and most class members would likely not file individual claims. Gaines Decl. at
10 ¶ 20.

11 Defendant strongly contends that its policies and practices do not violate any laws. It
12 contends that it provided all required wages in a timely manner. Gaines Decl. at ¶ 21.

13 When the costs and risks of non-certification and loss on the merits are considered,
14 Plaintiffs' counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
15 Decl. at ¶¶ 15-22.

16 The settlement for each participating Class Member is fair, reasonable and adequate, given
17 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
18 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the
19 Action. Gaines Decl. at ¶ 23.

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

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

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

1 **III. CONCLUSION**

2 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
3 request that the Court:

- 4 1. Review the proposed Settlement Agreement setting forth the settlement terms.
- 5 2. Consider whether the proposed settlement preliminarily appears to be fair,
6 reasonable and adequate, and whether the proposed settlement class preliminarily appear to meet
7 the applicable certification criteria.
- 8 3. Appoint Aaron Paul and Rebecca Joiner as the Class Representatives.
- 9 4. Appoint Daniel F. Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines,
10 APLC as Class Counsel.
- 11 5. Approve ILYM Group, Inc. as Settlement Administrator with regard to handling the
12 notice procedure as set forth more particularly in the Settlement Agreement.
- 13 6. Enter an Order provisionally approving the proposed settlement class on a non-
14 mandatory basis, approve forms to be distributed to the settlement class, direct notice to be given
15 to the settlement class, and set the following schedule of settlement proceedings:

16

<u>EVENT</u>	<u>TIMING</u>
17 18 19 20 21 Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and total wages paid (including gratuities) during employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
22 23 Last day for Settlement Administrator to mail Notice and Exclusion Form to Class Members via U.S. Mail	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
24 Last day for Class Members to submit a written Request for Exclusion to Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
25 26 Last day for Class Members to file an Objection with the Court	45 calendar days after the initial mailing of the Class Notice to Class Members
27 28 Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	_____, 2023

<u>EVENT</u>	<u>TIMING</u>
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	_____, 2023
Final settlement approval hearing	_____, 2023, at _____. The Parties suggest the final approval hearing be held approximately 90 days after the preliminary approval order is signed.

DATED: November 8, 2022

GAINES & GAINES, APLC

By: _____

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiffs Aaron Paul and Rebecca Joiner
and Proposed Class Counsel