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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

ELENA PUNTY, on behalf of herself and
all "aggrieved employees" pursuant to
Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

HOSKINS & MUIR, INC., a California
corporation, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: RG20064854

Assigned to the Hon. James Reilly, Dept. 25

**NOTICE OF UNOPPOSED MOTION AND
UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND SEEKING LEAVE TO
FILE FIRST AMENDED COMPLAINT**

Date: August 18, 2021

Time: 9:00 a.m.

Dept.: 25

Reservation # R-2265687

Complaint Filed: June 15, 2020

1 **PLEASE TAKE NOTICE THAT** on August 18, 2021 at 9:00 a.m., or as soon thereafter
2 as the matter may be heard, in Department 25 of the above-entitled Court, located at 1225 Fallon
3 Street, Oakland, California 94612, Plaintiff Elena Punty will and hereby does move unopposed for
4 an Order (1) preliminarily approving the proposed class action settlement in the above-captioned
5 case, (2) provisionally certifying a settlement class, (3) provisionally approving the appointment of
6 Plaintiff Elena Punty as Class Representative, (4) provisionally approving the appointment of
7 Daniel F. Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel,
8 (5) provisionally approving the appointment of ILYM Group, Inc. as settlement administrator,
9 (6) approving and directing distribution of notice to the settlement class, (7) permitting Plaintiff to
10 file a First Amended Complaint, and (8) 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 a 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 Settlement Agreement and Release of Claims, the Declaration of Daniel F. Gaines, such
20 evidence or oral argument as may be presented at the hearing, and on the complete record and file
21 herein.

1 DATED: June 22, 2021

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: Alex P. Katofsky

6 DANIEL F. GAINES
7 ALEX P. KATOFSKY
8 Attorneys for Plaintiff Elena Punty
9 and Proposed Class Counsel
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Parties have reached a resolution of this class action and hereby submit their Settlement Agreement and Release of Claims (the “Settlement,” “Stipulation,” or “Stip.”) for the Court’s approval. *See Exhibit B* to the Declaration of Daniel F. Gaines (“Gaines Decl.”). The Settlement is made and entered into by and between Plaintiff Elena Punty (“Plaintiff”, “Class Representative”, or “Punty”), individually and on behalf of all others similarly situated, and Defendant Hoskin & Muir, Inc. (“Hoskin” or “Defendant”).

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

For the foregoing reasons, the Parties respectfully request that the Court: (a) grant preliminary approval of the settlement agreement, (b) conditionally certify the proposed Settlement Class, (c) provisionally approve the appointment of Plaintiff Elena Punty as Class Representative, (d) provisionally approve the appointment of Daniel F. Gaines, Esq. and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (e) approve appointment of the settlement administrator, (f) permit the filing of a First Amended Complaint, (g) authorize the mailing of the proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

On March 25, 2020, Plaintiff Punty exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Gaines Decl. at ¶ 6.

On June 15, 2020, Plaintiff Punty initiated this Action in the Alameda County Superior Court by filing a complaint, pursuant to PAGA, on behalf of herself and all other aggrieved employees. Gaines Decl. at ¶ 7.

As set forth in the proposed First Amended Complaint attached as **Exhibit 3** to the Settlement Agreement, which the Parties seek to file as part of this motion for preliminary approval

1 of the Settlement Agreement, the Action asserts class and representative claims against Defendant
2 for (1) failure to provide meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512,
3 558 and IWC Wage Order 4-2001); (2) failure to provide rest periods or compensation in lieu
4 thereof (Labor Code §§ 226.7, 558 and IWC Wage Order 4-2001); (3) knowing and intentional
5 failure to comply with itemized employee wage statement provisions, including failure to maintain
6 accurate records (Labor Code §§ 226(a) and 226.3); (4) failure to timely pay wages at the separation
7 of employment (Labor Code §§ 201-203); (5) violation of Business and Professions Code § 17200
8 for underlying violations of the Labor Code as set forth above; and (6) civil penalties pursuant to
9 PAGA for underlying violations of the Labor Code as set forth above. Gaines Decl. at ¶ 8.

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

24 The Class Representative contends that Defendant violated the California Labor Code and
25 that this case is appropriate for class certification. Gaines Decl. at ¶ 10.

26 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

27 Throughout discovery, Class Counsel have conducted a thorough investigation into the facts
28 and law at issue in this case, including the exchange of extensive informal discovery and the review

1 and verification of statistical data and other facts and information provided by Defendant. Gaines
2 Decl. at ¶ 11.

3 On March 25, 2021, the Parties participated in a full day mediation session with Lisa
4 Klerman, Esq., a well-respected mediator with extensive experience resolving employment wage
5 and hour actions. The mediation did not culminate with any agreement to resolve the Action, but
6 following further extended negotiations with the assistance of Ms. Klerman, the basic terms of the
7 Settlement Agreement were reached. Gaines Decl. at ¶ 12.

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

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 settlement only. If for any reason the settlement is not approved, the
18 certification shall have no force or effect and the settlement and will immediately be revoked. The
19 Parties further agree that certification for purposes of approving the Settlement Agreement is in no
20 way an admission that class certification is proper under the more stringent standard applied for
21 litigation and that evidence of this limited stipulation for settlement purposes only will not be
22 admissible for any purpose in this or any other proceeding. Gaines Decl. at ¶ 14.

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 persons who are or were
27 employed by Defendant Hoskin & Muir, Inc. as non-exempt hourly employees in the State of
28

1 California at any time from June 15, 2016 to March 25, 2021. Defendant represents that the class
2 includes approximately 133 members. Stip. at ¶ 3.

3 2. **Allocations to be Paid from the Maximum Settlement Amount**

4 The Stipulation provides that Defendant shall pay an amount not to exceed \$300,000 to
5 resolve the Action on a class-wide basis (the “Maximum Settlement Amount”). The Maximum
6 Settlement Amount includes all payments for wages, penalties, and interest; the attorneys’ fees of
7 Class Counsel; litigation costs and expenses of Class Counsel (which includes, without limitation,
8 all such fees and costs incurred to date, as well as such fees and costs to be incurred in documenting
9 the Settlement Agreement, providing any notices required as part of the Settlement Agreement,
10 securing Court approval of the Settlement Agreement, and obtaining judgment in the Action); the
11 service payment and general release payment to the Class Representative, as approved by the Court;
12 the payment to the California Labor and Workforce Development Agency (“LWDA”) pursuant to
13 the PAGA claims in the Action; and all costs of administration, including, without limitation,
14 settlement administration fees and expenses and employee-side employment taxes. Defendant shall
15 pay all employer payroll tax obligations due on Individual Payment Amounts made from the Net
16 Settlement Proceeds in addition to, and separate and apart from, the Maximum Settlement Amount.
17 Stip. at ¶ C(1)(a).

18 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
19 application to the Court for up to \$100,000 for attorneys’ fees. Stip. at ¶ C(1)(f).

20 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
21 application to the Court for up to \$12,500 in reimbursement of litigation costs and expenses. Stip.
22 at ¶ C(1)(g).

23 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
24 application to the Court for a Service Payment and General Release Payment to the Class
25 Representative in the gross amount of \$10,000 in consideration for her efforts in instituting and
26 participating in the Action and in exchange for her general release of all claims. Stip. at ¶ C(1)(e).

27 From the Maximum Settlement Amount, settlement administration fees paid to ILYM
28 Group, Inc. will be no more than \$5,000. Stip. at ¶ C(1)(h).

1 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
2 and all claims for penalties under the PAGA is \$30,000 (75% of which shall be paid to the
3 California Labor and Workforce Development Agency and 25% of which shall be paid to Class
4 Members who have not submitted a valid and timely request for exclusion form as part of the Net
5 Settlement Proceeds). Stip. at ¶ C(1)(d).

6 The “Individual Payment Amount” shall be the portion of the Net Settlement Proceeds
7 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
8 valid Request for Exclusion Form). The Individual Payment Amounts will be calculated by
9 dividing the Net Settlement Proceeds by the total weeks worked (and during which compensation
10 was paid) by all participating Class Members in California during the Class Period, which will yield
11 the weekly settlement rate. The weekly settlement rate shall be multiplied by the number of weeks
12 each individual participating Class Member worked (and during which compensation was paid) for
13 Defendant in California during the Class Period to yield their Individual Payment Amount. Each
14 Class Member who does not opt out of the Settlement shall be paid an Individual Payment Amount.
15 All weeks worked calculations herein shall be made by reference to Class Members’ hire and
16 termination dates and payroll data contained in the records kept by Defendant in the ordinary course
17 of business during the Class Period. Stip. at ¶ C(1)(c).

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

19 Pursuant to PAGA, the Parties have agreed that \$30,000 of the Maximum Settlement
20 Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to
21 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
22 follows: 75 percent to the Labor and Workforce Development Agency and 25 percent to the
23 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
24 \$22,500 – shall be payable to the Labor and Workforce Development Agency. The remaining 25
25 percent, or \$7,500, shall be paid to Class Members who have not submitted a valid and timely
26 request for exclusion form (“Request for Exclusion Form”) as part of the Net Settlement Proceeds.
27 Stip. at ¶ 43.

28 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the

1 Settlement Agreement to the Court, they are transmitting it, together with this Motion, to the
2 LWDA. Gaines Decl. at ¶ 32.

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

4 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
5 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
6 trial court, and (2) a final review after notice has been distributed to the Class Members informing
7 them of the terms of the settlement and allowing them to exclude themselves from, participate in
8 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

9 Approval of class action settlements involves a two-step process.
10 First, counsel submit the proposed terms of settlement and the court
11 makes a preliminary fairness evaluation. If the preliminary
12 evaluation of the proposed settlement does not disclose grounds to
13 doubt its fairness or other obvious deficiencies, such as unduly
14 preferential treatment of class representatives or of segments of the
class, or excessive compensation for attorneys, and appears to fall
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.

15 Thus, the preliminary approval by the trial court is simply a conditional finding that the
16 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
17 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
18 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
19 may find that the settlement proposal contains some merit, is within the range of reasonableness
20 required for a settlement offer, or is presumptively valid subject only to any objections that may be
21 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
22 (4th ed. 2002).

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

25 When the parties to an action reach a monetary settlement, they will
26 usually prepare and execute a joint stipulation of settlement, which

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 is submitted to the court for preliminary approval. The stipulation
2 should set forth the essential terms of the agreement, including but
3 not limited to, the amount of settlement, form of payment, manner of
4 determining the effective date of settlement and any recapture clause.

5 *Id.* at § 11.24.

6 Here, the Parties have reached such an agreement and have submitted the Settlement
7 Agreement herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 15.

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

9 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
10 approval stage, request that the court provisionally approve certification of the class – conditioned
11 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
12 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
13 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
14 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
15 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
16 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

24 4 *Newberg on Class Actions*, at §11.26.

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

26 It is well established that trial courts should use a lower standard for determining the
27 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal.
28 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.

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 a. **The Settlement Class is Ascertainable**

2 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
3 and the means for identifying the members of the class determine whether the class is ascertainable.
4 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
5 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
6 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
7 comprises approximately 133 employees. Gaines Decl. ¶ 27.

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

10 The Class Members' claims all stem from a common source: members of the Settlement
11 Class allege that Defendant violated the same Labor Code provisions in connection with their
12 employment. All members of the Class seek the same relief under the same California laws (related
13 to unpaid meal and rest period premiums, inaccurate or incomplete wage statements, failure to
14 timely pay wages due upon separation, and derivative claims including without limitation claims
15 of unfair business practices and for penalties). Under these circumstances, the commonality
16 requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes.
17 Gaines Decl. ¶ 28.

18 c. **The Proposed Class Representative's Claims are Typical of the**
19 **Class Members' Claims**

20 A class representative's claims are typical when they arise from the same event or course
21 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
22 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
23 Class Representative Elena Puntý is a former non-exempt employee who worked for Defendant in
24 the State of California during the Class Period. She contends that Defendant failed to provide meal
25 and rest periods, failed to comply with itemized employee wage statement provisions, and failed to
26 timely pay wages at the separation of employment, in violation of Labor Code §§ 201-203, 226(a),
27 226.7, 512, 2698, and 2699, among other Labor Code provisions. She has the same claims as those
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1 that the members of the Settlement Class would reasonably be expected to bring based on the course
2 of conduct alleged herein. Gaines Decl. ¶ 29.

3 Plaintiff Elena Punty has also demonstrated that she will aggressively and competently
4 assert the interests of the proposed Settlement Class; she has taken an active role in this litigation
5 and has no apparent conflicts with other class members. Gaines Decl. ¶ 30. Furthermore, Plaintiff
6 has retained competent counsel, experienced in litigating class action claims in the employment
7 context. See Gaines Decl. ¶¶ 2-5.

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

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

20 While the recommendations of counsel proposing the settlement are not conclusive, the
21 Court can properly take them into account, particularly where, as here, such counsel have been
22 involved in informal discovery and negotiations for some period of time, appear to be competent,
23 have experience with this type of litigation, and have exchanged substantial evidence with the
24 opposing party. See *Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
25 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
26 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
27 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
28

counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines Decl. ¶¶ 2-5, 11-12.

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

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

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

Plaintiff’s counsel created a comprehensive damage analysis using sampling information obtained through informal discovery. This damage analysis reveals that the negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines Decl. ¶ 16.

In the Action, Plaintiff contends that Defendant failed to permit or authorize Plaintiff and Class Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§ 226.7, 512, 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers (like Defendant) may not employ an employee for a work period of more than five hours without providing a 30-minute meal period starting no later than the end of the fifth hour. Plaintiff and Class Members contend they were routinely unable to take a proper meal break

1 when they worked shifts in excess of five hours in duration and a second meal break when they
2 worked shifts in excess of ten hours in duration. When they were able to take a meal period, they
3 were oftentimes, late, cut short, or on-duty. Based on an expert analysis of employee time data, the
4 first meal period violation rate is 24.5% and the second meal period violation rate is 20.8%. The
5 maximum value of this claim is \$203,792, but required a discount for settlement purposes in light
6 of the defense asserted by Defendant, including that Plaintiff would be unable to certify a class,
7 would be unable to prove that employees did not waive their meal periods, and would be unable to
8 prove that meal periods were not properly taken. Litigation risks, including the class certification
9 risk, justify the compromised settlement amount. Gaines Decl. ¶ 17.

10 Plaintiff further alleges that Defendant failed to provide Plaintiff and Class Members with
11 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
12 Labor Code § 226.7 and Wage Order 4-2001. Plaintiff argues that Defendant maintained an illegal
13 policy and practice requiring Plaintiff and Class Members to remain on Defendant's premises
14 during their rest periods, resulting in impermissible on-duty rest periods subject to employer
15 control. Plaintiff contends that this policy and practice violates the holding in *Augustus v. ABM*
16 *Security Services, Inc.* (2016) 5 Cal. 5th 257, which held that the rest period requirement "obligates
17 employers to permit and authorizes employees to take off-duty rest periods. That is, during rest
18 periods employers must relieve employees of all duties and relinquish control over how employees
19 spend their time." *Id.* at 269. Based on an estimated 25% violation rate, the maximum value of this
20 claims exceeds \$204,000. It too, however, required a discount for settlement purposes. The risks
21 of class certification and Defendant's multiple litigation defenses on the merits – including that its
22 policy and practice of requiring employees stay on the company premises during their breaks is
23 both permitted by controlling law and was not actually a policy and practice at all – required and
24 justify the compromised settlement amount. Gaines Decl. ¶ 18.

25 Class Members also sought wage statement penalties pursuant to Labor Code § 226(e)
26 (valued at up to approximately \$196,700) waiting time penalties pursuant to Labor Code § 203
27 (valued at up to approximately \$511,500 for former employees) and PAGA penalties derivative of
28 the underlying violations alleged (valued at up to approximately \$231,500, without stacking

multiple violations). The value of these penalties – which are derivative, discretionary, and subject to defenses of their own – is substantial, but their recovery carried substantial risk. Plaintiff believed it was unlikely that many of these penalties could be recovered because their value would eclipse the value of alleged underpaid premium wages (if such wages were recovered at all), because Plaintiff's claims are novel, and because of Defendant's potential independent defenses to these penalties. The settlement here is a fair compromise of these penalty claims. Gaines Decl. ¶ 19.

A discount on the maximum value of Class members' claims was required (and warranted) to resolve the matter at this junction. Class certification is a substantial risk in any class action case. Here, while Plaintiff maintains that the requirements of class certification are met, Defendant proffers various arguments why class treatment is not appropriate here, including but not limited to that individualized inquires among class members predominate over common ones, and high documented compliance rates indicating lack of a common unlawful practice. If Defendant was to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and most class members would likely not file individual claims. Gaines Decl. ¶ 20.

Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the Court would agree with Defendant's position that its meal and rest period policies and practices complied with the requirements of California law. In such a case, the value of the majority of Plaintiff's claims would be zero. Gaines Decl. ¶ 21.

Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the Private Attorneys General Act. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 22.

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

1 When the costs and risks of non-certification and loss on the merits are considered,
2 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
3 Decl. ¶¶ 15-24.

4 The settlement for each participating Class Member is fair, reasonable and adequate, given
5 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
6 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the
7 Action. Gaines Decl. ¶ 25.

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

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

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

17 **E. Plaintiff Should Be Permitted to File Her First Amended Complaint**

18 In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached
19 to the Settlement Agreement as **Exhibit 3**, which adds class allegations and claims to comport with
20 the release provided for in the Stipulation. The Parties agreed that, as part of her motion for
21 preliminary approval, Plaintiff would concurrently seek leave to file the First Amended Complaint,
22 the filing of which is a condition of the Settlement Agreement.

23 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
24 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
25 the settlement, Plaintiff requests that the Court approve her filing of the First Amended Complaint,
26 and consent that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶
27 31.

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1 **V. 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 appears to meet
7 the applicable certification criteria.
- 8 3. Appoint Plaintiff Elena Punty as Class Representative.
- 9 4. Appoint Daniel F. Gaines, Esq. and Alex P. Katofsky of Gaines & Gaines, APLC
10 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 Stipulation of Settlement.
- 13 6. Permit Plaintiff to file her First Amended Complaint, attached to the Settlement
14 Agreement as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order
15 granting this motion has been given.
- 16 7. Enter an Order provisionally approving the proposed Settlement Class on a non-
17 mandatory basis, approve forms to be distributed to the Settlement Class, direct notice to be given
18 to the Settlement Class, and set the following schedule of settlement proceedings:

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<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide the Settlement Administrator a list of all Class Members, including their last known addresses, telephone numbers, Social Security numbers, and their total weeks worked in California during the Class Period during which they received compensation ("Settlement Class Information")	14 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	21 calendar days after entry of Court's Order granting preliminary approval of the Settlement Agreement
Last day for exclusion requests by Class Members to be postmarked to Settlement Administrator	60 calendar days after mailing of Class Notice

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<u>EVENT</u>	<u>TIMING</u>
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 95 calendar days after entry of the Order granting this Motion]

DATED: June 22, 2021

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By:



DANIEL F. GAINES
ALEX P. KATOFSKY
Attorneys for Plaintiff Elena Punty and
Proposed Class Counsel