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12

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF IMPERIAL**
15

16 OPHELIA OU, on behalf of herself and all
17 similarly situated employees, and on behalf
of all “aggrieved employees” pursuant to
Labor Code § 2698 et seq,

18 Plaintiffs,

19 v.

20 GEMALTO COGENT, INC., a Delaware
21 corporation, and DOES 1 through 10,
inclusive,

22 Defendants.
23
24

CASE NO: ECU001834

*Assigned to the Hon. L. Brooks Anderholt,
Department 9*

CLASS ACTION

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

**Date: May 20, 2021
Time: 8:30 a.m.
Dept.: 9**

Complaint Filed: March 30, 2021

1 **PLEASE TAKE NOTICE THAT** on May 20, 2021 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 9 of the above-entitled Court, located at 939 Main Street,
3 El Centro, California 92243, Plaintiff Ophelia Ou will and hereby does move unopposed for an
4 Order (1) preliminarily approving the proposed class action settlement in the above-captioned case,
5 (2) provisionally certifying a settlement class, (3) provisionally approving the appointment of
6 Plaintiff Ophelia Ou 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, and (7) setting a final
10 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: April 20, 2021

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Ophelia Ou and Proposed Class
9 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 Settlement
4 Agreement and Release of Claims for the Court’s approval. The Settlement is made and entered
5 into by and between Plaintiff Ophelia Ou (“Plaintiff”, “Class Representative”, or “Ou”),
6 individually and on behalf of all others similarly situated, on the one hand, and Defendant Gemalto
7 Cogent, Inc. (“Defendant”), on the other hand.

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, the Parties respectfully request 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 Plaintiff Ophelia Ou as
16 Class Representative, (d) provisionally approve the appointment of Daniel F. Gaines, Esq. and Alex
17 P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (e) approve appointment of the settlement
18 administrator, (f) authorize the mailing of the proposed class action notice packet; and (h) schedule
19 a final fairness and approval hearing.

20 **II. BACKGROUND, PROCEDURAL HISTORY, INVESTIGATION AND**
21 **SETTLEMENT DISCUSSIONS**

22 On June 23, 2020, Plaintiff sent a notice to the California Labor & Workforce Development
23 Agency (“LWDA”) pertaining to alleged wage and hour claims against Defendant. Declaration of
24 Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

25 Thereafter, the Parties tolled the statute of limitations on Plaintiff’s claims to engage in
26 settlement discussions, including the exchange and disclosure of classwide data and applicable
27 documents and a mediation with Marc Feder, Esq. on February 25, 2021. Gaines Decl. at ¶ 7.

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1 On March 30, 2021, following the mediation and tentative resolution of the claims asserted
2 by Plaintiff, she initiated the Action by filing a Complaint, on behalf of herself and approximately
3 38 other non-exempt California employees. The Complaint asserts direct class and representative
4 action claims against Defendant for (1) failure to pay all wages due (Labor Code §§ 510 and 1194;
5 IWC Wage Order 4-2001); (2) failure to provide rest periods or compensation in lieu thereof (Labor
6 Code § 226.7; IWC Wage Order 4-2001); (3) failure to provide meal periods or compensation in
7 lieu thereof (Labor Code §§ 226.7 and 512; IWC Wage Order 4-2001); (4) knowing and intentional
8 failure to comply with itemized employee wage statement provisions (Labor Code §§ 226(a), (e),
9 (h)); (5) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203);
10 (6) violation of Business and Professions Code § 17200; and (7) penalties pursuant to Labor Code
11 § 2699(f) for violations of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512, 558, and 1194
12 (the “Complaint”). Gaines Decl. at ¶ 8.

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

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

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1 Class Counsel represent that they have conducted a thorough investigation into the facts
2 and law during the prosecution of this class action case, including the exchange of extensive
3 informal discovery and the review and verification of statistical data and other facts and information
4 provided by Defendant. Counsel for the Parties also represent that they have investigated the
5 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
6 potential defenses thereto, and the damages claimed by Plaintiff. Gaines Decl. at ¶ 11.

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

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

20 **III. LEGAL ANALYSIS**

21 **A. The Proposed Settlement Terms**

22 **1. The Settlement Class**

23 The Parties have agreed to a Settlement Class composed of all current and former non-
24 exempt California employees of Defendant employed from June 23, 2016 through the earlier of
25 May 26, 2021 or the date the Court enters an order granting preliminary approval of this Settlement
26 (the “Class Period”).¹ Defendant represents and warrants that this Class contains no more than 38

27 ¹ Gemalto, Inc., Thales DIS USA, Inc, and 3M Cogent, Inc. are successor or predecessor entities
28 of named defendant Gemalto Cogent, Inc., and have employed some of the Class Members during
the Class Period.

1 members as of February 25, 2021. Stip. at ¶ A(4).

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

3 The Parties agree to settle this Action for a Maximum Settlement Amount of \$250,000 (“the
4 Maximum Settlement Amount”). The Maximum Settlement Amount includes the attorneys’ fees
5 of Class Counsel, litigation costs and expenses (which includes, without limitation, all such fees
6 and costs incurred to date, as well as such fees and costs to be incurred in documenting the
7 settlement, providing any notices required as part of the settlement, securing Court approval of the
8 settlement, and obtaining judgment in the Action), the service payment to the Class Representative,
9 as approved by the Court, the payment to the LWDA pursuant to the PAGA claims in the Action,
10 and all costs of administration, including, without limitation, settlement administration fees and
11 expenses. Defendant shall pay all employer payroll tax obligations due on wage payments made
12 from the Net Settlement Proceeds in addition to, and separate and apart from, the Maximum
13 Settlement Amount. Stip. at ¶ C(1)(a).

14 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
15 application to the Court for up to 40% of the Maximum Settlement Amount for attorneys’ fees.
16 Plaintiff’s estimated attorneys’ fees to be requested from the Court are \$100,000. Stip. at ¶ C(1)(f).

17 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
18 application to the Court for up to \$10,000 in reimbursement of litigation costs and expenses. Stip.
19 at ¶ C(1)(g).

20 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
21 application to the Court for a Service Payment to the Class Representative in the gross amount of
22 \$7,500 in consideration for her efforts in instituting and participating in the Action and in exchange
23 for her general release of all claims. Stip. at ¶ C(1)(e).

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

26 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
27 and all claims for penalties under the PAGA is \$20,000 (75% of which shall be paid to the
28 California Labor and Workforce Development Agency and 25% of shall be paid to Class Members

1 who have not submitted a valid and timely Request for Exclusion Form as part of the Net Settlement
2 Proceeds. Stip. at ¶ C(1)(d).

3 The Net Settlement Proceeds is defined as the Maximum Settlement Amount less the
4 amounts approved and awarded by the Court for: attorneys' fees and documented litigation costs
5 and expenses incurred or advanced by Class Counsel, the service payment to the Class
6 Representative, the payment to the LWDA pursuant to PAGA, and the costs of administering the
7 settlement. Stip. at ¶ C(1)(b).

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

9 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Maximum Settlement
10 Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to
11 Labor Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as
12 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
13 aggrieved employees." As such, 75 percent of the apportioned PAGA settlement amount – or
14 \$15,000 – shall be payable to the Labor and Workforce Development Agency. The remaining 25
15 percent, or \$5,000, shall be paid to Class Members who have not submitted a valid and timely
16 Request for Exclusion Form as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(d).

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

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

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

27 ² 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 within the range of possible approval, the court should direct that
2 notice ... be given to the class members of a formal fairness hearing,
3 at which arguments and evidence may be presented in support of and
4 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
18 should set forth the essential terms of the agreement, including but
19 not limited to, the amount of settlement, form of payment, manner of
20 determining the effective date of settlement and any recapture clause.

21 *Id.* at § 11.24.

22 Here, the Parties have reached such an agreement and have submitted the Stipulation of
23 Settlement herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 14.

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

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

1 Corp. (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“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 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
12 Settlement Agreement to the Court, her counsel is transmitting it, together with this Motion, to the
13 LWDA. Gaines Decl. at ¶ 31.

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

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

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

22 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
23 and the means for identifying the members of the class determine whether the class is ascertainable.
24 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
25 are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class
26 is sufficiently numerous to warrant certification. According to Defendant’s records, the Class is
27 comprised of approximately 38 employees. Gaines Decl. ¶ 27.

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³ 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.

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

The Class Members' claims all stem from a common source: members of the Settlement Class allege that Defendant violated the same Labor Code provisions in connection with their employment in non-exempt positions. All members of the Class seek the same relief under the same California laws (related to unpaid wages, unpaid missed rest and meal periods, and derivative claims). Under these circumstances, the commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 28.

c. **The Proposed Class Representative's 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, named Plaintiff and proposed Class Representative Ophelia Ou is a former non-exempt employee who worked for Defendant in the State of California during the Class Period. She contends that Defendant failed to pay all wages dues, failed to provide meal and rest periods, failed to comply with itemized employee wage statement provisions, and failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512, 558, 1194, 2698 and 2699, among other Labor Code provisions. She has the same claims as those that the members of the Settlement Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 29.

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

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

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

13 While the recommendations of counsel proposing the settlement are not conclusive, the
14 Court can properly take them into account, particularly where, as here, such counsel have been
15 involved in informal discovery and negotiations for some period of time, appear to be competent,
16 have experience with this type of litigation, and have exchanged substantial evidence with the
17 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
18 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
19 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
20 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
21 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
22 Decl. ¶¶ 2-5, 15-25.

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

Parties. *See* Gaines Decl. ¶¶ 2-5, 15-25.

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. ¶ 15.

In the Action, Plaintiff claims that Defendant failed to pay all wages earned during the course of employment in violation of Labor Code §§ 510, 558 and 1194 and IWC Wage Order 4-2001. An employer is obligated to pay the wages of an hourly employee for all the time the employee is under the control of the employer, and this includes all the time the employee is suffered or permitted to work, whether or not required to do so. Plaintiff contends that she and other employees were so restricted during their on-call shifts that even though they were not actively working for Defendant, they should have been compensated for this time because they were subject to Defendant’s control. Defendant vehemently disagrees, and contends this claim is wholly without merit. The maximum value of this claim – allocating an entire week of additional wages for each week a Class Member was on-call during the Class Period – is \$4,688,000, although the settlement value is far less given the lack of strength of the claim and the numerous defenses proffered by Defendant as to both merits liability and class certification. Gaines Decl. ¶ 16.

Plaintiff asserts that Defendant failed to pay premium wages to Plaintiff and Class Members who were denied meal periods, in violation of Labor Code §§ 226.7 and 512 and IWC Wage Order

1 9-2001. Plaintiff and Class Members were allegedly routinely denied, and not authorized to take,
2 an uninterrupted, 30-minute first meal period for every shift worked that exceeded five hours in
3 duration, and a second 30-minute meal period for every shift that exceeded ten hours in duration,
4 but were not always paid premium wages of one hour's pay for each missed meal period. When
5 meal periods were provided, Plaintiff contends that they were either untimely, late, cut short or on-
6 duty. The maximum value of this claim is approximately \$209,000 and its settlement value is far
7 less based on the defenses asserted by Defendant, including but not limited to the fact that it
8 purportedly paid meal period premiums for all missed and denied meal periods and that Class
9 Members voluntarily chose to take short, late or no meal periods, such that they waived their right
10 to recover these sums Gaines Decl. ¶ 17.

11 Defendant allegedly failed to offer or authorize uninterrupted ten-minute on-the-clock rest
12 periods to Plaintiff and Class Members for every four hours worked or major fraction thereof, but
13 did not pay them premium wages in the amount of one hour's pay for these denied rest periods, in
14 violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 4-2001. Plaintiff and Class
15 Members were routinely unable, and not authorized, to take a 10-minute rest period for every four
16 (4) hours of work or major fraction thereof, but were not paid premium wages of one hour's pay
17 for each missed rest period. Plaintiff and Class Members were simply denied rest periods
18 throughout their employment and were never paid any rest period premium wages for these missed
19 rest periods. Plaintiff contends that Defendant never scheduled rest periods and never advised
20 Plaintiff or Class Members that they could take them. The maximum value of this claim – based
21 on a realistic 20% violation rate – is \$133,600. Of course, this claim also required a discount for
22 settlement purposes due to the numerous risks involved in litigation, including a loss on the merits
23 and the failure to certify a class. Gaines Decl. ¶ 18.

24 Class Members also sought wage statement penalties pursuant to Labor Code § 226(e),
25 waiting time penalties pursuant to Labor Code § 203 and PAGA penalties derivative of the
26 underlying violations alleged. The value of these penalties – which are derivative, discretionary,
27 and subject to defenses of their own – could be more than \$252,000, but their recovery carried
28 substantial risk. Plaintiff believed it was unlikely the many of these penalties could be recovered

1 because their value would eclipse the value of alleged unpaid wages (if any unpaid wages were
2 recovered at all), because Plaintiff's claims are novel, and because of Defendant's potential
3 independent defenses to these penalties. Gaines Decl. ¶ 19.

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

11 Plaintiff also faced the risk of a loss on the merits on her claims. Some of Plaintiff's claims
12 required an intensive factual analysis in an area of law where the law is changing at a rapid pace.
13 It is possible that the Court would find that Defendant substantially complied with the requirements
14 of Labor Code section 226(a) such that no penalties would be awarded. It is also possible that the
15 Court would agree with Defendant's position that its meal and rest period policies and practices
16 and its on-call practices complied with the requirements of California law. In such a case, the value
17 of the majority of Plaintiff's claims would be zero. Gaines Decl. ¶ 21.

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 Private Attorneys General Act. Even if Plaintiff did prevail on these claims, it is possible that the
21 Court would not impose all penalties pursuant to its discretionary power to reduce them. Gaines
22 Decl. ¶ 22.

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

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

Decl. ¶¶ 15-24.

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

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

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

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

IV. CONCLUSION

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

1. Review the proposed Stipulation of Settlement setting forth the settlement terms.
2. Consider whether the proposed settlement preliminarily appears to be fair, reasonable and adequate, and whether the proposed Settlement Class preliminarily appears to meet the applicable certification criteria.
3. Appoint Plaintiff Ophelia Ou as Class Representative.
4. Appoint Daniel F. Gaines, Esq. and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel.
5. Approve ILYM Group, Inc. as Settlement Administrator with regard to handling the notice procedure as set forth more particularly in the Stipulation of Settlement.

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6. Enter an Order provisionally approving the proposed Settlement Class on a non-mandatory basis, approve forms to be distributed to the Settlement Class, direct notice to be given to the Settlement Class, and set the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide the Claims Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	14 calendar days after entry of Court's Order granting preliminary approval of the Settlement Agreement
Last day for Claims Administrator to mail Notice and Exclusion Form to Class Members	14 calendar days after receipt of the Settlement Class Information from Defendant
Last day for Exclusion Forms by Class Members to be postmarked to Claims Administrator	45 calendar days after mailing of Class Notice
Last day for written objections to the settlement by Class Members to be postmarked to Claims Administrator	45 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 Claims 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]

1 DATED: April 20, 2021

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

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5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Ophelia Ou and
9 Proposed Class Counsel
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