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8 and Proposed Class Counsel

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CLARA**
11

12 DEVENDRA PRASAD, on behalf of
13 himself and all "aggrieved employees"
pursuant to Labor Code § 2698 *et seq.*,

14 Plaintiffs,

15 v.

16 CYXTERA TECHNOLOGIES, INC., a
17 Delaware corporation, and DOES 1
through 10, inclusive,

18 Defendants.
19
20
21

Case No.: 20CV373926

Assigned to The Honorable Sunil R. Kulkarni, Dept.
1

CLASS ACTION

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

DATE: TBD

TIME: TBD

DEPT.: 1

Action Filed: November 23, 2020

1 **PLEASE TAKE NOTICE THAT** on _____, 2021 at _____.m., or as soon thereafter as
2 the matter may be heard, in Department 1 of the above-entitled Court, located at 191 North First
3 Street, San Jose, California 95113, Plaintiff Devendra Prasad will and hereby does move unopposed
4 for an Order (1) preliminarily finding that the settlement falls within the range of reasonableness
5 and approving the proposed class action settlement in the above-captioned case, (2) conditionally
6 certifying, for settlement purposes only, a settlement class, (3) approving the appointment of
7 Plaintiff as Class Representative, (4) approving the appointment of Daniel F. Gaines, Esq. and Alex
8 P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of
9 ILYM Group, Inc. as settlement administrator, (6) preliminarily approving the allocation of
10 \$20,000 from the Gross Settlement Amount to settle Plaintiff's representative claim under the
11 Private Attorney General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%)
12 will be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) will
13 be paid on a pro rata basis to the PAGA Group, (7) approving as to content and form the notice to
14 the settlement class, and directing it be disseminated by the settlement administrator; and (8) setting
15 a final fairness and approval hearing.

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

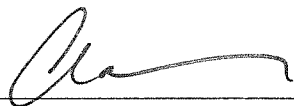
19 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
20 reasonable and in the best interests of the settlement class as a whole, and that the procedures
21 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,
22 opt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

23 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
24 the Class Action Settlement Agreement, the Declaration of Daniel F. Gaines, such evidence or oral
25 argument as may be presented at the hearing, and on the complete record and file herein.

1 DATED: July 21, 2021

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Devendra Prasad and Proposed
8 Class Counsel
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Class
4 Action Settlement Agreement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiff Devendra Prasad (“Plaintiff” or
6 “Prasad”), individually and on behalf of all others similarly situated, and Defendant Cyxtera
7 Technologies, Inc. (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-revisionary class settlement in the gross amount of \$295,000 to be paid to approximately
14 68 individuals who worked approximately 7,698 Qualifying Workweeks. The average gross
15 payment to each Class Member is expected to exceed \$4,300, and the average net payment to each
16 Class Member is projected to be more than \$2,200. As detailed below, the settlement is in the best
17 interests of the class in light of all of the facts and circumstances and the risks and delays of further
18 litigation.

19 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
20 preliminary approval of the settlement agreement and preliminarily find that the settlement falls
21 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement
22 Class, for settlement purposes only; (c) approve the appointment of Plaintiff as Class
23 Representative; (d) approve the appointment of Daniel F. Gaines, Esq. and Alex P. Katofsky, Esq.
24 of Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the settlement
25 administrator; (f) authorize the mailing of the proposed class action notice packet; and (h) schedule
26 a final fairness and approval hearing.

27 **II. BACKGROUND AND PROCEDURAL HISTORY**

28 On November 23, 2020, Plaintiff, on behalf of himself and all others “aggrieved

employees,” filed the above-referenced Representative Action Complaint (“Complaint”) in the Santa County Superior Court against Defendant. As subsequently amended by the First Amended Complaint, Plaintiff, on behalf of himself, allegedly aggrieved employees, and the Class, seeks unpaid wages, damages, restitution, civil and statutory penalties, including penalties pursuant to PAGA, interest, attorneys’ fees, costs and other relief on the basis of allegations, *inter alia*, that Defendant failed to properly calculate the regular rate of pay, such that Defendant allegedly improperly used the base hourly wage for calculating overtime, sick time, and meal premium payments, such that Plaintiff and the allegedly aggrieved employees and Class Members he seeks to represent were underpaid, in addition to Defendant’s alleged failure to timely pay all wages due at termination and failure to provide complete and accurate wage statements. Defendant denies each of the allegations of the Complaints and the PAGA notice, and denies that it has any liability to Plaintiff or the Class or any allegedly aggrieved current or former employee, and denies that Plaintiff, the Class or any allegedly aggrieved employee is entitled to any relief. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

Class Counsel and Defense Counsel have extensive experience in litigating wage and hour class actions in California, and they have vigorously litigated the Action since its inception. Gaines Decl. at ¶ 7.

On April 27, 2021, Plaintiff and Defendant engaged in mediation before the Honorable Michael A. Latin (L.A. Sup. Ct., Ret.), an experienced mediator in this area of law. The Parties reached an agreement on the key terms of a class action settlement, which was memorialized in a Memorandum of Understanding Re Settlement and fully executed by the Parties on April 29, 2021. The parties thereafter jointly prepared the Class Action Settlement Agreement. Gaines Decl. at ¶ 8; Exhibit B.

Because the settled case is a class action, this Agreement must receive preliminary and final approval by the Court. Accordingly, Plaintiff and Defendant enter into the Settlement Agreement on a conditional basis. Should the Court, or any other court taking jurisdiction of this matter, decline to approve all material aspects of the Settlement or make any ruling substantially altering the material terms of the Settlement, the Settlement shall be voidable and unenforceable as to

1 Plaintiff and Defendant, at the option of any party. In the event that the Effective Date does not
2 occur, this Agreement shall be deemed null and void *ab initio* and shall be of no force or effect
3 whatsoever, and shall not be referred to or utilized for any purpose. Defendant denies all of
4 Plaintiff's individual, class and representative claims as to liability and damages. Defendant
5 expressly reserves all rights to challenge any and all such claims and allegations upon all procedural
6 and factual grounds, including the assertion of all defenses, if the Effective Date of the Settlement
7 does not occur. Likewise, Plaintiff expressly reserves all rights to pursue, amend, dismiss or
8 otherwise dispose of the claims covered under the Settlement in the event the Effective Date of the
9 Settlement does not occur. Gaines Decl. at ¶ 9.

10 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

11 Plaintiff and Class Counsel have concluded, after taking into account the sharply disputed
12 factual and legal issues involved in the Action, the risks attending further prosecution, and the
13 substantial benefits to be received pursuant to settlement as set forth in this Agreement, that
14 settlement on the terms set forth herein is in the best interest of Plaintiff and the Class, and is fair
15 and reasonable. Gaines Decl. at ¶ 10.

16 Similarly, Defendant has concluded, after taking into account the sharply disputed factual
17 and legal issues involved in the Action, the risks and expense attending further litigation, and their
18 desire to put the controversy to rest, that settlement on the terms set forth herein is in their best
19 interests and is fair and reasonable. Gaines Decl. at ¶ 11.

20 The Settlement contemplates: (i) amendment of the Action to add the class claims
21 contemplated to be released therein (filed on June 4, 2021); (ii) entry of an order preliminarily
22 approving the Settlement; (iii) distribution of the Notice of Class Settlement to the Class Members;
23 and (iv) entry of a Final Order and Judgment in accordance with the Settlement. The Court shall
24 retain jurisdiction over the Action and Parties for purposes of enforcing the Settlement and
25 resolving any disputes relating to the Settlement. Gaines Decl. at ¶ 12.

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1 **IV. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class**

4 The Parties have agreed to a settlement class composed of all non-exempt California
5 employees who worked for Cyxtera Technologies, Inc. from July 1, 2017 through June 1, 2021
6 (“Settlement Class”). As of April 29, 2021, it includes approximately 68 employees who worked
7 approximately 7,698 workweeks.

8 **2. Allocations to be Paid from the Gross Settlement Amount**

9 The Stipulation provides that Defendant shall pay an amount not to exceed \$295,000 to
10 resolve the Action on a class-wide basis (the “Gross Settlement Settlement”). The Gross Settlement
11 Amount shall be inclusive of all Settlement Payments to individual Class Members, all attorneys’
12 fees and expenses (including court costs) to be paid to Class Counsel, any Class Representative
13 Enhancement Award, any settlement administration costs, any payments made pursuant to the
14 PAGA, and the employee portion of payroll taxes or tax withholdings due on the Settlement
15 Payments to individual Class Members. In no event shall Defendant be required to pay more than
16 the Gross Settlement Amount under this Agreement, except for the employer’s share of any payroll
17 taxes due on the settlement payments made pursuant to this Agreement, and in no event shall any
18 amount of the Gross Settlement Amount revert to Defendant’s possession. The employer portion
19 of any required payroll taxes will be paid separately by Defendant and not from the Gross
20 Settlement Amount. Stip. at ¶ 2(a).

21 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
22 application to the Court for up to one-third of the Gross Settlement Amount for attorneys’ fees
23 (projected at \$98,333.33, based on a Gross Settlement Amount of \$295,000). Stip. at ¶ 2(g).

24 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
25 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
26 at ¶ 2(g).

27 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
28 application to the Court for a Enhancement Award to the Class Representative in the gross amount

1 of \$10,000, in consideration for his efforts in instituting and participating in the Action and in
2 exchange for his general release of all claims. Stip. at ¶ 2(e).

3 From the Gross Settlement Amount, settlement administration fees paid to ILYM Group,
4 Inc. will be no more than \$5,000. Stip. at ¶ 2(d).

5 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
6 claims for penalties under the PAGA is \$20,000 (“PAGA Payment”), 75% of which shall be paid
7 to the LWDA and 25% shall be part of the Net Settlement Amount and shall be distributed to the
8 PAGA Group, who shall receive their share of the PAGA penalty allocation based on their pro rata
9 number of pay periods worked during the PAGA Period. Stip. at ¶ 2(f).

10 The Net Settlement Amount is the amount of money remaining after Class Counsel’s
11 attorneys’ fees and costs, any Enhancement Award to the Class Representative, settlement
12 administration costs and expenses to the Settlement Administrator, and the PAGA payment to the
13 LWDA are all deducted from the Gross Settlement Amount. The entire Net Settlement Amount
14 will be distributed to Participating Class Members without the need to submit claim forms. Stip.
15 at ¶ 16.

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

17 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Gross Settlement Amount
18 will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to Labor
19 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
20 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
21 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$15,000 – shall
22 be payable to the LWDA. The remaining 25 percent, or \$5,000, shall be part of the Net Settlement
23 Amount and shall be distributed to the PAGA Group, who shall receive their share of the PAGA
24 penalty allocation based on their pro rata number of pay periods worked during the PAGA Period.
25 Stip. at ¶ 2(f).

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

27 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
28

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

Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary 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 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.

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a 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 (4th ed. 2002).

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

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

Id. at § 11.24.

Here, the Parties have reached such an agreement and have submitted the Stipulation

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, Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 16.

C. Procedures for Settlement Before Class Certification.

Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class – conditioned upon final approval of the settlement. “[P]re-certification settlements are routinely approved if 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 Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal . . . may be set out in conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional 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.

As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA. Gaines Decl. at ¶ 30.

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 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.

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 68 employees who worked approximately 7,698 Qualifying Workweeks
8 during the Class Period. Gaines Decl. ¶ 26.

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

11 The Class Members' claims all stem from a common source: members of the Settlement
12 Class allege that Defendant violated the same Labor Code provisions in connection with their
13 employment. All members of the Class seek the same relief under the same California laws (related
14 to underpaid overtime, sick pay wages and meal period premium wages inaccurate or incomplete
15 wage statements, and failure to timely pay wages due upon separation). Under these circumstances,
16 the commonality requirement is satisfied for purposes of certifying the Settlement Class for
17 settlement purposes. Gaines Decl. ¶ 27.

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 Devendra Prasad is a former non-exempt employee who worked for
24 Defendant in the State of California during the Class Period. He contends that Defendant failed to
25 pay all overtime, meal period, and sick pay wages, failed to comply with itemized employee wage
26 statement provisions, and failed to timely pay wages at the separation of employment, in violation
27 of Labor Code §§ 201-203, 226(a), 226.7, 510, 512, 1194, 2698, and 2699, among other Labor
28 Code provisions. He has the same claims as those that the members of the Settlement Class would

1 reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 28.

2 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
3 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
4 conflicts with other class members. Gaines Decl. ¶ 29. Furthermore, Plaintiff has retained
5 competent counsel, experienced in litigating class action claims in the employment context. See
6 Gaines Decl. ¶¶ 2-5.

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

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

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

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

8 1. **The Settlement Falls Within The "Ballpark" of Reasonableness**

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

18 Working with an expert in statistical analysis, Plaintiff's counsel created a comprehensive
19 damage analysis using sampling information obtained through informal discovery. This damage
20 analysis reveals that the negotiated settlement falls within a realistic range of recovery on Class
21 Members' claims. *Gaines Decl.* ¶ 14.

22 Plaintiff alleges that Defendant failed to properly compute all non-base hourly wages
23 (including bonus, commission and shift differential wages) earned by Plaintiff and other Class
24 Members into their regular rate of pay for purposes of paying them overtime wages, double-time
25 wages, meal period premium wages, and sick pay wages at the correct rates, in violation of Labor
26 Code §§ 246, 510, 512, 558 and 1194. Based on Plaintiff's expert's review of the sampling, the
27 amount of the total wage underpayment was small – between \$25,000 and \$30,000 for the Class
28 overall – if Plaintiff could prove a violation of California law, which was by no means guaranteed

1 because of the numerous defenses asserted by Defendant – including that the payments at issue to
2 Class Members were not non-discretionary (i.e. were not required to be blended into the regular
3 rate of pay in the first place), that the law does not require that sick pay and meal premiums be
4 factored based on the regular rate of pay (even if the payments were non-discretionary), and that
5 no class could be certified, such that any class relief is a windfall. Gaines Decl. ¶ 15.

6 Plaintiff further alleges that Defendant failed to issue Plaintiff and Class Members
7 accurately itemized wage statements. The maximum value of this claim is approximately \$125,850,
8 assuming that Plaintiff prevailed on his underlying unpaid wage claims. If he did not, its value
9 would be zero. Defendant asserted numerous defenses to this claim as well, including that Plaintiff
10 could not prove injury, that the claims are technical such that any award of statutory penalties would
11 be oppressive, that no class could be certified as to this claim, and that it acted in good faith, even
12 if it failed to comply with the exact letter of the law (which it wholly denies). Gaines Decl. ¶ 16.

13 Plaintiff also asserted a claim under Labor Code section 203 for waiting time penalties.
14 This claim was valued at up to approximately \$290,100 and is wholly derivative of the unpaid
15 wages claim. If Plaintiff did not prevail on the unpaid wages claim, this claim for waiting time
16 penalties would have no value. Defendant also asserted multiple defenses to it, including that it
17 acted in good faith, such that no penalties should be awarded. Based on the risks of further
18 litigation, this claim required a compromise to resolve at this juncture. Gaines Decl. ¶ 17.

19 Plaintiff asserted a claim under PAGA valued at up to \$128,000, based on approximately
20 1,280 pay periods at issue during the applicable PAGA period. Because this is a wholly derivative
21 claim, should Plaintiff have not prevailed on his unpaid wages claim, this claim would have no
22 value. Based on litigation risks, and based on the risk the Court would exercise its discretion to
23 reduce a civil penalty award where it eclipses the value of the unpaid wages at issue, this claim
24 required a compromise to resolve at this point in the litigation. Gaines Decl. ¶ 18.

25 A discount on the maximum value of Class members' claims was required (and warranted)
26 to resolve the matter at this junction. Class certification is a substantial risk in any class action
27 case. Here, while Plaintiff maintains that the requirements of class certification are met, Defendant
28 proffers various arguments why class treatment is not appropriate here, including but not limited to

1 that individualized inquires among class members predominate over common ones. If Defendant
2 was to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever,
3 and most class members would likely not file individual claims. Gaines Decl. ¶ 19.

4 Plaintiff also faced the risk of a loss on the merits on his claims. It is very possible that the
5 Court would agree with Defendant's position that its policies and practices complied with the
6 requirements of California law or could not be certified. In such a case, the value of the majority
7 of Plaintiff's claims would be zero. Gaines Decl. ¶ 20.

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

12 Defendant strongly contends that its policies and practices do not violate any laws. It
13 contends that it properly and fully compensated its employees for all time worked. It further
14 contends that the wage statements it provides to their employees are fully compliant with California
15 law. Gaines Decl. ¶ 22.

16 When the costs and risks of non-certification and loss on the merits are considered,
17 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
18 Decl. ¶¶ 14-23.

19 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
20 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
21 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
22 Decl. ¶ 24.

23 2. **Despite the Asserted Fairness of the Settlement Terms, Class Members**

24 **May Request Exclusion From, Or Object To, The Settlement**

25 Despite the asserted fairness of the settlement terms, any potential Class Member who
26 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
27 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member
28 would be bound only by the PAGA portion of the Settlement but would otherwise retain any claim

1 he or she may have against Defendant.

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

5 **V. CONCLUSION**

6 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
7 request that the Court enter an order:

8 1. Preliminarily finding that the settlement falls within the range of reasonableness and
9 approving the proposed settlement;

10 2. Conditionally certifying, for settlement purposes only, the Settlement Class;

11 3. Appointing Plaintiff as Class Representative;

12 4. Appointing Daniel F. Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines,
13 APLC as Class Counsel;

14 5. Approving ILYM Group, Inc. as Settlement Administrator;

15 6. Preliminarily approving the allocation of \$20,000 from the gross settlement amount
16 to settle Plaintiff's representative claim under the Private Attorney General Act (Lab. Code §§ 2698
17 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development
18 Agency and twenty-five percent (25%) shall be part of the Net Settlement Amount and shall be
19 distributed to the PAGA Group and shall receive their share of the PAGA penalty allocation based
20 on their pro rata number of pay periods worked during the PAGA Period;

21 7. Approving as to content and form the notice to the Settlement Class, and directing
22 it to be disseminated by the Settlement Administrator; and

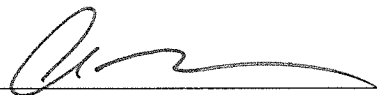
23 8. Setting the following schedule of settlement proceedings:
24
25
26
27
28

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including the names, last known addresses, social security numbers and Qualifying Workweeks for Class Members ("Class Data")	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members	35 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written request for exclusion to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Members to submit an Objection to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
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 before the final settlement approval hearing date
Final settlement approval hearing	_____, 202____, at _____.m. (approximately 100 days after entry of the Order granting this Motion)

DATED: July 21, 2021

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Devendra Prasad and Proposed
Class Counsel