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Attorneys for Plaintiff Jason McLelland
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

JASON MCLELLAND, on behalf of
himself and all "aggrieved employees"
pursuant to Labor Code § 2698 *et seq.*,

Plaintiff,

v.

CUMMINGS VACUUM SERVICE, INC.,
a California corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: BCV-21-100238

Assigned to the Hon. Thomas S. Clark, Dept. 17

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

DATE: June 7, 2022

TIME: 8:30 a.m.

DEPT.: 17

Action Filed: February 3, 2021

1 **PLEASE TAKE NOTICE THAT** on June 7, 2022 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 17 of the above-entitled Court, located at 1415 Truxton
3 Avenue, Bakersfield, California 93301, Plaintiff Jason McLelland will and hereby does move
4 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
5 the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiff as the Class Representative, (4) approving the appointment
8 of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel,
9 (5) approving the appointment of ILYM Group, Inc. as settlement administrator, (6) preliminarily
10 approving the allocation of \$10,000 from the Maximum Settlement Amount to settle Plaintiff's
11 representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.), of
12 which seventy-five percent (75%) will be paid to the Labor and Workforce Development Agency
13 and twenty-five percent (25%) shall be included in the Net Settlement Proceeds for payment to
14 Class Members; (7) approving as to content and form the notice to the settlement class, and
15 directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a
16 Second Amended Class and Representative Action Complaint, and (9) setting a final fairness and
17 approval hearing.

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

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

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1 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
2 the Settlement Agreement and Release of Claims, the Declaration of Daniel F. Gaines, such
3 evidence or oral argument as may be presented at the hearing, and on the complete record and file
4 herein.

5
6 DATED: May 5, 2022

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Jason McLelland and Proposed
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 Settlement
4 Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiff Jason McLelland (“Plaintiff” or
6 “McLelland”), individually and on behalf of all others similarly situated, and Defendant Cummings
7 Vacuum Service, 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 \$245,000 to a settlement class of
14 approximately 147 Class Members, yielding average gross payments of \$1,666 per employee. As
15 detailed below, the settlement is in the best interests of the class in light of all of the facts and
16 circumstances and the risks and delays of further litigation.

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

26 **II. BACKGROUND AND PROCEDURAL HISTORY**

27 On November 23, 2020 and March 2, 2021, Plaintiff exhausted the pre-filing requirements
28 of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F.

1 Gaines (“Gaines Decl.”) at ¶ 6.

2 On or about February 3, 2021, Plaintiff initiated the Action by filing a Representative Action
3 Complaint for Penalties, pursuant to PAGA, on behalf of himself and all other aggrieved employees
4 (the “Complaint”). Thereafter, on or about May 7, 2021, Plaintiff filed a First Amended Complaint,
5 which amended Defendant Universal Staffing Solutions, Inc.’s name. On or about July 15, 2021,
6 Defendant Universal Staffing Solutions, Inc. was dismissed from the Action without prejudice.
7 Gaines Decl. at ¶ 7.

8 The Second Amended Complaint, attached hereto as **Exhibit 3** and which will be filed as
9 part of the settlement approval process, asserts class and PAGA representative action claims against
10 Defendant for (1) failure to pay all wages due (Labor Code §§ 510, 558 and 1194; IWC Wage Order
11 9-2001); (2) failure to pay reporting time pay (Labor Code §§ 510, 558 and 1194; IWC Wage Order
12 9-2001); (3) failure to provide compliant rest periods or compensation in lieu thereof (Labor Code
13 §§ 226.7 and 558; IWC Wage Order 9-2001); (4) failure to provide compliant meal periods or
14 compensation in lieu thereof (Labor Code §§ 226.7, 510, 512, 558, 1171, 1194 and 1198; IWC
15 Wage Order 9-2001); (5) failure to comply with itemized employee wage statement provisions
16 (Labor Code §§ 226 and 226.3); (6) failure to timely pay wages due at separation of employment
17 (Labor Code §§ 201-203); (7) violation of Business and Professions Code §§ 17200, *et seq.*; and
18 (8) civil penalties pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201,
19 202, 226, 226.3, 226.7, 510, 512, 558, 1171, 1194, and 1198 (the “Second Amended Complaint”).
20 Gaines Decl. at ¶ 8.

21 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
22 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
23 other than this settlement. Defendant contends that it has complied at all times with the California
24 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
25 and local laws and regulations. It is Defendant’s position that, if this case were to be litigated, class
26 certification would be inappropriate because Plaintiff is not an adequate class representative,
27 Plaintiff’s claims are not typical of putative class members, and individual issues predominate over
28 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts

1 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
2 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
3 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
4 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
5 or evidence of the appropriateness of these or similar claims for class certification in the Action or
6 with respect to any other proceeding. Gaines Decl. at ¶ 9.

7 The Class Representative contends that Defendant violated the California Labor Code and
8 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
9 certification. Gaines Decl. at ¶ 10.

10 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

18 On February 23, 2022, following their exchange of information and documents regarding
19 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
20 arm's-length negotiations with the assistance of mediator Hon. Howard Broadman (Ret.), through
21 which they were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 12.

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

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

9 **IV. LEGAL ANALYSIS**

10 **A. The Proposed Settlement Terms**

11 **1. The Settlement Class**

12 The Parties have agreed to a settlement class composed of all non-exempt employees of
13 Defendant in California at any time between February 3, 2017 and February 22, 2022.
14 Defendant represents that this Class contains approximately 147 individuals who worked no more
15 than 9,500 workweeks during the Class Period. Stip. at ¶ A(4).

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

17 (a) The Parties agree to settle this Action for a Maximum Settlement Amount of
18 Two Hundred Forty-Five Thousand Dollars (\$245,000) (the “Maximum Settlement Amount”),
19 subject to any increase based on the escalator provision in paragraph H(16) of the Settlement. The
20 Maximum Settlement Amount includes the attorneys’ fees of Class Counsel; litigation costs and
21 expenses (which includes, without limitation, all such fees and costs incurred to date, as well as
22 such fees and costs to be incurred in documenting the settlement, providing any notices required as
23 part of the settlement, securing Court approval of the settlement, and obtaining judgment in the
24 Action); the Enhancement Payment to the Class Representative, as approved by the Court; the
25 payment to the California Labor and Workforce Development Agency (“LWDA”); all employer
26 payroll tax obligations due on wage payments made from the Net Settlement Proceeds; and all costs
27 of administration, including, without limitation, settlement administration fees and expenses. Stip.
28 at ¶ C(1)(a).

1 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
2 application to the Court for up to 40% of the Maximum Settlement Amount for attorneys' fees (or
3 \$98,000). Stip. at ¶ C(1)(f).

4 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
5 application to the Court for up to \$12,000 in reimbursement of litigation costs and expenses. Stip.
6 at ¶ C(1)(g).

7 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
8 application to the Court for an Enhancement Payment to the Class Representative in the gross
9 amount of \$10,000, in consideration for his efforts in instituting and participating in the Action.
10 Stip. at ¶ C(1)(e).

11 From the Maximum Settlement Amount, settlement administration fees paid to ILYM
12 Group, Inc. will be no more than \$6,000. Stip. at ¶ C(1)(h).

13 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
14 and all claims for penalties under the PAGA is \$10,000 ("PAGA Payment"), 75% of which shall
15 be paid to the LWDA and 25% shall be included in the Net Settlement Proceeds for payment to
16 Class Members. Stip. at ¶ C(1)(d).

17 The Net Settlement Proceeds is defined as the Maximum Settlement Amount less the
18 amounts approved and awarded by the Court for: attorneys' fees and documented litigation costs
19 and expenses incurred or advanced by Class Counsel; the Enhancement Payment to the Class
20 Representative; the payment to the LWDA pursuant to PAGA; employer payroll taxes due on wage
21 payments made from the Net Settlement Proceeds; and the costs of administering the settlement.
22 Stip. at ¶ C(1)(b).

23 The Individual Payment Amount means the portion of the Net Settlement Proceeds
24 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
25 valid request for exclusion form). The Individual Payment Amounts will be calculated by dividing
26 the Net Settlement Proceeds by the total weeks worked by all participating Class Members in
27 California in a non-exempt position during the Class Period, which will yield the applicable weekly
28 rate. The weekly rate shall be multiplied by the number of weeks each individual participating

1 Class Member worked for Defendant in California in a non-exempt position during the Class Period
2 to yield their Individual Payment Amount. Each Participating Settlement Class Member who does
3 not opt out will receive an Individual Payment Amount equal to their individual weeks worked in
4 California in a non-exempt position during the Class Period multiplied by the weekly rate. Stip. at
5 ¶ C(1)(c).

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

7 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Maximum Settlement
8 Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to
9 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
10 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
11 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
12 \$7,500 – shall be payable to the LWDA. The remaining 25 percent, or \$2,500, shall be included in
13 the Net Settlement Proceeds for payment to Class Members.

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

15 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
16 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
17 trial court, and (2) a final review after notice has been distributed to the Class Members informing
18 them of the terms of the settlement and allowing them to exclude themselves from, participate in
19 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

20 Approval of class action settlements involves a two-step process.
21 First, counsel submit the proposed terms of settlement and the court
22 makes a preliminary fairness evaluation. If the preliminary
23 evaluation of the proposed settlement does not disclose grounds to
24 doubt its fairness or other obvious deficiencies, such as unduly
25 preferential treatment of class representatives or of segments of the
26 class, or excessive compensation for attorneys, and appears to fall
27 within the range of possible approval, the court should direct that
28 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.

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.

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

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

11 When the parties to an action reach a monetary settlement, they will
12 usually prepare and execute a joint stipulation of settlement, which
13 is submitted to the court for preliminary approval. The stipulation
14 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.

15 *Id.* at § 11.24.

16 Here, the Parties have reached such an agreement and have submitted the Stipulation
17 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 15.

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

19 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
20 approval stage, request that the court provisionally approve certification of the class – conditioned
21 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
22 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
23 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
24 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
25 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
26 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

27 \\\n

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

8 4 *Newberg on Class Actions*, at § 11.26.

9 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff's submission of the
10 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
11 Gaines Decl. at ¶ 37.

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

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

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

20 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
21 and the means for identifying the members of the class determine whether the class is ascertainable.
22 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
23 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
24 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
25 comprises approximately 147 employees. Gaines Decl. ¶ 32.

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

28 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. All members of the Class seek the same relief under the same California laws (related
to unpaid wages due, unpaid reporting time pay, unpaid meal and rest period premiums, inaccurate

1 or incomplete wage statements, failure to timely pay wages due upon separation, and derivative
2 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
3 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 34.

4 c. **The Proposed Class Representative's Claims Are Typical of the**
5 **Class Members' Claims**

6 A class representative's claims are typical when they arise from the same event or course
7 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
8 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
9 Class Representative Jason McLelland is a former non-exempt employee who worked for
10 Defendant in the State of California during the Class Period. He contends that Defendant failed to
11 pay all overtime wages due, failed to pay for reporting time pay, failed to provide meal and rest
12 periods, failed to comply with itemized employee wage statement provisions, and failed to timely
13 pay wages at the separation of employment, in violation of Labor Code §§ 201-203, 226(a), 226.3,
14 226.7, 510, 512, 558, 1171, 1194, 1198, 2698, and 2699, among other Labor Code provisions. He
15 has the same claims as those that the members of the Settlement Class would reasonably be
16 expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 35.

17 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
18 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
19 conflicts with other class members. Gaines Decl. ¶ 36. Furthermore, Plaintiff has retained
20 competent counsel, experienced in litigating class action claims in the employment context. *See*
21 Gaines Decl. ¶¶ 2-5.

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

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

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

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

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

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

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

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

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

8 Plaintiff alleges that Defendant failed to pay Class Members all wages due in three separate
9 ways. Defendant allegedly rounded down the hours reflected on Class Members’ time records to
10 pay fewer hours than were actually worked, in violation of Labor Code §§ 510, 558, and 1194. On
11 a weekly basis, Plaintiff contends that this rounding practice deprived Class Members of significant
12 hours worked and wages due. Rounding is only permissible if the employer applies a consistent
13 rounding policy that, on average, favors neither overpayment or nor underpayment. *AHMC*
14 *Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014. Plaintiff contends that Class
15 Members were adversely affected as a result of the rounding policy. Gaines Decl. ¶ 17.

16 Plaintiff also argued that Defendant required some Class Members to be on-call and remain
17 tethered to the Bakersfield, California area to await instructions. If they were not called into work,
18 Defendant would not compensate them for any time worked that day. These practices violate Labor
19 Code §§ 510, 558, and 1194 and IWC Wage Order 9-2001. An employer is obligated to pay the
20 wages of an hourly employee for all time that the employee is under the control of the employer,
21 and this includes all the time the employee is suffered or permitted to work, whether or not required
22 to do so. When Plaintiffs and Class Members were on-call, they contend that they were under the
23 control of Defendant and required to be compensated for all hours worked. Gaines Decl. ¶ 18.

24 Plaintiff also alleged that Defendant would sometimes require Plaintiff and other Class
25 Members to report to work only to be told they were not longer needed and be sent home within
26 two hours of reporting to work, in violation of Labor Code §§ 510, 558, 1194 and IWC Wage Order
27 9-2001. Defendant must pay them for half the usual or scheduled day’s work, but in no event for
28 less than two hours at the employee’s regular rate of pay, and Plaintiff alleges that it failed to do

1 so. Gaines Decl. ¶ 19.

2 Defendant denies that it failed to pay any unpaid wages. It argues that Class Members were
3 never “on call” subjecting them to sufficient employer control that Defendant was obligated to pay
4 them wages. It contends that its time rounding practices yielded the same wage payments to Class
5 Members as if the time was not rounded. It argues that no reporting time wages are due, and even
6 if such wages are due, their value is minimal. Defendant also strongly contends that any unpaid
7 wage claims asserted by Class Members are highly individualized and therefore class certification
8 is not appropriate on these claims. Based on these defenses, Plaintiff was required to compromise
9 for purposes of reaching a resolution of the claims at this juncture of the litigation. Gaines Decl. ¶
10 20.

11 Plaintiff also alleges that Defendant failed to permit or authorize Class Members to take
12 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
13 §§ 226.7, 510, 512, and 558 and IWC Wage Order 9-2001. Labor Code § 512 provides that
14 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
15 without providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff
16 contends that Class Members were routinely unable to take a proper meal break when they worked
17 shifts in excess of 5 hours in duration and a second meal break when they worked shifts in excess
18 of 10 hours in duration. When they were able to take a meal period, Plaintiff argues that they would
19 typically be required to work through it, also depriving them of all wages due. In addition,
20 Defendant allegedly failed to maintain meal period records, which show the accurate time that meal
21 periods were taken. These instances violate Labor Code §§ 226.7, 510, 512, 558, 1174, 1194, and
22 1198 and IWC Wage Order 9-2001. Gaines Decl. ¶ 21.

23 Based on an analysis of a wage and time data provided by Defendant through discovery,
24 Plaintiff has ascertained a meal period violation rate of 94.9% during the Class Period. Most
25 violations are a result of missed meal periods (representing 98.2% violation rate). Defendant
26 argued these rates were substantially inflated, and that any exposure on this claim is minimal,
27 because Class Members entered into on-duty meal period agreements which, it contends, justify
28 the lack of meal period time records. It also argued that the meal period claim was subject to a

1 defense of waiver, and it implicated many individualized issues and manageability concerns which
2 would preclude class certification. Based on the risks inherent in further litigation, this claim
3 required a discount for purposes of securing a settlement at this stage of the litigation. Gaines Decl.
4 ¶ 22.

5 Plaintiff further contends that Defendant failed to provide Class Members with legally
6 compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor
7 Code §§ 226.7 and 558 and Wage Order 9-2001. Although Defendant maintains a legally compliant
8 rest period policy, Plaintiff argues that its practices significantly deviated as Class Members were
9 frequently denied rest periods. Defendant, in contrast, argued that this claim had no merit and could
10 not be certified because the Court was to have to consider and assess each of the thousands of rest
11 periods Defendant purportedly authorized Class Members to take, creating substantial
12 manageability concerns that would easily defeat class certification. at class certification. Gaines
13 Decl. ¶ 23.

14 Plaintiff alleges that Defendant failed to issue Class Members accurately itemized wage
15 statements and failed to timely pay all wages due at the separate of employment. Because Class
16 Members were not paid all wages due, the wage statements provided by Defendant allegedly failed
17 to accurately state all gross wages earned, in violation of Labor Code §§ 226(a)(1) and 226.3, total
18 hours worked, in violation of Labor Code §§ 226(a)(2) and 226.3, net wages earned, in violation of
19 Labor Code §§ 226(a)(5) and 226.3, and all applicable hourly rates in effect during the pay period
20 and the corresponding number of hours worked at each hourly rate, in violation of Labor Code §§
21 226(a)(9) and 226.3. Separately, the wage statements issued to Class Members also allegedly failed
22 to set forth all applicable hourly rates in effect during the pay period and the corresponding number
23 of hours worked, in violation of Labor Code § 226(a)(9). As to the timely payment of wages,
24 Plaintiff alleges that Defendant's failure to pay all wages due triggered the imposition of penalties
25 pursuant to Labor Code §§ 201-203. Defendant, in response, argued that these were highly
26 technical penalty claims that the Court had tremendous discretion to reduce or eliminate, and argued
27 that there were no underlying unpayments of wages which triggered the derivative wage statement
28 violations and waiting time penalty claims alleged. Based on the risks inherent in prevailing on

1 these claims, the compromised settlement amount reflects a fair discount on the maximum value of
2 this claim. Gaines Decl. ¶ 24.

3 The discount negotiated for settlement here is a reasonable compromise, particularly
4 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
5 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
6 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
7 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
8 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
9 various arguments why class treatment is not appropriate, including but not limited to that
10 individualized inquires among class members predominate over common ones. If Defendant was
11 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
12 most class members would likely not file individual claims. Gaines Decl. ¶ 25.

13 Plaintiff also faced the risk of a loss on the merits on his claims. It is very possible that the
14 Court would agree with Defendant's position that its policies and practices complied with the
15 requirements of California law or could not be certified. In such a case, the value of the majority
16 of Plaintiff's claims would be zero. Gaines Decl. ¶ 26.

17 Defendant argued that even if a judgment was entered against it at some point years down
18 the line, it would be uncollectible. Defendant shared confidential financial documents with counsel
19 for Plaintiff, who concluded that Defendant's financial concerns were legitimate. Indeed, the
20 parties agreed to an installment payment plan as recommended in the mediator's proposal by Judge
21 Broadman. Gaines Decl. ¶ 27; Stip. at ¶ E(13)³.

22 Finally, Plaintiff faced the risk that he would not obtain a maximum damage/penalty award
23 on all (or any of) his claims. For example, Plaintiff seeks discretionary penalties pursuant to the
24 PAGA, which are valued at up to \$100 per employee per pay period for 2,140 aggregate pay periods
25 worked during the one-year PAGA limitations period (i.e. up to \$214,000, without stacking
26 penalties). Even if Plaintiff did prevail on these claims, it is possible that the Court would not

27
28 ³ The first of two nearly-equal settlement share payments shall be mailed to Class Members shortly
after final approval, and the second approximately one year later. Stip. at ¶ E(13).

1 impose all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 28.

2 Defendant strongly contends that its policies and practices do not violate any laws. It
3 contends that it properly provided for all meal and rest periods and fully compensated their
4 employees for all time worked. It further contends that the wage statements it provides to its
5 employees are fully compliant with California law. Gaines Decl. ¶ 29.

6 When the costs and risks of non-certification and loss on the merits are considered,
7 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
8 Decl. ¶¶ 16-30.

9 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
10 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
11 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
12 Decl. ¶ 31.

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

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

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

22 **E. Plaintiff Should Be Permitted to File His Second Amended Complaint**

23 In connection with this Settlement, Plaintiff shall file a Second Amended Complaint,
24 attached to the Stipulation as **Exhibit 3**, which adds class allegations and claims to comport with
25 the release provided for in the Stipulation. The Parties agreed that, as part of his motion for
26 preliminary approval, Plaintiff would concurrently seek leave to file the Second Amended
27 Complaint, the filing of which is a condition of the Stipulation.

28 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the

1 Second Amended Complaint for settlement purposes only. As part of its order preliminarily
2 approving the settlement, Plaintiff requests that the Court approve his filing of the Second Amended
3 Complaint, and consent that Defendant not be required to file a responsive pleading thereto. Gaines
4 Decl. ¶ __.

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 Jason McLelland as the Class Representative;
- 12 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
13 Class Counsel;
- 14 5. Approving ILYM Group, Inc. as Settlement Administrator;
- 15 6. Preliminarily approving the allocation of \$10,000 from the Maximum Settlement
16 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
17 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
18 (25%) shall be included in the Net Settlement Proceeds for payment to Class Members;
- 19 7. Approving as to content and form the notice to the Settlement Class, and directing
20 it to be disseminated by the Settlement Administrator;
- 21 8. Permitting Plaintiff to file his Second Amended Complaint, attached to the
22 Stipulation as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order
23 granting this motion has been given, and consent that Defendant not be required to file a responsive
24 pleading thereto; and,
- 25 9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant shall provide to the Settlement 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")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice and Exclusion Form to Class Members	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written Exclusion Form 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	_____, 2022, at _____.m. (approximately 85 days after entry of the Order granting this Motion)

DATED: May 5, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: *Daniel F. Gaines*
 DANIEL F. GAINES
 ALEX P. KATOFISKY
 Attorneys for Plaintiff Jason McLelland and Proposed
 Class Counsel