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and Proposed Class Counsel
8

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

12 MARIA CAPETILLO, on behalf of herself
13 and all "aggrieved employees" pursuant to
Labor Code § 2698 et seq.,

14 Plaintiff,

15 v.

16 LOVE THOSE WINGS, INC., a California
17 corporation, and DOES 1 through 10,
inclusive,

18 Defendants.
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Case No.: 30-2021-01183363-CU-OE-CXC

*Assigned For All Purposes to the Honorable
Judge William Claster, Dept. CX104*

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

DATE: May 6, 2022

TIME: 9:00 A.M.

DEPT.: CX-104

Reservation Number: 73732198

Action Filed: February 9, 2021

1 **PLEASE TAKE NOTICE THAT** on May 6, 2022, at 9:00 a.m., or as soon thereafter as
2 the matter may be heard, in Department CX-104 of the above-entitled Court, located at 751 West
3 Santa Ana Blvd., Santa Ana, California 92701, Plaintiff Maria Capetillo (“Plaintiff” or
4 “Capetillo”), will and hereby does move unopposed for an Order (1) preliminarily approving the
5 proposed class and representative action settlement in the above-captioned case, (2) provisionally
6 certifying the settlement class, (3) permitting Plaintiff Capetillo to file a First Amended Class and
7 Representative Action Complaint, (4) provisionally approving the appointment of Plaintiff
8 Capetillo as Class Representative, (5) provisionally approving the appointment of Daniel F. Gaines
9 and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (6) provisionally approving
10 the appointment of ILYM Group, Inc. as settlement administrator, (7) approving and directing
11 distribution of notice to the settlement class, and (8) setting a final fairness and approval hearing.

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

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

19 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
20 the Settlement Agreement and Release of Claims (the “Agreement” or “Settlement Agreement”),
21 the Declaration of proposed Class Counsel Daniel F. Gaines, the Declaration of Maria Capetillo,
22 such evidence or oral argument as may be presented at the hearing, and on the complete record and
23 file herein.

24 DATED: April 5, 2022

GAINES & GAINES, APLC

25 By: Daniel F. Gaines

DANIEL F. GAINES

ALEX P. KATOFISKY

26 Attorneys for Plaintiff Maria Capetillo
27 and Proposed Class Counsel
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Case Summary and Procedural History

Plaintiff Maria Capetillo (“Plaintiff” or “Capetillo”) and Defendant Love Those Wings, Inc. (“Defendant”) (together, the “Parties”) have reached a resolution of this class and representative action and hereby submit their Settlement Agreement to the Court for its preliminary approval.

On December 4, 2020, Plaintiff exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On or about February 9, 2021, Plaintiff initiated the Action by filing a Representative Action Complaint for Penalties, pursuant to PAGA, on behalf of herself and all other aggrieved employees (the “Complaint”). The First Amended Complaint, attached to the Settlement Agreement as Exhibit 3 and which will be filed as part of the settlement approval process, asserts class and PAGA representative action claims against Defendant for (1) failure to pay all wages due, including minimum and overtime wages (Labor Code §§ 510, 558 and 1194); (2) failure to provide compliant rest periods or compensation in lieu thereof (Labor Code §§ 226.7 and 558; IWC Wage Order 5-2001); (3) failure to provide compliant meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512, 558, and 1194; IWC Wage Order 5-2001); (4) failure to comply with itemized employee wage statement provisions (Labor Code §§ 226 and 226.3); (5) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203); (6) violation of Business and Professions Code §§ 17200, *et seq.*; and (7) civil penalties pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201, 202, 203, 226, 226.3, 226.7, 510, 512, 558, 1174 and 1194 (the “First Amended Complaint”). Gaines Decl. at ¶ 7.

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action, and further denies that the Action is appropriate for class treatment for any purpose other than this settlement. Defendant contends that it has complied at all times with the California Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state, and local laws and regulations. It is Defendant’s position that, if this case were to be litigated, class

1 certification would be inappropriate because, among other things, Plaintiff is not an adequate class
2 representative, Plaintiff's claims are not typical of putative class members, and individual issues
3 predominate over class issues. The Action, the negotiation and execution of this Settlement
4 Agreement, and all acts performed or documents executed pursuant to or in furtherance of the
5 Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on behalf
6 of Defendant; (ii) shall not be an admission or evidence of fault on behalf of Defendant in any
7 action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be, and
8 may not be used as, an admission or evidence of the appropriateness of these or similar claims for
9 class certification in the Action or with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

13 **B. Investigation and Settlement Discussions**

14 Class Counsel represent that they have conducted a thorough investigation into the facts
15 and law during the prosecution of this class action case, including the exchange of extensive
16 informal discovery and the review and verification of statistical data and other facts and information
17 provided by Defendant. Counsel for the Parties also represent that they have investigated the
18 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
19 potential defenses thereto, and the damages and other losses claimed by Plaintiff. Gaines Decl. at
20 ¶ 10.

21 On December 14, 2021, following their exchange of information and documents regarding
22 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
23 arm's-length negotiations with the assistance of mediator Hon. Steven R. Denton (San Diego Sup.
24 Ct., Ret.), through which they were able to reach the resolution of the Action set forth herein. The
25 Parties thereafter jointly prepared the Settlement Agreement and Release of Claims. Gaines Decl.
26 at ¶ 11; Exhibit B.

27 Based on their own independent investigation and evaluation, Class Counsel are of the
28 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement

1 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
2 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
3 will not be certified by the Court, and the defenses asserted by Defendant. Defendant and its
4 counsel also agree that this settlement is fair and in the best interest of the Settlement Class. Gaines
5 Decl. at ¶ 12.

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

14 **II. LEGAL ANALYSIS**

15 **A. The Proposed Settlement Terms**

16 The Parties have agreed upon the following definition of the Settlement Class: all
17 individuals who worked for Love Those Wings, Inc. as hourly and/or non-exempt employees in
18 California at any time between February 9, 2017 and February 28, 2022. Settlement at ¶ A(4).

19 The Parties stipulate to the conditional certification of the Settlement Class for settlement
20 purposes only. Settlement at ¶ B(8).

21 The Settlement Agreement provides that Defendant shall pay the total, non-reversionary
22 sum of \$300,000 to resolve the claims alleged in the Actions (the “Maximum Settlement Amount”).
23 Settlement at ¶ C(1)(a). The Maximum Settlement Amount includes the attorneys’ fees of Class
24 Counsel; litigation costs and expenses (which includes, without limitation, all such fees and costs
25 incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
26 providing any notices required as part of the settlement, securing Court approval of the settlement,
27 and obtaining judgment in the Action); the service payment to the Class Representative, as
28 approved by the Court; the payments to the California Labor and Workforce Development Agency

1 (“LWDA”) and PAGA Members pursuant to the PAGA claims in the Action; and all costs of
2 administration, including, without limitation, settlement administration fees and expenses.
3 Defendant shall pay all employer payroll tax obligations due on wage payments made from the Net
4 Settlement Proceeds in addition to, and separate and apart from, the Maximum Settlement Amount.
5 *Id.*

6 The Net Settlement Proceeds is defined as the Maximum Settlement Amount less the
7 amounts approved and awarded by the Court for: attorneys’ fees and documented litigation costs
8 and expenses incurred or advanced by Class Counsel; the service payment to the Class
9 Representative; the payments to the LWDA and PAGA Members pursuant to PAGA; and the costs
10 of administering the settlement. Settlement at ¶ C(1)(b).

11 The Individual Payment Amount means the portion of the Net Settlement Proceeds
12 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
13 valid request for exclusion form) and the portion of the PAGA Payment distributable to each PAGA
14 Member, regardless if they request exclusion from the class settlement or not. The Individual
15 Payment Amounts will be calculated by dividing the Net Settlement Proceeds by the total weeks
16 worked by all participating Class Members in California in a non-exempt position during the Class
17 Period, which will yield the applicable weekly rate. The weekly rate shall be multiplied by the
18 number of weeks each individual participating Class Member worked for Defendant in California
19 in a non-exempt position during the Class Period to yield their Individual Payment Amount. Each
20 Participating Settlement Class Member who does not opt out will receive an Individual Payment
21 Amount equal to their individual weeks worked in California in a non-exempt position during the
22 Class Period multiplied by the Workweek Value, and the Individual Payment Amounts to be paid
23 to each PAGA Member will also include their Individual PAGA Payment Amount, as detailed
24 below. Settlement at ¶ C(1)(c).

25 The Settlement Agreement further provides that Plaintiff’s counsel may request an award
26 of attorneys’ fees not to exceed \$100,000 (i.e., one-third of the Maximum Settlement Amount) and
27 seek reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed
28 \$12,000. Settlement at ¶¶ C(1)(f)-(g).

1 It also provides that Plaintiff will seek, and Defendant will not oppose, a service payment
2 to the named Plaintiff Capetillo in the amount of \$2,500. Settlement at ¶ C(1)(e). Ms. Capetillo
3 was represented by separate counsel in a separate lawsuit, which alleged claims relating to her
4 separation of employment from Defendant. As part of the resolution of that action, Ms. Capetillo
5 will be paid a separate sum in exchange for a broad general release (excluding the claims alleged
6 in this Action, which will be released subject to the Court's final approval of the Settlement
7 Agreement). Gaines Decl. at ¶ 14.

8 The Parties have agreed that ILYM Group, Inc. ("ILYM"), an experienced and competent
9 settlement administration company, will administer the settlement. ILYM's credentials are attached
10 as **Exhibit C** to the Gaines Decl. Up to \$15,000 has been allocated to compensate ILYM for its
11 work related to the administration.

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

13 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Maximum Settlement
14 Amount will be allocated to settle the claims brought under Labor Code § 2699 *et. seq.* Pursuant
15 to Labor Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as
16 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
17 aggrieved employees." As such, 75 percent of the apportioned PAGA settlement amount – or
18 \$15,000 – shall be payable to the Labor and Workforce Development Agency. The remaining 25
19 percent, or \$5,000, shall be distributed to PAGA Members on a pro rata basis based on the number
20 of workweeks worked by each PAGA Member during the PAGA Period.

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

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

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

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

16 Thus, the preliminary approval by the trial court is simply a conditional finding that the
17 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
18 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
19 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
20 may find that the settlement proposal contains some merit, is within the range of reasonableness
21 required for a settlement offer, or is presumptively valid subject only to any objections that may be
22 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
23 (4th ed. 2002).

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

26 When the parties to an action reach a monetary settlement, they will
27 usually prepare and execute a joint stipulation of settlement, which
28 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.

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 Here, the Parties have reached such an agreement, with the assistance of mediator Hon.
2 Steven R. Denton, and have submitted the Settlement Agreement herewith which fully sets forth
3 all terms of the agreement reached among the Parties. *See* Gaines Decl. ¶ 11; **Exhibit B.**

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

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

13 The strength of the findings made by a judge at a preliminary hearing
14 or conference concerning a tentative settlement proposal . . . may be
15 set out in conditional orders granting tentative approval to the various
16 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.

17 4 *Newberg on Class Actions*, at §11.26.

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

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

25 a. **The Settlement Class is Numerous and Ascertainable**

26 The proposed settlement class is ascertainable. The class definition, the size of the class

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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 and the means for identifying the members of the class determine whether the class is ascertainable.
2 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
3 are identifiable from Defendant's employment records, including records of those who signed
4 severance and release agreements. Further, the settlement class is sufficiently numerous to warrant
5 certification. According to Defendant's records, the Settlement Class is comprised of more than
6 751 individuals who worked more than 22,000 workweeks during the Class Period. Gaines Decl.
7 ¶ 16.

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

10 The Class Members' claims all stem from a common source: Plaintiff alleges as to all Class
11 Members that Defendant violated the same Labor Code and Wage Order provisions in connection
12 with their work for Defendant. The same Labor Code and Wage Order violations are alleged on
13 behalf of all persons encompassed in the settlement class, including claims for: (1) Failure to Pay
14 All Minimum and Overtime Wages, (2) Failure to Provide Rest Periods or Compensation in Lieu
15 Thereof; (3) Failure to Provide Meal Periods or Compensation in Lieu Thereof, (4) Knowing and
16 Intentional Failure to Comply with Itemized Employee Wage Statement Provisions, (5) Failure to
17 Pay Wages Due at Separation of Employment, (6) Violation of Business & Professions Code §
18 17200, et seq., and (7) PAGA Civil Penalties, based on the preceding claims. Plaintiff seeks on
19 behalf of all members of the Settlement Class the same legal remedies under the same state laws,
20 all related to their employment under alleged uniform policies and practices. Under these
21 circumstances, the commonality requirement is satisfied for purposes of certifying the settlement
22 class for settlement. Gaines Decl. ¶ 17.

23 c. **The Proposed Class Representative's Claims are Typical of the**
24 **Class Members' Claims**

25 A class representative's claims are typical when they arise from the same event or course
26 of conduct that gives rise to the claims of the class and are based on the same legal theory.
27 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiff and proposed
28 Class Representative Maria Capetillo is a former non-exempt employee who was employed by

1 Defendant in California. Plaintiff alleges the same claims as those that she contends the members
2 of the Settlement Class would reasonably be expected to bring based on the course of conduct
3 alleged herein. Gaines Decl. ¶ 18.

4 Plaintiff has also demonstrated that she will aggressively and competently assert the
5 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no
6 apparent conflicts with other class members. Plaintiff participated actively in the litigation,
7 providing information and documents to assist her attorneys in pursuing her claims. Gaines Decl.
8 ¶ 19. Furthermore, Plaintiff has retained competent counsel, experienced in litigating class action
9 claims in the employment context. See Gaines Decl. ¶¶ 2-5.

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

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

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

1 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
2 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
3 Decl. ¶¶ 2-5, 10-14.

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

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

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

20 Prior to settlement, Plaintiff’s counsel created a comprehensive damage analysis using
21 sampling information obtained through informal discovery. This damage analysis reveals that the
22 negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines
23 Decl. ¶ 20.

24 In the Action, Plaintiff contended that Defendant failed to pay Plaintiff and Class Members
25 all minimum and overtime wages earned during the course of employment, in violation of Labor
26 Code §§ 510, 558 and 1194, when it required Plaintiff and Class Members to clock out and continue
27 working after completing six (6) hours of work, but failed to pay them for their time worked off-
28 the-clock. Defendant contended this claim had absolutely no merit and had zero value, and even if

1 it had value, the claims would not be certified because different stores under different managers for
2 different shifts would apply different practices. Even if Plaintiff did certify this off-the-clock claim,
3 and even if she could prove that every single employee worked 10 minutes off-the-clock for every
4 shift, the maximum value of this claim is approximately \$100,930 in potential liability. Gaines
5 Decl. ¶ 21.

6 Plaintiff also asserts that Defendant failed to permit or authorize Plaintiff and Class
7 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation
8 of Labor Code §§ 226.7, 512, 558 and IWC Wage Order 5-2001. Labor Code § 512 provides that
9 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
10 without providing a 30-minute meal period starting no later than the end of the 5th hour. When
11 Plaintiff and Class Members did receive meal periods, Plaintiff contends that they would typically
12 be interrupted and they would be required to continue working, resulting in off-the-clock work, in
13 violation of Labor Code §§ 226.7, 510, 512, 558, and 1194 and IWC Wage Order 5-2001. Based
14 on an analysis of a time and wage sampling produced by Defendant through pre-mediation
15 discovery, Plaintiff has ascertained meal period violation rate of 51% with over 86% of all pay
16 periods in the PAGA Period exhibiting some form of meal period violation, leading to \$308,874 in
17 liability. Defendant argued that employees frequently chose to waive their meal periods to leave
18 their shifts early, such that this claim would be difficult to certify and require an individualized
19 inquiry. The risk in continued litigation on this claim justifies the compromised settlement amount.
20 Gaines Decl. ¶ 22.

21 Plaintiff also contends that Defendant failed to provide Plaintiff and Class Members with
22 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
23 Labor Code § 226.7 and Wage Order 5-2001. Simply stated, Plaintiff argues that rest periods were
24 never authorized, and when employees were able to take a rest period, they were cut short or on-
25 duty, in violation of Labor Code §§ 226.7, 558 and IWC Wage Order No. 5-2001. Plaintiff
26 calculates liability for this claim at \$586,143. Although this claim has a substantial maximum
27 value, proceeding on this claim entailed a large risk of non-certification and loss on the merits
28 because of the multitude of defenses asserted by Defendant, including that it enacted written

1 policies which conformed with the requirements of California law, that it applied its compliant
2 written policies uniformly among all its restaurants, and that any missed rest break was a result of
3 employee waiver rather than a lack of authorization by Defendant. Gaines Decl. ¶ 23.

4 Plaintiff also sought statutory and civil penalties for non-compliant wage statements,
5 waiting time, and under PAGA. Each of these is a derivative claim and therefore, recovery is
6 necessarily dependent upon the success of the above underlying claims for unpaid wages and
7 missed meal and rest periods. Some of them are discretionary and/or subject to a good faith defense
8 or proof of injury. California law is also unsettled as to whether wage statement violations and
9 waiting time penalties stem from claims for missed meal and rest periods. Given that, it is possible
10 that Plaintiff would not recover on these penalties at all. Plaintiff's expert valued the maximum
11 value of the wage statement claims at approximately \$299,500, the maximum value of the waiting
12 time penalty claims at approximately \$1,122,379, and the maximum value of the PAGA penalties
13 between approximately \$348,500 (without "stacking" multiple violations) and \$1,372,800 (with
14 "stacking" for all five underlying Labor Code violations at issue). However, any recovery on these
15 claims is also not certain. A compromise was required to resolve these claims at this juncture of
16 the litigation. Gaines Decl. ¶ 24.

17 A discount on the maximum value of Class Members' claims was required (and warranted)
18 to resolve the matter at this stage of the litigation. Most importantly, Defendant demonstrated that
19 it had strong defenses to Plaintiff's claims. Defendant strongly contends that its policies and
20 practices do not violate any laws. It contends that it provided all required wages in a timely manner.
21 Based on Defendant's arguments and the information it provided to Plaintiff, the Parties were able
22 to negotiate a resolution which compromises the claims of the Class Members for fair
23 consideration. Gaines Decl. ¶ 25.

24 Plaintiff's claims were not without their challenges. Class certification is a substantial risk
25 in any class action case. Here, while Plaintiff maintains that the requirements of class certification
26 are met, Defendant proffers various arguments why class treatment is not appropriate here,
27 including but not limited to that individualized inquires among class members predominate over
28 common ones given that the putative class members worked at different restaurants under different

managers, the lack of records of rest break violations, and Defendant's facially complaint meal and rest break policies. If Defendant was to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and most class members would likely not file individual claims. Gaines Decl. ¶ 26.

Plaintiff also faced the risk of a loss on the merits on her claims. Plaintiff's wage statement claims, for example, are technical and primarily derivative of their underlying wage claims. It is possible that the Court would find that Defendant substantially complied with the requirements of Labor Code section 226(a) such that no penalties would be awarded. It is also possible that the Court would agree with Defendant's position that its policies and practices complied with the requirements of California law. In such a case, the value of most of Plaintiff's claims would be zero. Gaines Decl. ¶ 27. The PAGA claims could also be challenged on manageability grounds under the recent decision in *Wesson v. Staples the Off. Superstore, LLC* (2021) 68 Cal. App. 5th 746.

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 is the result of adversarial, non-collusive, and arms-length negotiations. The Parties arrived at it after extensive investigation and discovery, careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable. The settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines Decl. ¶ 28.

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 Settlement Agreement 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 Settlement Agreement.

F. Plaintiff Should Be Permitted to File Her First Amended Class and Representative Action Complaint

In connection with this Settlement, Plaintiff shall file a First Amended Class and Representative Action Complaint, attached to the Settlement Agreement as **Exhibit 3**, which adds class allegations and claims to comport with the release provided for in the Settlement Agreement, all of which are premised on the same claims alleged in the original complaint under PAGA. The Parties agreed that, as part of her motion for preliminary approval, Plaintiff would concurrently seek leave to file the First Amended Class and Representative Action Complaint, the filing of which is a condition of the Settlement Agreement. To effectuate the class settlement of the Actions, Defendant does not oppose the filing of the First Amended Class and Representative Action Complaint for settlement purposes only. As part of its order preliminarily approving the settlement, Plaintiff requests that the Court approve her filing of the First Amended Class and Representative Action Complaint. Gaines Decl. ¶ 29.

III. CONCLUSION

While settlement is fair and reasonable in light of the claims asserted and Defendant's defenses to each claim, the settlement is fair and reasonable. Based on the foregoing, as part of its preliminary approval of the settlement, the Parties request that the Court:

1. Review the proposed Settlement Agreement 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 appear to meet the applicable certification criteria.
3. Appoint Plaintiff Maria Capetillo as Class Representative.
4. Appoint Daniel F. Gaines 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 Settlement Agreement.

6. Permit Plaintiff to file her First Amended Class and Representative Action Complaint, attached to the Settlement Agreement as Exhibit 3.

7. 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 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")	No later than 10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice and Request for Exclusion form to Class Members	No later than 21 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a Request for Exclusion form to 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	No fewer than 16 Court days prior to the final approval hearing
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	No fewer than 16 Court days prior to the final approval hearing
Final settlement approval hearing	_____ at _____ (the Parties propose a date approximately 100 days after entry of the Order granting this Motion)

DATED: April 5, 2022

GAINES & GAINES, APLC

By: Daniel F. Gaines
DANIEL F. GAINES
ALEX P. KATOFISKY
Attorneys for Plaintiff Maria Capetillo
and Proposed Class Counsel