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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – POMONA COURTHOUSE SOUTH

HERIBERTO MARQUEZ, on behalf of
himself and all “aggrieved employees”
pursuant to Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

P & B INTERMODAL SERVICES
LIMITED LIABILITY COMPANY, a
New Jersey limited liability company, and
DOES 1 through 10, inclusive,

Defendants.

Case No.: 21PSCV00224

*Assigned For All Purposes to the Honorable Judge
Peter A. Hernandez, Dept. O*

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

DATE: April 26, 2022

TIME: 9:30 a.m.

DEPT.: O

Reservation No.: 985275804395

Action Filed: March 17, 2021

1 **PLEASE TAKE NOTICE THAT** on April 26, 2022 at 9:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department O of the above-entitled Court, located at 400 Civic Center
3 Plaza, Pomona, California 91766, Plaintiff Heriberto Marquez (“Plaintiff” or “Marquez”) will and
4 hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the
5 parties falls within the range of reasonableness and approving the proposed class action settlement
6 in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement
7 class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving the
8 appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of ILYM Group, Inc. as settlement administrator,
10 (6) preliminarily approving the allocation of \$20,000 from the Settlement Amount to settle
11 Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et
12 seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development
13 Agency (“LWDA”) and twenty-five percent (25%) will be distributed equally to the PAGA
14 Members, regardless of whether they exclude themselves from the Settlement or not, (7) approving
15 as to content and form the notice to the settlement class, and directing it be disseminated by the
16 Settlement Administrator; (8) permitting Plaintiff to file a First Amended Complaint, and (9) setting
17 a final fairness and 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 and Release of Claims, the Declaration of Daniel F. Gaines, such evidence or oral
3 argument as may be presented at the hearing, and on the complete record and file herein.

4
5 DATED: March 2, 2022

Respectfully submitted,

6 GAINES & GAINES,
7 A Professional Law Corporation

8
9 By: Alex P. Katofsky

10 DANIEL F. GAINES
11 ALEX P. KATOFSKY
12 Attorneys for Plaintiff Heriberto Marquez and Proposed
13 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 Stipulation
4 of Settlement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval. The Settlement is
5 made and entered into by and between Plaintiff Heriberto Marquez (“Plaintiff” or “Marquez”),
6 individually and on behalf of all others similarly situated, and Defendant P & B Intermodal Services
7 Limited Liability Company (“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 \$439,000 and the proposed settlement
14 class contains approximately 439 members who worked approximately 37,972 workweeks during
15 the Settlement Period as of November 1, 2021. As detailed below, the settlement is in the best
16 interests of the class in light of all of the facts and circumstances and the risks and delays of further
17 litigation.

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

26 **II. BACKGROUND AND PROCEDURAL HISTORY**

27 On January 11, 2021, Plaintiff sent a letter to the LWDA, alleging Defendant violated the
28 California Labor Code and seeking penalties under the Private Attorneys General Act, Labor Code

1 section 2698 *et seq.* (“PAGA”). Specifically, Plaintiff alleged Defendant failed to pay wages and
2 premium wages to Defendant’s non-exempt California employees, failed to reimburse business
3 expenses, failed to provide accurate itemized wage statements, and failed to timely pay wages
4 during employment and at separation of employment. Declaration of Daniel F. Gaines (“Gaines
5 Decl.”) at ¶ 6.

6 On March 17, 2021, Plaintiff filed a representative action complaint in the Los Angeles
7 County Superior court titled *Heriberto Marquez, et al. vs. P & B Intermodal Services Limited*
8 *Liability Company, et al.*, case no. 21PSCV00224. Plaintiff alleges Defendant violated various
9 sections of the California Labor Code and applicable wage orders as alleged in his letter to the
10 LWDA. Gaines Decl. at ¶ 7.

11 The First Amended Complaint, which will be filed as part of the settlement approval
12 process, asserts direct class and representative action claims against Defendant for (1) Failure to
13 Pay All Wages Due (Labor Code §§ 510 and 1194); (2) Failure to Reimburse Business Expenses
14 (Labor Code § 2802); (3) Failure to Comply With Itemized Employee Wage Statement Provisions
15 (Labor Code § 226(a), (e), (h)); (4) Failure to Pay Wages Due at Separation of Employment (Labor
16 Code §§ 201-203); (5) Violation of Business and Professions Code § 17200 *et seq.*; (6) Civil
17 Penalties Pursuant to Labor Code § 2698 *Et Seq.* for Violations of Labor Code §§ 201, 202, 204,
18 226(a), 510, 1194, and 2802 and Pursuant to Labor Code § 2699(a) for Violations of Labor Code
19 §§ 210, 226.3, and 558 (the “First Amended Complaint”). Gaines Decl. at ¶ 8.

20 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

21 The Parties engaged in informal discovery prior to attending mediation in the Action,
22 including but not limited to: Defendant’s policies and procedures regarding the payment of wages,
23 issuance of wage statements, and providing all wages at separation, as well as information regarding
24 the number of putative class members and the mix of current versus former employees, the average
25 number of hours worked, and the wage rates in effect. The Parties thoroughly investigated all of
26 the claims in the Action prior to negotiating a settlement in the Action. Gaines Decl. at ¶ 9.

27 On November 1, 2021, the Parties attended a formal mediation with well-known mediator
28 Marc J. Feder, Esq. The Parties reached a settlement agreement at the conclusion of the mediation

1 and executed a memorandum of understanding which is superseded in full by their Settlement
2 Agreement. Gaines Decl. at ¶ 10.

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

10 Defendant has denied and continues to deny each and all of the claims and allegations in
11 the Action. Defendant has asserted and continues to assert many defenses thereto and has expressly
12 denied and continues to deny any fault, wrongdoing, or liability whatsoever arising out of the
13 conduct alleged in the Action. Defendant contends that it has, at all times, complied with the
14 provisions of the California Labor Code, the California Business and Professions Code, and all
15 applicable federal and California laws and regulations. Neither the Settlement (including all drafts
16 hereof) nor any document referred to herein, nor any action taken to carry out this Settlement is,
17 may be construed as, or may be used in any proceeding as an admission by or against Defendant of
18 any fault, wrongdoing, infirmity of defense, or liability whatsoever. Defendant expressly denies
19 any fault, wrongdoing, or liability, and expressly denies the validity of all causes of action and
20 prayers for relief asserted in the Action. Gaines Decl. at ¶ 12.

21 **IV. LEGAL ANALYSIS**

22 **A. The Proposed Settlement Terms**

23 **1. The Settlement Class**

24 The Parties have agreed to a settlement class composed of all persons who are or were
25 employed by P&B Intermodal Services, LLC in the State of California in a non-exempt position
26 during the Settlement Period [March 17, 2017 to November 1, 2021] (the “Class Period”).
27 Defendant represents that this Class contains approximately 439 members who worked an
28

1 estimated 37,972 workweeks as of September 20, 2021 during the Settlement Period. Stip. at ¶
2 XVIII(L).

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

4 The Stipulation provides that Defendant shall pay an amount not to exceed \$439,000 to
5 resolve the Action on a class-wide basis (the “Settlement Amount”). The Gross Settlement Amount
6 includes Net Settlement Payments, Court approved attorneys’ fees and Litigation costs,
7 Administrative Costs, the enhancement to the Named Plaintiff, statutory penalties, interest, and
8 Taxes, and the PAGA Settlement. The Settlement Amount does not include Employer Taxes,
9 which Defendant shall pay in addition to the Settlement Amount.. Stip. at ¶ I(Q).

10 From the Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application
11 to the Court for up to one-third of the Settlement Amount for attorneys’ fees (or \$146,333.33). Stip.
12 at ¶ XIII.

13 From the Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application
14 to the Court for up to \$12,000 in reimbursement of litigation costs and expenses. Stip. at ¶ XIII.

15 From the Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application
16 to the Court for an Enhancement to the Class Representative in the gross amount of \$10,000, in
17 consideration for his efforts in instituting and participating in the Action and in exchange for his
18 general release of all claims. Stip. at ¶ XIV.

19 From the Settlement Amount, settlement administration fees paid to ILYM Group, Inc. will
20 be no more than \$7,500. Stip. at ¶ VIII.

21 From the Settlement Amount, the portion to be allocated for settlement of any and all claims
22 for penalties under the PAGA is \$20,000 (“PAGA Payment”), 75% of which shall be paid to the
23 LWDA and 25% will be distributed equally to the PAGA Members, regardless of whether they
24 exclude themselves from the Settlement or not. Stip. at ¶ XVI.

25 The Net Settlement Amount is the Settlement Amount minus any award of attorneys’ fees
26 and Litigation costs, Administrative Costs, enhancement to the Named Plaintiff, and penalties paid
27 pursuant to PAGA. Stip. at ¶ I(K).

28 The Individual Settlement Payment for each Class Member will be determined by

1 multiplying a Class Member's workweeks worked in California during the Settlement Period
2 ("Eligible Workweeks") by the Workweek Point Value. The Individual Settlement Payment will
3 be reduced by any required legal deductions, for each participating Class Member. Individual
4 Settlement Payments will include, as to all PAGA Members whether they exclude themselves from
5 the class portion or not, an equal portion of the PAGA Payment allocated to employees (i.e. \$5,000).
6 Stip. at ¶ X.

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

8 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Settlement Amount will be
9 allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor Code
10 § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows: 75
11 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
12 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$15,000 – shall
13 be payable to the LWDA. The remaining 25 percent, or \$5,000, will be distributed equally to the
14 PAGA Members, regardless of whether they exclude themselves from the Settlement or not. Stip.
15 at ¶ XVI.

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

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

22 Approval of class action settlements involves a two-step process.
23 First, counsel submit the proposed terms of settlement and the court
24 makes a preliminary fairness evaluation. If the preliminary
25 evaluation of the proposed settlement does not disclose grounds to
26 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

27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. See *Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 notice ... be given to the class members of a formal fairness hearing,
2 at which arguments and evidence may be presented in support of and
in opposition to the settlement.

3 Thus, the preliminary approval by the trial court is simply a conditional finding that the
4 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
5 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
6 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
7 may find that the settlement proposal contains some merit, is within the range of reasonableness
8 required for a settlement offer, or is presumptively valid subject only to any objections that may be
9 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
10 (4th ed. 2002).

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

13 When the parties to an action reach a monetary settlement, they will
14 usually prepare and execute a joint stipulation of settlement, which
15 is submitted to the court for preliminary approval. The stipulation
16 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.

17 *Id.* at § 11.24.

18 Here, the Parties have reached such an agreement and have submitted the Stipulation
19 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 13.

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

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

1 Corp. (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
2 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

10 4 *Newberg on Class Actions*, at § 11.26.

11 As required by Labor Code § 2699(l)(2), concurrent with Plaintiff’s submission of the
12 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
13 Gaines Decl. at ¶ 31.

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

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

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

22 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
23 and the means for identifying the members of the class determine whether the class is ascertainable.
24 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
25 are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class
26 is sufficiently numerous to warrant certification. According to Defendant’s records, the Class
27 comprises approximately 439 employees. Gaines Decl. ¶ 26.

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

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

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

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

1 Gaines Decl. ¶¶ 2-5, 9-10.

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

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

12 Plaintiff’s counsel created a comprehensive damage analysis using sampling information
13 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
14 falls within a realistic range of recovery on Class Members’ claims. Gaines Decl. ¶ 15.

15 Plaintiff alleges that Defendant failed to properly blend bonus/incentive wages into
16 Plaintiff’s and Class Members’ regular rate of pay when they worked overtime hours and earned
17 bonus wages, in violation of Labor Code §§ 510, 558 and 1194. The overtime rate is at least one-
18 and-one-half times an employee’s regular rate of pay. *Christopher v. SmithKline Beecham Corp.*,
19 567 U.S. 142, 147 (2012). The regular rate includes “all remunerations for employment” paid to
20 or on behalf of the employee, except matters specifically excluded. *Walling v. Youngerman-*
21 *Reynolds Hardwood Co.*, 325 US 419, 424 (1945). The DLSE has stated that “(t)he regular rate of
22 pay includes many different types of remuneration, for example: hourly earnings, salary, piecework
23 earnings, commission, bonus, value of meals and lodging.” DLSE 2002 Enforcement Policies &
24 Interpretations Manual (Revised), §§ 49.1-49.1.2.2 (emphasis added). Plaintiff and Class Members
25 earned bonuses/incentives for surpassing projected production levels, but Defendant allegedly did
26 not factor these bonuses/incentives into Plaintiff’s and Class Members’ regular rate of pay when
27 calculating their overtime rate. Pursuant to expert analysis, the damages for this claim total \$29,635
28 and these violations occurred in approximately 1,966 pay periods during the applicable time period.

1 Gaines Decl. ¶ 16.

2 Plaintiff further alleges that Defendant failed to compensate Plaintiff and Class Members
3 on a timely basis. Labor Code § 204 requires employers—like Defendant—who pay their
4 employees on a bi-weekly basis, to issue wages no later than seven calendar days after the final day
5 of the payroll period. *Labor Code* § 204(d). Defendant allegedly did not comply with Labor Code
6 § 204 (and derivatively, Labor Code § 210) because it did not issue bonus/incentive wages to
7 Plaintiff and Class Members within seven calendar days after the final day of the applicable payroll
8 period—it issued certain bonus/incentive wages nine or more days later, well beyond the time frame
9 permitted by Labor Code § 204. During the relevant limitations period (one year prior to filing the
10 Action through the present), Defendant allegedly issued wages late to Class Members 2,184 times,
11 yielding civil penalties for this claim of approximately \$218,400 (at the rate of \$100 per pay period
12 during which wages were willfully withheld). Gaines Decl. ¶ 17.

13 Plaintiff also alleges that Defendant failed to reimburse Plaintiff and Class Members’
14 business expenses incurred in the discharge of their duties, in violation of Labor Code § 2802. The
15 purpose of this statute is to prevent employers from passing their operating expenses on to their
16 employees. *James v. Dependency Legal Group*, 253 F.Supp.3d 1077 (S.D. Cal. 2015). The
17 employer’s duty to indemnify does not turn on whether an employee has made a request for
18 reimbursement, but rather, on whether the employer knew or had reason to know that the employee
19 has incurred a reimbursable expense; if it does, the employer must exercise due diligence to ensure
20 that the employee is reimbursed. *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901 (N.D. Cal.
21 2009). Plaintiff contends that Defendant failed to reimburse Plaintiff and other Class Members for
22 the use of their personal cellular phones to take and receive work-related phone calls and text
23 messages with Defendant, but were not fully reimbursed by Defendant for this expense, in violation
24 of Labor Code § 2802. Plaintiff estimates \$15 per month per Class Member in unreimbursed cell
25 phone expenses during the Class Period, yielding total exposure of up to \$137,000. Gaines Decl.
26 ¶ 18.

27 Class Members also sought wage statement penalties pursuant to Labor Code § 226(e),
28 waiting time penalties pursuant to Labor Code § 203 and PAGA penalties derivative of the

1 underlying violations alleged. The value of these penalties – which are derivative, discretionary,
2 and subject to defenses of their own – totals up to \$3.4 million, a substantial amount which required
3 a compromise to resolve based on risk of litigation. Plaintiff believed it was unlikely that many of
4 these penalties could be recovered because their value would eclipse the value of alleged underpaid
5 wages (if wages were recovered at all), because Plaintiff's claims are novel, and because of
6 Defendant's potential independent defenses to these penalties. Gaines Decl. ¶ 19.

7 The discount negotiated for settlement here is a reasonable compromise, particularly
8 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
9 a 50% or higher hurdle, and to which Defendant maintains strong arguments to defeat class
10 certification (in addition to multiple defenses on the merits of the claims). Class certification is a
11 substantial risk in any class action case. Here, while Plaintiff maintains that the requirements of
12 class certification are met, Defendant proffers various arguments why class treatment is not
13 appropriate, including but not limited to that individualized inquires among class members
14 predominate over common ones. If Defendant was to defeat Plaintiff's class certification motion,
15 there would be no class wide relief whatsoever, and most class members would likely not file
16 individual claims. Gaines Decl. ¶ 20.

17 Plaintiff also faced the risk of a loss on the merits on his claims. It is very possible that the
18 Court would agree with Defendant's position that its wage payment policies and practices complied
19 with the requirements of California law or could not be certified. In such a case, the value of the
20 majority of Plaintiff's claims would be zero. Gaines Decl. ¶ 21.

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

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

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

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

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

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

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

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

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

23 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
24 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
25 the settlement, Plaintiff requests that the Court approve their filing of the First Amended Complaint,
26 and requests that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶ 8.

27 **V. CONCLUSION**

28 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties

request that the Court enter an order:

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

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

3. Appointing Plaintiff Heriberto Marquez as Class Representative;

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

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

6. Preliminarily approving the allocation of \$20,000 from the Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) will be distributed equally to the PAGA Members, regardless of whether they exclude themselves from the Settlement or not;

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

8. Permitting Plaintiff to file his First Amended Complaint, attached to the Stipulation as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order granting this motion has been given, and consent that Defendant not be required to file a responsive pleading thereto; and,

9. Setting the following schedule of settlement proceedings:

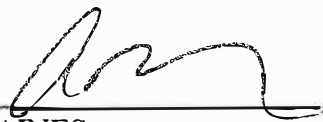
<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including their (1) name; (2) last known home address; (3) number of workweeks as a class member during the Settlement Period or the dates of employment for each Settlement Class member; and (4) Social Security number ("Class List")	30 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice and Workweek Dispute Form to Class Members	10 calendar days after receipt of Class List

<u>EVENT</u>	<u>TIMING</u>
Last day for Class Members to submit an exclusion request or Workweek Dispute 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 105 days after entry of the Order granting this Motion)

DATED: March 2, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES
ALEX P. KATOFISKY

Attorneys for Plaintiff Heriberto Marquez and Proposed
Class Counsel



Journal Technologies Court Portal

Court Reservation Receipt

Reservation

Reservation ID:
985275804395

Status:
RESERVED

Reservation Type:
Motion for Order (Motion for Preliminary Approval)

Number of Motions:
1

Case Number:
21PSCV00224

Case Title:
HERIBERTO MARQUEZ, ON BEHALF OF HIMSELF
AND ALL AGGRIEVED EMPLOYEES PURSUANT TO
LABOR CODE 2698 ET SEQ vs P & B INTERMODAL
SERVICES LIMITED LIABILITY COMPANY, A NEW
JERSEY LIMITED LIABILITY COMPANY, AND DOES 1
THROUGH 10, INCLUSIVE

Filing Party:
HERIBERTO MARQUEZ, on behalf of himself and all
aggrieved employees pursuant to Labor Code 2698 et
seq (Plaintiff)

Location:
Pomona Courthouse South - Department O

Date/Time:
April 26th 2022, 9:30AM

Confirmation Code:
CR-2YPZKAVDYBYGS26NZ

Fees

Description	Fee	Qty	Amount
Motion for Order (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount:
\$61.65

Type:
Visa

Account Number:
XXXX6645

Authorization:
05866G

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