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and Proposed Class Counsel
8

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

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

14 Plaintiff,

15 v.

16 NIXON-EGLI EQUIPMENT CO. OF
SOUTHERN CALIFORNIA, INC., a
17 California corporation, and DOES 1
through 10, inclusive,

18 Defendants.
19
20

CASE NO: CIVSB2119108

*Assigned to the Honorable Gilbert Ochoa, Dept.
S24*

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

DATE: February 24, 2022

TIME: 9:00 a.m.

DEPT.: S24

Action Filed: July 1, 2021

PLEASE TAKE NOTICE THAT on February 24, 2022 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department S24 of the above-entitled Court, located at 247 West Third Street San Bernardino, CA 92415-0210, Plaintiff Llusbysaret Cisneros will and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the Parties falls within the range of reasonableness and approving the proposed class action settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of ILYM Group, Inc. as settlement administrator, (6) preliminarily approving the allocation of \$10,000 from the Maximum Settlement Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be distributed to PAGA Members, (7) approving as to content and form the notice to the settlement class, and directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended Class and Representative Action Complaint, and (9) setting a final fairness and approval hearing.

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

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

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

1 DATED: January 18, 2022

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Llusbysaret Cisneros and
8 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," "Settlement Agreement," "Stipulation," or
5 "Stip.") for the Court's preliminary approval. The Settlement is made and entered into by and
6 between Plaintiff Llusbysaret Cisneros ("Plaintiff" or "Cisneros"), individually and on behalf of
7 the Settlement Class and all others similarly situated, and Defendant Nixon-Egli Equipment Co. of
8 Southern California, Inc. ("Defendant").

9 The settlement occurred as a result of extensive arm's-length negotiations by experienced
10 counsel with the assistance of a respected mediator with experience in the area of employment class
11 actions. Most importantly, the settlement will result in significant financial benefit to the
12 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
13 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
14 for a non-revisionary class settlement in the gross amount of \$285,000, which shall be paid to the
15 approximately 84 members of the proposed Settlement Class who worked approximately 11,000
16 workweeks during the Class Period, a stellar result which yields approximately \$3,392 per class
17 member and nearly \$26 per week worked. As detailed below, the settlement is in the best interests
18 of the class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

II. BACKGROUND AND PROCEDURAL HISTORY

On April 23, 2021, Plaintiff sent a letter to the Labor and Workforce Development Agency (“LWDA”), alleging Defendant violated the California Labor Code and seeking penalties under the Private Attorneys General Act (“PAGA”). Specifically, Plaintiff alleged Defendant failed to pay wages to Defendant’s non-exempt California employees, denied employees meal periods and rest periods, failed to reimburse business expenses, failed to provide accurate itemized wage statements, and failed to timely pay wages at the separation of employment. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On or about July 1, 2021, Plaintiff initiated the instant lawsuit (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 Class and Representative Action Complaint, which will be filed as part of the settlement approval process, asserts direct individual, class, and PAGA representative action claims against Defendant for (1) failure to pay all wages due, including minimum, regular, and overtime wages (Labor Code §§ 510, 558, 1194, 1194.2, and 1197.1; IWC Wage Order 4-2001); (2) failure to provide compliant rest periods or compensation in lieu thereof (Labor Code §§ 226.7 and 558; IWC Wage Order 4-2001); (3) failure to provide compliant meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512, and 558; IWC Wage Order 4-2001); (4) failure to comply with itemized employee wage statement provisions (Labor Code §§ 226 and 226.3; IWC Wage Order 4-2001); (5) failure to timely pay wages on designated pay dates (Labor Code § 204; IWC Wage Order 4-2001); (6) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203); (7) failure to reimburse employee business expenses (Labor Code § 2802; IWC Wage Order 4-2001); (8) violation of Business and Professions Code §§ 17200, *et seq.*; and (9) civil penalties pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 256; 512, 558, 1194, 1194.2, 1197.1, and 2802 (the “First Amended Complaint”). Gaines Decl. at ¶ 7;

Exhibit B-2.

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

1 other than this settlement. Defendant contends that it has complied at all times with the California
2 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
3 and local laws and regulations. It is Defendant's position that, if this case were to be litigated, class
4 certification would be inappropriate because Plaintiff is not an adequate class representative,
5 Plaintiff's claims are not typical of putative class members, and individual issues predominate over
6 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts
7 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
8 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
9 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
10 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
11 or evidence of the appropriateness of these or similar claims for class certification in the Action or
12 with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

16 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

17 Class Counsel represent that they have conducted a thorough investigation into the facts
18 and law during the prosecution of this class action case, including the exchange of extensive
19 informal discovery and the review and verification of statistical data and other facts and information
20 provided by Defendant. Counsel for the Parties also represent that they have investigated the
21 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
22 potential defenses thereto, and the damages and other losses claimed by Plaintiff. Gaines Decl. at
23 ¶ 10.

24 On December 1, 2021, following their exchange of information and documents regarding
25 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
26 arm's-length negotiations with the assistance of mediator Lisa Klerman, Esq., through which they
27 were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 11.

28 \\\

1 Based on their own independent investigation and evaluation, Class Counsel are of the
2 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
3 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
4 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
5 will not be certified by the Court, and the defenses asserted by Defendant. Defendant and its
6 counsel also agree that this settlement is fair and in the best interest of the Settlement Class. Gaines
7 Decl. at ¶ 13.

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

16 **IV. LEGAL ANALYSIS**

17 **A. The Proposed Settlement Terms**

18 **1. The Settlement Class**

19 The Parties have agreed to a Settlement Class composed of all individuals who worked for
20 Nixon-Egli Equipment Co. of Southern California, Inc. as hourly and/or non-exempt employees in
21 California at any time between July 1, 2017 and January 31, 2022 (the "Class Period"). Defendant
22 represents that this Class contains approximately 84 members who worked approximately 11,000
23 workweeks during the Class Period. Stip. at ¶ A(4).

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

25 The Stipulation provides that Defendant shall pay an amount not to exceed \$285,000 to
26 resolve the Action on a class-wide basis (the "Maximum Settlement Settlement"). The Maximum
27 Settlement Amount includes the attorneys' fees of Class Counsel; litigation costs and expenses
28 (which includes, without limitation, all such fees and costs incurred to date, as well as such fees

1 and costs to be incurred in documenting the settlement, providing any notices required as part of
2 the settlement, securing Court approval of the settlement, and obtaining judgment in the Action);
3 the service payment to the Class Representative, as approved by the Court; the payments to the
4 LWDA and PAGA Members pursuant to the PAGA claims in the Action; and all costs of
5 administration, including, without limitation, settlement administration fees and expenses.
6 Defendant shall pay all employer payroll tax obligations due on wage payments made from the Net
7 Settlement Proceeds in addition to, and separate and apart from, the Maximum Settlement Amount.
8 Stip. at ¶ C(1)(a).

9 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
10 application to the Court for up to 40% of the Maximum Settlement Amount (or \$114,000) for
11 attorneys' fees. Stip. at ¶ C(1)(f).

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

15 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
16 application to the Court for a Service Payment to the Class Representative in the gross amount of
17 \$10,000, in consideration for her efforts in instituting and participating in the Action¹. Stip. at ¶
18 C(1)(e).

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

21 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
22 and all claims for penalties under the PAGA is \$10,000 ("PAGA Payment"), 75% of which shall
23 be paid to the LWDA and 25% shall be distributed to PAGA Members on a pro rata basis based on
24 the number of workweeks each PAGA Member worked for Defendant in California in a non-

25
26 ¹ The Parties have also separately negotiated a general release payment in the amount of \$15,000
27 to be paid by Defendant to Plaintiff to resolve her separate individual wrongful termination claims
28 and all other individual claims that arose out of or are connected with Plaintiff's employment for
Defendant or her separation from Defendant's employ, with the express exception of the claims
alleged in the instant Action. This payment will be paid separate from, and is not included in, the
Maximum Settlement Amount.

1 exempt position at any time between April 23, 2020 and January 31, 2022 (the “PAGA Period”).
2 Stip. at ¶¶ A(6), C(1)(d).

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

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

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

21 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Maximum Settlement
22 Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to
23 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
24 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
25 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
26 \$7,500 – shall be payable to the LWDA. The remaining 25 percent, or \$2,500, shall be distributed
27 to PAGA Members, as detailed above. PAGA Members will receive their portion of the PAGA
28 Payment regardless of their decision to opt out of the class settlement (i.e., Class Members who opt

1 out will nevertheless receive their Individual PAGA Payment). Stip. at ¶ C(1)(d).

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

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

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

19 Thus, the preliminary approval by the trial court is simply a conditional finding that the
20 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
21 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
22 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
23 may find that the settlement proposal contains some merit, is within the range of reasonableness
24 required for a settlement offer, or is presumptively valid subject only to any objections that may be
25 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
26 (4th ed. 2002).

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

29 When the parties to an action reach a monetary settlement, they will
30 usually prepare and execute a joint stipulation of settlement, which
31 is submitted to the court for preliminary approval. The stipulation
32 should set forth the essential terms of the agreement, including but

33 ² The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
34 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
35 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
36 Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

not limited to, the amount of settlement, form of payment, manner of determining the effective date of settlement and any recapture clause.

Id. at § 11.24.

Here, the Parties have reached such an agreement and have submitted the Stipulation herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 12.

C. Procedures for Settlement Before Class Certification.

Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class – conditioned upon final approval of the settlement. “[P]re-certification settlements are routinely approved if found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*, 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

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

As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA. Gaines Decl. at ¶ 33.

1. The Settlement Class Should Be Certified for Settlement Purposes

It is well established that trial courts should use a lower standard for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal. App. 4th at 1807, n. 19. The reason for this is that no trial is anticipated in a settlement class, so the case management issues inherent in determining if the class should be certified need not be

³ In determining the fairness and reasonableness of a proposed settlement, California courts may look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

1 confronted. *Amchem Products, Inc. v. Windsor* (1987) 521 U.S. 591, 620. The proposed
2 Settlement Class meets all requirements for certification, as discussed below.

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

4 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
5 and the means for identifying the members of the class determine whether the class is ascertainable.
6 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
7 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
8 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
9 comprises approximately 84 employees. Gaines Decl. ¶ 28.

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

12 The Class Members' claims all stem from a common source: members of the Settlement
13 Class allege that Defendant violated the same Labor Code provisions in connection with their
14 employment. All members of the Class seek the same relief under the same California laws (related
15 to unpaid wages, unpaid meal and rest period premiums, unreimbursed business expenses,
16 inaccurate or incomplete wage statements, failure to timely pay wages due upon separation, and
17 derivative claims). Under these circumstances, the commonality requirement is satisfied for
18 purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 29.

19 c. **The Proposed Class Representative's Claims Are Typical of the**
20 **Class Members' Claims**

21 A class representative's claims are typical when they arise from the same event or course
22 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
23 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
24 Class Representative Llusbysaret Cisneros is a former non-exempt employee who worked for
25 Defendant in the State of California as a non-exempt employee during the Class Period (and PAGA
26 Period). She contends that Defendant failed to pay all wages, failed to provide meal and rest
27 periods, failed to comply with itemized employee wage statement provisions, failed to reimburse
28 expenses, and failed to timely pay wages at the separation of employment, in violation of Labor

1 Code §§ 201-203, 204, 210, 226(a), 226.3, 226.7, 256, 510, 512, 558, 1194, 1194.2, 1197.1, 2698,
2 2699, and 2802, among other Labor Code provisions. She has the same claims as those that the
3 members of the Settlement Class would reasonably be expected to bring based on the course of
4 conduct alleged herein. Gaines Decl. ¶ 30.

5 Plaintiff has also demonstrated that she will aggressively and competently assert the
6 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no
7 apparent conflicts with other Class Members. Gaines Decl. ¶ 31. Furthermore, Plaintiff has
8 retained competent counsel, experienced in litigating class action claims in the employment
9 context. See Gaines Decl. ¶¶ 2-5.

10 **D. 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.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. 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.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
19 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
20 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
21 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[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, 10-12.

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, data, records, and other information. Each side has apprised
8 the other, informally and at a formal mediation, of their respective factual contentions, legal
9 theories, and defenses, resulting in extensive arm’s-length negotiations taking place among the
10 Parties. *See* Gaines Decl. ¶¶ 2-5, 10-12.

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

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

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

24 Plaintiff alleges that Defendant failed to pay Plaintiff and Class Members all wages due, in
25 violation of Labor Code §§ 510, 558, and 1194 and IWC Wage Order 4-2001. Plaintiff and Class
26 Members contend that they were required to work off-the-clock both before and after their shifts,
27 communicating with other employees through texts, calls, and emails. This would violate Labor
28 Code §§ 510, 558, and 1194 and IWC Wage Order 4-2001. Based on an assumption that an average

1 of 10 minutes were unpaid per employee per shift, and extrapolated to all Class Members during a
2 four-year class period, this claim yields up to \$185,911 in unpaid wages. Defendant strongly
3 contended that no employees ever worked off the clock, and that a highly intensive and
4 individualized factual inquiry would be required to prove this claim, which may not be amenable
5 to class treatment. A substantial discount was required to compromise this claim as this juncture
6 of the proceedings based on the risk involved in future litigation. Gaines Decl. ¶ 16.

7 Plaintiff further alleges that Defendant failed to permit or authorize her and Class Members
8 to take timely 30-minute meal periods for shifts greater than five hours in length, in violation of
9 Labor Code §§ 226.7, 512, 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that
10 employers (like Defendant) may not employ an employee for a work period of more than five hours
11 without providing a 30-minute meal period starting no later than the end of the 5th hour. Instead,
12 Plaintiff alleges that she and Class Members were routinely denied, and not authorized to take, a
13 proper, timely, uninterrupted, 30-minute meal period for every shift worked that exceeded five
14 hours, or a second proper, timely, uninterrupted, 30-minute meal period for every shift worked that
15 exceeded 10 hours, but were not paid premium wages of one hour's pay for each missed first or
16 second meal period. Plaintiff alleges that meal periods would be typically late, short, or interrupted
17 and that employees would be required to continue working without compensation. This would
18 violate Labor Code §§ 226.7, 510, 512, 558, and 1194 and IWC Wage Order 4-2001. Plaintiff
19 further alleges that when meal periods were provided, Defendant purportedly maintained a practice
20 requiring Plaintiff and Class Members to carry a two-way radio and be alert to and respond to calls
21 during their meal period, resulting in an on-duty meal period and additional unpaid wages for time
22 worked during their meal period. Finally, Plaintiff alleges that Defendant rarely, if ever, paid meal
23 period premiums, and allegedly failed to maintain meal period records during a substantial portion
24 of the Class, in violation of Labor Code §§ 1174 and 1174.5. Plaintiff's damage model revealed a
25 potential of approximately \$735,000 in unpaid meal premiums. Defendant argued that employees
26 were provided all meal periods to which they were entitled, and that an individualized factual
27 inquiry would be required to prove this claim, which may not be amenable to class treatment. A
28 discount was required to compromise this claim as this juncture of the proceedings based on the

1 risk involved in future litigation. Gaines Decl. ¶ 17.

2 Plaintiff also contends that Defendant failed to provide Plaintiff and Class Members with
3 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
4 Labor Code § 226.7 and Wage Order 4-2001. Plaintiff alleges that when rest periods were provided,
5 Defendant maintained a practice requiring Plaintiff and other employees to carry, and be alert to, a
6 two-way radio, resulting in an on-duty rest period—a practice that Plaintiff contends violates the
7 Supreme Court's mandate in *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th 257, 269
8 (holding that the rest period requirement “obligates employers to permit and authorizes employees
9 to take off-duty rest periods. That is, during rest periods employers must relieve employees of all
10 duties and **relinquish control over how employees spend their time.**” (Emphasis added). An
11 employer may not place any limitations on where employees may go or not go during their rest
12 periods). Plaintiff's damage model revealed a potential of \$185,428 in potential unpaid rest
13 premiums based on a 25% violation rate. Defendant strongly contended that no employees ever
14 were denied or not authorized to take rest periods, and that an individualized factual inquiry would
15 be required to prove this claim, which may not be amenable to class treatment. A substantial
16 discount was required to compromise this claim as this juncture of the proceedings based on the
17 risk involved. Gaines Decl. ¶ 18.

18 Plaintiff also contends that she and other employees were required to incur expenses in the
19 performance of their job duties for which they were not fully reimbursed, in violation of Labor
20 Code § 2802. Plaintiff alleges that during the COVID-19 pandemic, she and other employees
21 worked from home and were required to use their own personal cellular phone or other mobile
22 device to perform work for Defendant, but were not reimbursed by Defendant for these expenses,
23 in violation of Labor Code § 2802. Because of the short time frame during which this claim could
24 apply and the small number of employees which it would affect, its value was similarly small,
25 perhaps less than \$20,000. Defendant contends that this claim has no merit for a host of reasons
26 and contends that it fully reimbursed employees for all expenses they incurred which were
27 reasonable and necessary in nature. Defendant is also insistent that no class would be certified on
28 this claim. A substantial discount was required to compromise this claim as this juncture of the

1 proceedings based on the risk involved in future litigation. Gaines Decl. ¶ 19.

2 Through the proposed First Amended Complaint, Plaintiff also seeks wage statement
3 statutory penalties pursuant to Labor Code § 226(e), waiting time penalties pursuant to Labor Code
4 § 203, and PAGA civil penalties derivative of the underlying violations alleged. Plaintiff estimates
5 that the value of these penalties – which are derivative, discretionary, and subject to defenses of
6 their own – is approximately \$493,000 (without stacking duplicative and oppressive PAGA
7 penalties), a substantial amount which required a compromise to resolve based on risk of litigation.
8 Plaintiff believed it was unlikely that many of these penalties could be recovered because their
9 value could eclipse the value of alleged underpaid wages (if wages were recovered at all), because
10 Plaintiff's claims are novel, and because of Defendant's potential independent defenses to these
11 penalties. Gaines Decl. ¶ 20.

12 The discount negotiated for settlement here is a reasonable compromise, particularly
13 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
14 a 50% or higher hurdle, especially with respect to the meal, rest period, and off-the-clock claims,
15 to which Defendant maintains strong arguments to defeat class certification (in addition to multiple
16 defenses on the merits of the claims), and the fact that Plaintiff and Class Members entered into
17 arbitration agreements with Defendant, which may render the class action claims valueless because
18 they cannot be pursued in a group action and few, if any, employees are likely to pursue their claims
19 on an individual basis. Class certification is a substantial risk in any class action case. Here, while
20 Plaintiff maintains that the requirements of class certification are met, Defendant proffers various
21 arguments why class treatment is not appropriate, including but not limited to that individualized
22 inquires among Class Members predominate over common ones. If Defendant was to defeat
23 Plaintiff's class certification motion, there would be no class wide relief whatsoever, and most
24 Class Members would likely not file individual claims. Gaines Decl. ¶ 21.

25 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the
26 Court would agree with Defendant's position that its meal and rest period policies and practices
27 complied with the requirements of California law or could not be certified. In such a case, the value
28 of the majority of Plaintiff's claims would be zero. Gaines Decl. ¶ 22.

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

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

9 When the costs and risks of non-certification and loss on the merits are considered,
10 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
11 Decl. ¶¶ 15-25.

12 The settlement for each Class Member is fair, reasonable, and adequate, given the inherent
13 risk of litigation, the risk relative to class certification, and the costs of pursuing such litigation.
14 The settlement shall finally resolve all claims of the Class Members as alleged in the Action.
15 Gaines Decl. ¶ 26.

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

18 Despite the asserted fairness of the settlement terms, any Class Member who objects to the
19 terms of the settlement set forth in the Settlement Agreement has the right to submit a request for
20 exclusion (*i.e.*, opt out) from the class portion of the settlement, pursuant to which the Class
21 Member would otherwise retain any claim he or she may have against Defendant, as set forth in
22 the Notice of Pendency of Proposed Class Action Settlement and Final Hearing ("Class Notice").
23 Stip. at ¶ E. The proposed Class Notice and Request for Exclusion Form are attached to the
24 Stipulation as **Exhibit 1** and **Exhibit 2**, respectively.

25 Moreover, Class Members who do not opt out may, upon providing proper notice to the
26 Parties and the Court, object to one or more of the settlement terms set forth in the Settlement
27 Agreement, as well as attend the final fairness and approval hearing for the purpose of objecting to
28 one or more of the settlement terms set forth in the Settlement Agreement. Stip. at ¶ E(11).

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

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

7 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
8 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
9 the settlement, Plaintiff requests that the Court approve their filing of the First Amended Complaint,
10 and consent that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶
11 32.

12 **V. CONCLUSION**

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

- 15 1. Preliminarily finding that the settlement falls within the range of reasonableness and
16 approving the proposed Settlement Agreement;
- 17 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 18 3. Appointing Plaintiff Llusbysaret Cisneros as Class Representative;
- 19 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
20 Class Counsel;
- 21 5. Approving ILYM Group, Inc. as Settlement Administrator;
- 22 6. Preliminarily approving the allocation of \$10,000 from the Maximum Settlement
23 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
24 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
25 (25%) shall be distributed to PAGA Members;
- 26 7. Approving as to content and form the Class Notice to the Settlement Class, attached
27 to the Stipulation as **Exhibit 1**, and directing it to be disseminated by the Settlement Administrator;

8. Permitting Plaintiff to file her 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 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 Class Notice and Request for Exclusion form to Class Members	14 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written Request for Exclusion 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 80 days after entry of the Order granting this Motion)

1 DATED: January 18, 2022

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiff Llusbysaret Cisneros and Proposed
8 Class Counsel
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