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Attorneys for Plaintiff Gabriela Bustamante
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

GABRIELA BUSTAMANTE, on behalf of
herself and all “aggrieved employees”
pursuant to Labor Code § 2698 et seq.,

Plaintiff,

v.

MARRIOTT HOTEL SERVICES, INC., a
Delaware corporation; and DOES 1
through 10 inclusive,

Defendants.

Case No. 22CV400968

*Assigned to the Hon. Theodore C. Zayner, Dept.
D19*

CLASS ACTION

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

Date: May 8, 2024

Time: 1:30 p.m.

Dept.: D19

Action Filed: July 21, 2022

1 **PLEASE TAKE NOTICE THAT** on May 8, 2024 at 1:30 p.m., or as soon thereafter as
2 the matter may be heard, in Department D19 of the above-entitled Court, located at 161 North First
3 Street in San Jose, California 95113, Plaintiff Gabriela Bustamante will and hereby does move
4 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
5 the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiff Gabriela Bustamante as Class Representative, (4) approving
8 the appointment of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of
9 ILYM Group, Inc. as settlement administrator, (6) preliminarily approving the allocation of
10 \$25,000 from the Settlement Amount to settle Plaintiff's representative claims under the Private
11 Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be
12 paid to the Labor and Workforce Development Agency and twenty-five percent (25%) will be
13 distributed to PAGA Members; (7) approving as to content and form the notice to the settlement
14 class, and directing it be disseminated by the Settlement Administrator; and (8) setting a final
15 fairness and approval hearing.

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

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

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

1 DATED: January 2, 2024

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Gabriela Bustamante and
9 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 and representative action and hereby
4 submit their Settlement Agreement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s
5 approval. The Settlement is made and entered into by and between Plaintiff Gabriela Bustamante
6 (“Plaintiff” or “Bustamante”), individually and on behalf of all others similarly situated, and
7 Defendant Marriott Hotel Services, Inc. (*now known as* Marriott Hotel Services, LLC)
8 (“Defendant”).¹

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 \$290,000 to a settlement class of
15 approximately 400 individuals who were employed at the Monterey Marriott hotel, yielding gross
16 payments of approximately **\$725** each. As detailed below, the Settlement is in the best interests of
17 the class in light of all of the facts and circumstances and the risks and delays of further litigation.

18 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
19 preliminary approval of the Settlement and preliminarily find that the Settlement falls within the
20 range of reasonableness; (b) conditionally grant certification of the proposed Settlement Class, for
21 settlement purposes only; (c) approve the appointment of Plaintiff Gabriela Bustamante as Class
22 Representative; (d) approve the appointment of Gaines & Gaines, APLC as Class Counsel; (e)
23 approve the appointment of ILYM Group, Inc. as the Settlement Administrator; (f) authorize the
24 mailing of the proposed class action notice packet; and (g) schedule a final fairness and approval
25 hearing.

26
27 ¹ Unless otherwise noted, capitalized terms not defined in this Motion have the definition ascribed
28 to them in the Parties’ executed Settlement Agreement, which will be included as an exhibit to the
Declaration of Daniel Gaines submitted concurrently herewith.

1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On May 11, 2022, Plaintiff exhausted the pre-filing requirements of the Private Attorneys
3 General Act of 2004, Cal. Labor Code § 2698 *et seq.* (“PAGA”). Declaration of Daniel F. Gaines
4 (“Gaines Decl.”) at ¶ 6.

5 On July 21, 2022, Plaintiff initiated the Action by filing a representative action in this Court
6 against Defendant pursuant to PAGA. On November 17, 2022, Plaintiff filed her First Amended
7 Complaint against Defendant, which added proposed class claims. On December 16, 2022,
8 Defendant removed the Action to the United States District Court for the Northern District of
9 California. Gaines Decl. at ¶ 7.

10 On September 14, 2023, Plaintiff filed her Second Amended Complaint (the operative
11 complaint in the Action), which amended the definition of the putative class to limit the scope to
12 only non-exempt employees of Defendant at the Monterey Marriott, and asserted the following
13 claims against Defendant: (1) Failure to Pay All Wages Due; (2) Failure to Provide Rest Periods
14 or Compensation In Lieu Thereof; (3) Failure to Provide Meal Periods or Compensation In Lieu
15 Thereof; (4) Knowing and Intentional Failure to Comply With Itemized Employee Wage Statement
16 Provisions; (5) Failure to Pay Wages Due at Separation of Employment; (6) Violation Of Business
17 and Professions Code § 17200; and (7) PAGA (“Second Amended Complaint”). That same day,
18 the Action was remanded from the United States District Court to this Court. Gaines Decl. at ¶ 8.

19 The Class Representative contends that Defendant violated the California Labor Code and
20 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
21 certification. Gaines Decl. at ¶ 9. Defendant denies all of Plaintiff’s claims and denies that the
22 case is appropriate or suitable for class or group-wide treatment. Gaines Decl. at ¶ 10.

23 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

24 Class Counsel conducted a thorough investigation into the facts and law during the
25 prosecution of this class action case, including the exchange of extensive informal discovery and
26 the review and verification of statistical data (including an approximately 25% data sample), and
27 other facts and information provided by Defendant. Counsel for the Parties represent that they have
28 investigated the applicable law as applied to the facts discovered regarding the alleged claims of

1 Plaintiff and potential defenses thereto, and the damages and other losses claimed by Plaintiff.
2 Gaines Decl. at ¶ 11.

3 On July 26, 2023, the Parties participated in private mediation conducted by retired judge,
4 Hon. Thierry Colaw (O.C. Sup. Ct., Ret.). The settlement discussions were conducted at arm's
5 length. The Parties reached an impasse at mediation, but the mediator successfully assisted the
6 Parties to agree on a resolution of the Action through post-mediation discussions and negotiations.
7 The Settlement is the result of an informed and detailed analysis of the risks facing all Parties in
8 litigating this case, including but not limited to, careful consideration of the legal and factual
9 obstacles to Plaintiff's prospects of obtaining class certification and on the merits, and Defendant's
10 defenses, as well as Defendant's potential exposure and the additional costs of litigating the Action.
11 Gaines Decl. at ¶ 12.

12 Based on their own independent investigation and evaluation, Class Counsel are of the
13 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
14 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
15 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
16 will not be certified by the Court, and the defenses asserted by Defendant. Gaines Decl. at ¶ 13.

17 The Parties agree that the Settlement Class described herein may be certified for settlement
18 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
19 Class is for purposes of the Settlement only. If for any reason the Settlement is not approved, the
20 certification will have no force or effect and will immediately be revoked. The Parties further agree
21 that certification for purposes of the Settlement is in no way an admission that class certification is
22 proper under the more stringent standard applied for litigation and that evidence of this limited
23 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
24 or any other proceeding. Gaines Decl. at ¶ 14.

25 \\\n

26 \\\n

27 \\\n

28 \\\n

1 **IV. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class and The Class Period**

4 The Parties have agreed to a settlement class composed of all individuals who are or who
5 have been directly employed by Defendant in California at the Monterey Marriott as a non-exempt
6 employee any time from July 21, 2018 through the date on which the Court issues the Preliminary
7 Approval Order, or an earlier date as Defendant may elect (such period, the “Class Period”) and
8 such individuals (the “Settlement Class”).² Stip. at ¶ 1.3.

9 **2. Allocations to be Paid from the Settlement Amount**

10 The Parties agree to settle the Action for a Settlement Amount of \$290,000 (the
11 “Settlement Amount”). The Settlement Amount is inclusive of the Attorneys’ Fees and Litigation
12 Costs and Expenses incurred by Class Counsel, the Settlement Administration Costs, the Service
13 Award to Plaintiff, any and all claims for penalties under PAGA to the State of California Labor
14 Workforce and Development Agency (“LWDA”) and PAGA Members, but excluding the
15 employer portion of any applicable payroll taxes. The Settlement Amount excludes any pro-rata
16 overages that may be required as set forth in Paragraph 10.9. Stip. at ¶ 1.27.

17 From the Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application
18 to the Court for up to 35% of the Settlement Amount for attorneys’ fees (projected to be \$101,500).
19 Stip. at ¶ 10.5. Defendant will also not oppose Plaintiff’s counsel’s application to the Court for up
20 to \$20,000 in reimbursement of litigation costs and expenses. Stip. at ¶ 10.5.

21 From the Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application
22 to the Court for a Service Award to Plaintiff in the gross amount of \$10,000, in consideration for
23 her efforts in instituting and participating in the Action. Stip. at ¶ 10.2.

24 ² In connection with mediation, Defendant estimated that as of May 11, 2023, there were
25 approximately 33,000 weeks worked by Class Members. The mediation took place on July 26,
26 2023. The Parties agree that if, as of the end date of the pay period covering July 26, 2023, the
27 number of weeks worked by Class Members was 37,950 weeks or more (i.e., if the number of
28 weeks worked by Class Members as of the end date of the pay period covering July 26, 2023 is
fifteen percent (15%) or more greater than 33,000 weeks worked), Defendant shall have the option
to (i) pay a pro rata increase on the Settlement Amount to compensate for the overage; or (ii) end
the Class Period and PAGA Period on the date that is one day before the date the total number of
weeks worked by Class Members exceeds 37,950 weeks worked. Stip. at ¶ 10.9.

1 From the Settlement Amount, settlement administration fees will be no more than \$10,000.
2 Stip. at ¶ 10.6.

3 From the Settlement Amount, the portion to be allocated for settlement of any and all claims
4 for penalties under the PAGA is \$25,000 (“PAGA Payment”), 75% (\$18,750) of which shall be
5 paid directly to the LWDA and 25% (\$6,250) of which will be distributed to PAGA Members.
6 Stip. at ¶ 10.4.

7 The Settlement Amount minus the Court-approved Attorneys’ Fees, Litigation Costs and
8 Expenses, Service Award to Plaintiff, Settlement Administration Costs, and PAGA Payment is the
9 “Net Settlement Amount.” Stip. at ¶ 1.16. If the Court awards less than the total amounts requested
10 to be awarded for Attorneys’ Fees, Litigation Costs and Expenses, PAGA Payment, Settlement
11 Administration Costs, and/or Service Award to Plaintiff, the difference in any such amounts will
12 be added to the Net Settlement Amount.

13 Individual Settlement Payments to be made to Participating Class Members will be
14 determined as follows: The Settlement Administrator will calculate the total number of Workweeks
15 worked by all Participating Class Members during the Class Period (“Total Workweeks”). To
16 determine the Individual Settlement Payment for each Participating Class Member, the Settlement
17 Administrator will (1) divide each Participating Class Member’s respective Workweeks by the
18 Total Workweeks, and (2) multiply the resulting figure by the Net Settlement Amount. The
19 Individual Settlement Payment will be reduced by any required legal deductions for each
20 Participating Class Member, provided that such legal deductions will not include the employer’s
21 share of any payroll taxes. Stip. at ¶ 10.2

22 The \$6,250.00 portion of the PAGA Payment that will be distributed to PAGA Members
23 shall be calculated and distributed on a pro rata basis based on PAGA Members’ respective number
24 of PAGA Workweeks during the PAGA Period. The Settlement Administrator will (1) divide each
25 PAGA Member’s PAGA Workweeks by the total number of workweeks worked by all PAGA
26 Members during the PAGA Period, and (2) multiply the resulting figure by the \$6,250.00 PAGA
27 Payment allocated to PAGA Members in order to yield each PAGA Member’s “Individual PAGA
28 Payment.” Stip. at ¶ 10.4.

1 Participating Class Members and PAGA Members will have one hundred eighty (180)
2 calendar days from the date on which the Individual Settlement Payment and/or Individual PAGA
3 Payment check is issued, to cash or deposit such check(s). If an Individual Settlement Payment
4 and/or Individual PAGA Payment check is not cashed or deposited within ninety (90) calendar days
5 after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the
6 check is cashed or deposited within the original 180 day check cashing period, the check(s) will
7 expire and become non-negotiable, and offering to replace the check(s) if it was lost or misplaced.
8 If any checks remain uncashed or not deposited by the expiration of the 180 day check cashing
9 period, the Settlement Administrator will, within two hundred (200) calendar days after the checks
10 are initially mailed, cancel the check(s), and pay the amount of the Individual Settlement
11 Payment(s) and/or Individual PAGA Payment(s) to the California State Controller's Office in
12 accordance with California Unclaimed Property Law in the name of the Participating Class
13 Member(s) and/or PAGA Members, as an alternative distribution for which there is good cause,
14 under Code of Civil Procedure § 384(b). *Id.* at 10.2.

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

16 The Parties have agreed that \$25,000 of the Settlement Amount will be allocated to settle
17 the claims brought pursuant to PAGA. Pursuant to Labor Code § 2699(i), "civil penalties recovered
18 by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce
19 Development Agency...and 25 percent to the aggrieved employees." As such, 75% of the PAGA
20 Payment – or \$18,750 – shall be paid directly to the LWDA, and 25%, i.e., \$6,250, will be
21 distributed to PAGA Members. Stip. at ¶ 10.4.

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

23 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
24 3.769; Fed. R. Civ. P. 23(e).³ This is done in two steps: (1) an early (preliminary) review by the
25 trial court, and (2) a final review after notice has been distributed to the Class Members informing

26 _____
27 ³ 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 them of the terms of the settlement and allowing them to exclude themselves from, participate in
2 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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

24 When the parties to an action reach a monetary settlement, they will
25 usually prepare and execute a joint stipulation of settlement, which
26 is submitted to the court for preliminary approval. The stipulation
27 should set forth the essential terms of the agreement, including but
28 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. ¶ 15.

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

1 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
2 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
3 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
4 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
5 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478⁴ (“many courts have employed this practice in the
6 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

14 4 *Newberg on Class Actions*, at § 11.26.

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

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
24 Settlement Class meets all requirements for certification, including ascertainability, commonality,
25 typicality, superiority, and adequacy, as discussed below.

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

27 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
28 and the means for identifying the members of the class determine whether the class is ascertainable.
29 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members

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

are defined as Defendant's non-exempt employees and as such are identifiable from Defendant's records. Further, the Settlement Class is sufficiently numerous to warrant certification. According to Defendant's records, the Class comprises approximately 400 members. Gaines Decl. ¶ 27.

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

The Settlement Class Members' claims all stem from a common source: alleged violations by Defendant of the same Labor Code provisions in connection with their employment. All members of the Class seek the same relief under the same California laws (including Labor Code §§ 201, 202, 226(a), 226.7, 510, 512, 558, 1194, 2698, and 2699, among other Labor Code provisions and derivative claims). Under these circumstances, the commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 28.

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

A class representative's claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class, and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, Plaintiff and proposed Class Representative Gabriela Bustamante is a former non-exempt employee who worked for Defendant at the Monterey Marriott in the State of California during the Class Period. She contends that Defendant failed to pay all wages, failed to provide meal and rest periods, failed to comply with itemized employee wage statement provisions, and failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201, 202, 226(a), 226.7, 510, 512, 558, 1194, 2698, and 2699, among other Labor Code provisions. She has the same claims as those that the members of the Settlement Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 29.

d. **The Proposed Class Representative Is Adequate**

The proposed class representative must establish that he or she will adequately represent the proposed class. *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.

1 Specifically, the Parties agree for purposes of settlement only that Plaintiff is adequate to represent
2 the Settlement Class because she was employed by Defendant during the Class Period, experienced
3 the same wage and hour practices as the rest of the Class, understood her duties as a Class
4 Representative, has been willing to undergo the risks of litigation, will aggressively and
5 competently assert the interests of the proposed Settlement Class, and has no apparent conflicts
6 with of interest. Gaines Decl. ¶ 30.

7 Adequacy may be established by the fact that counsel are experienced practitioners. *Local*
8 *Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d
9 1152, 1162. Here, Plaintiff has retained competent counsel, experienced in litigating class action
10 claims in the employment context. See Gaines Decl. ¶¶ 2-5.

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

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

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

1 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
2 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
3 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
4 Decl. ¶¶ 2-5, 13-15.

5 Here, the Parties’ counsel have a great deal of experience in class action litigation and
6 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
7 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
8 in a broad exchange of documents, data, records and other information. Each side has apprised the
9 other, informally and at a formal mediation, of their respective factual contentions, legal theories
10 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*
11 Gaines Decl. ¶¶ 2-5, 13-15.

12 1. **The Settlement Falls Within The “Ballpark” of Reasonableness Based**
13 **On The Circumstances of the Claims**

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

23 a. **Failure To Properly Compute All Wages**

24 Plaintiff contends that Defendant failed to properly compute all non-base hourly wages
25 (including banquet service charges) earned by Plaintiff and Class Members into their regular rate
26 of pay for purposes of paying them meal and rest period premiums and overtime wages at the
27 correct rates, in violation of Labor Code §§ 226.7, 510, 512, and 1194. Defendant paid Plaintiff
28 and Class Members non-base hourly wages (including banquet service charges) for working

1 specific shifts; however, Plaintiff alleged that Defendant failed to properly blend these non-base
2 hourly wages and instead paid Plaintiff and Class Members meal and rest period premiums and
3 overtime wages based only on the base hourly rate of pay, or at some other incorrect rate below the
4 proper rate, thus depriving Plaintiff and Class Members of all meal and rest period premiums and
5 overtime wages earned. Gaines Decl. ¶ 17. Defendant denied these allegations and maintained that
6 it properly calculated the regular rate of pay for purposes of overtime wages and premium penalty
7 payments.

8 Discovery revealed that there was a low likelihood that Plaintiff and the Class would prevail
9 on this claim. Plaintiff's expert reviewed and analyzed a 25% sampling of time and wage records
10 of the Class and concluded that there was minimal, if any, underpayment of wages based on a
11 miscalculation of the regular rate of pay. Plaintiff valued this claim at a minimal value because it
12 was unlikely any recovery could be obtained on a group-wide basis and beyond nominal amounts
13 per person. Gaines Decl. ¶ 18.

14 b. **Meal and Rest Period Claims**

15 Plaintiff alleges that Defendant failed to provide Plaintiff and Class Members with legally
16 compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor
17 Code §§ 226.7 and 558 and Wage Order 5-2001. Plaintiff argues that she and Class Members were
18 simply too busy to take their rest periods and would be required to work through them. When they
19 are able to take a rest period, Plaintiff contends that Class Members were improperly prohibited
20 from leaving Defendant's premises, thereby subjecting them to Defendant's control during their
21 rest periods. Plaintiff contends she was unable to leave the premises during rest breaks (if provided)
22 and was required to take her breaks in the break room only when they were provided. Plaintiff
23 states that she was affirmatively told that she was not allowed to leave the premises during her rest
24 periods. Plaintiff contends that this alleged policy and practice violate the holding in *Augustus v.*
25 *ABM Security Services, Inc.* (2016) 5 Cal. 5th 257, which held that the rest period requirement
26 "obligates employers to permit and authorizes employees to take off-duty rest periods. That is,
27 during rest periods employers must relieve employees of all duties and relinquish control over how
28 employees spend their time." *Id.* at 269 (emphasis added). Defendant denies Plaintiff's allegations

1 and contends it authorized and permitted rest periods in accordance with California law. If Plaintiff
2 could prove a 50% violation rate, she believed she could recover rest period damages of up to
3 \$2,247,000 with corresponding PAGA civil penalty liability for this claim of up to \$1,066,000, but
4 this assumes overall success on the merits and does not take into account the discount factors
5 discussed below.⁵ These calculations were completed by Plaintiff's team based on the data
6 provided by Defendant. Gaines Decl. ¶ 19.

7 Plaintiff further contends that Defendant failed to permit or authorize Class Members to
8 take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor
9 Code §§ 226.7, 512, and 558 and IWC Wage Order 5-2001. Labor Code § 512 provides that
10 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
11 without providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff
12 argues that Class Members were routinely unable to take a proper meal period when they worked
13 shifts in excess of 5 hours in duration and a second meal period when they worked shifts in excess
14 of 10 hours in duration. Plaintiff further contends that when Plaintiff and Class Members were able
15 to take a meal period, they were oftentimes late or short. Defendant denies Plaintiff's allegations
16 and contends it provided reasonable opportunities for meal periods in accordance with California
17 law. Based on an analysis of the wage and time data provided by Defendant through informal
18 discovery, Plaintiff has ascertained a meal period compliance rate in excess of 92% for shifts in
19 excess of 5 hours (13,557 unique meal period violations). Plaintiff calculates maximum classwide
20 meal period damages at \$293,736, based on the data provided by Defendant in advance of mediation
21 and analyzed by Berger Consulting Group. Plaintiff also calculated PAGA civil penalty liability
22 for this claim of up to \$666,900, assuming success on the merits and without regard to any discount
23 factors. In order to be awarded PAGA penalties, Plaintiff would have had to succeed on the merits
24 first. There is always a risk that Plaintiff would have been unable to prove the Defendant's policies
25 and practices were unlawful, thus a risk of no recovery on the PAGA claims. Gaines Decl. ¶ 20.

26
27 ⁵ In preparation for the mediation, Plaintiff's counsel retained the services of Berger Consulting
28 Group, a well renowned expert within the legal field, which performs expert data analysis in
employment and labor law matters. Gaines Decl. ¶ ____.

1 c. **Wage Statements**

2 Plaintiff argues that Defendant failed to issue Class Members accurately itemized wage
3 statements. As detailed above, Plaintiff alleges that Class Members were not paid all premium meal
4 and rest period wages due on a derivative basis. As such, Plaintiff argues that the wage statements
5 provided by Defendant failed to accurately state all gross wages earned, in violation of Labor Code
6 §§ 226(a)(1) and 226.3, total hours worked, in violation of Labor Code §§ 226(a)(2) and 226.3, net
7 wages earned, in violation of Labor Code §§ 226(a)(5) and 226.3, and all applicable hourly rates in
8 effect during the pay period and the corresponding number of hours worked at each hourly rate, in
9 violation of Labor Code §§ 226(a)(9) and 226.3. Defendant denied these allegations and
10 maintained it properly issued accurate and itemized wage statements in compliance with Labor
11 Code § 226. Provided Plaintiff was able to establish her underlying wage-hour violations and there
12 were no discounts, Plaintiff calculates the damages for this derivative claim at an additional
13 \$917,950 in addition to \$2,018,600 in PAGA civil penalties. Gaines Decl. ¶ 21.

14 d. **Waiting Time Penalties**

15 Finally, Plaintiff alleges that Defendant failed to pay Class Members all wages due upon
16 separation of employment, also on a derivative basis, in violation of Labor Code §§ 201-202. As
17 Defendant allegedly failed to pay Plaintiff and Class Members all premium wages due during the
18 course of employment, as discussed above, and these wages remained due and owing upon
19 separation of employment. Defendant denies this claim. In the event Plaintiff succeeded on the
20 merits of her underlying wage-hour claims, Plaintiff calculates statutory penalties on this claim at
21 \$719,508, with PAGA civil penalty liability of \$9,900. Gaines Decl. ¶ 22.

22 e. **Settlement Discount Factors**

23 A discount was required to resolve this matter at this juncture of the litigation. It is possible
24 that Plaintiff would not prevail on her meal and rest period premium theories, such that Class
25 Members would recover nothing. It is also possible that Plaintiff would not successfully certify a
26 class, which would also yield a net zero result for Class Members. Even if Plaintiff did prevail on
27 class certification and on the merits of her claims, it is possible that she would not be able to
28 demonstrate the damages she contends were incurred for meal and rest period premiums and all

1 penalties she seeks. The penalties sought – for inaccurate wage statements, waiting time and PAGA
2 – eclipse the value of damages sought and are wholly derivative and subject to independent
3 defenses, including for willfulness, good faith, and injury. PAGA penalties are discretionary and
4 are rarely “stacked.” In short, numerous defenses that Defendant proffers could eliminate some –
5 if not all – of Plaintiff’s claims. This tremendous risk required a discount for settlement purposes,
6 and justifies the compromised settlement amount. Gaines Decl. ¶ 23.

7 When the costs and risks of non-certification and loss on the merits are considered,
8 Plaintiff’s counsel are of the opinion that the Settlement reached is clearly a favorable one. Gaines
9 Decl. ¶ 24.

10 The Settlement for each Class Member is fair, reasonable and adequate, given the inherent
11 risk of litigation, the risk relative to class certification and success on the merits, and the costs of
12 pursuing such litigation. The Settlement shall finally resolve all claims of the Class Members as
13 alleged in the Action. Gaines Decl. ¶ 25.

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

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

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

23 **V. CONCLUSION**

24 Based on the foregoing, as part of its preliminary approval of the Settlement, the Parties
25 request that the Court enter an order:

- 26 1. Preliminarily finding that the Settlement falls within the range of reasonableness
27 and approving the proposed Settlement;
- 28 2. Conditionally certifying, for settlement purposes only, the Settlement Class;

3. Appointing Plaintiff Gabriela Bustamante as the Class Representative;
4. Appointing Gaines & Gaines, APLC as Class Counsel;
5. Approving ILYM Group, Inc. as Settlement Administrator;
6. Preliminarily approving the allocation of \$25,000 from the Settlement Amount to settle the representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the LWDA and twenty-five percent (25%) will be distributed to PAGA Members;
7. Approving as to content and form the notice to the Settlement Class, and directing it to be disseminated by the Settlement Administrator; and
8. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator with the Class List and Data	21 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members	15 calendar days after Settlement Administrator's receipt of Class List and Data
Last day for Class Members to submit a written exclusion request to the Settlement Administrator	45 calendar days after the initial mailing of the 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 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	16 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	16 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2024, at _____.m. (approximately 120 days after entry of this Order)

1 DATED: January 2, 2024

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Gabriela Bustamante and Proposed
9 Class Counsel
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