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9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF STANISLAUS**
12

13 NORMAN ESAKHANI, on behalf of
himself and all "aggrieved employees"
14 pursuant to Labor Code § 2698 *et seq.*,

15 Plaintiff,

16 v.

17 CENTRAL VALLEY GAMING, LLC, a
California limited liability company, and
18 DOES 1 through 10, inclusive,

19 Defendants.
20
21

CASE NO: 2020667

Assigned to the Hon. Timothy W. Salter, Dept. 22

CLASS ACTION

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

Date: November 2, 2017

Time: 8:30 a.m.

Dept.: 22

Action Filed: June 28, 2016

22 **PLEASE TAKE NOTICE THAT** on November 2, 2017 at 8:30 a.m., or as soon thereafter
23 as the matter may be heard, in Department 22 of the above-entitled Court, located at 801 Tenth
24 Street, Modesto, California 95354, the Honorable Judge Timothy W. Salter presiding, Plaintiff
25 Norman Esakhani will and hereby does move unopposed for an Order (1) preliminarily approving
26 the proposed class action settlement in the above-captioned case, (2) provisionally certifying a
27 settlement class, (3) provisionally approving the appointment of Plaintiff Norman Esakhani as
28

1 Class Representative, (4) provisionally approving the appointment of Kenneth S. Gaines, Esq.,
2 Daniel F. Gaines, Esq., and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel,
3 (5) provisionally approving the appointment of ILYM Group, Inc. as settlement administrator,
4 (6) approving and directing distribution of notice to the settlement class, and (7) setting a final
5 fairness and approval hearing.

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

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

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

17 DATED: September 5, 2017

Respectfully submitted,

18 GAINES & GAINES,
19 A Professional Law Corporation

20
21 By: 

22 DANIEL F. GAINES

ALEX P. KATOFSKY

23 Attorneys for Plaintiff Norman Esakhani and
24 Proposed Class Counsel

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Parties have reached a resolution of this proposed class action and hereby submit their Settlement Agreement and Release of Claims for the Court's approval. The Settlement is made and entered into by and between Plaintiff Norman Esakhani ("Plaintiff" or "Class Representative"), individually and on behalf of all others similarly situated, and Defendant Central Valley Gaming, LLC ("CVG" or "Defendant").

The Settlement resolves claims asserted by Plaintiff and other of Defendant's non-exempt California employees regarding the alleged failure to provide proper meal and rest periods, failure to issue properly itemized wage statements, the unlawful withholding of gratuities, and failure to timely pay wages due at separation of employment.

The settlement occurred as a result of extensive arm's-length negotiations by experienced counsel after sufficient discovery and investigation into the facts had taken place. Most importantly, the settlement will result in significant financial benefit to the participating claimants, on terms that are by any measure fair, reasonable and adequate. *See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02.

For the foregoing reasons, the Parties respectfully request that the Court: (a) grant preliminary approval of the settlement agreement, (b) conditionally grant certification of the proposed Settlement Class, (c) provisionally approve the appointment of Plaintiff Norman Esakhani as Class Representative, (d) provisionally approve the appointment of Kenneth S. Gaines, Esq., Daniel F. Gaines, Esq., and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (e) approve appointment of the settlement administrator, (f) authorize the mailing of the proposed class action notice packet, and (g) schedule a final fairness and approval hearing.

II. PROCEDURAL HISTORY AND SETTLEMENT DISCUSSIONS

Plaintiff complied with the administrative exhaustion requirements of the Labor Code Private Attorneys General Act (Labor Code section 2698 *et seq.*, "PAGA") on or about May 11, 2016 in a letter to the Labor and Workforce Development Agency ("LWDA") and Defendant

1 stating facts and theories against Defendant for, among other things, (1) failure to provide meal and
2 rest periods or compensation in lieu thereof (Labor Code §§ 226.7, 512); (2) failure to issue accurate
3 wage statements (Labor Code § 226(a)); and (4) failure to timely pay wages due at separation of
4 employment (Labor Code §§ 201-203). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

5 On June 28, 2016, Plaintiff filed a Complaint against Defendant which asserted claims for
6 (1) failure to provide meal and rest periods or compensation in lieu thereof (Labor Code §§ 226.7,
7 512); (2) failure to issue accurate wage statements (Labor Code § 226(a), (e), (h)); (3) failure to
8 timely pay wages due at separation of employment (Labor Code §§ 201-203); (4) unfair
9 competition (Business & Professions Code § 17200 *et seq.*); and (5) PAGA penalties premised on
10 violations of Labor Code §§ 201-203, 226(a), 226.7, 512 and 1198. Gaines Decl. at ¶ 7.

11 On August 23, 2017, by stipulation of the Parties, Plaintiff filed a First Amended Complaint
12 which added a claim for the unlawful withholding of gratuities, in contravention of Labor Code §
13 351, under Business & Professions Code 17200 *et seq.*, PAGA and other theories. Gaines Decl. at
14 ¶ 8.

15 After the Action commenced, the Parties exchanged a significant amount of formal and
16 informal written discovery and entered into settlement discussions. The parties engaged in
17 conferences regarding Plaintiff’s claims, the value of those claims (if any), and Defendant’s
18 defenses to those claims. Plaintiff took the deposition of Defendant’s designated representatives
19 and Defendant took Plaintiff’s deposition. Gaines Decl. at ¶ 9.

20 The Class Representative contends that Defendant violated the California Labor Code and
21 that this case is appropriate for class certification. Gaines Decl. at ¶ 10.

22 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
23 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
24 other than this settlement. Defendant contends that it has complied at all times with the California
25 Labor Code. It is Defendant’s position that, if this case were to be litigated, class certification
26 would be inappropriate because Plaintiff is not an adequate class representative, the Plaintiff’s
27 claims are not typical of putative class members, and individual issues predominate over class
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1 issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts
2 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
3 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
4 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
5 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
6 or evidence of the appropriateness of these or similar claims for class certification in the Action or
7 with respect to any other proceeding. Gaines Decl. at ¶ 11.

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

14 On May 17, 2017, the Parties participated in a mediation with respected mediator and jurist
15 Hon. Hurl Johnson (Stanislaus County Sup. Ct., Ret.). The basic terms of this settlement agreement
16 were reached at the end of this settlement conference. The parties thereafter jointly prepared the
17 Settlement Agreement and Release of Claims ("Stipulation" or "Settlement Agreement"). A true
18 correct copy of the Settlement Agreement is attached to the Gaines Decl. as Exhibit B; Gaines Decl.
19 at ¶ 13.

20 Based on their own independent investigation and evaluation, Class Counsel are of the
21 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
22 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
23 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
24 will not be certified by the Court, and the defenses asserted by Defendant. Defendant and its
25 counsel also agree that this settlement is fair and in the best interest of the Settlement Class. Gaines
26 Decl. at ¶ 14.

27 \\
28

1 **III. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class**

4 The Parties have agreed to a Settlement Class composed of “[a]ll persons employed by
5 Defendant in California in a non-exempt position at any time between June 28, 2012 and the date
6 the Court grants Preliminary Approval to this Settlement”. Settlement at ¶ A(4).

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

8 The Stipulation provides that Defendant shall pay up to \$225,000 to resolve the claims
9 alleged in the Action on a class-wide basis (the “Maximum Settlement Amount”). Defendant shall
10 pay no less than sixty percent (60%) of the Net Settlement Proceeds to Participating Class
11 Members, even if less is actually claimed. Any such unclaimed portion shall be distributed among
12 Participating Class Members on a pro rata basis, proportionately with the value of their Individual
13 Payment Amounts. Settlement at ¶ C(1)(c).

14 The Maximum Settlement Amount includes the attorneys’ fees of Class Counsel, litigation
15 costs and expenses of Class Counsel (which includes, without limitation, all such fees and costs
16 incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
17 securing Court approval of the settlement, and obtaining judgment in the Action), the service
18 payment to the Class Representative, as approved by the Court, the payment to the LWDA pursuant
19 to the PAGA claims in the Action, all costs of administration, including, without limitation,
20 settlement administration fees and expenses, and any employer payroll taxes due on wage payments
21 made under the Settlement. Settlement at ¶ C(1)(a).

22 The Stipulation of Settlement further provides that Plaintiff’s counsel may request an award
23 of attorneys’ fees not to exceed \$78,750 and litigation costs not to exceed \$12,500. Settlement at
24 ¶¶ C(1)(f), C(1)(g). It also provides that Plaintiff will seek, and Defendant will not oppose, a service
25 award to named Plaintiff Esakhani not to exceed \$10,000.¹ Settlement at ¶ C(1)(e).

26 \\\n

27 _____
28 ¹ Plaintiff Esakhani is separately represented by independent counsel in a lawsuit against Defendant related to his allegedly unlawful termination, Stanislaus County Sup. Ct. case no. 2021385.

1 The Parties have agreed that ILYM Group, Inc., an experienced and competent claims
2 administration company, will administer the settlement. Up to \$10,000 has been allocated to
3 compensate ILYM for its work related to the administration. Settlement at ¶ C(1)(h).

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

9
10 **3. Calculation of Settlement Amounts**

11 The Individual Payment Amounts will be calculated as follows. Based on its records,
12 Defendant will determine the total weeks worked by each Class Member while employed by
13 Defendant in California in a non-exempt position during the Class Period (for each, their
14 "Individual Workweeks"). Settlement at ¶ C(1)(c)(i).

15 To compute the Individual Payment Amount to be paid to each Class Member, the Net
16 Settlement Proceeds will be multiplied by a fraction, the numerator of which is the Individual
17 Workweeks for each respective Class Member and the denominator of which is the aggregated
18 Individual Workweeks of all Class Members. Settlement at ¶ C(1)(c)(ii).

19 Each Class Member who is employed by Defendant as of the date the Court enters an order
20 granting preliminary approval of the Settlement ("Current Employees") shall be issued an
21 Individual Payment Amount, no Claim Form required. Each Class Member who is not employed
22 by Defendant as of the date the Court enters an order granting preliminary approval of the
23 Settlement ("Former Employees") shall be required to submit a valid and timely Claim Form to be
24 paid an Individual Payment Amount. Current Employees who do not opt out of the Settlement, and
25 Former Employees who submit a valid and timely Claim Form and do not opt out of the Settlement
26 shall be deemed "Participating Class Members." Defendant shall pay no less than sixty percent
27 (60%) of the Net Settlement Proceeds to Participating Class Members, even if less is actually
28 claimed. Any such unclaimed portion shall be distributed among Participating Class Members on

1 a pro rata basis, proportionately with the value of their Individual Payment Amounts. If more than
2 sixty percent (60%) of the Net Settlement Proceeds is claimed, Defendant shall not be required to
3 pay any unclaimed portion thereof in excess of the sixty percent (60%) floor. Settlement at ¶
4 C(1)(c)(iii).

5 For tax purposes, twenty-five percent (25%) of each Individual Payment Amount shall be
6 taxable as wages, for which an IRS Form W-2 shall be issued and withholdings shall be made;
7 fifteen percent (15%) shall be taxable as interest, for which an IRS Form 1099 shall be issued and
8 no withholdings will be made; and sixty percent (60%) shall be taxable as penalties, for which an
9 IRS Form 1099 shall be issued and no withholdings shall be made. All settlement payments to
10 Participating Class Members will be subject to any applicable wage garnishments, liens, or other
11 legally mandated treatment as required by law. Settlement at ¶ C(1)(c)(iv).

12 All employer side payroll taxes due on wage payments to be made under this Settlement
13 will be paid from any reversionary portion of the Net Settlement Proceeds. However, if the entire
14 Net Settlement Proceeds is claimed, or the reversionary portion is insufficient to pay all employer
15 side taxes, the employer side taxes shall be paid from the Individual Payment Amounts. Settlement
16 at ¶ C(1)(c)(v).

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

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

23 Approval of class action settlements involves a two-step process.
24 First, counsel submit the proposed terms of settlement and the court
25 makes a preliminary fairness evaluation. If the preliminary
26 evaluation of the proposed settlement does not disclose grounds to
doubt its fairness or other obvious deficiencies, such as unduly

27 ² 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 preferential treatment of class representatives or of segments of the
2 class, or excessive compensation for attorneys, and appears to fall
3 within the range of possible approval, the court should direct that
4 notice ... be given to the class members of a formal fairness hearing,
at which arguments and evidence may be presented in support of and
in opposition to the settlement.

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

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

14 When the parties to an action reach a monetary settlement, they will
15 usually prepare and execute a joint stipulation of settlement, which
16 is submitted to the court for preliminary approval. The stipulation
17 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.

18 *Id.* at § 11.24.

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

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

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

1 Corp. (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ ("many courts have employed this practice in the
2 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.")

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

11 4 *Newberg on Class Actions*, at §11.26.

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

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

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

21 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
22 and the means for identifying the members of the class determine whether the class is ascertainable.
23 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
24 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
25 is sufficiently numerous to warrant certification. According to Defendant's records, the Settlement
26 Class is comprised of approximately 200 employees. Gaines Decl. at ¶ 28.

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

The Class Members' claims all stem from a common source: members of the Settlement
Class allege that Defendant violated the same Labor Code provisions in connection with their
employment in related job positions. All members of the Settlement Class seek the same relief

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 under the same California laws. Under these circumstances, the commonality requirement is
2 satisfied for purposes of certifying the Settlement Class and its subclasses for settlement purposes.
3 Gaines Decl. at ¶ 29.

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

6 A class representative's claims are typical when they arise from the same event or course
7 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
8 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
9 Class Representative Norman Esakhani is a former non-exempt employee employed by Defendant
10 in California. He contends that Defendant failed to provide meal periods, failed to provide rest
11 periods, failed to issue properly itemized wage statements to their California non-exempt
12 employees, unlawfully withheld gratuities, and failed to timely pay all wages due upon separation
13 of employment. For these violations, Plaintiff seeks damages and civil and statutory penalties. He
14 has the same claims as those that the members of the Settlement Class would reasonably be
15 expected to bring based on the course of conduct alleged herein. Gaines Decl. at ¶ 30.

16 Plaintiff Esakhani has also demonstrated that he will aggressively and competently assert
17 the interests of the proposed Settlement Class; he has taken an active role in this litigation and has
18 no apparent conflicts with other Class Members. Gaines Decl. at ¶ 31. Furthermore, Plaintiff has
19 retained competent counsel, experienced in litigating class action claims in the employment
20 context. See Gaines Decl. ¶¶ 2-5.

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

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

6 While the recommendations of counsel proposing the settlement are not conclusive, the
7 Court can properly take them into account, particularly where, as here, such counsel have been
8 involved in discovery and negotiations for some period of time, appear to be competent, have
9 experience with this type of litigation, and have exchanged substantial evidence with the opposing
10 party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships Litig.*
11 (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length negotiation
12 process is preserved, however, a strong initial presumption of fairness attaches to the proposed
13 settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of counsel, who
14 are most closely acquainted with the facts of the underlying litigation”); *see* Gaines Decl. at ¶¶ 2-
15 5, 14-25.

16 Here, Plaintiff’s counsel have a great deal of experience in class action litigation and
17 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
18 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
19 in a broad exchange of documents, statistics, records and other information. Each side has apprised
20 the other of their respective factual contentions, legal theories and defenses, resulting in extensive
21 arms-length negotiations taking place among the Parties. *See* Gaines Decl. at ¶¶ 2-5, 14-25.

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

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

5 Prior to settlement, Plaintiff’s counsel created a comprehensive damage analysis using an
6 expert’s analysis of time and wage records and sampling information obtained through informal
7 discovery. This damage analysis reveals that the negotiated settlement falls within a realistic range
8 of recovery on class members’ claims. Gaines Decl. at ¶ 16.

9 Plaintiff seeks the recovery of missed meal period premium wages. In the Action,
10 Defendant allegedly failed to pay Plaintiff and Class Members premium wages for missed and
11 denied 30-minute meal periods for every five hours of work. An employer must pay an employee
12 one hour of pay at the employee’s regular rate of compensation for each workday that a meal period
13 is not properly provided. Defendant allegedly failed to do so and therefore has violated Labor Code
14 §§ 226.7 and 512. Gaines Decl. at ¶ 17. Defendant, however, maintains numerous defenses to this
15 claim, including but not limited to compliant meal period practices and policies. Based on
16 Plaintiff’s expert’s analysis of time and wage records, the maximum value of this claim is \$84,820,
17 prior to discounting it for risk of loss. Gaines Decl. at ¶ 18.

18 Plaintiff also seeks the recovery of missed rest period premium wages. In the Action,
19 Defendant allegedly failed to pay Plaintiff and Class Members premium wages for missed and
20 denied 10-minute rest periods for every four hours of work. An employer must pay an employee
21 one hour of pay at the employee’s regular rate of compensation for each workday that a rest period
22 is not properly provided. Defendant allegedly failed to do so and therefore has violated Labor Code
23 § 226.7. Gaines Decl. at ¶ 19. Defendant, however, maintains numerous defenses to this claim,
24 including but not limited to compliant rest period practices and policies. Gaines Decl. at ¶ 20.
25 Plaintiff estimates that this claim, discounted for risk of loss, is valued at no more than \$100,000,
26 and perhaps far less, on the basis that Defendant maintained legally compliant rest period policies,
27 it staggered employees’ shifts to ensure rest breaks could be taken, and the likelihood of class
28

1 certification on this claim was not high. Gaines Decl. at ¶ 21.

2 Plaintiff also sought penalties for non-compliant wage statements, waiting time, and
3 pursuant to PAGA, amounting to slightly over \$850,000. Plaintiff, however, faced the risk that
4 because these are derivative claims (e.g., Plaintiff must prevail on his underlying unpaid wage
5 claims to prevail on these penalty claims), he would not recover on these claims at all. Moreover,
6 these claims are subject to independent defenses of their own. For example, the Court could use
7 its discretion to reduce or eliminate the PAGA penalty award entirely, or could find that the
8 requisite “injury” was not shown in order to recover on the wage statement claim (pursuant to Labor
9 Code section 226(e)). It could also decline to award any waiting time penalties based on a good
10 faith defense proffered by Defendant and based on new applicable law which holds that waiting
11 time penalties cannot be recovered based on a failure to provide meal and rest break premium pay.
12 *See Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261, review denied
13 (July 13, 2016). Gaines Decl. at ¶ 22.

14 Defendant strongly contends that its policies do not violate any laws. Defendant contends
15 its wage payment policies are fully compliant with California law. Gaines Decl. at ¶ 23.

16 When the costs and risks of non-certification and loss on the merits are considered,
17 Plaintiff’s counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
18 Decl. at ¶¶ 16-24.

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

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

25 Despite the asserted fairness of the settlement terms, any potential Class Member who
26 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
27 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the class member would
28

1 retain any claim he or she may have against Defendant.

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

5 **IV. CONCLUSION**

6 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
7 request that the Court:

- 8 1. Review the proposed Stipulation of Settlement setting forth the settlement terms.
- 9 2. Consider whether the proposed settlement preliminarily appears to be fair,
10 reasonable and adequate, and whether the proposed Settlement Class preliminarily appears to meet
11 the applicable certification criteria.
- 12 3. Appoint Plaintiff Norman Esakhani as Class Representative.
- 13 4. Appoint Kenneth S. Gaines, Esq., Daniel F. Gaines, Esq., and Alex P. Katofsky of
14 Gaines & Gaines, APLC as Class Counsel.
- 15 5. Approve ILYM Group, Inc. as Settlement Administrator with regard to handling the
16 notice procedure as set forth more particularly in the Stipulation of Settlement.
- 17 6. Enter an Order provisionally approving the proposed Settlement Class on a non-
18 mandatory basis, approve the forms to be distributed to the Settlement Class, direct notice to be
19 given to the Settlement Class, and set the following schedule of settlement proceedings:
- 20

21

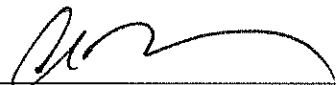
<u>EVENT</u>	<u>TIMING</u>
22 Last day for Defendant to provide to the Settlement 23 Administrator a list of all Class Members, including 24 their last known addresses, telephone numbers, 25 social security numbers, and their dates of employment during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
26 Last day for Settlement Administrator to mail Notice 27 and Claim Form (collectively, the "Notice Packet") to 28 Class Members	20 calendar days after entry of Court's Order granting preliminary approval of Settlement

<u>EVENT</u>	<u>TIMING</u>
Last day for Claim Forms to be postmarked to Settlement Administrator	60 calendar days after mailing of class Notice Packet
Last day for exclusion requests from the settlement by Settlement Class Members to be postmarked to Settlement Administrator	60 calendar days after mailing of class Notice Packet
Last day for written objections to the settlement by Settlement Class Members to be postmarked to Settlement Administrator	60 calendar days after mailing of Notice Packet
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 prior to the Final settlement approval hearing
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days prior to the Final settlement approval hearing
Final settlement approval hearing	_____, 2018, at a.m. [Proposed Date: approximately 95 days after entry of the Order granting this Motion].

DATED: September 5, 2017

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES
ALEX P. KATOFISKY
Attorneys for Plaintiff Norman Esakhani and
Proposed Class Counsel