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7 Attorneys for Plaintiff Renee Lopez
and Proposed Class Counsel
8

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

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

14 Plaintiff,

15 v.

16 COVENANT LIVING WEST, a California
domestic nonprofit corporation, and DOES
17 1 through 10, inclusive,

18 Defendants.
19
20

CASE NO: CV-21-001160

Assigned to the Hon. Stacy Speiller, Department 22

CLASS ACTION

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

DATE: January 18, 2023

TIME: 8:30 a.m.

DEPT.: 22

Action Filed: March 5, 2021

1 **PLEASE TAKE NOTICE THAT** on January 18, 2023 at 8:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department 22 of the above-entitled Court, located at 800 11th Street,
3 Modesto, California 95354, Plaintiff Renee Lopez (“Plaintiff” or “Lopez”) will and hereby does
4 move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls
5 within 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 as Class Representative, (4) approving the appointment of
8 Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) approving
9 the appointment of Phoenix Class Action Administration Solutions as settlement administrator,
10 (6) preliminarily approving the allocation of \$80,000 from the Maximum Settlement Amount to
11 settle Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698
12 et seq.); (7) approving as to content and form the notice to the settlement class, and directing it be
13 disseminated by the Settlement Administrator; and (8) setting a final fairness and approval hearing.

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

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

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

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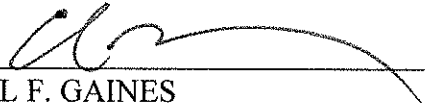
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1 DATED: December 12, 2022

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Renee Lopez and Proposed Class
9 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”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiff Renee Lopez (“Plaintiff” or
6 “Lopez”), individually and on behalf of all others similarly situated, and Defendant Covenant
7 Living West (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-revisionary class settlement in the gross amount of \$1,900,000 to a settlement class of
14 approximately 2,615 Class Members, yielding average gross payments of \$727 per employee. As
15 detailed below, the settlement is in the best interests of the class in light of all of the facts and
16 circumstances and the risks and delays of further litigation.

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

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On December 8, 2020, Plaintiff exhausted the pre-filing requirements of the Labor Code
27 Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
28 Decl.”) at ¶ 6.

1 On or about March 5, 2021, Plaintiff initiated the Action by filing a Representative Action
2 Complaint for Penalties, pursuant to PAGA, on behalf of herself and all other aggrieved employees.
3 The First Amended Complaint, filed on or about August 27, 2021, asserts class and PAGA
4 representative action claims against Defendant for (1) failure to pay all minimum and overtime
5 wages due (Labor Code §§ 510, 1194, and 1194.2); (2) failure to provide rest periods or
6 compensation in lieu thereof (Labor Code §§ 226.7, 510, and 1194; IWC Wage Order 5-2001); (3)
7 failure to comply with itemized employee wage statement provisions (Labor Code § 226(a), (e),
8 (h)); (4) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203);
9 (5) violation of Business and Professions Code §§ 17200, *et seq.*; and (6) civil penalties pursuant
10 to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201-202, 226(a), 226.3, 226.7, 510,
11 558 and 1194 (the "First Amended Complaint"). Gaines Decl. at ¶ 7.

12 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
13 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
14 other than this settlement. Defendant contends that it has complied at all times with the California
15 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
16 and local laws and regulations. It is Defendant's position that, if this case were to be litigated, class
17 certification would be inappropriate because Plaintiff is not an adequate class representative,
18 Plaintiff's claims are not typical of putative class members, and individual issues predominate over
19 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts
20 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
21 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
22 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
23 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
24 or evidence of the appropriateness of these or similar claims for class certification in the Action or
25 with respect to any other proceeding. The parties further agree that Defendant does not waive any
26 defense to the First Amended Complaint and the PAGA claim contained therein. Gaines Decl. at
27 ¶ 8.

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

4 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

12 On April 18, 2022 and again on August 2, 2022, following their exchange of information
13 and documents regarding the Settlement Class and Aggrieved Employees and the claims and
14 defenses asserted by the Parties, the Parties engaged in arm's-length negotiations with the
15 assistance of mediator Steven Pearl, Esq. At the conclusion of the August 2, 2022 mediation
16 session, the Parties were able to reach the resolution of the Action set forth herein. Gaines Decl. at
17 ¶ 11.

18 Based on their own independent investigation and evaluation, Class Counsel are of the
19 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
20 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
21 the Settlement Class in light of all known facts and circumstances, including the risk of significant
22 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
23 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
24 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 12.

25 The Parties agree that the Settlement Class described herein may be certified for settlement
26 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
27 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
28 certification will have no force or effect and will immediately be revoked. The Parties further agree

1 that certification for purposes of the settlement is in no way an admission that class certification is
2 proper under the more stringent standard applied for litigation and that evidence of this limited
3 Stipulation for settlement purposes only will not be admissible for any purpose in this or any other
4 proceeding. Gaines Decl. at ¶ 13.

5 **IV. LEGAL ANALYSIS**

6 **A. The Proposed Settlement Terms**

7 **1. The Settlement Class**

8 The Parties have agreed to a settlement class composed of all persons who are or were
9 employed in California by Defendant as non-exempt employees at any point from March 5,
10 2017 through September 30, 2022. Defendant represents that this Class contains approximately
11 2,615 individuals.

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

13 The Parties agree to settle this Action for a Maximum Settlement Amount of One Million
14 Nine Hundred Thousand Dollars (\$1,900,000) (the “Maximum Settlement Amount”), subject to
15 any increase based on the escalator provision in paragraph H(16) of the Settlement. The Maximum
16 Settlement Amount is non-reversionary; no portion of the Maximum Settlement Amount will return
17 to Defendant. The Maximum Settlement Amount plus any applicable employer-side payroll taxes
18 shall be the maximum amount Defendant is required to pay under the Settlement. Stip. at ¶ C(1)(a).

19 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
20 application to the Court for up to 35% of the Maximum Settlement Amount for attorneys’ fees (or
21 \$665,000 based on the projected Maximum Settlement Amount of \$1,900,000). Stip. at ¶ C(1)(f).

22 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
23 application to the Court for up to \$20,000 in reimbursement of litigation costs and expenses. Stip.
24 at ¶ C(1)(g).

25 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
26 application to the Court for an Enhancement Payment to the Class Representative in the gross
27 amount of \$15,000, in consideration for her efforts in instituting and participating in the Action.
28 Stip. at ¶ C(1)(e).

1 From the Maximum Settlement Amount, settlement administration fees paid to Phoenix
2 Class Action Administration Solutions will be no more than \$25,000. Stip. at ¶ C(1)(h).

3 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
4 and all claims for penalties under the PAGA is \$80,000 (the “PAGA Payment”), 75% of which
5 shall be paid to the LWDA and 25% shall be included in the Net Settlement Proceeds for payment
6 to Aggrieved Employees. PAGA Members shall receive their portion of the PAGA Payment and
7 release the PAGA claims alleged regardless of their decision to opt-out of the class settlement. Stip.
8 at ¶ C(1)(d).

9 The Net Settlement Amount is defined as the Maximum Settlement Amount less the
10 amounts approved and awarded by the Court for: attorneys’ fees and documented litigation costs
11 and expenses incurred or advanced by Class Counsel; the Enhancement Payment to the Class
12 Representative; the payment to the LWDA pursuant to PAGA; and the costs of administering the
13 settlement. Stip. at ¶ C(1)(b).

14 The Individual Settlement Payments will be the portion of the Net Settlement Proceeds
15 distributable to each Class Member who participates in the class settlement (i.e., who does not
16 submit a valid request for exclusion) and each Aggrieved Employee, whether or not they participate
17 in the class settlement. The class portion of the Individual Payment Amounts will be calculated by
18 dividing the Net Settlement Proceeds, less the \$20,000 allocation to the Aggrieved Employees, by
19 the total weeks worked by all participating Class Members in California in a non-exempt position
20 during the Class Period, which will yield the applicable class workweek rate. The class workweek
21 rate shall be multiplied by the number of workweeks each individual participating Class Member
22 worked for Defendant in California in a non-exempt position during the Class Period to yield the
23 class portion of their Individual Payment Amount. Each Participating Settlement Class Member
24 who does not opt out will receive an Individual Payment Amount for the class settlement equal to
25 their individual workweeks worked in California in a non-exempt position during the Class Period
26 multiplied by the class workweek rate. Stip. at ¶ C(1)(c).

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

2 Pursuant to PAGA, the Parties have agreed that \$80,000 of the Maximum Settlement
3 Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to
4 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
5 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
6 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
7 \$60,000 – shall be payable to the LWDA. The remaining 25 percent, or \$20,000, shall be included
8 in the Net Settlement Proceeds for payment to Aggrieved Employees, who shall receive their
9 portion of the PAGA Payment and release the PAGA claims alleged regardless of their decision to
10 opt-out of the class settlement. Stip. at ¶¶ C(1)(d); D(3).

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

12 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
13 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
14 trial court, and (2) a final review after notice has been distributed to the Class Members informing
15 them of the terms of the settlement and allowing them to exclude themselves from, participate in
16 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

17 Approval of class action settlements involves a two-step process.
18 First, counsel submit the proposed terms of settlement and the court
19 makes a preliminary fairness evaluation. If the preliminary
20 evaluation of the proposed settlement does not disclose grounds to
21 doubt its fairness or other obvious deficiencies, such as unduly
22 preferential treatment of class representatives or of segments of the
 class, or excessive compensation for attorneys, and appears to fall
 within the range of possible approval, the court should direct that
 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.

23 Thus, the preliminary approval by the trial court is simply a conditional finding that the
24 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
25 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a

26
27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
 Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
2 may find that the settlement proposal contains some merit, is within the range of reasonableness
3 required for a settlement offer, or is presumptively valid subject only to any objections that may be
4 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
5 (4th ed. 2002).

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

8 When the parties to an action reach a monetary settlement, they will
9 usually prepare and execute a joint stipulation of settlement, which
10 is submitted to the court for preliminary approval. The stipulation
11 should set forth the essential terms of the agreement, including but
12 not limited to, the amount of settlement, form of payment, manner of
13 determining the effective date of settlement and any recapture clause.

14 *Id.* at § 11.24.

15 Here, the Parties have reached such an agreement and have submitted the Stipulation
16 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 14.

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

18 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
19 approval stage, request that the court provisionally approve certification of the class – conditioned
20 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
21 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
22 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
23 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
24 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
25 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

26 The strength of the findings made by a judge at a preliminary hearing
27 or conference concerning a tentative settlement proposal . . . may be
28 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.

² In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

1 4 *Newberg on Class Actions*, at § 11.26.

2 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff's submission of the
3 Stipulation to the Court, her counsel is transmitting it, together with this Motion, to the LWDA.
4 Gaines Decl. at ¶ 32.

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

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

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

13 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
14 and the means for identifying the members of the class determine whether the class is ascertainable.
15 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
16 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
17 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
18 comprises approximately 2,615 employees. Gaines Decl. ¶ 28.

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

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

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

3 A class representative's claims are typical when they arise from the same event or course
4 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
5 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
6 Class Representative Renee Lopez is a former non-exempt employee who worked for Defendant
7 in the State of California during the Class Period. She contends that Defendant failed to pay all
8 wages due, failed to provide rest periods, failed to comply with itemized employee wage statement
9 provisions, and failed to timely pay wages at the separation of employment, in violation of Labor
10 Code §§ 201-203, 226, 226.3, 226.7, 510, 558, 1194, 1194.2, 2698, and 2699, among other Labor
11 Code provisions. She has the same claims as those that the members of the Settlement Class would
12 reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 30.

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

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

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

1 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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

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

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

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

1 Plaintiff alleges that Defendant paid Plaintiff and Class Members bonuses and other forms
2 of non-base hourly wages that were not included in their regular rate of pay for purposes of
3 computing the proper overtime rate. Plaintiff claims that Defendant failed to properly blend these
4 non-base hourly wages and instead paid Plaintiff and other Class Members overtime based only on
5 the base hourly rate of pay, thus depriving Plaintiff and other Class Members of all overtime wages
6 earned. As a result, they were allegedly not properly compensated for work performed in excess of
7 8 hours in a workday and worked performed in excess of 40 hours in a workweek at a rate no less
8 than one and one-half times the regular rate of pay, in violation of Labor Code §§ 510, 558 and
9 1194. California Labor Code § 510 requires the payment of premium overtime compensation based
10 on employees' regular rate of pay. Labor Code § 207(e) defines the "regular rate" to include all
11 remuneration for employment paid to or on behalf of the employee. California law mirrors federal
12 law on the issue of computation of the regular rate of pay. The leading case on this issue is *Walling*
13 *v. Youngerman-Reynolds Hardware Co.* (1945) 324 U.S. 419, 424, which explains that the "regular
14 rate" is "all payments which the parties have agreed shall be received regularly during the
15 workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is
16 an actual fact." This includes all forms of non-base hourly wages, including Defendant's payments
17 for OnCall, Incentive, Helpmate, Fringe, Commission, Revisit, and Sign On Bonus at issue here.
18 The non-base hourly wages earned by Plaintiff and Class Members were not discretionary within
19 the meaning of the applicable regulation (29 U.S.C. § 207(e)), and accordingly, must have been
20 included in their regular rate of pay for purposes of determining their overtime pay compensation.
21 Plaintiff calculates the aggregate class damage liability for this claim at \$73,634. Gaines Decl. ¶
22 15.

23 Plaintiff further contends that Defendant failed to provide Plaintiff and Class Members with
24 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
25 Labor Code §§ 226.7 and 558 and Wage Order 5-2001. Plaintiff contends that she and Class
26 Members were simply too busy to take their rest periods and would be required to work through
27 them. Furthermore, she argues that Defendant maintains an illegal policy and practice requiring
28 Plaintiff and Class Members to remain on company premises during rest periods, which resulted in

1 impermissible on-duty rest periods subject to employer control. Plaintiff contends she was unable
2 to leave the premises during rest breaks and was required to take her breaks in the break room *only*.
3 Plaintiff asserts that Defendant's policy and practice would violate the holding in *Augustus v. ABM*
4 *Security Services, Inc.* (2016) 5 Cal. 5th 257, which held that the rest period requirement "obligates
5 employers to permit and authorizes employees to take off-duty rest periods. That is, during rest
6 periods employers must relieve employees of all duties and relinquish control over how employees
7 spend their time." *Id.* at 269 (emphasis added). Gaines Decl. ¶ 16.

8 Defendant contends that this claim is completely without merit; that it never exerted control
9 over Class Members during their rest periods; that they were free to come and go as they wish
10 during their rest breaks, with no adverse consequences; and that this claim would never be certified
11 because assessing which employees took rest breaks would be impossible because rest breaks are
12 not recorded in the time records. The risks inherent in prevailing on this claim commanded a
13 discount for settlement purposes at this juncture of the litigation. Gaines Decl. ¶ 17.

14 Plaintiff calculates Defendant's maximum rest period damages at \$6,400,000, if she was
15 able to prove a 50% violation rate. The risks of prevailing on the merits and the risks to achieving
16 class certification on this claim favor the compromised settlement amount reached here, particularly
17 because each of these risks involves a 50% or higher hurdle to prevail. Gaines Decl. ¶ 18.

18 Plaintiff alleges that Defendant failed to issue Plaintiff and Class Members accurately
19 itemized wage statements. As detailed above, Plaintiff contends that she and Class Members were
20 not paid all minimum and overtime wages due and premium rest period wages. As such, the wage
21 statements provided by Defendant allegedly failed to accurately state all gross wages earned, in
22 violation of Labor Code §§ 226(a)(1) and 226.3, total hours worked, in violation of Labor Code §§
23 226(a)(2) and 226.3, net wages earned, in violation of Labor Code §§ 226(a)(5) and 226.3, and all
24 applicable hourly rates in effect during the pay period and the corresponding number of hours
25 worked at each hourly rate, in violation of Labor Code §§ 226(a)(9) and 226.3. Plaintiff calculates
26 the damages for this claim at \$1,428,000, but this required a compromise to reach the settlement
27 here, particularly because this claim is wholly derivative of the unpaid wage claims and if Plaintiff
28 did not prevail on those claims, she would not prevail on this claim either. Gaines Decl. ¶ 19.

1 Finally, Plaintiff sought penalties for waiting time (Labor Code section 203) and under
2 PAGA, predicated on all the claims alleged in the Action. The value of these duplicative and
3 potentially oppressive penalties may approach close to \$10,000,000. These claims also required a
4 significant compromise at this juncture of the litigation, and the compromise reached is fair given
5 the risk of loss on the merits and as to class certification as to the unpaid wage claims from which
6 they derive. Gaines Decl. ¶ 20.

7 The discount negotiated for settlement here is a reasonable compromise, particularly
8 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
9 a 50% or higher hurdle, especially with respect to the rest period claims, to which Defendant
10 maintains strong arguments to defeat class certification (in addition to multiple defenses on the
11 merits of the claims). Class certification is a substantial risk in any class action case. Here, while
12 Plaintiff maintains that the requirements of class certification are met, Defendant proffers various
13 arguments why class treatment is not appropriate, including but not limited to that individualized
14 inquires among class members predominate over common ones. If Defendant was to defeat
15 Plaintiff's class certification motion, there would be no class wide relief whatsoever, and most
16 Class Members would likely not file individual claims. Gaines Decl. ¶ 21.

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

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

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

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

4 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
5 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
6 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
7 Decl. ¶ 16.

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

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

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

17 **V. CONCLUSION**

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

- 20 1. Preliminarily finding that the settlement falls within the range of reasonableness and
21 approving the proposed settlement;
- 22 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 23 3. Appointing Plaintiff Renee Lopez as Class Representative;
- 24 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
25 Class Counsel;
- 26 5. Approving Phoenix Class Action Administration Solutions as Settlement
27 Administrator;

28 \\\

6. Preliminarily approving the allocation of \$80,000 from the Maximum Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be included in the Net Settlement Proceeds for payment to Aggrieved Employees;

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 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 Notice to Class Members	20 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 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	_____, 2023, at _____m. (approximately 90 days after entry of the Order granting this Motion)

1 DATED: December 12, 2022

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiff Renee Lopez and Proposed Class
8 Counsel