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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

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

Plaintiff,

v.

MCS INDUSTRIES, INC., a Pennsylvania
corporation, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: CIVSB2116240

Assigned to the Hon. Lynn Poncin, Dept. S28

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

DATE: July 28, 2022

TIME: 8:30 a.m.

DEPT.: S28

Action Filed: June 7, 2021

PLEASE TAKE NOTICE THAT on July 28, 2022 at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department S28 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415-0210, Plaintiff Ginger Gonzalez (“Plaintiff” or “Gonzalez”) will and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within the range of reasonableness and approving the proposed class action settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of Phoenix Class Action Administration Solutions as settlement administrator, (6) preliminarily approving the allocation of \$10,000 from the Gross Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.); (7) approving as to content and form the notice to the settlement class, and directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended Complaint, and (9) setting a final fairness and approval hearing.

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

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

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

1 DATED: July 1, 2022

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Alex P. Katofsky*

6 DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiff Ginger Gonzalez and Proposed
8 Class Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY	1
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....	3
IV. LEGAL ANALYSIS.....	4
A. The Proposed Settlement Terms	4
1. The Settlement Class.....	4
2. Allocations to be Paid from the Gross Settlement Amount	4
3. Settlement of Claims Pursuant to Labor Code § 2699 et seq. (PAGA)	6
B. Two-Step Approval Process.....	6
C. Procedures for Settlement Before Class Certification	6
1. The Settlement Class Should Be Certified for Settlement Purposes	8
a. The Settlement Class is Ascertainable	8
b. Questions of Law or Fact Common to Members of the Settlement Class Predominate.....	9
c. The Proposed Class Representative’s Claims are Typical of the Class Members’ Claims	9
D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	10
1. The Settlement Falls Within The “Ballpark” of Reasonableness	11
2. Despite the Asserted Fairness of the Settlement Terms, Class Members May Request Exclusion From, Or Object To, The Settlement.....	15
E. Plaintiff Should Be Permitted to File Her First Amended Complaint	15
V. CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

<i>Amchem Products, Inc. v. Windsor</i> (1987) 521 U.S. 591	8
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785	11
<i>Classen v. Weller</i> (1983) 145 Cal. App. 3d 27.....	9
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794	1, 8
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	6
<i>Hammon v. Barry</i> (D.D.C. 1990) 752 F. Supp. 1087	10
<i>In re Armored Car Antitrust Litig.</i> (N.D. Ga. 1979) 472 F. Supp. 1357	10
<i>In re Baldwin-United Corp.</i> (S.D.N.Y. 1984) 105 F.R.D. 475	8
<i>In re Chicken Antitrust Litig.</i> (N.D. Ga. 1980) 560 F. Supp. 957	10
<i>In re Paine Webber Ltd. P'ships Litig.</i> (S.D.N.Y. 1997) 171 F.R.D. 104	10
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	11
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7th Cir. 1987) 834 F.2d 677.....	10
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> (C.D. Cal. 2004) 221 F.R.D. 523	10
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438.....	10
<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263.....	9

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> (E.D. Pa. 1978).....	10
<i>Steinberg v. Carey</i> (S.D.N.Y. 1979) 470 F. Supp. 471.....	10
<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800	6
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224	7, 8

STATUTES

Cal. Bus. & Prof. Code § 17200	2
Cal. Labor Code §§ 201-203.....	2
Cal. Labor Code § 226	2, 9
Cal. Labor Code § 226.3	2, 9, 13
Cal. Labor Code § 226.7	2, 9, 12
Cal. Labor Code § 510	2, 9, 11
Cal. Labor Code § 512	2, 9, 12
Cal. Labor Code § 558	2, 9, 11, 12
Cal. Labor Code § 1194	2, 9, 11
Cal. Labor Code § 2698	1, 2, 9
Cal. Labor Code § 2699	2, 5, 7, 8

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	1, 6, 8
Fed. R. Civ. P. 23(e).....	6

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	7
Manual for Complex Litigation (Third) § 30.41	7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Joint
4 Stipulation of Class Action and PAGA Settlement (“Settlement”, “Stipulation” or “Stip.”) for the
5 Court’s approval. The Settlement is made and entered into by and between Plaintiff Ginger
6 Gonzalez (“Plaintiff” or “Gonzalez”), individually and on behalf of all others similarly situated,
7 and Defendant MCS Industries, Inc. (“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 \$175,000 to a settlement class of
14 approximately 55 Class Members, yielding gross payments of \$3,182 per employee. As detailed
15 below, the settlement is in the best interests of the class in light of all of the facts and circumstances
16 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 Ginger Gonzalez as
21 Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
22 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
23 Administrator; (f) permit the filing of a First Amended Complaint; (g) authorize the mailing of the
24 proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On March 8, 2021, Plaintiff exhausted the pre-filing requirements of the Labor Code Private
27 Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶
28 6.

1 On or about June 7, 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 “Complaint”). The First Amended Complaint, attached to the Settlement as Exhibit B and
4 which will be filed as part of this settlement approval process, asserts class and PAGA
5 representative action claims against Defendant for (1) Failure To Pay All Overtime Wages (Labor
6 Code §§ 510 and 1194); (2) Failure To Pay All Wages Due, Including Minimum Wages (Labor
7 Code §§ 510 and 1194); (3) Failure To Provide Compliant Meal Periods or Compensation In Lieu
8 Thereof (Labor Code §§ 226.7, 510, 512, and 1194; IWC Wage Order 9-2001); (4) Failure To
9 Provide Compliant Rest Periods Or Compensation In Lieu Thereof (Labor Code § 226.7; IWC
10 Wage Order 9-2001); (5) Failure To Comply With Itemized Employee Wage Statement Provisions
11 (Labor Code § 226(a), (h), (e)); (6) Failure To Indemnify For All Work-Related Expenses (Labor
12 Code § 2802); (7) Violation Of Fair Credit Reporting Act And Labor Code § 1024.5; (8) Failure
13 To Timely Pay Wages Due At Separation Of Employment (Labor Code §§ 201-203); (9) Violation
14 Of Business And Professions Code § 17200 et seq.; and (10) Civil Penalties Pursuant To Labor
15 Code § 2698 Et Seq. For Violations of Labor Code §§ 201, 202, 226, 226.7, 510, 512, 1194, and
16 2802 and Pursuant To Labor Code § 2699(a) For Violations Of Labor Code §§ 226.3, 558, and
17 1024.5 (the “First Amended Complaint”). Gaines Decl. at ¶ 7.

18 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
19 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
20 other than this settlement. Defendant contends that it has complied at all times with the California
21 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
22 and local laws and regulations. It is Defendant’s position that, if this case were to be litigated, class
23 certification would be inappropriate because Plaintiff is not an adequate class representative,
24 Plaintiff’s claims are not typical of putative class members, and individual issues predominate over
25 class issues. The Action, the negotiation and execution of the Settlement Agreement, and all acts
26 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
27 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
28 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,

1 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
2 or evidence of the appropriateness of these or similar claims for class certification in the Action or
3 with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

7 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

15 On April 25, 2022, following their exchange of information and documents regarding the
16 Settlement Class and the claims and defenses asserted by the Parties, the Parties commenced arm's-
17 length negotiations with the assistance of mediator Chris Barnes, an experienced mediator who has
18 mediated numerous wage-hour class actions. Through their assisted negotiations, the Parties
19 reached the resolution of the Action set forth in the Settlement Agreement. Gaines Decl. at ¶ 11.

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

27 The Parties agree that the Settlement Class described in the Settlement Agreement may be
28 certified for settlement purposes only and that this motion for approval seeking, *inter alia*,

1 certification of the Settlement Class is for purposes of the settlement only. If for any reason the
2 settlement is not approved, the certification will have no force or effect and will immediately be
3 revoked. The Parties further agree that certification for purposes of the settlement is in no way an
4 admission that class certification is proper under the more stringent standard applied for litigation
5 and that evidence of this limited stipulation for settlement purposes only will not be admissible for
6 any purpose in this or any other proceeding. Gaines Decl. at ¶ 13.

7 **IV. LEGAL ANALYSIS**

8 **A. The Proposed Settlement Terms**

9 **1. The Settlement Class**

10 The Parties have agreed to a settlement class composed of all current and former non-
11 exempt employees of Defendant employed in the State of California at any time during the Class
12 Period [June 7, 2017 to June 24, 2022]. Defendant represents that this Class contains approximately
13 55 individuals. Stip. at ¶¶ 6, 37.

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

15 The Parties agree to settle this Action for a Gross Settlement Amount of One Hundred
16 Seventy-Five Thousand Dollars (\$175,000.00) (the “Gross Settlement Amount”), subject to any
17 increase based on the escalator provision in paragraph 37 of the Settlement. The Gross Settlement
18 Amount is non-reversionary; no portion of the Gross Settlement Amount will return to Defendant.
19 The Gross Settlement Amount plus any applicable employer-side payroll taxes shall be the
20 maximum amount Defendant is required to pay under the Settlement. Stip. at ¶ 14.

21 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
22 application to the Court for up to 35% of the Gross Settlement Amount for attorneys’ fees (or
23 \$61,250). Stip. at ¶ 40.

24 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
25 application to the Court for up to \$12,000 in reimbursement of litigation costs and expenses. Stip.
26 at ¶ 40.

27 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
28 application to the Court for a Class Representative Enhancement Payment to the Class

1 Representative in the gross amount of \$5,000, in consideration for her efforts in instituting and
2 participating in the Action. Stip. at ¶ 41.

3 From the Gross Settlement Amount, settlement administration fees paid to Phoenix Class
4 Action Administration Solutions will be no more than \$4,000. Stip. at ¶ 42.

5 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
6 claims for penalties under the PAGA is \$10,000 (the “PAGA Payment”), 75% of which shall be
7 paid to the LWDA and 25% will be distributed to PAGA Members on a *pro rata* basis based on the
8 total number of Workweeks worked by each PAGA Member during the PAGA Period. PAGA
9 Members shall receive their portion of the PAGA Payment and release the Released PAGA Claims
10 regardless of their decision to opt-out of the class settlement. Stip. at ¶ 43.

11 The Net Settlement Amount means the funds available for payments to the Class, which
12 shall be amount remaining after the following amounts are deducted from the Gross Settlement
13 Amount: (1) Class Counsel’s fees, (2) Class Counsel’s costs, (3) Settlement Administration Costs,
14 (4) Class Representative Enhancement Payment to Plaintiff; and (5) the PAGA Payment to the
15 LWDA and PAGA Members. Stip. at ¶ 16.

16 Individual Settlement Payments will be paid from the Net Settlement Amount and the 25%
17 portion of the PAGA Payment allocated for PAGA Members and shall be paid pursuant to the
18 formulas set forth herein. The Settlement Administrator will calculate the total Workweeks for all
19 Participating Class Members by adding the number of Workweeks worked by each Participating
20 Class Member during the Class Period. The respective Workweeks for each Participating Class
21 Member will be divided by the total Workweeks for all Participating Class Members, resulting in
22 the Payment Ratio for each Participating Class Member. Each Participating Class Member’s
23 Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Settlement
24 Class Member’s estimated share of the Net Settlement Amount. Stip. at ¶ 45(a). The Settlement
25 Administrator will calculate the total Workweeks for all PAGA Members by adding the number of
26 Workweeks worked by each PAGA Member during the PAGA Period. The respective Workweeks
27 for each PAGA Member will be divided by the total Workweeks for all PAGA Members, resulting
28 in the Payment Ratio for each PAGA Member. Each PAGA Member’s Payment Ratio will then be

multiplied by the employee portion of the PAGA Payment to calculate each PAGA Member's estimated share of the PAGA Payment. PAGA Members shall receive this portion of their Individual Settlement Payment regardless of whether they opt out of the participation regarding the class claims. Stip. at ¶ 45(b). All Individual Settlement Payments from the Net Settlement Amount will be allocated as follows: twenty percent (20%) of each Individual Settlement Payment will be allocated as wages, forty percent (40%) shall be allocated as interest, and forty percent (40%) shall be allocated as penalties. All Individual Settlement Payments from the PAGA Payment will be allocated one hundred percent (100%) as penalties. The portion of the Individual Settlement Payment allocated to wages will be reported by the Settlement Administrator on an IRS Form W-2. The remaining non-wage payments will be reported on an IRS Form-1099 by the Settlement Administrator. Stip. at ¶ 45(c).

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

Pursuant to PAGA, the Parties have agreed that \$10,000 of the Gross Settlement Amount will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$7,500 – shall be payable to the LWDA. The remaining 25 percent, or \$2,500, will be distributed to PAGA Members on a *pro rata* basis based on the total number of Workweeks worked by each PAGA Member during the PAGA Period. PAGA Members shall receive their portion of the PAGA Payment and release the claims as set forth herein under the Released PAGA Claims regardless of their decision to opt-out of the class settlement. Stip. at ¶ 43.

B. Two-Step Approval Process

Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct. 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the

¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and 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 trial court, and (2) a final review after notice has been distributed to the Class Members informing
2 them of the terms of the settlement and allowing them to exclude themselves from, participate in
3 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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

25 When the parties to an action reach a monetary settlement, they will
26 usually prepare and execute a joint stipulation of settlement, which
27 is submitted to the court for preliminary approval. The stipulation
28 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.

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. ¶ 14.

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

2 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
3 approval stage, request that the court provisionally approve certification of the class – conditioned
4 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
5 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
6 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
7 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
8 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
9 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

17 4 *Newberg on Class Actions*, at § 11.26.

18 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
19 Stipulation to the Court, her counsel is transmitting it, together with this Motion, to the LWDA.
20 Gaines Decl. at ¶ 30.

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

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

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

 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,

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 and the means for identifying the members of the class determine whether the class is ascertainable.
2 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
3 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
4 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
5 comprises approximately 55 employees. Gaines Decl. ¶ 29.

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

8 The Class Members' claims all stem from a common source: members of the Settlement
9 Class allege that Defendant violated the same Labor Code provisions in connection with their
10 employment. All members of the Class seek the same relief under the same California laws (related
11 to unpaid wages, unpaid meal and rest period premiums, inaccurate or incomplete wage statements,
12 failure to timely pay wages due upon separation, failure to reimburse expenses, and derivative
13 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
14 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 30.

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

17 A class representative's claims are typical when they arise from the same event or course
18 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
19 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
20 Class Representative Ginger Gonzalez is a former non-exempt employee who worked for
21 Defendant in the State of California during the Class Period. She contends that Defendant failed
22 to pay all wages due, failed to provide meal and rest periods, failed to comply with itemized
23 employee wage statement provisions, failed to reimburse expenses, and failed to timely pay wages
24 at the separation of employment, in violation of Labor Code §§ 201, 202, 203, 226, 226.3, 226.7,
25 510, 512, 558, 1024.5, 1194, 2698, 2699, and 2802, among other Labor Code provisions. She has
26 the same claims as those that the members of the Settlement Class would reasonably be expected
27 to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 31.

28 \\\

1 Plaintiff has also demonstrated that she will aggressively and competently assert the
2 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no
3 apparent conflicts with other class members. Gaines Decl. ¶ 32. Furthermore, Plaintiff has retained
4 competent counsel, experienced in litigating class action claims in the employment context. *See*
5 Gaines Decl. ¶¶ 2-5.

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

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

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

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

8 1. **The Settlement Falls Within The "Ballpark" of Reasonableness**

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

18 Plaintiff alleges that Defendant failed to pay all wages due by (1) failing to blend bonus
19 wages into the regular rate for purposes of computing overtime and double time rates, and (2)
20 rounding. Defendant allegedly failed to properly blend all bonus wages and other non-base wages
21 earned by Plaintiff and Class Members into their regular rate of pay for purposes of paying overtime
22 wages at the correct rates, and rounded down the time worked by Class Members as recorded in
23 Defendant's timekeeping system. As such, Defendants purportedly deprived Plaintiff and other
24 Aggrieved Employees of all minimum, overtime and double time wages earned. This would violate
25 Labor Code §§ 510, 558 and 1194. Plaintiff asserts the maximum value of this unpaid wage claim
26 at approximately \$34,730, based on an expert analysis of a sampling of data supplied by Defendant.
27 *Gaines Decl.* ¶ 15.

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1 Plaintiff further contends that Defendant failed to permit or authorize Plaintiff and Class
2 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation
3 of Labor Code §§ 226.7, 512, 558 and IWC Wage Order 9-2001. Plaintiff and Class Members
4 allege that they were routinely unable to take a proper meal break when they worked shifts in excess
5 of 5 hours in duration and a second meal break when they worked shifts in excess of 10 hours in
6 duration. Based on Plaintiff's expert's analysis of a sampling of Defendant's time and payroll data
7 for the Class Period, Defendant's meal period violation rate totals 18.3% among all shifts worked
8 (3,968 unique meal break violations) and, more significantly, affects over 49% of all 1,420 pay
9 periods worked during the PAGA Period (i.e., 698 pay periods with at least one unique meal break
10 violation). Only a tiny fraction of these (23) have a meal period premium paid. Defendant's
11 maximum exposure on this claim was approximately \$69,444. Gaines Decl. ¶ 16.

12 Plaintiff also argues that Defendant failed to provide Plaintiff and Class Members with
13 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
14 Labor Code § 226.7 and Wage Order 9-2001. Plaintiff reports that she and other Class Members
15 were routinely not authorized and unable to take an off-duty, 10-minute rest period for every four
16 (4) hours of work or major fraction thereof, but were not paid premium wages of one hour's pay
17 for each missed rest period. Plaintiff and Class Members were also allegedly required to carry a
18 two-way radio to which they had to be alert and respond to during their rest periods, if any were
19 provided. Plaintiff's damage model places the value of this claim at \$378,804, although it required
20 a significant discount to resolve at this juncture of the litigation, particularly in light of Defendant's
21 defenses to class certification on this claim (that it would be unmanageable) and its defenses to the
22 merits of the claim (that employees waived their rest periods, if any employee ever missed a rest
23 period in the first place). Gaines Decl. ¶ 17.

24 Plaintiff and Class Members allege that they were required to use their personal cellular
25 phones to make calls for Defendant's benefit, but were not fully reimbursed by Defendant for these
26 cellular phone expenses, in violation of Labor Code § 2802. Defendant adamantly opposed this
27 claim on the basis that use of one's own cell phone was neither reasonable nor necessary during the
28 course of employment, that it reimbursed all expenses as required by law, and argued that this claim

1 could not be certified. The maximum value of this claim is approximately \$28,200, but required a
2 discount for settlement purposes. Gaines Decl. ¶ 18.

3 Plaintiff further alleges that the wage statements provided by Defendant failed to comply
4 with Labor Code § 226(a). Specifically, the wage statements issued to Plaintiff and Class Members
5 failed to set forth all gross wages earned (Labor Code §§ 226(a)(1) and 226.3); total hours worked
6 (Labor Code §§ 226(a)(2) and 226.3); net wages earned (Labor Code §§ 226(a)(5) and 226.3); and
7 all applicable hourly rates in effect during the pay period and the corresponding numbers of hours
8 worked at each rate (Labor Code §§ 226(a)(9) and 226.3). Independent of the above, the wage
9 statements also allegedly fail to set forth all applicable hourly rates in effect and the hours worked
10 at each rate during the pay period, as they set forth various categories of wages earned during the
11 pay period, but omit the corresponding rates or hours worked. Certain bonuses were earned on an
12 hourly basis and there is no rate of pay or associated hours worked listed. This would also be a
13 violation of Labor Code § 226(a)(9). The maximum value of this claim is \$114,700, although it,
14 too, required a discount for settlement purposes based on risk as to both the merits of the claim and
15 as to class certification. Gaines Decl. ¶ 19.

16 Defendant also allegedly required Plaintiff and Class Members to undergo background
17 checks, even though their job titles and classifications did not provide for or allow any form of
18 background check, in violation of the Fair Credit Reporting Act and California Labor Code §
19 1024.5. If Plaintiff could prove groupwide liability, the value of this claim – for which relief is
20 sought under PAGA – would total approximately \$4,000 – at the rate of one PAGA violation per
21 employee during the applicable PAGA Period. Gaines Decl. ¶ 20.

22 Finally, Plaintiff sought penalties for waiting time (Labor Code section 203) and under
23 PAGA, predicated on all the claims alleged in the Action. The value of these duplicative penalties
24 is approximately \$250,000 (without stacking oppressive PAGA penalties). These claims also
25 required a significant compromise at this juncture of the litigation, and the compromise reached is
26 fair given the risk of loss on the merits and as to class certification. Gaines Decl. ¶ 21.

27 The discount negotiated for settlement here is a reasonable compromise, particularly
28 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves

1 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
2 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
3 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
4 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
5 various arguments why class treatment is not appropriate, including but not limited to that
6 individualized inquires among class members predominate over common ones. If Defendant was
7 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
8 most class members would likely not file individual claims. Gaines Decl. ¶ 22.

9 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the
10 Court would agree with Defendant's position that its meal and rest period practices complied with
11 the requirements of California law or could not be certified. In such a case, the value of the majority
12 of Plaintiff's claims would be zero. Gaines Decl. ¶ 23.

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

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

21 When the costs and risks of non-certification and loss on the merits are considered,
22 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
23 Decl. ¶¶ 15-26.

24 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
25 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
26 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
27 Decl. ¶ 27.

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

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

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

10 **E. Plaintiff Should Be Permitted to File Her First Amended Complaint**

11 In connection with the Settlement, Plaintiff shall file a First Amended Complaint, attached
12 to the Stipulation as Exhibit B, which adds class allegations and claims to comport with the release
13 provided for in the Stipulation. The Parties agreed that, as part of her motion for preliminary
14 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
15 of which is a condition of the Stipulation.

16 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
17 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
18 the settlement, Plaintiff requests that the Court approve her filing of the First Amended Complaint,
19 and consents that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶
20 33.

21 **V. CONCLUSION**

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

- 24 1. Preliminarily finding that the settlement falls within the range of reasonableness and
25 approving the proposed settlement;
- 26 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 27 3. Appointing Plaintiff Ginger Gonzalez as Class Representative;
- 28

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

5. Approving Phoenix Class Action Administration Solutions as Settlement Administrator;

6. Preliminarily approving the allocation of \$10,000 from the Gross Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) will be distributed 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;

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

9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including 1) full name; (2) last known home address; (3) last known telephone number (if available); (4) social security number; and (5) total workweeks worked or information sufficient to allow the Settlement Administrator to calculate individual Class Member workweeks (the "Class List")	15 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members	10 calendar days after Settlement Administrator's receipt of Class List
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

<u>EVENT</u>	<u>TIMING</u>
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2022, at _____.m. (approximately 90 days after entry of the Order granting this Motion)

DATED: July 1, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: Alex P. Katofsky

DANIEL F. GAINES

ALEX P. KATOFSKY

Attorneys for Plaintiff Ginger Gonzalez and Proposed
Class Counsel