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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

DINESHA WHITE, on behalf of herself and
all "aggrieved employees" pursuant to Labor
Code § 2698 *et seq.*,

Plaintiffs,

v.

WING PROS, INC., a California
corporation, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 34-2021-00303521

*Assigned to the Hon., Richard K. Sueyoshi, Dept.
38*

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

Date: July 13, 2023

Time: 1:30 p.m.

Dept.: 53

Reservation #2720918

Complaint Filed: July 2, 2021

1 **PLEASE TAKE NOTICE THAT** on July 13, 2023 at 1:30 p.m., or as soon thereafter as
2 the matter may be heard, in Department 53 of the above-entitled Court, located at 720 9th Street,
3 Sacramento, California 95814, Plaintiff Dinesha White will and hereby does move unopposed for
4 an Order (1) preliminarily finding that the settlement between the parties falls within the range of
5 reasonableness and approving the proposed class action settlement in the above-captioned case, (2)
6 conditionally certifying, for settlement purposes only, a settlement class, (3) approving the
7 appointment of Plaintiff Dinesha White as the Class Representative, (4) approving the appointment
8 of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel,
9 (5) approving the appointment of Phoenix Class Action Administration Solutions as settlement
10 administrator, (6) preliminarily approving the allocation of \$20,000 from the Class Settlement
11 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
12 Code §§ 2698 et seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and
13 Workforce Development Agency and twenty-five percent (25%) allocated to the Individual PAGA
14 Payments; (7) approving as to content and form the notice to the settlement class, and directing it
15 be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended
16 Class and Representative Action Complaint; and (9) setting a final fairness and approval hearing.

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

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

24 Plaintiff further seeks leave of Court permitting Plaintiff to file her First Amended
25 Complaint, attached to the Settlement as Exhibit B, no later than five (5) court days after notice of
26 the entry of the Order granting this motion has been given, and order that Defendant not be required
27 to file a responsive pleading thereto.

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1 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
2 the Class, Collective, And Representative Settlement Agreement, the Declaration of Daniel F.
3 Gaines, such evidence or oral argument as may be presented at the hearing, and on the complete
4 record and file herein.

5 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
6 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for
7 the department may be downloaded off the court's website. If the party does not have online access,
8 they may call the dedicated phone number for the department as referenced in the local telephone
9 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and
10 receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the
11 court day before the hearing, no hearing will be held.

12
13 DATED: June 1, 2023

GAINES & GAINES, APLC

14
15 By: 

16 DANIEL F. GAINES

ALEX P. KATOFISKY

17 Attorneys for Plaintiff Dinesha White and Proposed Class
18 Counsel
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Parties have reached a resolution of this class action and hereby submit their Class, Collective, And Representative Settlement Agreement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval. The Settlement is made and entered into by and between Plaintiff Dinesha White (“White,” “Class Representative” or “Plaintiff”), individually and on behalf of all others similarly situated, and Defendant Wing Pros, Inc. (“Defendant”).

The settlement occurred as a result of extensive arm’s-length negotiations by experienced counsel with the assistance of a respected mediator with experience in the area of employment class actions. 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. The proposed settlement provides for a non-revisionary class settlement in the gross amount of \$235,000 to a settlement class of approximately 337 employees who worked approximately 13,000 workweeks, yielding gross payments of **\$697 per employee**. As detailed below, the settlement is in the best interests of the class in light of all of the facts and circumstances and the risks and delays of further litigation.

For the foregoing reasons, the Parties respectfully request that the Court: (a) grant preliminary approval of the settlement agreement and preliminarily find that the settlement falls within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement Class, for settlement purposes only; (c) approve the appointment of Plaintiff Dinesha White as the Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement Administrator; (f) permit the filing of a First Amended Complaint; (g) authorize the mailing of the proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

On April 28, 2021, Plaintiff exhausted the pre-filing requirements of the PAGA. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

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1 On July 2, 2021, Plaintiff initiated the Action by filing a Representative Action Complaint
2 on behalf of herself and on behalf of all similarly situated individuals (the "Complaint"). The First
3 Amended Complaint, attached to the Settlement as Exhibit B and which will be filed as part of the
4 settlement approval process, asserts class and representative action claims pursuant to PAGA
5 against Defendant for (1) Failure to Pay All Wages Due (FLSA 29 U.S.C. §§ 206 and 207); (2)
6 Failure to Pay All Wages Due (Labor Code §§ 510 And 1194; IWC Wage Order 4-2001); (3)
7 Failure to Provide Rest Periods or Compensation In Lieu Thereof (Labor Code § 226.7; IWC Wage
8 Order 4-2001); (4) Failure to Provide Meal Periods or Compensation In Lieu Thereof (Labor Code
9 §§ 226.7 and 512; IWC Wage Order 4-2001); (5) Knowing and Intentional Failure to Comply With
10 Itemized Employee Wage Statement Provisions (Labor Code § 226(a), (e)); (6) Failure to Pay All
11 Gratuities (Labor Code §§ 350 and 351); (7) Failure to Pay Wages Due at Separation of
12 Employment (Labor Code §§ 201-203); (8) Violation of Business and Professions Code § 17200;
13 and (9) Penalties Pursuant to Labor Code § 2699(f) for Violations of Labor Code §§ 201, 202,
14 226(a), 226.7, 350, 351, 510, 512, 1194, and 1198 and Pursuant to Labor Code § 2699(a) for
15 Violations of Labor Code §§ 226.3, 246, and 558 (the "First Amended Complaint"). Gaines Decl.
16 at ¶ 7.

17 Defendant adamantly denies the allegations in the Complaint and First Amended Complaint, denies
18 any failure to comply with the laws identified in the Complaint and First Amended Complaint, and denies
19 any and all liability for the causes of action alleged. Gaines Decl. at ¶ 8.

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

23 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

24 Class Counsel has conducted a thorough investigation into the facts of the Action, including
25 extensive informal discovery and exchange of a volume of documents and information, which
26 included and was not limited to, Defendant's production of a sampling of information/data for the
27 putative class members to allow Plaintiff to perform an analysis and valuation of all claims. Prior
28 to mediation, the Parties exchanged information and documents to investigate the veracity, strength,

1 and scope of the claims, and to allow analysis and evaluation of the claims and Defendant's
2 defenses thereto. The Class Representative has vigorously prosecuted this case, and Defendant has
3 vigorously contested it. The Court has not granted class certification in the Action. Gaines Decl.
4 at ¶ 10.

5 On November 3, 2022, following their exchange of information and documents regarding
6 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
7 arm's-length negotiations with the assistance of mediator Eve Wagner, Esq., through which they
8 were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 11.

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

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

22 **IV. LEGAL ANALYSIS**

23 **A. The Proposed Settlement Terms**

24 The Parties have agreed upon a settlement class: All current and former non-exempt
25 employees of Defendant [Wing Pros, Inc.] who worked in the State of California at any time during
26 the Class Period [beginning on November 4, 2018, and continuing through to and including August
27
28

31, 2022]. Defendant represents that this Class contains no more than approximately 337 members who worked no more than 14,300 workweeks during the Class Period. Settlement at ¶¶ 1.8, 1.11.

The Parties stipulate to the conditional certification of the Settlement Class as defined herein for settlement purposes only. Settlement at ¶ 13.20.

The Settlement Agreement provides that Defendant shall pay the total, non-reversionary sum of \$235,000 in connection with the Stipulation ("Gross Settlement Amount"). Settlement. at ¶ 1.14.

Class Members need not submit a claim form to receive their share of the Settlement. Class Members who timely exclude themselves from the Settlement will not be part of the final Settlement Class and not bound by the Settlement's class release (although Aggrieved Employees will be bound by the PAGA release, even if they opt out of the class settlement). Settlement at ¶ 8.5.3.

The Settlement Agreement further provides that Plaintiff's counsel may request an award of attorneys' fees not to exceed \$82,250 (i.e., 35% of the Gross Settlement Amount) and seek reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed \$17,000. Settlement at ¶ 3.2.2. It also provides that Plaintiff will seek, and Defendant will not oppose, a Class Representative Enhancement Payment to the named Plaintiff, Dinesha White, in the amount of \$10,000. Settlement at ¶ 3.2.1.

The Parties have agreed that Phoenix Class Action Administration Solutions ("Phoenix"), an experienced and competent settlement administration company will administer the settlement. Up to \$10,000 has been allocated to compensate Phoenix for its work related to the administration. Settlement at ¶ 3.2.3.

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

Pursuant to PAGA, the Parties have agreed that \$20,000 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 \$15,000 – of

1 the PAGA Settlement Amount will be paid to the California Labor and Workforce Development
2 Agency as the Labor and Workforce Development Agency Payment, and Twenty-Five Percent
3 (25%), or \$5,000, is allocated to the Individual PAGA Payments.

4 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff's submission of the
5 Settlement Agreement to the Court, Class Counsel is transmitting it, together with this Motion, to
6 the LWDA. Gaines Decl. at ¶ 38.

7 **C. Two-Step Approval Process**

8 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
9 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
10 trial court, and (2) a final review after notice has been distributed to the Class Members informing
11 them of the terms of the settlement and allowing them to exclude themselves from, participate in
12 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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 (4th ed. 2002).

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

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

10 *Id.* at § 11.24.

11 Here, the Parties have reached such an agreement and have submitted the Settlement
12 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
13 See Gaines Decl. ¶ 14, Exhibit B.

14 **D. Procedures for Settlement Before Class Certification.**

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

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

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

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

It is well established that trial courts should use a lower standard for determining the

²In 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.

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

a. **The Settlement Class is Ascertainable**

The proposed settlement class is ascertainable. The class definition, the size of the class and the means for identifying the members of the class determine whether the class is ascertainable. *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members are identifiable from Defendant's records. Further, the settlement class is sufficiently numerous to warrant certification. According to Defendant's records, the Class is comprised of approximately 337 individuals. Gaines Decl. ¶ 34; Settlement at ¶ 1.8.

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

The Class Members' claims all stem from a common source: all Class Members allege that Defendant violated the same Labor Code and Wage Order provisions in connection with their work for Defendant. The same Labor Code and Wage Order violations are alleged on behalf of all persons encompassed in the settlement class, arising out of or which could be pled based on the facts and the allegations set forth in the operative complaints in the Actions, including but not limited to claims for failure to pay for all hours worked, including overtime; failure to provide meal periods; failure to authorize and permit rest periods; failure to provide suitable seating; failure to maintain accurate records of hours worked and meal periods; failure to provide tips; failure to provide paid sick leave, failure to timely pay all wages at termination; and failure to furnish accurate itemized wage statements. Gaines Decl. ¶ 35.

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

A class representative's claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiff and proposed

1 Class Representative Dinesha White is a former non-exempt employee of Defendant whom,
2 Plaintiff alleges, was not paid for all hours worked, including overtime; was not provided all meal periods;
3 was not authorized and permitted all rest periods; was not provided suitable seating; was not provided all
4 tips; was not provided all paid sick leave; was not timely paid all wages at termination; and was not furnished
5 accurate itemized wage statements. Plaintiff alleges the same claims as those that the members of the
6 Settlement Class would reasonably be expected to bring based on the course of conduct alleged
7 herein. Gaines Decl. ¶ 36.

8 Plaintiff has also demonstrated that she will aggressively and competently assert the
9 interests of the proposed Settlement Class; she has taken an active role in the litigation and has no
10 apparent conflicts with other class members. Gaines Decl. ¶ 37. Furthermore, Plaintiff has retained
11 competent counsel, experienced in litigating class action claims in the employment context. See
12 Gaines Decl. ¶¶ 2-5.

13 **E. The Settlement Is Fair and Reasonable and Not the Result of Fraud or**
14 **Collusion**

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

25 While the recommendations of counsel proposing the settlement are not conclusive, the
26 Court can properly take them into account, particularly where, as here, such counsel have been
27 involved in informal discovery and negotiations for some period of time, appear to be competent,
28 have experience with this type of litigation, and have exchanged substantial evidence with the

opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines Decl. ¶¶ 2-5, 10-11.

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

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

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

Prior to settlement, Plaintiff’s counsel created a comprehensive damage analysis using sampling information obtained through informal discovery. This damage analysis reveals that the negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines Decl. ¶ 19.

\\

1 Plaintiff alleges that Defendant failed to permit or authorize Class Members to take timely
2 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
3 226.7, 512, and 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers (like
4 Defendant) may not employ an employee for a work period of more than 5 hours without providing
5 a 30-minute meal period starting no later than the end of the fifth hour. Plaintiff contends that Class
6 Members were routinely unable to take a proper meal period when they worked shifts in excess of
7 5 hours in duration and a second meal period when they worked shifts in excess of 10 hours in
8 duration. Plaintiff also contends that Defendant maintained an illegal meal period policy which
9 omitted any requirement for a second meal period for shifts worked in excess of ten hours in a
10 workday. Plaintiff contends that an analysis of wage and time data provided by Defendant through
11 informal discovery shows a second meal period violation rate of 48% for shifts longer than 10
12 hours, with an aggregate violation rate of 25.5% among all shifts greater than five hours in length.
13 Plaintiff calculates damages on this claim at \$181,138, with PAGA civil penalty liability of
14 \$157,600. Gaines Decl. ¶ 20.

15 Plaintiff further complains that Defendant failed to pay Class Members premium wages for
16 missed, denied and unauthorized rest periods in violation of Labor Code §§ 226.7 and 558 and IWC
17 Wage Order 4-2001. Plaintiff alleges that Class Members were denied, and therefore unable to
18 take, 10-minute on-the-clock rest periods for every four hours of work or major fraction thereof,
19 but were not paid premium wages of one hour's pay for each missed, denied and unauthorized rest
20 period. Plaintiff calculates damages on this claim at \$683,126, with PAGA civil penalty liability
21 of \$250,500. Gaines Decl. ¶ 21.

22 Plaintiff also contends that Defendant failed to pay all gratuities due and owing to Class
23 Members, in violation of Labor Code § 351, because it allegedly required its employees to put any
24 tips received into a tip jar, which management would purportedly distribute to employees at
25 meetings via gift card, retaining a portion for themselves. Plaintiff alleges that the tips were either
26 not evenly distributed amongst employees, or that Defendant stole tips from its employees. Plaintiff
27 calculates PAGA civil penalty liability for this claim at \$255,400. Gaines Decl. ¶ 22.

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1 Plaintiff argues that Class Members were not permitted to sit down during the course of
2 their employment, in violation of Labor Code § 1198 and Wage Order 4-2001, § 14, which provide
3 that “(A) All working employees shall be provided with suitable seats when the nature of the work
4 reasonably permits the use of seats. (B) When employees are not engaged in the active duties of
5 their employment and the nature of the work requires standing, an adequate number of suitable
6 seats shall be placed in reasonable proximity to the work area and employees shall be permitted to
7 use such seats when it does not interfere with the performance of their duties.” Plaintiff calculates
8 \$255,400 in PAGA penalties for Defendant’s alleged failure to provide suitable seating. Gaines
9 Decl. ¶ 23.

10 Plaintiff alleges that Defendant paid Class Members bonuses and other forms of non-base
11 hourly wages that were not included in their regular rate of pay for purposes of computing the
12 proper overtime rate. As a result, they were allegedly not properly compensated for work performed
13 in excess of 8 hours in a workday and worked performed in excess of 40 hours in a workweek at a
14 rate no less than one and one-half times the regular rate of pay, in violation of Labor Code §§ 510,
15 558, and 1194. Defendant purportedly failed to properly blend “Appreciation Pay” bonuses and
16 instead paid Plaintiff and other Class Members overtime based only on the base hourly rate of pay,
17 thus depriving Plaintiff and other Class Members of all overtime wages earned. California Labor
18 Code § 510 requires the payment of premium overtime compensation based on employees’ regular
19 rate of pay. Plaintiff contends that the bonus and other non-base hourly wages earned by Plaintiff
20 and Class Members were not discretionary within the meaning of the applicable regulation (29
21 U.S.C. § 207(e)), and accordingly, must have been included in their regular rate of pay for purposes
22 of determining their overtime pay compensation. Plaintiff calculates classwide damages on this
23 claim at a modest \$300, with PAGA civil penalty liability of \$9,000. Gaines Decl. ¶ 24.

24 Plaintiff also argues that Defendant failed to issue Class Members accurately itemized wage
25 statements. Specifically, Plaintiff and Class Members contend they were not paid all wages due,
26 as detailed above. As a result, Plaintiff contends that the wage statements issued by Defendant to
27 Plaintiff and those Class Members fail to accurately state all gross wages earned, in violation of
28 Labor Code § 226(a)(1), total hours worked, in violation of Labor Code § 226(a)(2), net wages

1 earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates in effect during the
2 pay period and the corresponding number of hours worked at each hourly rate, in violation of Labor
3 Code § 226(a)(9). Separately, Plaintiff contends that the wage statements issued to Plaintiff and
4 all other Class Members failed to set forth either the last four digits of their social security number
5 or their employee identification number, in violation of Labor Code §§ 226(a)(7) and 226.3.
6 Plaintiff calculates statutory penalties on this claim at \$229,300, with PAGA civil penalty liability
7 of \$255,400. Gaines Decl. ¶ 25.

8 Plaintiff complains that Defendant failed to pay Class Members all wages due upon
9 separation of employment, in violation of Labor Code §§ 201-203. As Defendant purportedly failed
10 to pay them all wages due during the course of their employment, as described above, these wages
11 were due and owing upon separation of employment yet went unpaid. Plaintiff calculates statutory
12 waiting time penalties at \$667,272, with PAGA civil penalty liability of \$13,700. Gaines Decl. ¶
13 26.

14 Defendant also allegedly failed to provide Class Members with any paid sick leave, as
15 required by the California Healthy Workplaces/Healthy Families Act of 2014 (the “Act”), codified
16 at Labor Code § 246(d). Pursuant to the Act, at a minimum, employers must provide employees
17 with 24 hours or three days of accrued sick leave for each year of employment. Instead, Defendant
18 purportedly failed to provide any paid sick leave, in violation of the Act, resulting in a failure to
19 pay all wages due, in violation of Labor Code §§ 246(d), 510, 558, and 1194. Plaintiff calculates
20 the PAGA liability for this claim at \$255,400. Gaines Decl. ¶ 27.

21 A discount on the maximum value of Class members’ claims was required (and warranted)
22 to resolve the matter at this stage of the litigation. Class certification is a substantial risk in any
23 class action case. Here, while Plaintiff maintains that the requirements of class certification are
24 met, Defendant proffers various arguments why class treatment is not appropriate here, including
25 but not limited to that individualized inquiries among class members predominate over common
26 ones. If Defendant was to defeat Plaintiffs’ class certification motion, there would be no class wide
27 relief whatsoever, and most class members would likely not file individual claims. Gaines Decl. at
28 ¶ 28.

1 Defendant further opposes Plaintiff's claims on the merits. It argues that it offered and
2 provided all meal and rest periods, and any employee who chose not to take them voluntarily
3 waived them. It contends that any bonuses paid for "Appreciation" were non-discretionary and not
4 subject to overtime premiums. It argues that it always acted in good faith, and never intentionally
5 or willfully violated any provision of the Labor Code or the FLSA, such that no penalties pursuant
6 to Labor Code sections 226 (wage statements) or 203 (late pay at separation) could be recovered.
7 It also steadfastly denies that it took any gratuities, and instead insists that all tips were paid directly
8 to employees. Finally, it insists that because there are no underlying violations of the Labor Code,
9 there are no violations of PAGA for which penalties can be recovered. Gaines Decl. at ¶ 29.

10 Defendant strongly contends that its policies and practices do not violate any laws. It
11 contends that it provided all required wages in a timely manner. Gaines Decl. at ¶ 30.

12 When the costs and risks of non-certification and loss on the merits are considered,
13 Plaintiffs' counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
14 Decl. at ¶¶ 19-31.

15 The settlement for each participating Class Member is fair, reasonable and adequate, given
16 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
17 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the
18 Action. Gaines Decl. at ¶ 32.

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

21 Despite the asserted fairness of the settlement terms, any potential Class Member who
22 objects to the terms of the settlement set forth in the Settlement Agreement has the right to submit
23 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the class member would
24 retain any claim he or she may have against Defendant, though Aggrieved Employees will be bound
25 by the PAGA release, even if they opt out of the class settlement.

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

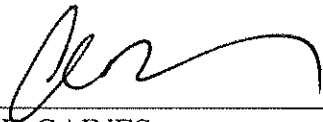
8. Permitting Plaintiff to file her First Amended Complaint, attached to the Settlement as Exhibit B, no later than five (5) court days after notice of the entry of the Order granting this motion has been given, and order that Defendant not be required to file a responsive pleading thereto; and

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 the Class Member's name, last-known mailing address, Social Security number, and number of Class Period Workweeks and PAGA Pay Periods ("Class Data")	15 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail the Notice to Class Members via U.S. Mail	14 calendar days after Settlement Administrator's receipt of Class Data
Last day for Class Members to submit a written exclusion or objection to Settlement Administrator	60 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	_____, 2023
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, the Exclusion Form, and the Dispute Form	_____, 2023
Final settlement approval hearing	_____, 2023, at _____. The Parties suggest the final approval hearing be held approximately 120 days after the preliminary approval order is signed.

1
2 DATED: June 1, 2023

GAINES & GAINES, APLC

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4 By: 

5 DANIEL F. GAINES

ALEX P. KATOFSKY

6 Attorneys for Plaintiff Dinesha White and Proposed Class
7 Counsel
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