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Attorneys for Plaintiff Dominique Mitchell
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LAKE

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

Plaintiffs,

v.

COLEMAN ENVIRONMENTAL
ENGINEERING, INC., a California
corporation, DOES 1 through 10, inclusive,

Defendants.

CASE NO: CV421915

*Assigned to the Honorable Michael S. Lunas
Department 1*

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

DATE: August 1, 2022

TIME: 9:00 a.m.

DEPT.: 1

Action Filed: July 1, 2021

1 **PLEASE TAKE NOTICE THAT** on August 1, 2022 at 9:00 a.m., or as soon thereafter as
2 the matter may be heard, in Department 1 of the above-entitled Court, located at 255 North Forbes
3 Street, Lakeport, California 95453, Plaintiff Dominique Mitchell’s (“Plaintiff” or “Mitchell”) will
4 and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between
5 the parties falls within the range of reasonableness and approving the proposed class action
6 settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only,
7 a settlement class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving
8 the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Class Action Administration Solutions as
10 settlement administrator, (6) preliminarily approving the allocation of \$10,000 from the Maximum
11 Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General
12 Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and
13 Workforce Development Agency and twenty-five percent (25%) shall be included in the Net
14 Settlement Proceeds for payment to Class Members; (7) approving as to content and form the notice
15 to the settlement class, and directing it be disseminated by the Settlement Administrator; (8)
16 permitting Plaintiff to file a First Amended Complaint, and (9) setting a final fairness and approval
17 hearing.

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

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

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

1
2 DATED: June 28, 2022

Respectfully submitted,

3 GAINES & GAINES,
4 A Professional Law Corporation

5
6 By: Alex P. Katofsky

DANIEL F. GAINES

7 ALEX P. KATOFSKY

8 Attorneys for Plaintiff Dominique Mitchell and Proposed
9 Class Counsel
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class 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 Dominique Mitchell (“Plaintiff”
6 or “Mitchell”), individually and on behalf of all others similarly situated, and Defendant Coleman
7 Environmental Engineering, 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 \$425,000 to a settlement class of
14 approximately 659 Class Members, yielding gross payments of \$645 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 Dominique Mitchell
21 as 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 April 21, 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 July 1, 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”). Plaintiff intends to amend the complaint and as such, the First Amended
4 Complaint, attached hereto as **Exhibit 3** and which will be filed as part of the settlement approval
5 process, asserts class and PAGA representative action claims against Defendant for (a) failure to
6 pay all wages due (Labor Code §§ 510, 1194, 1197, 1720, 1771, 1772 and 1774); (b) failure to
7 provide compliant rest periods or compensation in lieu thereof (Labor Code §§ 226.7 and 558; IWC
8 Wage Order 16-2001); (c) failure to provide compliant meal periods or compensation in lieu thereof
9 (Labor Code §§ 226.7, 510, 512, 558; IWC Wage Order 16-2001); (d) failure to reimburse
10 employee business expenses (Labor Code § 2802); (e) failure to comply with itemized employee
11 wage statement provisions (Labor Code §§ 226 and 226.3); (f) failure to timely pay wages due at
12 separation of employment (Labor Code §§ 201-203); (g) violation of Business and Professions
13 Code §§ 17200, *et seq.*; and (h) civil penalties pursuant to Labor Code §§ 2698, *et seq.* for violations
14 of Labor Code §§ 201, 202, 226, 226.3, 226.7, 510, 558, 1194, 1197, 1720, 1771, 1772, 1774 and
15 2802 (the “First Amended Complaint”). Gaines Decl. at ¶ 7.

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

1 with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

5 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

13 On January 10, 2022, following their exchange of information and documents regarding the
14 Settlement Class and the claims and defenses asserted by the Parties, the Parties commenced arm's-
15 length negotiations with the assistance of mediator Lisa Klerman, an experienced mediator who
16 has mediated numerous wage-hour class actions. Through continued negotiations, the Parties
17 reached the resolution of the Action set forth herein on or about March 24, 2022. Gaines Decl. at
18 ¶ 11.

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

26 The Parties agree that the Settlement Class described herein may be certified for settlement
27 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
28 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the

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

6 **IV. LEGAL ANALYSIS**

7 **A. The Proposed Settlement Terms**

8 **1. The Settlement Class**

9 The Parties have agreed to a settlement class composed of all non-exempt California
10 employees of Defendant from April 21, 2020 through March 24, 2022 (the “Class Period”).
11 Defendant represents that this Class contains approximately 659 individuals. Stip. at ¶ A(4).

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 Two Hundred
14 Thousand Dollars (\$425,000.00) (the “Maximum Settlement Amount”), subject to any increase
15 based on the escalator provision in paragraph H(16) of the Settlement. The Maximum Settlement
16 Amount includes the attorneys’ fees of Class Counsel; litigation costs and expenses (which
17 includes, without limitation, all such fees and costs incurred to date, as well as such fees and costs
18 to be incurred in documenting the settlement, providing any notices required as part of the
19 settlement, securing Court approval of the settlement, and obtaining judgment in the Action); the
20 Enhancement Payment to the Class Representative, as approved by the Court; the payment to the
21 California Labor and Workforce Development Agency (“LWDA”); and all costs of administration,
22 including, without limitation, settlement administration fees and expenses. Defendant shall pay all
23 employer payroll tax obligations due on wage payments made from the Net Settlement Proceeds in
24 addition to, and separate and apart from, the Maximum Settlement Amount. Stip. at ¶ C(1).

25 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
26 application to the Court for up to 35% of the Maximum Settlement Amount for attorneys’ fees (or
27 \$148,750). Stip. at ¶ C(7).

28 \\\

1 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
2 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
3 at ¶ C(7).

4 From the Maximum Settlement Amount, Defendant will not oppose Plaintiff's counsel's
5 application to the Court for an Enhancement Payment to the Class Representative in the gross
6 amount of \$12,000, in consideration for her efforts in instituting and participating in the Action.
7 Stip. at ¶ C(5).

8 From the Maximum Settlement Amount, settlement administration fees paid to Phoenix
9 Class Action Administration Solutions will be no more than \$12,500. Stip. at ¶ C(7)(a).

10 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
11 and all claims for penalties under the PAGA is \$10,000 ("PAGA Payment"), 75% of which shall
12 be paid to the LWDA and 25% shall be included in the Net Settlement Proceeds for payment to
13 Class Members. Stip. at ¶ C(4).

14 The Net Settlement Proceeds is defined as the Maximum Settlement Amount less the
15 amounts approved and awarded by the Court for: attorneys' fees and documented litigation costs
16 and expenses incurred or advanced by Class Counsel; the Enhancement Payment to the Class
17 Representative; the payment to the LWDA pursuant to PAGA; and the costs of administering the
18 settlement. Stip. at ¶ C(2).

19 The Individual Payment Amount means the portion of the Net Settlement Proceeds
20 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
21 valid request for exclusion form). The Individual Payment Amounts will be calculated by dividing
22 the Net Settlement Proceeds by the total weeks worked by all participating Class Members in
23 California in a non-exempt position during the Class Period, which will yield the applicable weekly
24 rate. The weekly rate shall be multiplied by the number of weeks each individual participating
25 Class Member worked for Defendant in California in a non-exempt position during the Class Period
26 to yield their Individual Payment Amount. Each Participating Settlement Class Member who does
27 not opt out will receive an Individual Payment Amount equal to their individual weeks worked in
28 California in a non-exempt position during the Class Period multiplied by the weekly rate.

For tax purposes, each Individual Payment Amount will be apportioned (a) 30% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); (b) 50% to penalties (reported on an IRS Form 1099); (c) 10% to expense reimbursement; and (d) 10% to interest (reported on an IRS Form 1099). All Individual Payment Amounts paid to Class Members will be subject to any applicable wage garnishments, liens, or other legally mandated treatment as required by law. Stip. at ¶ C(3).

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

Pursuant to PAGA, the Parties have agreed that \$10,000 of the Maximum 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, shall be included in the Net Settlement Proceeds for payment to Class Members. Stip. at ¶ C(4).

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 trial court, and (2) a final review after notice has been distributed to the Class Members informing them of the terms of the settlement and allowing them to exclude themselves from, participate in and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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 in opposition to the settlement.

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

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

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

18 *Id.* at § 11.24.

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

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

22 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
23 approval stage, request that the court provisionally approve certification of the class – conditioned
24 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
25 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
26 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
27 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
28 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

8 4 *Newberg on Class Actions*, at § 11.26.

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

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

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

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

20 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
21 and the means for identifying the members of the class determine whether the class is ascertainable.
22 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
23 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
24 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
25 comprises approximately 659 employees. Gaines Decl. ¶ 30.

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

28 The Class Members' claims all stem from a common source: members of the Settlement
Class allege that Defendant violated the same Labor Code provisions in connection with their
employment. All members of the Class seek the same relief under the same California laws (related
to unpaid wages, unpaid meal and rest period premiums, inaccurate or incomplete wage statements,

1 failure to timely pay wages due upon separation, failure to reimburse expenses, and derivative
2 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
3 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 31.

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

6 A class representative's claims are typical when they arise from the same event or course
7 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
8 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
9 Class Representative Dominique Mitchell is a former non-exempt employee who worked for
10 Defendant in the State of California during the Class Period. She contends that Defendant failed
11 to pay all wages due, failed to provide meal and rest periods, failed to comply with itemized
12 employee wage statement provisions, failed to reimburse expenses, and failed to timely pay wages
13 at the separation of employment, in violation of Labor Code §§ 2201, 202, 226, 226.3, 226.7, 510,
14 558, 1194, 1197, 1720, 1771, 1772, 1774, 2698, 2802, 2699, and 2802, among other Labor Code
15 provisions. She has the same claims as those that the members of the Settlement Class would
16 reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 32.

17 Plaintiff has also demonstrated that she will aggressively and competently assert the
18 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no
19 apparent conflicts with other class members. Gaines Decl. ¶ 33. Furthermore, Plaintiff has retained
20 competent counsel, experienced in litigating class action claims in the employment context. *See*
21 Gaines Decl. ¶¶ 2-5.

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

24 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
25 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
26 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
27 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
28 judgment for that of the proponents, particularly where, as here, settlement has been reached with

1 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
2 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
3 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
4 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
5 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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

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

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

24 The Court must make an “independent assessment of the reasonableness of the terms of the
25 settlement” prior to granting preliminary and final approval. *Clark v. American Residential*
26 *Services LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
27 Cal.App.4th 116, 127-28, 130, 133. To do so requires the Parties to submit “basic information
28 about the nature and magnitude of the claims in question and the basis for concluding that the

1 consideration being paid for the release of those claims represents a reasonable compromise.”
2 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* “attempt to decide the merits
3 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
4 *Kullar, supra*, 168 Cal.App.4th at 133.

5 This settlement is limited by Defendant’s precarious financial situation. In connection with
6 settlement negotiations, Defendant provided counsel for Plaintiff with extensive financial
7 disclosures, including tax returns. From these disclosures, it is clear that this settlement will be
8 difficult (but not impossible) for Defendant to fund. Gaines Decl. ¶ 15.

9 The aggregate value of all claims alleged by the approximately 659 Class Members during
10 their 19,364 weekly pay periods during the Class Period could exceed \$8,700,000 (calculated as
11 follows: meal break claims \$503,464 (based on a 25% violation rate), rest break claims \$503,464
12 (based on a 25% violation rate), unpaid wages (nominal classwide damages, based on the strength
13 of the defenses proffered by Defendant), wage statement penalties \$1,903,450, waiting time
14 penalties \$3,744,000, unreimbursed expenses \$111,715 (based on \$25 cell phone expense
15 reimbursement per month), and PAGA penalties \$1,936,400 (without stacking multiple
16 violations)). Considering Defendant’s financial condition, this settlement is a fair compromise for
17 Class Members; it falls within a realistic range of recovery on Class Members’ claims, particularly
18 in light of the risk of non-recovery. Gaines Decl. ¶ 16.

19 Defendant allegedly failed to permit or authorize Plaintiff and Class Members to take timely
20 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
21 226.7, 512, 558 and IWC Wage Order 5-2001. Labor Code § 512 provides that employers (like
22 Defendant) may not employ an employee for a work period of more than 5 hours without providing
23 a 30-minute meal period starting no later than the end of the fifth hour of work. When Plaintiff and
24 Aggrieved Employees did receive meal periods, they would typically be late (commencing after
25 the fifth hour of work) or interrupted and they would be required to continue working, resulting in
26 off-the-clock work, in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194 and IWC Wage
27 Order 5-2001. Gaines Decl. ¶ 17.

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1 More importantly, Defendant's applicable employee handbook for the applicable time
2 period allegedly contained a facially unlawful rest and meal period policy. Plaintiff therefore
3 contends that Defendant's written policy makes the meal (and rest) break claim(s) easily certifiable
4 as a class claim. Gaines Decl. ¶ 18.

5 Defendant also allegedly failed to provide Plaintiff and Class Members with legally
6 compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor
7 Code § 226.7 and Wage Order 5-2001. For the same reasons discussed above, Plaintiff contends
8 that Defendant's written rest break policy is unlawful because it lacks the requisite language. She
9 also argued that Defendant's jobsite practices further resulted in rest periods never being authorized
10 or permitted, and when employees were able to take a rest period, they were frequently late, cut
11 short, or on-duty in violation of Labor Code §§ 226.7, 558 and IWC Wage Order No. 5-2001.
12 Accordingly, Defendant's liability for this claim will also be significant. Gaines Decl. ¶ 19.

13 Plaintiff further contended that Class Members were not paid all wages due because
14 Defendant allegedly did not pay prevailing wages for government job sites. This claim has minimal
15 value because Defendant demonstrated that Class Members did not engage in job which required
16 the payment of prevailing wages. Gaines Decl. ¶ 20.

17 Plaintiff and Class Members also contend that they were required to incur expenses in the
18 performance of their job duties for which they were not fully reimbursed, in violation of Labor
19 Code § 2802. Plaintiff and other Class Members were allegedly required to use their own personal
20 cellular phones to perform work for Defendant, both to communicate with each other about work
21 matters throughout the workday, and to enter the information they were required to log in order to
22 complete reports. They contend they were not reimbursed by Defendant for these expenses,
23 although Defendant argues that it always reimbursed employees when they properly sought
24 reimbursement for expenses. Gaines Decl. ¶ 21.

25 Plaintiff alleges that Defendant failed to issue Plaintiff and Class Members accurately
26 itemized wage statements, failed to pay waiting time penalties, and owes PAGA civil penalties, all
27 derivative of the claims alleged above. As noted above, these penalty claims would be large but
28 required a substantial discount for settlement purposes because they are wholly derivative of the

1 underlying unpaid wage claims (i.e. if Plaintiff did not prevail on her underlying meal and rest
2 period claims, she would not prevail on these penalty claims), they are subject to independent
3 defenses of their own (including proof of injury and/or willfulness), and they are subject to
4 reduction in the Court's discretion. Plaintiff believed it was unlikely that the Court would entertain
5 an award of penalties which was substantial compared to the amount of the unpaid wages sought.
6 As such, these claims required a compromise to resolve at this juncture of the litigation. Gaines
7 Decl. ¶ 22.

8 The discount negotiated for settlement here is a reasonable compromise, particularly
9 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
10 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
11 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
12 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
13 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
14 various arguments why class treatment is not appropriate, including but not limited to that
15 individualized inquires among class members predominate over common ones. If Defendant was
16 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
17 most class members would likely not file individual claims. Gaines Decl. ¶ 23.

18 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the
19 Court would agree with Defendant's position that its meal and rest period practices complied with
20 the requirements of California law or could not be certified. In such a case, the value of the majority
21 of Plaintiff's claims would be zero. Gaines Decl. ¶ 24.

22 Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award
23 on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the
24 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
25 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 25.

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

1 fully compliant with California law. Gaines Decl. ¶ 26.

2 When the costs and risks of non-certification and loss on the merits are considered,
3 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
4 Decl. ¶¶ 15-27.

5 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
6 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
7 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
8 Decl. ¶ 28.

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

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

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

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

19 In connection with the Settlement, Plaintiff shall file a First Amended Complaint, attached
20 to the Stipulation as **Exhibit 3**, which adds class allegations and claims to comport with the release
21 provided for in the Stipulation. The Parties agreed that, as part of her motion for preliminary
22 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
23 of which is a condition of the Stipulation.

24 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
25 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
26 the settlement, Plaintiff requests that the Court approve her filing of the First Amended Complaint,
27 and consents that Defendant not be required to file a responsive pleading thereto.

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1 **V. CONCLUSION**

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

4 1. Preliminarily finding that the settlement falls within the range of reasonableness and
5 approving the proposed settlement;

6 2. Conditionally certifying, for settlement purposes only, the Settlement Class;

7 3. Appointing Plaintiff Dominique Mitchell as Class Representative;

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

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

12 6. Preliminarily approving the allocation of \$10,000 from the Maximum Settlement
13 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
14 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
15 (25%) shall be included in the Net Settlement Proceeds for payment to Class Members;

16 7. Approving as to content and form the notice to the Settlement Class, and directing
17 it to be disseminated by the Settlement Administrator;

18 8. Permitting Plaintiff to file her First Amended Complaint, attached to the Stipulation
19 as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order granting this
20 motion has been given, and consent that Defendant not be required to file a responsive pleading
21 thereto; and,

22 9. Setting the following schedule of settlement proceedings:
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<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 and Request for Exclusion form 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 form 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	_____, 2022, at _____.m. (approximately 85 days after entry of the Order granting this Motion)

DATED: June 28, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: *Alex P. Katofsky*

DANIEL F. GAINES
ALEX P. KATOFSKY
Attorneys for Plaintiff Dominique Mitchell and Proposed
Class Counsel