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Thomas Tomlinson and Proposed Class Counsel
8

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

12 RONNIE GARCIA, PETER SUMO,
THOMAS TOMLINSON, on behalf of
13 themselves and on behalf of all similarly
situated individuals,

14 Plaintiffs,

15 v.

16 SST CONSTRUCTION, LLC, a California
17 limited liability company, and DOES 1
through 10, inclusive,

18 Defendants.
19

CASE NO: 34-2022-00320617

Assigned to Hon. Jill H. Talley, Dept. 27

CLASS ACTION

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

Date: September 29, 2023

Time: 9:00 a.m.

Dept.: 27

Complaint Filed: July 2, 2021

1 **PLEASE TAKE NOTICE THAT** on September 29, 2023 at 9:00 a.m., or as soon
2 thereafter as the matter may be heard, in Department 27 of the above-entitled Court, located at 720
3 9th Street, Sacramento, California 95814, Plaintiffs Ronnie Garcia, Peter Sumo, and Thomas
4 Tomlinson will and hereby do move unopposed for an Order (1) preliminarily finding that the
5 settlement between the parties falls within the range of reasonableness and approving the proposed
6 class action settlement in the above-captioned case, (2) conditionally certifying, for settlement
7 purposes only, a settlement class, (3) approving the appointment of Plaintiffs Ronnie Garcia, Peter
8 Sumo, and Thomas Tomlinson as the Class Representatives, (4) approving the appointment of
9 Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) approving
10 the appointment of Phoenix Settlement Administration as settlement administrator,
11 (6) preliminarily approving the allocation of \$100,000 from the Gross Settlement Amount to settle
12 Plaintiffs' representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et
13 seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and Workforce
14 Development Agency and twenty-five percent (25%) will be allocated to the Aggrieved Employees
15 as part of the Net Settlement Proceeds; (7) approving as to content and form the notice to the
16 settlement class, and directing it be disseminated by the Settlement Administrator; and (8) setting
17 a final fairness and approval 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 the 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 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
2 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for
3 the department may be downloaded off the court's website. If the party does not have online access,
4 they may call the dedicated phone number for the department as referenced in the local telephone
5 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and
6 receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the
7 court day before the hearing, no hearing will be held.

8
9 DATED: August 10, 2023

GAINES & GAINES, APLC

10
11 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

12 Attorneys for Plaintiffs Ronnie Garcia, Peter Sumo, and
13 Thomas Tomlinson and Proposed Class Counsel
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND AND PRECEDURAL HISTORY	1
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....	3
IV. LEGAL ANALYSIS	4
A. The Proposed Settlement Terms	4
B. Settlement of Claims Pursuant to Labor Code § 2699 et. seq. (PAGA)	5
C. Two-Step Approval Process.....	5
D. Procedures for Settlement Before Class Certification	7
1. The Settlement Class Should Be Certified for Settlement Purposes.....	7
a. The Settlement Class Is Ascertainable	7
b. Questions of Law or Fact Common to Members of the Settlement Class Predominate.....	8
c. The Proposed Class Representative's Claims are Typical of the Class Members' Claims	8
E. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	10
1. The Settlement Falls Within The "Ballpark" of Reasonableness	10
2. Despite the Asserted Fairness of the Settlement Terms, Class Members May Request Exclusion From, Or Object To, The Settlement.....	15
VI. CONCLUSION	16

1 TABLE OF AUTHORITIES

2 Page

3 CASES

4	<i>Amchem Products, Inc. v. Windsor</i>	
5	(1987) 521 U.S. 591	7
6	<i>Clark v. American Residential Services LLC</i>	
7	(2009) 175 Cal.App.4th 785.....	10
8	<i>Classen v. Weller</i>	
9	(1983) 145 Cal. App. 3d 27	8
10	<i>Dunk v. Ford Motor Co.</i>	
11	(1996) 48 Cal. App. 4th 1794.....	1, 7
12	<i>Green v. Obledo</i>	
13	(1981) 29 Cal.3d 126.....	6
14	<i>Hammon v. Barry</i>	
15	(D.D.C. 1990) 752 F. Supp. 1087	9
16	<i>In re Armored Car Antitrust Litig.</i>	
17	(N.D. Ga. 1979) 472 F. Supp. 1357	9
18	<i>In re Baldwin-United Corp.</i>	
19	(S.D.N.Y. 1984) 105 F.R.D. 475	7
20	<i>In re Chicken Antitrust Litig.</i>	
21	(N.D. Ga. 1980) 560 F. Supp. 957	9
22	<i>In re Paine Webber Ltd. P'ships Litig.</i>	
23	(S.D.N.Y. 1997) 171 F.R.D. 104	9
24	<i>Kullar v. Foot Locker Retail, Inc.</i>	
25	(2008) 168 Cal.App.4th 116.....	10
26	<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i>	
27	(7th Cir. 1987) 834 F.2d 677.....	9
28	<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i>	
	(C.D. Cal. 2004) 221 F.R.D. 523	9
	<i>Priddy v. Edelman</i>	
	(6th Cir. 1989) 883 F.2d 438.....	9

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263	8
<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> (E.D. Pa. 1978)	9
<i>Steinberg v. Carey</i> (S.D.N.Y. 1979) 470 F. Supp. 471	9
<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800	6
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224	6, 7

STATUTES

Cal. Business & Professions Code § 17200	2
Cal. Labor Code §§ 201-203	2, 14
Cal. Labor Code § 226	2, 13
Cal. Labor Code § 226.7	2, 11, 12
Cal. Labor Code § 510	2, 10, 11
Cal. Labor Code § 512	2, 11, 12
Cal. Labor Code § 558	2, 10, 11, 12
Cal. Labor Code § 1194	2, 10, 11, 12
Cal. Labor Code § 2698	1, 2
Cal. Labor Code § 2699	2, 5

RULES AND REGULATIONS

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

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002)	6, 7
---	------

1
2
3
4
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23
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27
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TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
Manual for Complex Litigation (Third) § 30.41	6

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 Plaintiffs Ronnie Garcia, Peter Sumo, and
6 Thomas Tomlinson (“Class Representatives” or “Plaintiffs”), individually and on behalf of all
7 others similarly situated, and Defendant SST Construction, LLC, on behalf of itself and its
8 subsidiaries, affiliates, and parents (“Defendants”).

9 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
10 counsel with the assistance of a respected mediator with experience in the area of employment class
11 actions. Most importantly, the settlement will result in significant financial benefit to the
12 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
13 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
14 for a non-revisionary class settlement in the gross amount of \$1,500,000 to a settlement class of
15 approximately 492 employees who worked approximately 30,000 workweeks, yielding gross
16 payments of **\$3,049 per employee**. As detailed below, the settlement is in the best interests of the
17 class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

26 **II. BACKGROUND AND PROCEDURAL HISTORY**

27 On or about August 25, 2021, David Rhoe (“Rhoe”), a former employee of Defendants,
28 acting on behalf of the Plaintiffs and Aggrieved Employees, exhausted the pre-filing requirements

1 of the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698 *et seq.*
2 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

3 On or about November 2, 2021, Rhoe and Defendants entered into an agreement to toll the
4 statute of limitations of Aggrieved Employees’ alleged wage and hour claims. Gaines Decl. at ¶ 7.

5 On or about May 17, 2022, Plaintiffs further exhausted the pre-filing requirements of the
6 PAGA. Gaines Decl. at ¶ 8.

7 On or about May 17, 2022, Plaintiffs initiated the Action by filing a Complaint as a class
8 action, pursuant to California Code of Civil Code section 382, on behalf of themselves and all other
9 non-exempt California employees. Thereafter, on July 25, 2022, Plaintiffs filed their First
10 Amended Complaint (“FAC”) as a class and representative action, pursuant to California Code of
11 Civil Code § 382 and PAGA, on behalf of themselves and all other non-exempt California
12 employees. The FAC asserts class and representative action claims against Defendants for (1)
13 failure to pay all minimum and overtime wages (Labor Code §§ 510, 1194, and 1194.2); (2) failure
14 to provide rest periods or compensation in lieu thereof (Labor Code § 226.7); (3) failure to provide
15 meal periods or compensation in lieu thereof (Labor Code §§ 226.7, and 512); (4) knowing and
16 intentional failure to comply with itemized employee wage statement provisions (Labor Code §§
17 226(a), (e)); (5) failure to timely pay wages due at separation of employment (Labor Code §§ 201-
18 203); (6) failure to reimburse all business expenses (Labor Code § 2802); (7) violation of Business
19 and Professions Code § 17200; and (8) penalties pursuant to Labor Code § 2699(f) for violations
20 of Labor Code §§ 201-202, 226(a), 226.3, 226.7, 510, 512, 558, 1194, and 2802 (the “Complaint”).
21 Gaines Decl. at ¶ 9.

22 Defendants deny any liability or wrongdoing of any kind associated with the claims alleged
23 in the Action, and further deny that the Action is appropriate for class treatment for any purpose
24 other than this settlement. Defendants contend that they have complied at all times with the
25 California Labor Code. It is Defendants’ position that, if this case were to be litigated, class
26 certification would be inappropriate because Plaintiffs are not adequate Class Representatives,
27 Plaintiffs’ claims are not typical of putative class members, and individual issues predominate over
28 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts

1 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
2 shall not be used as an admission or evidence of wrongdoing on behalf of Defendants; (ii) shall not
3 be an admission or evidence of fault on behalf of Defendants in any action before a civil, criminal,
4 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
5 or evidence of the appropriateness of these or similar claims for class certification in the Action or
6 with respect to any other proceeding. Gaines Decl. at ¶ 10.

7 The Class Representatives contend that Defendants violated the California Labor Code and
8 that this case is appropriate for class certification. Gaines Decl. at ¶ 11.

9 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

16 On April 10, 2023, the Parties participated in a full day mediation session with David
17 Phillips, Esq., a respected mediator with extensive experience resolving employment actions. The
18 Parties were able to agree to the basic terms of their Settlement Agreement with the assistance of
19 Mr. Phillips. Gaines Decl. at ¶ 13.

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 Defendants. Defendants and their counsel also agree (and will so represent to the Court) that the
26 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 14.

27 The Parties agree that the Settlement Class described herein may be certified for settlement
28 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement

1 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
2 certification will have no force or effect and will immediately be revoked. The Parties further agree
3 that certification for purposes of the settlement is in no way an admission that class certification is
4 proper under the more stringent standard applied for litigation and that evidence of this limited
5 stipulation for settlement purposes only will not be admissible for any purpose in this or any other
6 proceeding. Gaines Decl. at ¶ 15.

7 **IV. LEGAL ANALYSIS**

8 **A. The Proposed Settlement Terms**

9 The Parties have agreed upon a settlement class: all individuals who currently work or
10 previously worked for Defendants in California in a non-exempt position between August 25, 2020
11 and the date the Court grants preliminary approval of the Settlement. Defendant represents that
12 this Class contains no more than approximately 492 members who worked no more than 30,000
13 workweeks as of April 14, 2023¹. Settlement at ¶ H(1).

14 The Parties stipulate to the conditional certification of the Settlement Class as defined herein
15 for settlement purposes only. Settlement at ¶ B(10).

16 The Settlement Agreement provides that Defendants shall pay the total, non-reversionary
17 sum of \$1,500,000 in connection with the Stipulation ("Gross Settlement Amount"). Settlement at
18 ¶ C(1)(a).

19 Class Members need not submit a claim form to receive their share of the Settlement. Class
20 Members who timely exclude themselves from the Settlement will not be part of the final
21 Settlement Class and not bound by the Settlement's class release (although Aggrieved Employees
22 will be bound by the PAGA release, even if they opt out of the class settlement). Settlement at ¶
23 A(6).

24
25 ¹ Defendants have represented that as of April 14, 2023, there are approximately 492 Class
26 Members who worked 30,000 workweeks during the Class Period. Defendants will provide a
27 declaration under penalty of perjury confirming the number of Class Members and workweeks they
28 worked during the Class Period. Should the number of workweeks increase by more than 10% (i.e.
exceed 33,000), Defendants will have the option to either a) increase the Gross Settlement Amount
proportionally (i.e. \$45.45 for each workweek in excess of 33,000) or b) shorten the Class Period
and PAGA Period so that there are no more than 33,000 workweeks encompassed in the Class
Period, such that there would be no increase to the Gross Settlement Amount. Settlement at ¶ H(1).

1 The Settlement Agreement further provides that Plaintiffs' counsel may request an award
2 of attorneys' fees not to exceed one-third of the Gross Settlement Amount (i.e. \$500,000) and seek
3 reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed
4 \$25,000. Settlement at ¶ C(1)(g), C(1)(h). It also provides that Plaintiffs will seek, and Defendant
5 will not oppose, Service Awards to the named Plaintiffs Ronnie Garcia, Peter Sumo, and Thomas
6 Tomlinson in the amount of \$12,000 each (totaling \$36,000). Settlement at ¶ C(1)(f).

7 The Parties have agreed that Phoenix Class Action Administration ("Phoenix"), an
8 experienced and competent settlement administration company will administer the settlement. Up
9 to \$15,000 has been allocated to compensate Phoenix for its work related to the administration.
10 Settlement at ¶ C(1)(i).

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

12 Pursuant to PAGA, the Parties have agreed that \$100,000 of the Gross Settlement Amount
13 will be allocated to settle the claims brought under Labor Code § 2699 et. seq. Pursuant to Labor
14 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
15 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
16 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$75,000 – of
17 the PAGA Settlement Amount will be paid to the California Labor and Workforce Development
18 Agency as the Labor and Workforce Development Agency Payment, and Twenty-Five Percent
19 (25%), or \$25,000, shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds.
20 Settlement at ¶ C(1)(e).

21 As required by Labor Code § 2699(l)(2), concurrent with Plaintiffs' submission of the
22 Settlement Agreement to the Court, Class Counsel is transmitting it, together with this Motion, to
23 the LWDA. Gaines Decl. at ¶ 43; Exhibit C.

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

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

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

16 Thus, the preliminary approval by the trial court is simply a conditional finding that the
17 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
18 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
19 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
20 may find that the settlement proposal contains some merit, is within the range of reasonableness
21 required for a settlement offer, or is presumptively valid subject only to any objections that may be
22 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
23 (4th ed. 2002).

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

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

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² 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, Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

1 Here, the Parties have reached such an agreement and have submitted the Settlement
2 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
3 See Gaines Decl. ¶ 16, Exhibit B.

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

5 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
6 approval stage, request that the court provisionally approve certification of the class – conditioned
7 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
8 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
9 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
10 the court was satisfied that it was “fair, adequate and reasonable.”). See also *In re Baldwin-United*
11 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
12 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

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

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

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

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

26 The proposed settlement class is ascertainable. The class definition, the size of the class

27
28 ³In 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 Defendants' records. Further, the settlement class is sufficiently numerous to
4 warrant certification. According to Defendants' records, the Class is comprised of approximately
5 492 individuals. Gaines Decl. ¶ 39.

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: all Class Members allege that
9 Defendants violated the same Labor Code and Wage Order provisions in connection with their
10 work for Defendants. The same Labor Code and Wage Order violations are alleged on behalf of
11 all persons encompassed in the settlement class, arising out of or which could be pled based on the
12 facts and the allegations set forth in the operative complaint in the Action, including but not limited
13 to claims for failure to pay for all hours worked, including overtime; failure to provide meal periods;
14 failure to authorize and permit rest periods; failure to reimburse expenses, failure to timely pay all
15 wages at termination; and failure to furnish accurate itemized wage statements. Gaines Decl. ¶ 40.

16 c. **The Proposed Class Representatives' Claims are Typical of the**

17 **Class Members' Claims**

18 A class representative's claims are typical when they arise from the same event or course
19 of conduct that gives rise to the claims of the class and are based on the same legal theory.
20 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiffs and
21 proposed Class Representatives Ronnie Garcia, Peter Sumo, and Thomas Tomlinson are former
22 non-exempt employees of Defendants whom, Plaintiffs allege, were not paid for all hours worked,
23 including overtime; were not provided all meal periods; were not authorized and permitted all rest
24 periods; were not reimbursed business expenses; were not timely paid all wages at termination; and
25 were not furnished accurate itemized wage statements. Plaintiffs alleges the same claims as those
26 that the members of the Settlement Class would reasonably be expected to bring based on the course
27 of conduct alleged herein. Gaines Decl. ¶ 41.

28 \\\

1 Plaintiffs have also demonstrated that they will aggressively and competently assert the
2 interests of the proposed Settlement Class; they have taken active roles in the litigation and have
3 no apparent conflicts with other class members. Gaines Decl. ¶ 42. Furthermore, Plaintiffs have
4 retained competent counsel, experienced in litigating class action claims in the employment
5 context. See Gaines Decl. ¶¶ 2-5.

6 **E. 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.

28 \\\

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, statistics, records and other information. Each side has apprised
5 the other, informally and at a formal mediation, of their respective factual contentions, legal
6 theories and defenses, resulting in extensive arms-length negotiations taking place among the
7 Parties. *See* Gaines Decl. ¶ 2-5, 12-13.

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 Prior to settlement, Plaintiffs' counsel created a comprehensive damage analysis using
19 sampling information obtained through informal discovery. This damage analysis reveals that the
20 negotiated settlement falls within a realistic range of recovery on class members' claims. Gaines
21 Decl. ¶ 22.

22 Plaintiffs allege that Defendants failed to pay all minimum and overtime wages earned, in
23 violation of Labor Code §§ 510, 558, 1194, and 1194.2. Plaintiffs and Class Members contend that
24 they were required to perform work-related activities off-the-clock. An employer is obligated to
25 pay the wages of an hourly employee for all time that the employee is under the control of the
26 employer, and this includes all the time the employee is suffered or permitted to work, whether or
27 not required to do so. When Class Members performed work-related activities off-the-clock, they
28 were under the control of Defendants and required to be compensated for all hours worked.

1 Defendants, however, allegedly failed to do so, in violation of Labor Code §§ 510, 558, 1194, and
2 1194.2. Plaintiffs contend that their supervisors required Class Members to clock out and continue
3 working at a jobsite until the work was completed. Defendants also allegedly required Class
4 Members to answer customers' questions via phone calls, prepare and finish reports, and send
5 follow-up emails off-the-clock. Defendants also frequently contacted Class Members via their cell
6 phones to ask them work-related questions, ask them to go back out into the field, or go pick up
7 equipment. In advance of mediation, Defendants provided timecards which reflected that most
8 time punches for each employee are evenly recorded on the quarter, half, or full hour, such that
9 each employee regularly clocked in and out at the exact same time every day and took an exactly
10 30-minute meal period at the same time every day. This is consistent with Plaintiffs' position that
11 they were required to spend time off-the-clock outside of their pre-set shifts. Plaintiffs calculate
12 damages on this claim at approximately \$3,333,000 (based on 5 hours of off-the-clock work per
13 week per employee). Gaines Decl. ¶ 23.

14 Plaintiffs also contend that Defendants paid Class Members bonuses and other forms of
15 non-base hourly wages that were not included in their regular rate of pay for purposes of computing
16 the proper overtime and double-time rates, meal and rest period premiums, and sick pay rate, in
17 violation of Labor Code §§ 226.7, 246, 510, 512, 558, and 1194. California Labor Code § 510
18 requires the payment of premium overtime and double-time compensation, meal and rest period
19 premium compensation, and sick pay based on employees' regular rate of pay. Labor Code § 207(e)
20 defines the "regular rate" to include all remuneration for employment paid to or on behalf of the
21 employee. California law mirrors federal law on the issue of computation of the regular rate of pay.
22 *See Walling v. Youngerman-Reynolds Hardware Co.* (1945) 324 U.S. 419, 424. *See also Ferra v.*
23 *Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863 (holding that "the calculation of premium
24 pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime pay, must
25 account for not only hourly wages but also other nondiscretionary payments for work performed
26 by the employee" because the terms "regular rate of compensation under section 226.7(c)" and
27 "regular rate of pay under section 510(a)" are "synonymous" and "encompasses all
28 nondiscretionary payments, not just hourly wages.") Here, when Class Members worked overtime

1 and double-time hours, Plaintiffs contend that they were paid at one and one-half times and two
2 times the base hourly rate of pay. Plaintiffs calculate damages on this claim at slightly under
3 \$17,000. Gaines Decl. ¶ 24.

4 Plaintiffs also argue that Defendants failed to permit or authorize Class Members to take
5 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
6 §§ 226.7, 512, 558, and 1194 and IWC Wage Order 16-2001. Labor Code § 512 provides that
7 employers (like Defendants) may not employ an employee for a work period of more than five
8 hours without providing a 30-minute meal period starting no later than the end of the fifth hour.
9 Class Members contend that they were routinely unable to take a proper meal period when they
10 worked shifts in excess of 5 hours and a second meal period when they worked shifts in excess of
11 10 hours. Gaines Decl. ¶ 25.

12 Plaintiffs argue that Defendants' meal period practice clearly violates the Supreme Court's
13 mandate in *Brinker Restaurant Corp. v. Superior Court* (2014) 53 Cal.4th 1004, 1038-39 (holding
14 that during meal periods, employers must "relieve the employee of all duty and relinquish any
15 employer control over the employee and how he or she spends the time."). In advance of mediation,
16 Defendants provided timecards which reflected that most recorded meal periods are exactly 30
17 minutes, indicating rounding or otherwise manipulated or inaccurate records. In *Donohue v. AMN*
18 *Services, LLC* (2021) 11 Cal.5th 58, the California Supreme Court held that the employer defendant
19 "improperly used rounded time punches to track potentially noncompliant meal periods" because
20 the defendant's "system did not properly account for meal periods that were short or delayed based
21 on actual time punches but did not appear as short or delayed under the rounding policy." *Donahue*,
22 *supra*, 11 Cal.5th 78. As a result, those employees are entitled to "premium pay for any instances
23 in which employees did not voluntarily choose to shorten or delay those meal periods." Plaintiffs
24 calculate damages on this claim at approximately \$400,000. Gaines Decl. ¶ 26.

25 Plaintiffs contend that Defendants failed to pay Plaintiffs and Class Members premium
26 wages for missed, denied and unauthorized rest periods in violation of Labor Code § 226.7 and
27 IWC Wage Order 16-2001. Plaintiffs argue that Class Members were required to remain on the
28 work premises during their rest periods, which they argue violates our Supreme Court's mandate

1 in *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th 257, 269 (holding that the rest period
2 requirement “obligates employers to permit and authorizes employees to take off-duty rest periods.
3 That is, during rest periods employers must relieve employees of all duties and relinquish control
4 over how employees spend their time.” An employer may not place any limitations on where
5 employees may go or not go during their rest periods). (Emphasis added). Plaintiffs also contend
6 that due to the busy nature of their work schedules, they were simply unable to take the vast majority
7 of their entitled rest periods. For each workday on which Class Members were denied a rest period,
8 they must be paid a one-hour premium as additional wages beyond earnings for actual hours
9 worked. See Wage Order No. 16 subdivision 11(d). According to the wage records produced in
10 discovery, Defendants never paid any rest period premiums. Plaintiffs calculate damages on this
11 claim at approximately \$2,037,000. Gaines Decl. ¶ 27.

12 Plaintiffs also allege that Class Members were required to incur expenses in the
13 performance of their job duties for which they are not fully reimbursed, in violation of Labor Code
14 § 2802. Class Members were required to use their personal cell phones and vehicles, but were not
15 fully reimbursed by Defendant for these expenses. Despite providing Plaintiffs with a company
16 cellphone, Plaintiffs were still required and expected by Defendants to use their personal cell
17 phones for work-related matters, including, but not limited to, as a personal hotspot for their
18 company cell phone when their work phone did not have service. Also infrequent, Defendants
19 sometimes required employees to drive their personal vehicles at times, but did not reimburse them
20 for the operating costs associated therewith. Plaintiffs calculate damages on this claim at \$62,520,
21 comprised primarily of expenses related to cell phone use. Gaines Decl. ¶ 28.

22 Defendants also allegedly failed to issue Class Members accurately itemized wage
23 statements, primarily on a derivative basis related to their unpaid wage claims. When Class
24 Members were not paid all wages due, as detailed above, their wage statements failed to accurately
25 state all gross wages earned, in violation of Labor Code § 226(a)(1), and net wages earned, in
26 violation of Labor Code § 226(a)(5). Separately, the wage statements issued to Class Members
27 purportedly failed to properly list the total hours worked, in violation of Labor Code § 226(a)(2).
28 Plaintiffs calculate statutory penalties on this claim at \$317,600. Gaines Decl. ¶ 29.

1 Defendants also allegedly failed to pay Class Members all wages due upon separation of
2 employment, in violation of Labor Code §§ 201-203. As Defendants failed to pay them all wages
3 due during the course of their employment, as described above, these wages were due and owing
4 upon separation of employment, yet went unpaid. Plaintiffs calculate statutory penalties on this
5 claim at \$1,511,184. Gaines Decl. ¶ 30.

6 A discount on the maximum value of Class members' claims was required (and warranted)
7 to resolve the matter at this stage of the litigation. As to the merits of Plaintiffs' claims, Defendants
8 strongly argued that employees waived any missed meal and rest periods, such that no premiums
9 are due. They argued that employees were always afforded the right to take their breaks, and as to
10 rest periods, lulls in business allowed for ample time to take rest periods. They argued that it
11 adopted and enforced legally compliant policies and practices which authorized meal and rest
12 periods as required by law, and employees did not voice concern over meal and rest periods being
13 denied. They also vehemently deny that any employees worked off-the-clock, all time worked was
14 completely paid in full, and all expenses were reimbursed (and any unreimbursed expenses were
15 not reasonably and necessarily incurred). Gaines Decl. ¶ 31.

16 The discount negotiated for settlement here is a reasonable compromise, particularly
17 considering that the risk of obtaining class certification on all or any of Plaintiffs' claims involves
18 a 50% or higher hurdle, especially with respect to the off-the-clock claims, meal and rest period
19 claims, and expense reimbursement claims to which Defendants maintain strong arguments to
20 defeat class certification (in addition to multiple defenses on the merits of the claims). Class
21 certification is a substantial risk in any class action case. Here, while Plaintiffs maintain that the
22 requirements of class certification are met, Defendants proffer various arguments why class
23 treatment is not appropriate, including but not limited to that individualized inquires among class
24 members predominate over common ones. If Defendants were to defeat Plaintiffs' class
25 certification motion, there would be no class wide relief whatsoever, and most class members would
26 likely not file individual claims. Gaines Decl. ¶ 32.

27 Plaintiffs also faced the risk of a loss on the merits on their claims. It is very possible that
28 the Court would agree with Defendants' position that their practices complied with the

1 requirements of California law or could not be certified. In such a case, the value of the majority
2 of Plaintiffs' claims would be zero. Gaines Decl. ¶ 33.

3 Finally, Plaintiffs faced the risk that they would not obtain a maximum damage/penalty
4 award on all (or any of) their claims. For example, Plaintiffs' wage statement claim and waiting
5 time penalty claim are derivative of their unpaid wage claims. If they did not prevail on those
6 claims, they would not prevail on a claim for deficient wage statements or failure to timely pay
7 wages. In addition, Plaintiffs seek discretionary penalties pursuant to the PAGA, which can be
8 valued at more than \$448,800 (based on nearly 4,500 pay periods at issue, and without stacking
9 multiple violations in the same pay period). Even if Plaintiffs did prevail on their claims, it is
10 possible that the Court would not impose all such penalties pursuant to its discretionary power to
11 reduce them. Gaines Decl. ¶ 34.

12 Defendants strongly contend that their policies and practices do not violate any laws. They
13 contend that they properly provided for all meal and rest periods and fully compensated their
14 employees for all time worked. They further contend that the wage statements they provide to their
15 employees are fully compliant with California law. Gaines Decl. ¶ 35.

16 When the costs and risks of non-certification and loss on the merits are considered,
17 Plaintiffs' counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
18 Decl. ¶ 36.

19 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
20 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
21 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
22 Decl. ¶ 37.

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

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

1 by the PAGA release, even if they opt out of the class settlement.

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

5 **V. CONCLUSION**

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

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

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

11 3. Appointing Plaintiffs Ronnie Garcia, Peter Sumo, and Thomas Tomlinson as the
12 Class Representatives;

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

15 5. Approving Phoenix Settlement Administration as the Settlement Administrator;

16 6. Preliminarily approving the allocation of \$100,000 from the Gross Settlement
17 Amount to settle Plaintiffs' representative claims under the PAGA, of which seventy-five percent
18 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
19 (25%) allocated to the Aggrieved Employees as part of the Net Settlement Proceeds;

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

22 8. 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")	7 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail the Notice and Exclusion Forms to Class Members via U.S. Mail	14 calendar days after Settlement Administrator's receipt of Settlement Class Information
Last day for Class Members to submit a written exclusion or objection to Settlement Administrator	45 calendar days after the initial mailing of the Class Notice and Exclusion Form 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	16 court days prior to the final settlement approval hearing
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice, the Exclusion Form, and the Dispute Form	16 court days prior to the final settlement approval hearing
Final settlement approval hearing	The Parties suggest this hearing be set approximately 100 days after the order granting this motion is entered.

DATED: August 10, 2023

GAINES & GAINES, APLC

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiffs Ronnie Garcia, Peter Sumo, and Thomas Tomlinson and Proposed Class Counsel