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Attorneys for Plaintiff Ethan Troupe
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ETHAN TROUPE, on behalf of himself
and all "aggrieved employees" pursuant to
Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

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

Defendants.

CASE NO: 21CMCV00282

*Assigned to the Honorable George F. Bird, Jr.,
Dept. B*

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

DATE: March 10, 2023

TIME: 8:30 a.m.

DEPT.: B

Action Filed: October 28, 2021

PLEASE TAKE NOTICE THAT on March 10, 2023 at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department B of the above-entitled Court, located at 200 West Compton Blvd., Compton, California 90220, Plaintiff Ethan Troupe will and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within the range of reasonableness and approving the proposed class action settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the appointment of Plaintiff as the Class Representative, (4) approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement administrator, (6) preliminarily approving the allocation of \$15,000 from the Gross Settlement Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be paid to the Aggrieved Employees; (7) approving as to content and form the notice to the settlement class, and directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended Class and Representative Action Complaint; and (9) setting a final fairness and approval hearing.

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

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

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

1 DATED: February 14, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

7 ALEX P. KATOFSKY

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

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Class
4 Action and PAGA Settlement Agreement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s
5 approval. The Settlement is made and entered into by and between Plaintiff Ethan Troupe
6 (“Plaintiff” or “Troupe”), individually and on behalf of all others similarly situated, and Defendant
7 Azurelite, 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 \$150,000 to a settlement class of
14 approximately 218 employees who worked approximately 11,000 workweeks, yielding gross
15 payments of **\$688 per employee**. As detailed below, the settlement is in the best interests of the
16 class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On August 23, 2021, Plaintiff submitted a letter to the Labor & Workforce Development
27 Agency (“LWDA”) and Defendant asserting the violation of the Private Attorneys General Act,
28 Labor Code section 2698 *et seq.* (“PAGA”), based on Defendant’s alleged failure to pay all wages

1 due, failure to provide meal and rest periods or premium wages in lieu thereof, failure to issue
2 accurate wage statements, failure to reimburse expenses, failure to pay sick leave, and failure to
3 timely pay wages, including vacation wages, at separation of employment, premised on the
4 violation of Labor Code sections 201-202, 226(a), 226.3, 226.7, 246(h), 510, 512, 558, 1174,
5 1174.5, 1194, and 2802. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

6 On October 28, 2021, Plaintiff commenced this Action by filing a Complaint alleging a
7 single representative cause of action under PAGA against Defendant for: (i) failure to pay minimum
8 wage and overtime; (ii) failure to provide meal and rest periods; (iii) failure to reimburse for
9 business expenses; (iv) failure to provide wage statements in compliance with Cal. Lab. Code §
10 226; and (v) failure to provide statutory paid sick leave pursuant to Cal Lab. Code § 246(d) (the
11 “Complaint”). Gaines Decl. at ¶ 7.

12 The Complaint is presently the operative complaint in the Action. However, Plaintiff will
13 file a First Amended Complaint as part of this Motion for Preliminary Approval which adds class
14 allegations and derivative claims predicated on the same factual bases as the Complaint. The First
15 Amended Complaint, a copy of which is attached to the Settlement as Exhibit B, shall hereinafter
16 be referred to as the “Operative Complaint.” Defendant denies the allegations in the Operative
17 Complaint, denies any failure to comply with the laws identified in in the Operative Complaint and
18 denies any and all liability for the causes of action alleged. Gaines Decl. at ¶ 8.

19 Defendant filed a cross-complaint against Plaintiff alleging (1) breach of written contract
20 and (2) conspiracy to commit fraudulent misrepresentation. Extensive litigation related to the
21 prosecution of the complaint and defense of the cross-complaint followed, including demurrers and
22 anti-SLAPP motions. Plaintiff prevailed on Defendant’s demurrer to his complaint and at the
23 Parties’ request, the Court deferred ruling on Plaintiff’s anti-SLAPP motion after its briefing was
24 complete. Defendant later dismissed the second cause of action for fraudulent misrepresentation
25 but continued to prosecute the first cause of action for breach of written contract. As part of the
26 Settlement (and subject to the Court’s approval), the Parties have agreed to a mutual release of
27 claims and dismissal with prejudice of the cross-complaint following the Effective Date. Gaines
28 Decl. at ¶ 9; see also, Addendum to Class Action and PAGA Settlement Agreement.

1 On September 20, 2022 and on October 5, 2022, following their exchange of information
2 regarding the Settlement Class and the claims and defenses asserted by the Parties, counsel for the
3 Parties engaged in arm's-length negotiations with the help of mediator Brandon McKelvey, Esq.,
4 to reach the basic terms of this Settlement. Gaines Decl. at ¶ 10.

5 Prior to the mediation of this Action, Plaintiff obtained, through informal discovery certain
6 data points related to the number of putative Class Members and allegedly Aggrieved Employees,
7 pay periods worked during the proposed Class and PAGA Periods, average rates of pay,
8 timekeeping and payroll records for a statistically significant portion of the proposed Class and
9 allegedly Aggrieved Employees, as well as all documents that describe Defendant's policies or
10 practices regarding the legal claims and factual allegations in the Complaint. Plaintiff's
11 investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker*
12 *Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168
13 Cal.App.4th 116, 129-130 ("*Dunk/Kullar*"). Gaines Decl. at ¶ 11.

14 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
15 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
16 other than this settlement. Defendant contends that it has complied at all times with the California
17 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification
18 would be inappropriate because the case fails to meet numerosity requirements, Plaintiff is not an
19 adequate class representative, Plaintiff's claims are not typical of putative class members, and
20 individual issues predominate over class issues. Similarly, on the PAGA cause of action,
21 Defendant's position is that Plaintiff is not an "aggrieved employee" and is not a proper
22 representative to bring a PAGA cause of action. The Action, the negotiation and execution of this
23 Settlement Agreement, and all acts performed or documents executed pursuant to or in furtherance
24 of the Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on
25 behalf of Defendant; (ii) shall not be an admission or evidence of fault on behalf of Defendant in
26 any action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be,
27 and may not be used as, an admission or evidence of the appropriateness of these or similar claims
28 for class certification in the Action or with respect to any other proceeding. If the First Amended

1 Complaint is not authorized to be filed before or at the time when the Court grants preliminary
2 approval of this Settlement, Defendant has the right to withdraw from the settlement. If Defendant
3 so withdraws, the Parties will return to the same position that they were in prior to mediation and
4 the First Amended Complaint will be deemed withdrawn. The Parties also agree that in the event
5 the Court does not grant final approval of the Settlement, the First Amended Complaint shall be
6 deemed withdrawn. The parties further agree that Defendant does not waive any defense to the First
7 Amended Complaint and the PAGA claim contained therein. The parties further acknowledge that
8 the filing of the First Amended Complaint is for settlement purposes only. Gaines Decl. at ¶ 12.

9 Plaintiff contends that Defendant violated the California Labor Code and that this case is
10 appropriate for class certification. Gaines Decl. at ¶ 13.

11 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

12 Class Counsel represent that they have conducted a thorough investigation into the facts
13 and law during the prosecution of this class action case, including the exchange of extensive
14 informal discovery and the review and verification of statistical data and other facts and information
15 provided by Defendant. Counsel for the Parties also represent that they have investigated the
16 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
17 potential defenses thereto, the damages claimed by Plaintiff, as well as Defendant's cross-complaint
18 against Plaintiff and any potential damages and defenses related thereto. Gaines Decl. at ¶ 14.

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 ¶ 15.

26 The Parties agree that the settlement class described herein may be certified for settlement
27 purposes only and that this 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 ¶ 16.

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 persons employed by
10 Defendant in California and classified as nonexempt employees who worked for Defendant during
11 the Class Period [October 5, 2018 to November 5, 2022]. Stip. at ¶ 1.5.

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

13 The Parties agree to settle this Action for a Gross Settlement Amount of One Hundred Fifty
14 Thousand Dollars (\$150,000) (the “Gross Settlement Amount”), subject to any increase based on
15 the escalator provision in paragraph 9 of the Settlement and paid and disbursed over 24 months.
16 The Gross Settlement Amount will be used to pay Individual Class Payments, Individual PAGA
17 Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class
18 Representative Service Payment and the Administrator’s Expenses. Stip. at ¶¶ 1.22, 4.3.

19 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
20 application to the Court for up to 33-1/3% of the Gross Settlement Amount for attorneys’ fees (or
21 \$50,000), plus \$15,070, which is the amount Class Counsel sought from Defendant in Plaintiff’s
22 anti-SLAPP motion, which was pending at the time of the Settlement (representing its fees incurred
23 to defend the cross-complaint filed against Plaintiff, work not related to prosecution of the Action
24 on behalf of Plaintiff and Class Members).. Stip. at ¶ 3.2.2.

25 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
26 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
27 at ¶ 3.2.2.

28 \\\

1 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
2 application to the Court for a Class Representative Service Payment to the Class Representative in
3 the gross amount of \$10,000, in consideration for his efforts in instituting and participating in the
4 Action. Stip. at ¶ 3.2.1.

5 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
6 Settlement Administration will be no more than \$11,000. Stip. at ¶ 3.2.3.

7 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
8 claims for penalties under the PAGA is \$15,000 ("PAGA Payment"), 75% of which shall be paid
9 to the LWDA and 25% shall be paid to the Aggrieved Employees. Stip. at ¶ 1.34.

10 The Net Settlement Amount is the Gross Settlement Amount, less the following payments
11 in the amounts approved by the Court: Individual PAGA Payments, the PAGA Payment, Class
12 Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses
13 Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating
14 Class Members as Individual Class Payments. Stip. at ¶ 1.28.

15 The Individual Settlement Payment means a Participating Class Member's pro rata share of
16 the Net Settlement Amount calculated according to the number of Workweeks worked during the
17 Class Period. Stip. at ¶ 1.23.

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

19 Pursuant to PAGA, the Parties have agreed that \$15,000 of the Gross Settlement Amount
20 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
21 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
22 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
23 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$11,250 – shall
24 be payable to the LWDA. The remaining 25 percent, or \$3,750, shall be paid to Aggrieved
25 Employees employed during the PAGA Period based on the prorated weeks worked – whether or
26 not they exclude themselves from the Settlement. Stip. at ¶ 1.34.

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

28 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.

1 3.769; Fed. R. Civ. P. 23(e).¹ 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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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 Here, the Parties have reached such an agreement and have submitted the Stipulation
2 herewith. See Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 17.

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

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

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

16 4 *Newberg on Class Actions*, at § 11.26.

17 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
18 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
19 Gaines Decl. at ¶ 35.

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

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

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

2 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
3 and the means for identifying the members of the class determine whether the class is ascertainable.
4 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
5 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
6 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
7 comprises approximately 218 employees. Gaines Decl. ¶ 31.

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

10 The Class Members' claims all stem from a common source: members of the Settlement
11 Class allege that Defendant violated the same Labor Code provisions in connection with their
12 employment. All members of the Class seek the same relief under the same California laws (related
13 to unpaid wages due, unpaid meal and rest period premiums, inaccurate or incomplete wage
14 statements, failure to timely pay wages upon separation, failure to reimburse expenses, and
15 derivative claims). Under these circumstances, the commonality requirement is satisfied for
16 purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 32.

17 c. **The Proposed Class Representative's Claims Are Typical of the**
18 **Class Members' Claims**

19 A class representative's claims are typical when they arise from the same event or course
20 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
21 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
22 Class Representative Ethan Troupe is a former non-exempt employee who worked for Defendant
23 in the State of California during the Class Period. He contends that Defendant failed to pay all
24 wages due, failed to provide meal and rest periods, failed to comply with itemized employee wage
25 statement provisions, failed to reimburse expenses, and failed to timely pay wages at the separation
26 of employment, in violation of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 246(h) 510, 512,
27 1174, 1174.5, 1194, 2698, 2699, and 2802, among other Labor Code provisions. He has the same
28 claims as those that the members of the Settlement Class would reasonably be expected to bring

1 based on the course of conduct alleged herein. Gaines Decl. ¶ 33.

2 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
3 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
4 conflicts with other class members. Gaines Decl. ¶ 34. Furthermore, Plaintiff has retained
5 competent counsel, experienced in litigating class action claims in the employment context. See
6 Gaines Decl. ¶¶ 2-5.

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

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

19 While the recommendations of counsel proposing the settlement are not conclusive, the
20 Court can properly take them into account, particularly where, as here, such counsel have been
21 involved in informal discovery and negotiations for some period of time, appear to be competent,
22 have experience with this type of litigation, and have exchanged substantial evidence with the
23 opposing party. See *Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
24 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
25 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
26 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
27 counsel, who are most closely acquainted with the facts of the underlying litigation”); see Gaines
28 Decl. ¶¶ 2-5, 10-29.

1 Here, the Parties' counsel have a great deal of experience in class action litigation and
2 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
3 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
4 in a broad exchange of documents, data, records and other information. Each side has apprised the
5 other, informally and at a formal mediation, of their respective factual contentions, legal theories
6 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*
7 *Gaines Decl.* ¶¶ 2-5, 10-29.

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 about
13 the nature and magnitude of the claims in question and the basis for concluding that the
14 consideration being paid for the release of those claims represents a reasonable compromise."
15 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* "attempt to decide the merits
16 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys."
17 *Kullar, supra*, 168 Cal.App.4th at 133.

18 Plaintiff's counsel created a comprehensive damage analysis using sampling information
19 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
20 falls within a realistic range of recovery on Class Members' claims. *Gaines Decl.* ¶ 18.

21 Plaintiff alleges that Defendant failed to pay all wages due in three separate ways: failing
22 to blend hazard pay, requiring that Class Members perform work off-the-clock, including rounding
23 down their hours to pay fewer hours than actually worked, failing to provide paid sick leave, as
24 required by the California Healthy Workplaces/Healthy Families Act of 2014 (codified at Labor
25 Code § 246(d)). These three factual predicates yield up to approximately \$253,000 in damage
26 exposure premised on an assumed one-half hour of unpaid work per week. *Gaines Decl.* ¶ 19.

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28 \\\

1 Plaintiff alleges that Defendant failed to pay Class Members premium wages for missed,
2 denied and unauthorized rest periods in violation of Labor Code § 226.7 and IWC Wage Order 9-
3 2001. Plaintiff and Class Members were allegedly denied, and therefore unable to take, 10-minute
4 on-the-clock rest periods for every four hours of work or major fraction thereof, but were not paid
5 premium wages of one hour's pay for each missed, denied and unauthorized rest period. When
6 they were able to take a rest period, they were oftentimes late, cut short or on-duty, in violation of
7 Labor Code §§ 226.7, 558 and IWC Wage Order No. 9-2001. Plaintiff calculates the classwide
8 liability for this claim at up to \$425,000 premised on a 25% violation rate. Gaines Decl. ¶ 20.

9 Plaintiff also contends that Defendant failed to permit or authorize Plaintiff and Class
10 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation
11 of Labor Code §§ 226.7 and 512 and IWC Wage Order 9-2001. Labor Code § 512 provides that
12 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
13 without providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff
14 and Class Members contend that they were routinely denied, and not authorized to take, a proper,
15 timely, uninterrupted, 30-minute meal period for every shift worked that exceeded five hours, or a
16 second proper, timely, uninterrupted, 30-minute meal period for every shift worked that exceeded
17 ten hours, but were not paid premium wages of one hour's pay for each missed first or second meal
18 period. When they were able to take a meal period, they were oftentimes late, cut short, or on-duty.
19 Plaintiff also alleges that Defendant allegedly failed to maintain meal period records which
20 indicated when meal periods were taken and clock records relating to such, which raises a rebuttable
21 presumption of meal period violations. These fact patterns would violate Labor Code §§ 226.7,
22 512, 558, 1174, 1174.5, and IWC Wage Order 9-2001. Based on his expert's analysis of employee
23 time records, many of which omitted time clock entries for meal periods, Plaintiff calculates the
24 classwide liability for this claim at up to \$1,695,000. Gaines Decl. ¶ 21.

25 Plaintiff further alleges that Defendant failed to issue Plaintiff and Class Members
26 accurately itemized wage statements. Plaintiff and Class Members were allegedly not paid all
27 wages due, as stated above. As such, Plaintiff alleges that the wage statements provided by
28 Defendant failed to accurately state all gross wages earned, in violation of Labor Code §§ 226(a)(1)

1 and 226.3, total hours worked, in violation of Labor Code §§ 226(a)(2) and 226.3, net wages earned,
2 in violation of Labor Code §§ 226(a)(5) and 226.3, and all applicable hourly rates in effect during
3 the pay period and the corresponding number of hours worked at each hourly rate, in violation of
4 Labor Code §§ 226(a)(9) and 226.3. Separately, the wage statements issued to Plaintiff and Class
5 Members allegedly failed to set forth the inclusive dates of the pay period for which the employee
6 is paid, in violation of Labor Code §§ 226(a)(6) and 226.3, and also failed to set forth the name and
7 address of the legal entity that is the employer, in violation of Labor Code §§ 226(a)(8) and 226.3.
8 Plaintiff calculates the statutory penalty liability for this claim at up to \$276,000. Gaines Decl. ¶
9 22.

10 Plaintiff and Class Members contend that they were required to incur expenses in the
11 performance of their job duties for which they were not fully reimbursed, in violation of Labor
12 Code § 2802. Plaintiff argues that Defendant required Class Members to purchase office equipment
13 and power tools, among other things, for work-related purposes but failed to reimburse them for
14 their use. This practice would violate Labor Code § 2802. Plaintiff calculates the classwide liability
15 for this claim at \$64,140. Gaines Decl. ¶ 23.

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 Plaintiff's claims involves
18 a 50% or higher hurdle, especially with respect to the unpaid wage claims, meal and rest period
19 claims and expense reimbursement claims, to which Defendant maintains 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 Plaintiff maintains that the
22 requirements of class certification are met, Defendant has articulated 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 Defendant were to defeat Plaintiff's class certification
25 motion, there would be no class wide relief whatsoever, and most class members would likely not
26 file individual claims. Gaines Decl. ¶ 24.

27 Plaintiff also faced the risk of a loss on the merits on his claims. It is very possible that the
28 Court would agree with Defendant's position that its policies and 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 Plaintiff's claims would be zero. Gaines Decl. ¶ 25.

3 Plaintiff faced the risk that he would not obtain a maximum damage/penalty award on all
4 (or any of) his claims. For example, Plaintiff seeks discretionary penalties pursuant to the PAGA.
5 Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose all
6 penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 26.

7 Perhaps most significantly, Defendant has demonstrated that it does not have the financial
8 resources to fund a significant settlement or continue its defense of this Action. The compromise
9 reached – only after Plaintiff's counsel's confidential review and analysis of Defendant's financials
10 – reflects a middle ground position that permits Defendant to stay in business and continue
11 employing California employees while paying a fair sum, over time, to compensate Class Members
12 for their alleged damages. Moreover, Defendant strongly contends that its policies and practices
13 do not violate any laws and that the arbitration agreements signed by most, if not all, Class Members
14 preclude class treatment if they are enforceable. It contends that it properly provided for all meal
15 and rest periods and fully compensated its employees for all time worked. It further contends that
16 the wage statements it provides to its employees are fully compliant with California law. Gaines
17 Decl. ¶ 27.

18 When the costs and risks of non-certification and loss on the merits are considered,
19 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
20 Decl. ¶¶ 18-28.

21 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
22 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
23 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
24 Decl. ¶ 29.

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

27 Despite the asserted fairness of the settlement terms, any potential Class Member who
28 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit

1 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member
2 would otherwise retain any claim he or she may have against Defendant.

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

6 **E. Plaintiff Should Be Permitted to File His First Amended Complaint**

7 In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached
8 to the Stipulation as **Exhibit B**, which adds PAGA allegations and claims to comport with the
9 release provided for in the Stipulation. The Parties agreed that, as part of his motion for preliminary
10 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
11 of which is a condition of the Stipulation.

12 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
13 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
14 the settlement, Plaintiff requests that the Court approve his filing of the First Amended Complaint,
15 and consent that Defendant not be required to file a responsive pleading thereto.

16 **V. CONCLUSION**

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

- 19 1. Preliminarily finding that the settlement falls within the range of reasonableness and
20 approving the proposed settlement;
- 21 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 22 3. Appointing Plaintiff Ethan Troupe as the Class Representative;
- 23 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
24 Class Counsel;
- 25 5. Approving Phoenix Settlement Administrators as Settlement Administrator;
- 26 6. Preliminarily approving the allocation of \$15,000 from the Gross Settlement
27 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
28

(75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be paid to the Aggrieved Employees;

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

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

9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant shall provide to the Administrator a list of all Class Members, including 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 Administrator to mail Notice to Class Members	14 calendar days after Administrator's receipt of Class Data
Last day for Class Members to submit a written request for exclusion to the 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 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 Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2023, at _____ m. (approximately 95 days after entry of the Order granting this Motion)

1 DATED: February 14, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Ethan Troupe and Proposed Class
8 Counsel