

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
EVAN S. GAINES, ESQ. SBN 287668
evan@gaineslawfirm.com
GAINES & GAINES, APLC
4550 E. Thousand Oaks Blvd., Suite 100
Westlake Village, CA 91362
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Holly Brown
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

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

Plaintiff,

v.

PARKER BUILDING SUPPLY-USLBM
LLC, a Delaware limited liability company,
and DOES 1 through 10, inclusive,

Defendants.

CASE NO: CIVSB2113312

*Assigned to the Honorable Joseph T. Ortiz, Dept.
S17*

CLASS ACTION

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

DATE: April 12, 2023

TIME: 1:30 p.m.

DEPT.: S17

Action Filed: January 6, 2022

1 **PLEASE TAKE NOTICE THAT** on April 12, 2023 at 1:30 p.m., or as soon thereafter as
2 the matter may be heard, in Department S17 of the above-entitled Court, located at 247 West Third
3 Street, San Bernardino, California 92415, Plaintiff Holly Brown will and hereby does move
4 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
5 the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiff Holly Brown as the Class Representative, (4) approving the
8 appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement
10 administrator, (6) preliminarily approving the allocation of \$40,000 from the Class Settlement
11 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
12 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce
13 Development Agency and twenty-five percent (25%) shall be distributed to the Aggrieved
14 Employees; (7) approving as to content and form the notice to the settlement class, and directing it
15 be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended
16 Complaint, and (9) setting a final fairness and approval hearing.

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

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

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

1 DATED: March 17, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Holly Brown and Proposed Class
8 Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY	2
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....	2
IV. LEGAL ANALYSIS.....	3
A. The Proposed Settlement Terms	3
1. The Settlement Class.....	3
2. Allocations to be Paid from the Class Settlement Amount.....	3
3. Settlement of Claims Pursuant to Labor Code § 2698 et seq. (PAGA)	5
B. Two-Step Approval Process.....	5
C. Procedures for Settlement Before Class Certification	6
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
D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	9
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.....	14
E. Plaintiff Should Be Permitted to File Their First Amended Complaint	14
V. CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

<i>Amchem Products, Inc. v. Windsor</i> (1987) 521 U.S. 591	7
<i>Augustus v. ABM Security Services, Inc.</i> (2016) 5 Cal.5th 257, 269	11
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785	10
<i>Classen v. Weller</i> (1983) 145 Cal. App. 3d 27.....	8
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794	7
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	5
<i>Hammon v. Barry</i> (D.D.C. 1990) 752 F. Supp. 1087	9
<i>In re Armored Car Antitrust Litig.</i> (N.D. Ga. 1979) 472 F. Supp. 1357	9
<i>In re Baldwin-United Corp.</i> (S.D.N.Y. 1984) 105 F.R.D. 475	7
<i>In re Chicken Antitrust Litig.</i> (N.D. Ga. 1980) 560 F. Supp. 957	9
<i>In re Paine Webber Ltd. P'ships Litig.</i> (S.D.N.Y. 1997) 171 F.R.D. 104	9
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	10
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7th Cir. 1987) 834 F.2d 677.....	9
<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)

Page

<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263.....	7
<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	5
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224	6, 7

STATUTES

Cal. Labor Code §§ 201-203.....	8, 12
Cal. Labor Code § 226	8, 12
Cal. Labor Code § 226.3	8
Cal. Labor Code § 226.7	8, 10
Cal. Labor Code § 512	8, 10
Cal. Labor Code § 558	8, 10
Cal. Labor Code § 1198	8, 11
Cal. Labor Code § 2698	5, 8
Cal. Labor Code § 2699	5, 7, 8

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	5, 6
Fed. R. Civ. P. 23(e).....	5

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	6, 7, 9
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 Joint
4 Stipulation of Class and Representative Action Settlement (“Settlement”, “Stipulation” or “Stip.”)
5 for the Court’s review and approval. The Settlement is made and entered into by and between
6 Plaintiff Holly Brown (“Brown” or “Plaintiff”), individually and on behalf of all others similarly
7 situated, and Defendant Parker Building Supply-USLBM LLC (“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. The
12 proposed settlement provides for a non-revisionary class settlement in the gross amount of
13 \$700,000 to a settlement class of approximately 110 Class Members, yielding gross payments of
14 approximately **\$6,364 per employee.**¹ The total number of workweeks worked by Class Members
15 during the applicable class period is anticipated to slightly exceed 10,500. As detailed below, the
16 settlement is in the best interests of the class in light of all of the facts and circumstances and the
17 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 Plaintiff Holly Brown as the
22 Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
23 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
24 Administrator; (f) permit the filing of a First Amended Complaint; (g) authorize the mailing of the
25 proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

26
27
28 ¹ The data supplied by Defendant goes through November 1, 2022; the number will likely increase through the conclusion of the Class Period (December 31, 2022).

II. BACKGROUND AND PROCEDURAL HISTORY

On October 29, 2021, Plaintiff Brown exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On January 6, 2022, Plaintiff filed a Representative Action Complaint, pursuant to the Private Attorneys General Act (“PAGA”), in the Superior Court of California, County of San Bernardino, alleging a single cause of action seeking PAGA civil penalties for Labor Code violations. The First Amended Complaint (the “Operative Complaint”), attached to the Settlement as **Exhibit B** and which will be filed as part of the settlement approval process, asserts class and PAGA representative action claims against Defendant for, among other things, failure to provide meal and rest breaks; failure to provide accurate wage statements; failure to pay wages timely during employment and upon termination; and failure to provide suitable seating. Gaines Decl. at ¶ 7; Exhibit B-B.

III. INVESTIGATION AND SETTLEMENT DISCUSSIONS

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

On November 17, 2022, following their exchange of information and documents regarding the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm’s-length negotiations with the assistance of mediator David Rotman, Esq. With the assistance of the mediator, the parties were able to reach a resolution of the Action. Gaines Decl. at ¶ 9.

Based on their own independent investigation and evaluation, Class Counsel are of the opinion (and will so represent to the Court) that settlement for the consideration and on the terms set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of

1 the Settlement Class in light of all known facts and circumstances, including the risk of significant
2 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
3 Defendant. Gaines Decl. at ¶ 10.

4 The Parties agree that the Settlement Class described herein may be certified for settlement
5 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
6 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
7 certification will have no force or effect and will immediately be revoked. The Parties further agree
8 that certification for purposes of the settlement is in no way an admission that class certification is
9 proper under the more stringent standard applied for litigation and that evidence of this limited
10 Stipulation for settlement purposes only will not be admissible for any purpose in this or any other
11 proceeding. Gaines Decl. at ¶ 11.

12 **IV. LEGAL ANALYSIS**

13 **A. The Proposed Settlement Terms**

14 **1. The Settlement Class**

15 The Parties have agreed to a settlement class composed of all persons who are or were
16 employed in California by Defendant as non-exempt employees at any point from January 6, 2018
17 through December 31, 2022. Stip. at ¶ 9.

18 **2. Allocations to be Paid from the Class Settlement Amount**

19 The Parties agree to settle the Action for a Class Settlement Amount of Seven Hundred
20 Thousand Dollars (\$700,000) (the “Class Settlement Amount”), subject to any increase based on
21 the escalator provision in paragraph 54 of the Settlement. The Class Settlement Amount means the
22 maximum settlement amount of Seven Hundred Thousand Dollars (\$700,000.00) to be paid by
23 Defendant in full satisfaction of all class and representative action claims arising from the facts
24 alleged in the Action and LWDA Notice, which includes all Individual Settlement Payments to
25 Participating Class Members, Class Representative enhancement payment, Claims Administration
26 Costs, the PAGA Payment, and the Class Counsel Award. This Class Settlement Amount has been
27 agreed to by Plaintiff and Defendant based on an “all in” Class Settlement Amount. In no event
28 will Defendant be liable for more than the Class Settlement Amount for the Released Class Claims

1 and Released PAGA Claims, with the exception of Defendant's share of payroll taxes, which shall
2 be funded separate and apart from the Class Settlement Amount. No later than ten (10) business
3 days after the Effective Date, Defendant shall deposit the Class Settlement Amount into an interest-
4 bearing Qualified Settlement Fund created by the Claims Administrator. The Claims Administrator
5 shall handle such monies pursuant to the terms of the Joint Stipulation of Class and Representative
6 Action Settlement. Stip. at ¶ 11.

7 From the Class Settlement Amount, Plaintiff will request an award of attorneys' fees not to
8 exceed 35% of the Class Settlement Amount (i.e., \$245,000). Stip. at ¶ 7.

9 From the Class Settlement Amount, Defendant will not oppose Plaintiff's counsel's
10 application to the Court for up to \$20,000 in reimbursement of litigation costs and expenses. Stip.
11 at ¶ 7.

12 From the Class Settlement Amount, Defendant will not oppose Plaintiff's counsel's
13 application to the Court for Class Representative Enhancement Payment to the Class
14 Representatives in the gross amount of \$15,000, in consideration for her efforts in instituting and
15 participating in the Action and her full general release of all claims. Stip. at ¶¶ 38, 69

16 From the Class Settlement Amount, settlement administration fees paid to Phoenix
17 Settlement Administrators will be no more than \$8,000. Stip. at ¶¶ 4, 36.

18 The Parties have agreed that Forty Thousand Dollars (\$40,000.00) of the Class Settlement
19 Amount shall be allocated to the resolution of any and all Aggrieved Employees' and the State of
20 California's claims arising under PAGA. Pursuant to PAGA, Seventy-Five Percent (75%), or Thirty
21 Thousand Dollars (\$30,000.00), of the PAGA Payment shall be paid to the LWDA (this is defined
22 above as the LWDA Payment), and twenty-five percent (25%), or Ten Thousand Dollars
23 (\$10,000.00), of the PAGA Payment shall be distributed to the Aggrieved Employees. Stip. at ¶
24 22.

25 The Net Settlement Amount means the portion of the Class Settlement Amount remaining
26 after deduction of the approved Claims Administration Costs, PAGA Payment, and the Class
27 Counsel Award. The Net Settlement Amount will be distributed to Participating Class Members.
28 Stip. at ¶ 17.

1 The Individual Settlement Payments shall be calculated and apportioned from the Net
2 Settlement Amount based on the total number of workweeks the Class Member worked in a non-
3 exempt position in California during the Class Period. The Net Settlement Amount shall be divided
4 by the total number of workweeks worked by Participating Class Members, and each Participating
5 Class Member shall receive a proportional share of the Net Settlement Amount that corresponds to
6 the number of workweeks the Class Member worked during the Class Period. Stip. at ¶ 42.

7 All Individual Settlement Payments will be allocated as follows: 80% to penalties and
8 interest, which shall be reported by the Claims Administrator on an IRS Form-1099, and 20% to
9 wages, which shall be reported on an IRS Form W-2 by the Claims Administrator. All Aggrieved
10 Employee Payments will be allocated 100% to penalties, which shall be reported by the Claims
11 Administrator on an IRS Form-1099. Defendant shall be separately responsible for funding the
12 employer's share of payroll taxes. Stip. at ¶ 62.

13 3. **Settlement of Claims Pursuant to Labor Code § 2698 et seq. (PAGA)**

14 Pursuant to PAGA, the Parties have agreed that \$40,000 of the Class Settlement Amount
15 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Labor Code § 2699(i)
16 requires that "civil penalties recovered by aggrieved employees shall be distributed as follows: 75
17 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
18 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$30,000 – shall
19 be payable to the LWDA. The remaining 25 percent, or \$10,000, shall be distributed to the
20 Aggrieved Employees. Stip. at ¶ 22.

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

22 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
23 3.769; Fed. R. Civ. P. 23(e).² This is done in two steps: (1) an early (preliminary) review by the
24 trial court, and (2) a final review after notice has been distributed to the Class Members informing
25 them of the terms of the settlement and allowing them to exclude themselves from, participate in

26 _____
27 ² The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 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 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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

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

Id. at § 11.24.

Here, the Parties have reached such an agreement and have submitted the Stipulation
herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 12.

C. Procedures for Settlement Before Class Certification.

Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
approval stage, request that the court provisionally approve certification of the class – conditioned
upon final approval of the settlement. “[P]re-certification settlements are routinely approved if

1 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
2 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
3 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
4 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
5 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

6 The strength of the findings made by a judge at a preliminary hearing
7 or conference concerning a tentative settlement proposal . . . may be
8 set out in conditional orders granting tentative approval to the various
9 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.

10 4 *Newberg on Class Actions*, at § 11.26.

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

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

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

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

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

27 _____
28 ³ 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.

comprises approximately 110 employees, who worked approximately 10,500 workweeks as of November 1, 2022. Gaines Decl. ¶ 26.

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

The Class Members' claims all stem from a common source: members of the Settlement Class allege that Defendant violated the same Labor Code provisions in connection with their employment. All members of the Class seek the same relief under the same California laws (related to unpaid meal and rest period premiums, inaccurate or incomplete wage statements, failure to timely pay wages due upon separation, failure to provide suitable seating, and derivative claims). Under these circumstances, the commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 27.

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

A class representative's claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed Class Representative Holly Brown is a former non-exempt employee who worked for Defendant in the State of California during the Class Period. She contends that Defendant failed to provide meal and rest periods, failed to comply with itemized employee wage statement provisions, failed to provide suitable seating, and failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201, 202, 226(a), 226.3, 226.7, 512, 558, 1198, 2698, and 2699. She has the same claims as those that the members of the Settlement Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 28.

Plaintiff has also demonstrated that she will aggressively and competently assert the interests of the proposed Settlement Class; she has taken an active role in this litigation and has no apparent conflicts with other class members. Gaines Decl. ¶ 29. Furthermore, Plaintiff has retained competent counsel, experienced in litigating wage and hour class action claims in state and federal courts. *See* Gaines Decl. ¶¶ 2-5.

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

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

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

23 Here, the Parties’ counsel have a great deal of experience in class action litigation and
24 specialize in employment wage and hour matters. Moreover, counsel for all Parties conducted an
25 extensive investigation of the factual allegations involved in this case. The Parties have engaged
26 in a broad exchange of documents, data, records and other information. Each side has apprised the
27 other, informally, at a formal mediation with the assistance of one of California’s most highly
28 regarded mediators, and through lengthy negotiations, of their respective factual contentions, legal

1 theories and defenses, resulting in extensive arm's-length negotiations taking place among the
2 Parties. *See* Gaines Decl. ¶¶ 2-5, 8-12.

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

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

13 Plaintiff contends that Defendant failed to permit or authorize Class Members to take timely
14 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
15 226.7, 512, and 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers (like
16 Defendant) may not employ an employee for a work period of more than 5 hours without providing
17 a 30-minute meal period starting no later than the end of the fifth hour. Plaintiff and Class Members
18 were routinely unable to take a proper meal period when they worked shifts in excess of 5 hours in
19 duration and a second meal period when they worked shifts in excess of 10 hours in duration.
20 Moreover, Plaintiff maintains that Defendant failed to adopt a legally compliant meal period policy
21 (or any meal policy). Based on time and wage records supplied by Defendant, in coordination with
22 her data analysis expert, Plaintiff has ascertained a meal period violation rate of 41.5%. Based on
23 the data provided, Defendant did not pay meal period premiums during the Class Period. Plaintiff
24 calculates maximum damages on this claim at \$282,560, with PAGA civil penalty liability of
25 \$228,200. Gaines Decl. ¶ 13.

26 Plaintiff further alleges that Defendant failed to pay Class Members premium wages for
27 missed, denied and unauthorized rest periods in violation of Labor Code §§ 226.7 and 558 and IWC
28 Wage Order 4-2001. Plaintiff and Class Members were allegedly denied, and therefore unable to

1 take, 10-minute on-the-clock rest periods for every four hours of work or major fraction thereof,
2 but were not paid premium wages of one hour's pay for each missed, denied and unauthorized rest
3 period. When Plaintiff and Class Members were able to take a rest period, they contend that they
4 were typically late, cut-short, or interrupted. Plaintiff also argues that Defendant maintained a
5 practice requiring employees to remain on the company premises during their rest periods, which
6 would violate our Supreme Court's mandate in *Augustus v. ABM Security Services, Inc.* (2016) 5
7 Cal.5th 257, 269 (holding that the rest period requirement "obligates employers to permit and
8 authorizes employees to take off-duty rest periods. That is, during rest periods employers must
9 relieve employees of all duties and relinquish control over how employees spend their time." An
10 employer may not place any limitations on where employees may go or not go during their rest
11 periods). For each workday that Plaintiff and Class Members were denied a rest period and/or were
12 restricted from leaving the premises during their rest period, they must be paid a one-hour premium
13 as additional wages beyond earnings for actual hours worked. *See* IWC Wage Order No. 5
14 subdivision 12(a). Plaintiff alleges that Defendant never paid such premiums. Plaintiff calculates
15 damages on this claim at \$672,957, with PAGA civil penalty liability of \$276,900. Gaines Decl. ¶
16 14.

17 Plaintiff argues that she and Class Members were not permitted to sit down during the
18 course of their employment, in violation of Labor Code § 1198 and IWC Wage Order 4-2001, §
19 14. Plaintiff was not provided with a chair or any other form of seating. Plaintiff performed the
20 majority of her job duties behind a cash register, however, Defendant did not permit chairs, seats,
21 or stools behind the cash register. Having chairs, seats, or stools behind the register would not
22 interfere with employee's duties. Plaintiff contends that this practice violates California Labor Code
23 § 1198 and IWC Wage Order 4-2001, § 14, which provides as follows: "(A) All working employees
24 shall be provided with suitable seats when the nature of the work reasonably permits the use of
25 seats. (B) When employees are not engaged in the active duties of their employment and the nature
26 of the work requires standing, an adequate number of suitable seats shall be placed in reasonable
27 proximity to the work area and employees shall be permitted to use such seats when it does not
28 interfere with the performance of their duties." Plaintiff calculates \$276,900 in PAGA penalties

1 for failure to provide suitable seating. Gaines Decl. ¶ 15.

2 Plaintiff also contends that Defendant failed to issue Class Members accurately itemized
3 wage statements. Specifically, Plaintiff and non-exempt Class Members were not paid all wages
4 due, as detailed above. As a result, the wage statements issued by Defendant to Plaintiff and Class
5 Members fail to accurately state all gross wages earned, in violation of Labor Code § 226(a)(1),
6 total hours worked, in violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor
7 Code § 226(a)(5), and all applicable hourly rates in effect during the pay period and the
8 corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226(a)(9).
9 Plaintiff calculates statutory penalties on this claim at \$224,650, with PAGA civil penalty liability
10 of \$276,900. Gaines Decl. ¶ 16.

11 Finally, Plaintiff contends that Defendant failed to pay Plaintiff and certain Class Members
12 all wages due upon separation of employment, in violation of Labor Code §§ 201-203. As
13 Defendant failed to pay them all wages due during the course of their employment, as described
14 above, these wages were due and owing upon separation of employment yet went unpaid.
15 Separately, when Plaintiff ended her employment with Defendant, she was not provided her final
16 wages within 72 hours. Instead, Defendant paid her 4-5 days after her last date of employment, in
17 violation of Labor Code § 201. Plaintiff calculates statutory waiting time penalties at \$187,255,
18 with PAGA civil penalty liability of \$4,900. Gaines Decl. ¶ 17.

19 A discount on the maximum value of Class members' claims was required (and warranted)
20 to resolve the matter at this stage of the litigation. As to the merits of Plaintiff's claims, Defendant
21 strongly argued that employees waived any missed meal and rest periods, such that no premiums
22 are due. It argued that employees were always afforded the right to take their breaks, and as to rest
23 periods, lulls in business allowed for ample time to take rest periods. It argued that it adopted and
24 enforced legally compliant policies and practices which authorized meal and rest periods as
25 required by law, and employees did not voice concern over meal and rest periods being denied. As
26 to Plaintiff's suitable seating claims, Defendant maintained throughout the litigation and the course
27 of settlement negotiations that all employees were permitted to use a seat during their work, and
28 even if they were not, their work would not permit the use of seats, such that seating was not

1 required in the first place. Gaines Decl. ¶ 18.

2 The discount negotiated for settlement here is a reasonable compromise, particularly
3 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
4 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
5 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
6 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
7 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
8 various arguments why class treatment is not appropriate, including but not limited to that
9 individualized inquires among class members predominate over common ones. If Defendant was
10 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
11 most class members would likely not file individual claims. Gaines Decl. ¶ 19.

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

16 Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award
17 on all (or any of) their claims. For example, Plaintiff's wage statement claim and waiting time
18 penalty claim are wholly derivative of her unpaid wage claims. If she did not prevail on those
19 claims, she would not prevail on a claim for deficient wage statements or failure to timely pay
20 wages. In addition, Plaintiff seeks discretionary penalties pursuant to the PAGA. Even if Plaintiff
21 did prevail on her claims, it is possible that the Court would not impose all penalties pursuant to its
22 discretionary power to reduce them. Gaines Decl. ¶ 21.

23 Defendant strongly contends that its policies and practices do not violate any laws. It
24 contends that it properly provided for all meal and rest periods and fully compensated its employees
25 for all time worked. It further contends that the wage statements it provides to its employees are
26 fully compliant with California law. Gaines Decl. ¶ 22.

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

Decl. ¶¶ 13-23.

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

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

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

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

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

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

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

V. **CONCLUSION**

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

1. Preliminarily finding that the settlement falls within the range of reasonableness and approving the proposed settlement;
2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiff Holly Brown as the Class Representative;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel;
5. Approving Phoenix Settlement Administrators as the claims administrator and its estimated fees not to exceed \$8,000;
6. Preliminarily approving the allocation of \$40,000 from the Class Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) of the PAGA Payment shall be distributed to the Aggrieved Employees as their Aggrieved Employee Payment;
7. Approving as to content and form the notice to the Settlement Class, and directing it to be disseminated by the Settlement Administrator;
8. Permitting Plaintiff to file her First Amended Complaint, attached to the Stipulation as **Exhibit B**, no later than five (5) court days after notice of the entry of the Order granting this motion has been given, and consent that Defendant not be required to file a responsive pleading thereto; and
9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Claims Administrator a complete list of all Class Members, including their name, most recent mailing address and telephone number, Social Security Number, dates of employment, and the respective number of pay periods that he or she worked during the Class Period ("Class List")	14 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Claims Administrator to mail Notice to Class Members	10 calendar days after Claims Administrator's receipt of Class List

<u>EVENT</u>	<u>TIMING</u>
Last day for Class Members to submit a written request for exclusion to the Claims 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 Claims 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 Claims 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 90 days after entry of the Order granting this Motion)

DATED: March 17, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Holly Brown and Proposed Class
Counsel