

1 DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
2 ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
3 EVAN S. GAINES, ESQ. SBN 287668
evan@gaineslawfirm.com
4 **GAINES & GAINES, APLC**
4550 East Thousand Oaks Boulevard, Suite 100
5 Westlake Village, CA 91362
Telephone: (818) 703-8985
6 Facsimile: (818) 703-8984

7 Attorneys for Plaintiff Arturo Gonzalez
and Proposed Class Counsel

8 JAMES KAWAHITO, ESQ. SBN 234851
jkawahito@kawahitolaw.com
9 **KAWAHITO LAW GROUP APC**
300 Corporate Pointe, Suite 340
10 Culver City, CA 90230
Telephone: (310) 746-5300
11 Facsimile: (310) 593-2520

12 Attorneys for Plaintiff Randall Hord
13 and Proposed Class Counsel

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15
16 **FOR THE COUNTY OF KERN**

17 ARTURO GONZALEZ, on behalf of
18 himself and all "aggrieved employees"
pursuant to Labor Code § 2698 *et seq.*,

19 Plaintiffs,

20 v.

21 JTI ELECTRICAL &
22 INSTRUMENTATION,
LLC, a Delaware limited liability company,
23 and DOES 1 through 10, inclusive,

24 Defendants.

CASE NO: BCV-21-102905

Assigned to the Hon. Thomas S. Clark, Dept. 17

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

DATE: October 10, 2023

TIME: 8:30 a.m.

DEPT.: 17

Action Filed: December 13, 2021

1 **PLEASE TAKE NOTICE THAT** on October 10, 2023 at 8:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department 17 of the above-entitled Court, located at 1415 Truxtun
3 Avenue, Bakersfield, California 93301, Plaintiffs Arturo Gonzalez and Randall Hord will and
4 hereby do move unopposed for an Order (1) preliminarily finding that the settlement between the
5 parties falls within the range of reasonableness and approving the proposed class action settlement
6 in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement
7 class, (3) approving the appointment of Plaintiffs Arturo Gonzalez and Randall Hord as the Class
8 Representatives, (4) approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines
9 & Gaines, APLC as Class Counsel, (5) approving the appointment of Phoenix Settlement
10 Administrators as settlement administrator, (6) preliminarily approving the allocation of \$145,000
11 from the Gross Settlement Amount to settle Plaintiffs' representative claims under the Private
12 Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be
13 paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be paid
14 to Aggrieved Employees as part of the Net Settlement Proceeds; (7) approving as to content and
15 form the notice to the settlement class, and directing it be disseminated by the Settlement
16 Administrator; (8) permitting Plaintiffs to file a First Amended Complaint, and (9) setting a final
17 fairness and approval hearing.

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

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

25 \\

26 \\

27 \\

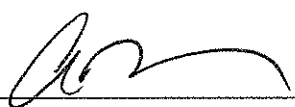
28 \\

1 This Motion will be based on the accompanying Memorandum of Points and Authorities,
2 the Settlement Agreement and Release of Claims, the Declarations of Daniel F. Gaines, James
3 Kawahito, Arturo Gonzalez, and Randall Hord, such evidence or oral argument as may be presented
4 at the hearing, and on the complete record and file herein.

5
6 DATED: July 27, 2023

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Arturo Gonzalez and Proposed
Class Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND AND PROCEDURAL HISTORY.....	2
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....	3
IV. LEGAL ANALYSIS.....	4
A. The Proposed Settlement Terms	4
1. The Settlement Class.....	4
2. Allocations to be Paid from the Gross Settlement Amount	4
3. Settlement of Claims Pursuant to Labor Code § 2698 et seq. (PAGA).....	6
B. Two-Step Approval Process.....	7
C. Procedures for Settlement Before Class Certification	8
1. The Settlement Class Should Be Certified for Settlement Purposes.....	8
a. The Settlement Class is Ascertainable	9
b. Questions of Law or Fact Common to Members of the Settlement Class Predominate.....	9
c. The Proposed Class Representative's Claims are Typical of the Class Members' Claims	9
D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	10
1. The Settlement Falls Within The "Ballpark" of Reasonableness	11
2. Despite the Asserted Fairness of the Settlement Terms, Class Members May Request Exclusion From, Or Object To, The Settlement.....	15
E. Plaintiff Should Be Permitted to File Their First Amended Complaint.....	16
V. CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

<i>Amchem Products, Inc. v. Windsor</i> (1987) 521 U.S. 591	8
<i>Augustus v. ABM Security Services, Inc.</i> (2016) 5 Cal.5th 257, 269	13
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785.....	11
<i>Classen v. Weller</i> (1983) 145 Cal. App. 3d 27.....	9
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794.....	8
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126.....	7
<i>Hammon v. Barry</i> (D.D.C. 1990) 752 F. Supp. 1087	10
<i>In re Armored Car Antitrust Litig.</i> (N.D. Ga. 1979) 472 F. Supp. 1357	10
<i>In re Baldwin-United Corp.</i> (S.D.N.Y. 1984) 105 F.R.D. 475	8
<i>In re Chicken Antitrust Litig.</i> (N.D. Ga. 1980) 560 F. Supp. 957	10
<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.....	11
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7th Cir. 1987) 834 F.2d 677.....	10
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> (C.D. Cal. 2004) 221 F.R.D. 523	10
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438.....	10

TABLE OF AUTHORITIES

(continued)

Page

<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263.....	9
<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> (E.D. Pa. 1978).....	10
<i>Steinberg v. Carey</i> (S.D.N.Y. 1979) 470 F. Supp. 471.....	10
<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800.....	7
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224.....	7, 8

STATUTES

Cal. Labor Code §§ 201-203	2, 14
Cal. Labor Code § 226	2, 9, 13, 14
Cal. Labor Code § 226.7	2, 9, 12, 13
Cal. Labor Code § 512	2, 10, 12
Cal. Labor Code § 558	10, 11, 12, 13
Cal. Labor Code § 2698	1, 6, 10
Cal. Labor Code § 2699	6, 8, 10

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	7, 8
Fed. R. Civ. P. 23(e).....	7

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	7, 8, 10
Manual for Complex Litigation (Third) § 30.41	7

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 review
5 and approval. The Settlement is made and entered into by and between Plaintiffs Arturo Gonzalez
6 ("Gonzalez") and Randall Hord ("Hord") (together, "Plaintiffs"), individually and on behalf of all
7 others similarly situated, and Defendant JTI Electrical & Instrumentation, 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 \$1,450,000 to a settlement class of approximately 469 Class Members who worked approximately
14 25,225 workweeks during the applicable time frame, yielding gross payments of approximately
15 **\$3,092 per employee**. As detailed below, the settlement is in the best interests of the class in light
16 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 Plaintiffs Arturo Gonzalez and
21 Randall Hord as the Class Representatives; (d) approve the appointment of Daniel F. Gaines and
22 Alex P. Katofsky of Gaines & Gaines, APLC and James Kawahito of Kawahito Law Group APC
23 as Class Counsel; (e) approve appointment of the Settlement Administrator; (f) permit the filing of
24 a First Amended Complaint; (g) authorize the mailing of the proposed class action notice packet;
25 and (h) schedule a final fairness and approval hearing.

26 \\\

27 \\\

28 \\\

1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On October 4, 2021, Plaintiff Gonzalez exhausted the pre-filing requirements of the Labor
3 Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
4 Decl.”) at ¶ 6.

5 On December 13, 2021, Plaintiff Gonzalez initiated his Action in the Kern County Superior
6 Court by filing a complaint, pursuant to PAGA, on behalf of himself and all other aggrieved
7 employees. On May 13, 2022, Plaintiff Hord filed his Class Action in the Kern County Superior
8 Court, alleging substantially similar claims as Gonzalez on behalf of non-exempt employees of
9 Defendant. Gaines Decl. at ¶ 7.

10 Together, as set forth in the proposed First Amended Complaint (see Settlement, Exhibit
11 3), which the Parties seek to file as part of this Motion, the Actions assert claims against Defendant
12 for (1) failure to pay all wages due (Labor Code §§ 510, 1194, and 1194.2 and IWC Wage Order
13 16-2001); (2) failure to provide rest periods or compensation in lieu thereof (Labor Code § 226.7
14 and IWC Wage Order 16-2001); (3) failure to provide meal periods or compensation in lieu thereof
15 (Labor Code §§ 226.7, 510, 512, and 1194 and IWC Wage Order 16-2001); (4) failure to reimburse
16 for necessary expenditures (Labor Code § 2802); (5) knowing and intentional failure to comply
17 with itemized employee wage statement provisions (Labor Code §§ 226(a) and (e)); (6) failure to
18 timely pay wages due at the separation of employment (Labor Code §§ 201-203 and 227.3); (7)
19 violation of Business and Professions Code § 17200 for underlying violations of the Labor Code
20 as set forth in the complaints in the Actions; and (8) civil penalties pursuant to PAGA for underlying
21 violations of the Labor Code as set forth in the complaints in the Actions. Gaines Decl. at ¶ 8.

22 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
23 in the Actions, and further denies that the Actions are appropriate for class treatment for any
24 purpose other than this settlement. Defendant contends that it has complied at all times with the
25 California Labor Code. It is Defendant’s 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, among other defenses. The Actions, the negotiation and execution of the Settlement

1 Agreement, and all acts performed or documents executed pursuant to or in furtherance of this
2 Settlement Agreement (i) shall not be used as an admission, or as evidence of wrongdoing by the
3 Defendant, or for any other purpose whatsoever; (ii) shall not be an admission or evidence of fault
4 on behalf of Defendant in any action before a civil court, criminal court, administrative agency of
5 any type, or other tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission
6 or evidence of the appropriateness of these or similar claims for class certification in the Actions
7 or with respect to any other proceeding whatsoever. Gaines Decl. at ¶ 9.

8 The Class Representatives contend that Defendant violated the California Labor Code and
9 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
10 certification. Gaines Decl. at ¶ 10.

11 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

12 Class Counsel conducted a thorough investigation into the facts and law during the
13 prosecution of this class action case, including the exchange of extensive formal and informal
14 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 Plaintiffs and
17 potential defenses thereto, and the damages and other losses claimed by Plaintiffs. Gaines Decl. at
18 ¶ 11.

19 On March 27, 2023, following their exchange of information and documents regarding the
20 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
21 length negotiations with the assistance of an experienced wage and hour mediator, the Hon. David
22 I. Brown (Sacramento Superior Court, Ret.), after which the Parties were able to reach the
23 resolution of the Actions set forth herein following their acceptance of a mediator's proposal.
24 Gaines Decl. at ¶ 12.

25 Based on their own independent investigation and evaluation, Class Counsel are of the
26 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
27 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
28 the Settlement Class in light of all known facts and circumstances, including the risk of significant

1 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
2 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
3 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 13.

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 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
11 or any other proceeding. Gaines Decl. at ¶ 14.

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 non-exempt employees of
16 Defendant in California at any time between October 4, 2020 through June 30, 2023. Stip. at ¶
17 A(5).

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

19 The Parties agree to settle the Action for a Gross Settlement Amount of One Million Four
20 Hundred Fifty Thousand Dollars (\$1,450,000) (the “Gross Settlement Amount”). The Gross
21 Settlement Amount includes the attorneys’ fees of Class Counsel; litigation costs and expenses
22 (which includes, without limitation, all such fees and costs incurred to date, as well as such fees
23 and costs to be incurred in documenting the settlement, providing any notices required as part of
24 the settlement, securing Court approval of the settlement, and obtaining judgment in the Action);
25 the Service Payments to the Class Representatives, as approved by the Court; the payment to the
26 California Labor and Workforce Development Agency (“LWDA”); and all costs of administration,
27 including, without limitation, settlement administration fees and expenses. All employer payroll
28

1 tax obligations due on wage payments made from the Net Settlement Proceeds shall be paid from
2 the Gross Settlement Amount. Stip. at ¶ C(1)(a).

3 From the Gross Settlement Amount, Plaintiffs will request an award of attorneys' fees not
4 to exceed 35% of the Gross Settlement Amount (i.e., \$507,500). Stip. at ¶ C(1)(g).

5 From the Gross Settlement Amount, Defendant will not oppose Plaintiffs' counsel's
6 application to the Court for up to \$30,000 in reimbursement of litigation costs and expenses. Stip.
7 at ¶ C(1)(h).

8 From the Gross Settlement Amount, Defendant will not oppose Plaintiffs' counsel's
9 application to the Court for Service Payments and General Release Payments to the Class
10 Representatives in the gross amount of \$12,000 each (\$24,000 total), in consideration for their
11 efforts in instituting and participating in the Action and their full general release of all claims. Stip.
12 at ¶¶ C(1)(f).

13 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
14 Settlement Administrators will be no more than \$12,000. Stip. at ¶¶ C(1)(i).

15 The Parties have agreed that One Hundred Forty-Five Thousand Dollars (\$145,000.00) of
16 the Gross Settlement Amount shall be allocated to the resolution of any and all Aggrieved
17 Employees' and the State of California's claims arising under PAGA. Pursuant to PAGA, Seventy-
18 Five Percent (75%), or One Hundred Eight Thousand Seven Hundred Fifty Dollars (\$108,750) shall
19 be paid to the LWDA, and twenty-five percent (25%), or Thirty-Six Thousand Two Hundred Fifty
20 Dollars (\$36,250), shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds.
21 Stip. at ¶ C(1)(e).

22 The Net Settlement Proceeds is defined as the Gross Settlement Amount less the amounts
23 approved and awarded by the Court for: attorneys' fees and documented litigation costs and
24 expenses incurred or advanced by Class Counsel; the Service Payments to the Class
25 Representatives; the payment to the LWDA pursuant to PAGA; and the costs of administering the
26 settlement. Stip. at ¶ C(1)(b).

27 The Individual Payment Amount means the portion of the Net Settlement Proceeds
28 distributable to each Class Member who participates in the Class Settlement (i.e., who does not

1 submit a valid request for exclusion form) and each Aggrieved Employee, whether they participate
2 in the Class Settlement or not. As to participating Class Members, the class portion of the
3 Individual Payment Amount will be determined by dividing the Net Settlement Proceeds, less the
4 \$36,250 PAGA allocation, by the total number of weeks worked by the entire Settlement Class in
5 non-exempt positions during the Class Period, net of opt outs, resulting in the class workweek
6 value; and then multiplying the class workweek value by the number of weeks worked by each
7 participating Class Member in a non-exempt position during the Class Period. As to the Aggrieved
8 Employees, the PAGA portion of the Individual Payment Amount will be determined by dividing
9 the PAGA settlement amount (\$36,250) by the total number of weeks worked by all Aggrieved
10 Employees in non-exempt positions during the PAGA Period, resulting in the PAGA workweek
11 value; and then multiplying the PAGA workweek value by the number of weeks worked in a non-
12 exempt position by each Aggrieved Employee during the PAGA Period. Stip. at ¶ C(1)(c).

13 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
14 (a) 20% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
15 80% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
16 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
17 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
18 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
19 mandated treatment as required by law. Stip. at ¶ C(1)(d).

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

21 Pursuant to PAGA, the Parties have agreed that \$145,000 of the Gross Settlement Amount
22 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Labor Code § 2699(i)
23 requires that “civil penalties recovered by aggrieved employees shall be distributed as follows: 75
24 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
25 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$108,750 –
26 shall be payable to the LWDA. The remaining 25 percent, or \$36,250, shall be paid to Aggrieved
27 Employees as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

28 \\\

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

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

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

27 ¹ 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,
Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

1 *Id.* at § 11.24.

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

4 **C. 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, 478² (“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 As required by Labor Code § 2699(l)(2), concurrent with Plaintiffs’ submission of the
19 Stipulation to the Court, their counsel is transmitting it, together with this Motion, to the LWDA.
20 Gaines Decl. at ¶ 36; **Exhibit C**.

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

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

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 Settlement Class meets all requirements for certification, as discussed below.

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

3 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
4 and the means for identifying the members of the class determine whether the class is ascertainable.
5 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
6 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
7 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
8 comprises approximately 469 employees, who worked approximately 25,225 workweeks during
9 the Class Period. Gaines Decl. ¶ 32.

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

12 The Class Members' claims all stem from a common source: members of the Settlement
13 Class allege that Defendant violated the same Labor Code provisions in connection with their
14 employment. All members of the Class seek the same relief under the same California laws (related
15 to unpaid wages, meal and rest period premiums, inaccurate or incomplete wage statements,
16 unreimbursed business expenses, failure to timely pay wages due upon separation, and derivative
17 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
18 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 33.

19 c. **The Proposed Class Representatives' Claims Are Typical of the**
20 **Class Members' Claims**

21 A class representative's claims are typical when they arise from the same event or course
22 of conduct that gives rise to the claims of the class and are based on the same legal theory.
23 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiffs and proposed
24 Class Representatives Arturo Gonzalez and Randall Hord are former non-exempt employees who
25 worked for Defendant in the State of California during the Class Period. They contend that
26 Defendant failed to pay all wages, failed to provide meal and rest periods, failed to comply with
27 itemized employee wage statement provisions, failed to reimburse expenses, and failed to timely
28 pay wages at the separation of employment, in violation of Labor Code §§ 201-202, 226(a), 226.7,

1 227.3, 510, 512, 558, 1194, 2698, 2699, and 2802. They have the same claims as those that the
2 members of the Settlement Class would reasonably be expected to bring based on the course of
3 conduct alleged herein. Gaines Decl. ¶ 34.

4 Plaintiffs have also demonstrated that they will aggressively and competently assert the
5 interests of the proposed Settlement Class; they have taken active roles in this litigation and have
6 no apparent conflicts with other class members. Gaines Decl. ¶ 35. Furthermore, Plaintiffs have
7 retained competent counsel, experienced in litigating wage and hour class action claims in state and
8 federal courts. See Gaines Decl. ¶¶ 2-5; Declaration of James Kawahito ¶¶ 3-9.

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

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

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

1 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
2 Decl. ¶¶ 2-5, 11-14.

3 Here, the Parties’ counsel have a great deal of experience in class action litigation and
4 specialize in employment wage and hour matters. Moreover, counsel for all Parties conducted an
5 extensive investigation of the factual allegations involved in this case. The Parties have engaged
6 in a broad exchange of documents, data, records and other information. Each side has apprised the
7 other, informally, at a formal mediation with the assistance of one of California’s most highly
8 regarded mediators, and through lengthy negotiations, of their respective factual contentions, legal
9 theories and defenses, resulting in extensive arm’s-length negotiations taking place among the
10 Parties. *See* Gaines Decl. ¶¶ 2-5, 11-14.

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

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

21 Plaintiffs contend that Defendant failed to pay Class Members all minimum and overtime
22 wages due, in violation of Labor Code §§ 510, 558, 1194, and 1194.2. Defendant allegedly required
23 Class Members to perform work-related activities off-the-clock, without pay. Class Members
24 contend that they were regularly required to work off-the-clock, such that they would be required
25 to stay after their shifts ended to attend to incoming work. Class Members allege that they were
26 required to collect tools and other materials from Defendant’s premises prior to clocking in for their
27 shifts. Defendant also purportedly required that Class Members notate that they took meal periods,
28 but required them to work through it. Class Members also allege they were not paid for travel time

1 to job sites, time spent working through meal periods, nor required training time. Gaines Decl. ¶
2 16.

3 An employer is obligated to pay the wages of an hourly employee for all time that the
4 employee is under the control of the employer, and this includes all the time the employee is
5 suffered or permitted to work, whether or not required to do so. When Plaintiffs and Class Members
6 worked off-the-clock, they were under the control of Defendant and required to be compensated
7 for all hours worked. Defendant, however, failed to do so, in violation of Labor Code §§ 510, 558,
8 1194, and 1194.2 and IWC Wage Order 16-2001. Plaintiffs calculate damages on this claim at
9 nearly \$1 million, based on one hour of off-the-clock work per week, with PAGA civil penalty
10 liability of \$1,147,300. Gaines Decl. ¶ 17.

11 Plaintiffs further contend that Defendant offered numerous types of non-discretionary
12 bonuses and incentive pay to Class Members. California overtime law requires that employers pay
13 their non-exempt employees based on their “regular rate of pay.” Notwithstanding the foregoing,
14 Defendant allegedly failed to use the regular rate of pay for purposes of calculating the proper
15 overtime rate for Class Members. Plaintiffs calculate damages on this claim at \$84,638, with
16 PAGA civil penalty liability of \$292,700. Gaines Decl. ¶ 18.

17 Plaintiffs also assert that Defendant failed to permit or authorize Class Members to take
18 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
19 §§ 226.7, 510, 512, 558, and 1194, and IWC Wage Order 16-2001. Labor Code § 512 provides
20 that employers (like Defendant) may not employ an employee for a work period of more than 5
21 hours without providing a 30-minute meal period starting no later than the end of the fifth hour.
22 Class Members were allegedly routinely unable to take a proper meal break when they worked
23 shifts in excess of 5 hours in duration and a second meal break when they worked shifts in excess
24 of 10 hours in duration. When they were able to take a meal period, they were oftentimes late, cut
25 short or they would be required to work through them. Based on Plaintiffs’ experience of regularly
26 receiving late or on-duty meal periods, Plaintiffs applied a 50% meal period violation rate.
27 Plaintiffs calculate damages on this claim at \$1,515,000, with PAGA civil penalty liability of
28 \$1,147,300. Gaines Decl. ¶ 19.

1 Plaintiffs argue that Defendant failed to provide Class Members with legally compliant rest
2 periods, or premium wages of one hour's pay in lieu thereof, as required by Labor Code §§ 226.7
3 and 558, and IWC Wage Order 16-2001. Plaintiffs and Class Members allege that they were too
4 busy to take their rest periods or that they would be required to work through them. Further,
5 Defendant maintained a policy and practice requiring employees to remain on the company
6 premises during their rest periods. Plaintiffs contend that Defendant's rest period policy and
7 practice would violate our Supreme Court's mandate in *Augustus v. ABM Security Services, Inc.*
8 (2016) 5 Cal. 5th 257, 269 (holding that the rest period requirement "obligates employers to permit
9 and authorizes employees to take off-duty rest periods. That is, during rest periods employers must
10 relieve employees of all duties and **relinquish control over how employees spend their time.**")
11 An employer may not place any limitations on where employees may go or not go during their rest
12 periods). (Emphasis added). These restrictions and requirements contravene California law with
13 respect to rest periods. See also Department of Industrial Relations website
14 (www.dir.ca.gov/dlse/faq_restperiods.htm) (Question: "Can my employer require that I stay on the
15 work premises during my rest period? No, your employer cannot impose any restraints not inherent
16 in the rest period requirement itself.) Assuming a 50% violation rate, Plaintiffs calculate damages
17 on this claim at \$1,515,000, with PAGA civil penalty liability of \$1,147,300. Gaines Decl. ¶ 20.

18 Plaintiffs allege that Class Members were required to incur expenses in the performance of
19 their job duties for which they are not fully reimbursed, in violation of Labor Code § 2802. Class
20 Members were allegedly required to purchase tools and use their personal cell phones, but were not
21 always reimbursed by Defendant for these expenses. This violates Labor Code § 2802. Plaintiffs
22 calculate \$278,817 in unreimbursed expenses, with PAGA civil penalty liability of \$1,147,300.
23 Gaines Decl. ¶ 21.

24 Plaintiffs further contend that Defendant failed to issue Class Members accurately itemized
25 wage statements. Because Class Members were allegedly not paid all wages due, the wage
26 statements issued by Defendant failed to accurately state all gross wages earned, in violation of
27 Labor Code § 226(a)(1), total hours worked, in violation of Labor Code § 226(a)(2), net wages
28 earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates in effect during the

1 pay period and the corresponding number of hours worked at each hourly rate, in violation of Labor
2 Code § 226(a)(9). Plaintiffs calculate statutory penalties on this claim at \$1,037,500, with PAGA
3 civil penalty liability of \$1,147,300. Gaines Decl. ¶ 22.

4 Defendant also allegedly failed to pay certain Class Members all wages due upon separation
5 of employment, in violation of Labor Code §§ 201-203 and 227.3. As Defendant failed to pay them
6 all wages due during the course of their employment, as alleged above, these wages were due and
7 owing upon separation of employment yet went unpaid. Plaintiffs calculate statutory penalties on
8 this claim at \$1,173,504, with PAGA civil penalty liability of \$11,600. Gaines Decl. ¶ 23.

9 A discount on the maximum value of Class members' claims was required (and warranted)
10 to resolve the matter at this stage of the litigation. As to the merits of Plaintiffs' claims, Defendant
11 strongly argued that employees waived any missed meal and rest periods, such that no premiums
12 are due. It argued that employees were always afforded the right to take their breaks, and as to rest
13 periods, lulls in business allowed for ample time to take rest periods. It argued that it adopted and
14 enforced legally complaint policies and practices which authorized meal and rest periods as
15 required by law, and employees did not voice concern over meal and rest periods being denied. It
16 also vehemently denies that any employees worked off-the-clock, and all time worked was
17 completely paid in full. Gaines Decl. ¶ 24.

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

28 \\\

1 Plaintiffs also faced the risk of a loss on the merits on their claims. It is very possible that
2 the Court would agree with Defendant's position that its practices complied with the requirements
3 of California law or could not be certified. In such a case, the value of the majority of Plaintiffs'
4 claims would be zero. Gaines Decl. ¶ 26.

5 Finally, Plaintiffs faced the risk that they would not obtain a maximum damage/penalty
6 award on all (or any of) their claims. For example, Plaintiffs' wage statement claim and waiting
7 time penalty claim are wholly derivative of their unpaid wage claims. If they did not prevail on
8 those claims, they would not prevail on a claim for deficient wage statements or failure to timely
9 pay wages. In addition, Plaintiffs seek discretionary penalties pursuant to the PAGA. Even if
10 Plaintiffs did prevail on their claims, it is possible that the Court would not impose all such penalties
11 pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 27.

12 Defendant strongly contends that its policies and practices do not violate any laws. It
13 contends that it properly provided for all meal and rest periods and fully compensated its employees
14 for all time worked. It further contends that the wage statements it provides to its employees are
15 fully compliant with California law. Gaines Decl. ¶ 28.

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. ¶ 29.

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. ¶ 30.

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 Stipulation of Settlement has the right to submit
27 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member
28 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. Plaintiffs Should Be Permitted to File Their First Amended Complaint

In connection with the Settlement, Plaintiffs shall file a First Amended Complaint, attached to the Stipulation as **Exhibit 3**, 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, Plaintiffs 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, Plaintiffs request 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 Plaintiffs Arturo Gonzalez and Randall Hord as the Class Representatives;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC and James Kawahito of Kawahito Law Group APC as Class Counsel;
5. Approving Phoenix Settlement Administrators as the claims administrator and its estimated fees not to exceed \$12,000;
6. Preliminarily approving the allocation of \$145,000 from the Gross 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%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;

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 Plaintiffs to file their First Amended Complaint, attached to the Stipulation as **Exhibit 3**, 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

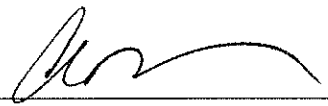
9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Claims Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Claims Administrator to mail Notice and Exclusion Form to Class Members	20 calendar days after Claims Administrator's receipt of Class List
Last day for Class Members to submit a written Exclusion Form 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)

1 DATED: July 27, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiff Arturo Gonzalez and Proposed
8 Class Counsel