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Attorneys for Plaintiff Alejandro Ramirez
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

ALEJANDRO RAMIREZ, on behalf of
himself and on behalf of all similarly
situated individuals,

Plaintiff,

v.

DE ANDA ENTERPRISES, INC., a
California corporation, and DOES 1 through
10, inclusive,

Defendants.

CASE NO: 30-2021-01232142-CU-OE-CXC

*Assigned for all purposes to the Hon. William
Claster, Dept. CX104*

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

Date: May 5, 2023

Time: 9:00 a.m.

Dept.: CX104

Reservation # 73983637

Complaint Filed: November 16, 2021

1
2 **PLEASE TAKE NOTICE THAT** on May 5, 2023 at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, in Department CX104 of the above-entitled Court, located at 700 Civic
4 Center Drive West, Santa Ana, California 92701, Plaintiff Alejandro Ramirez will and hereby does
5 move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls
6 within the range of reasonableness and approving the proposed class action settlement in the above-
7 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
8 approving the appointment of Plaintiff Alejandro Ramirez as the Class Representative, (4)
9 approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC
10 as Class Counsel, (5) approving the appointment of Phoenix Settlement Administration as
11 settlement administrator, (6) preliminarily approving the allocation of \$10,000 from the Maximum
12 Payment to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
13 Code §§ 2698 et seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and
14 Workforce Development Agency and twenty-five percent (25%) shall be distributed to Aggrieved
15 Employees on a pro rata basis based on the number of workweeks worked by each of them during
16 the PAGA Period; (7) approving as to content and form the notice to the settlement class, and
17 directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First
18 Amended Class and Representative Action Complaint; and (9) setting a final fairness and approval
19 hearing.

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

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

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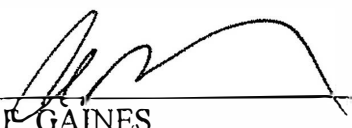
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2 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
3 the Settlement Agreement and Release of Claims, the Declaration of Daniel F. Gaines, such
4 evidence or oral argument as may be presented at the hearing, and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

6
7 DATED: March 29, 2023

GAINES & GAINES, APLC

8
9 By: 

10 DANIEL F. GAINES

ALEX P. KATOFISKY

11 Attorneys for Plaintiff Alejandro Ramirez and Proposed
12 Class Counsel
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Settlement
4 Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiff Alejandro Ramirez (“Plaintiff”
6 or “Ramirez”), individually and on behalf of all others similarly situated, and Defendant De Anda
7 Enterprises, Inc. (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-revisionary class settlement in the gross amount of \$150,000 to a settlement class of
14 approximately 260 employees who worked approximately 15,000 workweeks, yielding gross
15 payments of **\$577 per employee**. As detailed below, the settlement is in the best interests of the
16 class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On November 12, 2021, Plaintiff exhausted the pre-filing requirements of the Labor Code
27 Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
28 Decl.”) at ¶ 6.

1 On or about November 16, 2021, Plaintiff initiated the Action by filing a Class Action
2 Complaint on behalf of himself and on behalf of all similarly situated individuals (the
3 "Complaint"). The First Amended Complaint, attached to the Settlement as Exhibit 4 and which
4 will be filed as part of the settlement approval process, asserts class and representative action claims
5 pursuant to PAGA against Defendant for (1) failure to pay all minimum and overtime wages (Labor
6 Code §§ 510, 1194, and 1194.2); (2) failure to provide compliant rest periods or compensation in
7 lieu thereof (Labor Code § 226.7; IWC Wage Order 5-2001); (3) failure to provide compliant meal
8 periods or compensation in lieu thereof (Labor Code §§ 226.7, 512, 1174, and 1174.5; IWC Wage
9 Order 5-2001); (4) failure to comply with itemized employee wage statement provisions (Labor
10 Code § 226(a); (5) failure to timely pay wages due at separation of employment (Labor Code §§
11 201-203); (6) violation of Business and Professions Code §§ 17200, *et seq.*; and (7) civil penalties
12 pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201-202, 226(a), 226.3,
13 226.7, 510, 512, 558, 1174, 1174.5, and 1194 (the "First Amended Complaint"). Gaines Decl. at ¶
14 7.

15 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
16 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
17 other than this settlement. Defendant contends that it has complied at all times with the California
18 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
19 and local laws and regulations. It is Defendant's position that, if this case were to be litigated, class
20 certification would be inappropriate because Plaintiff is not an adequate class representative,
21 Plaintiff's claims are not typical of putative class members, and individual issues predominate over
22 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts
23 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
24 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
25 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
26 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
27 or evidence of the appropriateness of these or similar claims for class certification in the Action or
28 with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

4 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

12 On November 30, 2022, following their exchange of information and documents regarding
13 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
14 arm's-length negotiations with the assistance of mediator Mark LeHocky, Esq., through which they
15 were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 11.

16 Based on their own independent investigation and evaluation, Class Counsel are of the
17 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
18 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
19 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
20 will not be certified by the Court, and the defenses asserted by Defendant. Gaines Decl. at ¶ 12.

21 The Parties agree that the Settlement Class described herein may be certified for settlement
22 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
23 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
24 certification will have no force or effect and will immediately be revoked. The Parties further agree
25 that certification for purposes of the settlement is in no way an admission that class certification is
26 proper under the more stringent standard applied for litigation and that evidence of this limited
27 stipulation for settlement purposes only will not be admissible for any purpose in this or any other
28 proceeding. Gaines Decl. at ¶ 13.

1 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
2 preliminary approval of the settlement agreement, (b) conditionally grant certification of the
3 proposed settlement class, (c) provisionally approve the appointment of Plaintiff Alejandro
4 Ramirez as the Class Representative, (d) provisionally approve the appointment of Daniel F.
5 Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (e) approve
6 appointment of the settlement administrator, (f) authorize the mailing of the proposed class action
7 notice packet; and (g) schedule a final fairness and approval hearing.

8 **IV. LEGAL ANALYSIS**

9 **A. The Proposed Settlement Terms**

10 The Parties have agreed upon a settlement class: all persons who are or were employed in
11 California by Defendant as non-exempt employees at any point from November 16, 2017 through
12 November 30, 2022. Defendant represents that this Class contains no more than approximately
13 260 members who worked no more than 15,000 workweeks during the Class Period. Settlement at
14 ¶ A(4).

15 The Parties stipulate to the conditional certification of the Settlement Class as defined herein
16 for settlement purposes only. Settlement at ¶ B(8).

17 The Settlement Agreement provides that Defendant shall pay the total, non-reversionary
18 sum of \$150,000 to resolve the claims alleged in the Action on behalf of the Settlement Class (the
19 “Maximum Payment”). Settlement. at ¶ C(1)(a).

20 Class Members need not submit a claim form to receive their share of the Settlement. Class
21 Members who timely exclude themselves from the Settlement will not be part of the final
22 Settlement Class and not bound by the Settlement’s class release (although Aggrieved Employees
23 will be bound by the PAGA release, even if they opt out of the class settlement). Settlement at ¶
24 C(1)(c).

25 The Settlement Agreement further provides that Plaintiff’s counsel may request an award
26 of attorneys’ fees not to exceed \$50,000 (i.e., one-third of the Maximum Payment) and seek
27 reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed
28 \$12,000. Settlement at ¶ C(1)(g). It also provides that Plaintiff will seek, and Defendant will not

1 oppose, a service payment to the named Plaintiff, Alejandro Ramirez, in the amount of \$5,000.
2 Settlement at ¶ C(1)(e).

3 The Parties have agreed that Phoenix Settlement Administration (“Phoenix”), an
4 experienced and competent settlement administration company. Up to \$5,000 has been allocated
5 to compensate Phoenix for its work related to the administration. Settlement at ¶ C(1)(h).

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

7 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Maximum Payment will be
8 allocated to settle the claims brought under Labor Code § 2699 *et. seq.* Pursuant to Labor Code
9 § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows: 75
10 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
11 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$7,500 – of the
12 PAGA Settlement Amount will be paid to the California Labor and Workforce Development
13 Agency as the Labor and Workforce Development Agency Payment, and Twenty-Five Percent
14 (25%), or \$2,500, of the PAGA Settlement Amount shall be distributed to Aggrieved Employees
15 on a pro rata basis based on the number of workweeks worked by each PAGA Member during the
16 PAGA Period. Settlement at ¶ C(1)(d).

17 As required by Labor Code § 2699(l)(2), concurrent with Plaintiff’s submission of the
18 Settlement Agreement to the Court, they are transmitting it, together with this Motion, to the
19 LWDA. Gaines Decl. at ¶ 36.

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

21 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
22 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
23 trial court, and (2) a final review after notice has been distributed to the Class Members informing
24 them of the terms of the settlement and allowing them to exclude themselves from, participate in
25 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

26
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,
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

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

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

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

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

28 *Id.* at § 11.24.

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

D. 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, 478² (“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
10 conditionally entered at this preliminary hearing. These conditional
11 rulings may approve a temporary settlement class, the proposed
12 settlement, and the class counsel’s application for fees and expenses.

13 4 *Newberg on Class Actions*, at §11.26.

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 settlement
20 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 records. Further, the settlement class is sufficiently numerous to
26 warrant certification. According to Defendant’s records, the Class is comprised of approximately
27 260 individuals. Gaines Decl. ¶ 31; Settlement at ¶ A(4).

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²In 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.

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

The Class Members' claims all stem from a common source: all Class Members allege that Defendant violated the same Labor Code and Wage Order provisions in connection with their work for Defendant. The same Labor Code and Wage Order violations are alleged on behalf of all persons encompassed in the settlement class, arising out of or which could be pled based on the facts and the allegations set forth in the operative complaints in the Actions, including but not limited to claims for unpaid wages; meal period violations; rest period violations; failure to pay meal or rest period premiums; failure to pay wages; wage statement violations; waiting time penalties; civil penalties, including penalties under PAGA, based on the allegations set forth above; and violations of Business and Professions Code section 17200 based on the allegations set forth above. Gaines Decl. ¶ 33.

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, the named Plaintiff and proposed Class Representative Alejandro Ramirez is a former non-exempt employee of Defendant whom, Plaintiff alleges, were not paid all wages; were not provided with proper uninterrupted (off-the-clock and free of all duties) 30-minute meal periods for every shift they worked which exceeded five hours in duration; were not provided with 10-minute rest breaks as required by California law; were not provided with compliant itemized employee wage statements; and were not timely paid all wages due at termination. Plaintiff alleges 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. ¶ 34.

Plaintiff has also demonstrated that he will aggressively and competently assert the interests of the proposed Settlement Class; he has taken an active role in the litigation and has no apparent conflicts with other class members. Gaines Decl. ¶ 35. Furthermore, Plaintiff has retained

1 competent counsel, experienced in litigating class action claims in the employment context. *See*
2 Gaines Decl. ¶¶ 2-5.

3 **E. The Settlement Is Fair and Reasonable and Not the Result of Fraud or**
4 **Collusion**

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

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

25 Here, the Parties’ counsel have a great deal of experience in class action litigation and
26 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
27 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
28 in a broad exchange of documents, statistics, records and other information. Each side has apprised

1 the other, informally and at a formal mediation, of their respective factual contentions, legal
2 theories and defenses, resulting in extensive arms-length negotiations taking place among the
3 Parties. *See* Gaines Decl. ¶ 2-5, 10-11.

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

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

14 Prior to settlement, Plaintiff’s counsel created a comprehensive damage analysis using
15 sampling information obtained through informal discovery. This damage analysis reveals that the
16 negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines
17 Decl. ¶ 19.

18 Plaintiff contends that Defendant failed to permit or authorize Plaintiff and Class Members
19 to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor
20 Code §§ 226.7 and 512 and IWC Wage Order 5-2001. Labor Code § 512 provides that employers
21 (like Defendant) may not employ an employee for a work period of more than 5 hours without
22 providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff contends
23 that Plaintiff and Class Members were routinely unable to take a proper meal period when they
24 worked shifts in excess of 5 hours in duration and a second meal period when they worked shifts
25 in excess of 10 hours in duration. Although Defendant maintains a legally compliant meal period
26 policy, in practice, Plaintiff contends that he rarely took a proper meal period. According to
27 Plaintiff, when Plaintiff and Class Members received meal periods, they would typically be late
28 (commencing after the fifth hour of work) or short (less than 30 minutes in duration). Plaintiff also

1 alleges that Defendant does not maintain any meal period time records, which would make it
2 impossible to determine with certainty whether Class Members received a proper meal period. This
3 would violate Labor Code §§ 226.7, 512, 1174, and 1174.5 and IWC Wage Order 5-2001. Based
4 on Plaintiff's own experience working at one of Defendant's taco shops, he estimated that half of
5 his meal periods were short, denied, or not taken. Plaintiff believes that Defendant will be unable
6 to refute these allegations because their records are insufficient to establish otherwise. Plaintiff has
7 ascertained a meal period violation rate of 50%. What's more, based on the data provided,
8 Defendant never paid meal period premiums during the Class Period. Significant meal period
9 premiums are owed. Accordingly, Plaintiff calculates damages on this claim at \$532,000, although
10 a discount was required to resolve it at this stage of the litigation, primarily as of result of
11 Defendant's financial hardship. In addition, certification of meal period claims is no guarantee
12 because Defendant would argue individualized issues surrounding waiver preclude class treatment,
13 and proving a substantial 50% violation rate among all employees was also not certain. The
14 compromise reached for this claim is reasonable based on the facts and circumstances of this case.
15 Gaines Decl. ¶ 20.

16 Plaintiff also contends that Defendant failed to pay Plaintiff and Class Members premium
17 wages for missed, denied and unauthorized rest periods in violation of Labor Code §§ 226.7 and
18 558 and IWC Wage Order 5-2001. Plaintiff and Class Members argue that they were denied, and
19 therefore unable to take, 10-minute on-the-clock rest periods for every four hours of work or major
20 fraction thereof, but were not paid premium wages of one hour's pay for each missed, denied and
21 unauthorized rest period. Although Defendant maintains a legally compliant rest period policy, in
22 practice, Plaintiff contends he rarely took a proper rest period. Based on his experience, Plaintiff
23 has ascertained a rest period violation rate of 50%, valuing the claim at up to \$532,000. This claim
24 also required a discount to resolve it at this stage of the litigation, primarily because of Defendant's
25 financial hardship. In addition, certification of rest period claims is more difficult than that for
26 meal periods because they need not be recorded and can be waived, arguments which Defendant
27 raised at mediation. Proving a substantial 50% violation rate among all employees was also not
28 certain. The compromise reached for this claim is reasonable based on the facts and circumstances

1 of this case. Gaines Decl. ¶ 21.

2 Plaintiff alleged that Defendant oftentimes failed to Plaintiff and Class Members premium
3 overtime wages, in violation of Labor Code §§ 510 and 1194. Based on an estimate that Class
4 Members worked one hour off the clock per week, Plaintiff calculates damages on this claim at
5 \$212,865.00. This claim, however, also required a discount for settlement purposes. The time
6 records would not show this violation – testimony and surveys would be the evidence necessary to
7 prove the violation, which Plaintiff would have to demonstrate affected all employees. This was
8 not guaranteed. This was Plaintiff’s weakest claim because of difficulty in proof and certification,
9 and the compromise reached reflects this. Gaines Decl. ¶ 22.

10 Defendant also allegedly failed to issue Plaintiff and Class Members accurately itemized
11 wage statements on a derivative basis. Specifically, Plaintiff and non-exempt Class Members
12 allege they were not paid all wages due, as detailed above. As a result, the wage statements issued
13 by Defendant to Plaintiff and Class Members allegedly failed to accurately state all gross wages
14 earned, in violation of Labor Code § 226(a)(1), total hours worked, in violation of Labor Code §
15 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates
16 in effect during the pay period and the corresponding number of hours worked at each hourly rate,
17 in violation of Labor Code § 226(a)(9). Plaintiff calculates damages on this claim at \$332,000
18 (employees were paid weekly, so these statutory damages are capped at \$4000 for employees
19 employed during the entire applicable one-year limitation period). Gaines Decl. ¶ 23.

20 Defendant also allegedly failed to pay Plaintiff and certain Class Members all wages due
21 upon separation of employment on a derivative basis, in violation of Labor Code §§ 201-203, as a
22 result of its failure to pay all wages due during the course of their employment. Plaintiff calculates
23 statutory damages on this claim at \$727,200 based on 202 former employee Class Members.
24 Gaines Decl. ¶ 24.

25 Finally, PAGA penalties here are valued at up to \$541,700 based on the 5,417 pay periods
26 worked by the PAGA Members (without stacking; with stacking of penalties, the total would be
27 astronomical and exceed \$2,500,000, eclipsing the alleged value of the unpaid wages). This claim
28 is wholly derivative of the Labor Code claims and the penalties are discretionary. Defendant’s

1 defenses to the merits of each claim and its financial hardship justify the compromised PAGA
2 settlement amount here. Gaines Decl. ¶ 25.

3 A discount on the maximum value of Class members' claims was required (and warranted)
4 to resolve the matter at this stage of the litigation. Class certification is a substantial risk in any
5 class action case. Here, while Plaintiff maintains that the requirements of class certification are
6 met, Defendant proffers various arguments why class treatment is not appropriate here, including
7 but not limited to that individualized inquires among class members predominate over common
8 ones. If Defendant was to defeat Plaintiffs' class certification motion, there would be no class wide
9 relief whatsoever, and most class members would likely not file individual claims. Gaines Decl. at
10 ¶ 26.

11 Defendant strongly contends that its policies and practices do not violate any laws. It
12 contends that it provided all required wages in a timely manner. Gaines Decl. at ¶ 27.

13 Most important, Defendant is a small, family-owned enterprise with limited financial
14 resources to defend this action and pay any resulting judgment. In connection with the mediation
15 and settlement, Plaintiff reviewed Defendant's financial disclosures, which included notices of
16 substantial tax underpayments and installment payment plans with the Internal Revenue Service,
17 the Franchise Tax Board, and the California Department of Tax and Fee Administration. Defendant
18 has many pressing financial obligations; its settlement payment here is a clearly substantial
19 compromise but the compromise is necessary to ensure it can stay in business, continue to employ
20 California employees, and continue to serve its California customers. If Plaintiff kills the proverbial
21 golden goose, everyone loses; the settlement here is intended to avoid such a situation. Gaines
22 Decl. ¶ 28.

23 When the costs and risks of non-certification and loss on the merits are considered,
24 Plaintiffs' counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
25 Decl. at ¶¶ 19-29.

26 The settlement for each participating Class Member is fair, reasonable and adequate, given
27 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
28 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the

1 Action. Gaines Decl. at ¶ 30.

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

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

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

11 **V. PLAINTIFF SHOULD BE PERMITTED TO FILE HIS FIRST AMENDED**
12 **COMPLAINT**

13 In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached
14 to the Settlement as Exhibit 4, which adds PAGA allegations (following his compliance with
15 PAGA's administrative exhaustion requirements on November 12, 2021) and claims to comport
16 with the release provided for in the Settlement. The Parties agreed that, as part of his motion for
17 preliminary approval, Plaintiff would concurrently seek leave to file the First Amended Complaint,
18 the filing of which is a condition of the Stipulation.

19 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
20 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
21 the settlement, Plaintiff requests that the Court approve his filing of the First Amended Complaint,
22 and consent that Defendant need not file a responsive pleading thereto.

23 **VI. CONCLUSION**

24 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
25 request that the Court:

26 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
27 request that the Court enter an order:
28

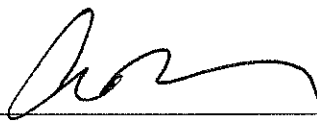
1. Preliminarily finding that the settlement falls within the range of reasonableness and approving the proposed settlement;
2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiff Alejandro Ramirez as the Class Representative;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel;
5. Approving Phoenix Settlement Administration as the Settlement Administrator;
6. Preliminarily approving the allocation of \$10,000 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 distributed to Aggrieved Employees on a pro rata basis based on the number of workweeks worked by each PAGA Member during the PAGA Period;
7. Approving as to content and form the notice to the Settlement Class, and directing it to be disseminated by the Settlement Administrator;
8. Permitting Plaintiff to file his First Amended Complaint, attached to the Settlement as Exhibit 4, 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 Settlement Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	30 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail the Notice, the Exclusion Form, and the Dispute Form to Class Members via U.S. Mail	14 calendar days after Settlement Administrator's receipt of Settlement Class Information
Last day for Class Members to submit a written Exclusion Form, Objection, and/or Dispute Form to	60 calendar days after the initial mailing of the Class Notice to Class Members

<u>EVENT</u>	<u>TIMING</u>
Settlement Administrator	
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	_____, 2023
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice, the Exclusion Form, and the Dispute Form	_____, 2023
Final settlement approval hearing	_____, 2023, at _____. The Parties suggest the final approval hearing be held approximately 150 days after the preliminary approval order is signed.

DATED: March 29, 2023

GAINES & GAINES, APLC

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Alejandro Ramirez and Proposed Class Counsel