

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 Brandon Velazquez
and Proposed Class Counsel
8

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

12 BRANDON VELAZQUEZ, on behalf of
himself and on behalf of all similarly
13 situated individuals,

14 Plaintiff,

15 v.

16 PRECISION ALMOND HARVESTING
LLC, a California limited liability
17 company, and DOES 1 through 10,
inclusive,

18 Defendants.
19
20

CASE NO: BCV-22-100125

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

CLASS ACTION

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

DATE: February 24, 2023

TIME: 8:30 a.m.

DEPT.: 17

Action Filed: January 14, 2022

1 **PLEASE TAKE NOTICE THAT** on February 24, 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 1215 Truxtun
3 Avenue, Bakersfield, California 93301, Plaintiff Brandon Velazquez (“Plaintiff” or “Velazquez”)
4 will and hereby does move unopposed for an Order (1) preliminarily finding that the settlement
5 between the parties falls within the range of reasonableness and approving the proposed class action
6 settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only,
7 a settlement class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving
8 the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Class Action Administration Solutions as
10 settlement administrator, (6) preliminarily approving the allocation of \$8,000 from the Maximum
11 Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General
12 Act (Lab. Code §§ 2698 et seq.); (7) approving as to content and form the notice to the settlement
13 class, and directing it be disseminated by the Settlement Administrator; and (8) setting a final
14 fairness and approval hearing.

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

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

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

26 \\

27 \\

28 \\

1 DATED: January 24, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Brandon Velazquez and Proposed
8 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 Brandon Velaquez (“Plaintiff”
6 or “Velaquez”), individually and on behalf of all others similarly situated, and Defendant Precision
7 Almond Harvesting 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. *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 \$225,000 to a settlement class of
14 approximately 190 Class Members, yielding average gross payments of \$1,184 per employee. As
15 detailed below, the settlement is in the best interests of the class in light of all of the facts and
16 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 Brandon Velaquez as
21 Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
22 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
23 Administrator; (f) authorize the mailing of the proposed class action notice packet; and (g) schedule
24 a final fairness and approval hearing.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On January 10, 2022, 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 January 14, 2022, Plaintiff initiated the Action by filing a complaint on behalf
2 of himself and all other class members. The First Amended Complaint was filed on March 7, 2022
3 and asserts class and PAGA representative action claims against Defendant for (1) failure to pay
4 all minimum and overtime wages due (Labor Code §§ 510, 1194, and 1194.2); (2) failure to provide
5 compliant rest periods or compensation in lieu thereof (Labor Code §§ 226.7, 510, and 1194; IWC
6 Wage Order 4-2001); (3) failure to provide compliant meal periods or compensation in lieu thereof
7 (Labor Code §§ 226.7 and 512; IWC Wage Order 4-2001); (4) failure to reimburse expenses (Labor
8 Code § 2802); (5) failure to comply with itemized employee wage statement provisions (Labor
9 Code § 226(a), (e).); (6) failure to timely pay wages due at separation of employment (Labor Code
10 §§ 201-203); (7) violation of Business and Professions Code §§ 17200, *et seq.*; and (8) civil
11 penalties pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201-202, 226(a),
12 226.3, 226.7, 510, 512, 558, 1194, and 2802 (the “First Amended Complaint”). Gaines Decl. at ¶
13 7.

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

¶ 8.

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

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 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 ¶ 10.

On November 15, 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 Thomas Feher, Esq., through which they were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 11.

Based on their own independent investigation and evaluation, Class Counsel are of the opinion 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 the Settlement Class in light of all known facts and circumstances, including the risk of significant delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by Defendant. Gaines Decl. at ¶ 12.

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

proceeding. Gaines Decl. at ¶ 13.

IV. LEGAL ANALYSIS

A. The Proposed Settlement Terms

1. The Settlement Class

The Parties have agreed to a settlement class composed of all persons who are or were previously employed in California by Defendant as non-exempt employees at any point from January 14, 2018 through November 15, 2022. Defendant represents that this Class contains approximately 190 individuals.

2. Allocations to be Paid from the Maximum Settlement Amount

The Parties agree to settle this Action for a Maximum Settlement Amount of Two Hundred Twenty-Five Thousand Dollars (\$225,000) (the “Maximum Settlement Amount”), subject to any increase based on the escalator provision in paragraph H(16) of the Settlement. The Maximum Settlement Amount is non-reversionary; no portion of the Maximum Settlement Amount will return to Defendant. The Maximum Settlement Amount plus any applicable employer-side payroll taxes shall be the maximum amount Defendant is required to pay under the Settlement. Stip. at ¶ C(1)(a).

From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application to the Court for up to 35% of the Maximum Settlement Amount for attorneys’ fees (or \$78,750 based on the projected Maximum Settlement Amount of \$225,000). Stip. at ¶ C(1)(f).

From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application to the Court for up to \$10,000 in reimbursement of litigation costs and expenses. Stip. at ¶ C(1)(g).

From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application to the Court for an Enhancement Payment to the Class Representative in the gross amount of \$10,000, in consideration for his efforts in instituting and participating in the Action and in exchange for his general release of all claims. Stip. at ¶ C(1)(e).

From the Maximum Settlement Amount, settlement administration fees paid to Phoenix Class Action Administration Solutions will be no more than \$6,000. Stip. at ¶ C(1)(h).

\\

1 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
2 and all claims for penalties under the PAGA is \$8,000, 75% of which shall be paid to the LWDA
3 and 25% shall be included in the Net Settlement Proceeds for payment to Class Members. Stip. at
4 ¶ C(1)(d).

5 The Net Settlement Amount is defined as the Maximum Settlement Amount less the
6 amounts approved and awarded by the Court for: attorneys' fees and documented litigation costs
7 and expenses incurred or advanced by Class Counsel; the Enhancement Payment to the Class
8 Representative; the payment to the LWDA pursuant to PAGA; and the costs of administering the
9 settlement. Stip. at ¶ C(1)(b).

10 The Individual Settlement Payments will be the portion of the Net Settlement Proceeds
11 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
12 valid request for exclusion form). The Individual Payment Amounts will be calculated by dividing
13 the Net Settlement Proceeds by the total workdays worked by all participating Class Members in
14 California in a non-exempt position during the Class Period, which will yield the applicable
15 workday rate. The workday rate shall be multiplied by the number of workdays each individual
16 participating Class Member worked for Defendant in California in a non-exempt position during
17 the Class Period to yield their Individual Payment Amount. Each Participating Settlement Class
18 Member who does not opt out will receive an Individual Payment Amount equal to their individual
19 workdays worked in California in a non-exempt position during the Class Period multiplied by the
20 workday rate. Stip. at ¶ C(1)(c).

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

22 Pursuant to PAGA, the Parties have agreed that \$8,000 of the Maximum Settlement Amount
23 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
24 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
25 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
26 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$6,000 – shall
27 be payable to the LWDA. The remaining 25 percent, or \$2,000, shall be included in the Net
28 Settlement Proceeds for payment to Class Members. . Stip. at ¶¶ C(1)(d); D(3).

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,
Plaintiff cites 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. ¶ 14.

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 Plaintiff’s submission of the
19 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
20 Gaines Decl. at ¶ 32.

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 190 employees. Gaines Decl. ¶ 28.

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

11 The Class Members' claims all stem from a common source: members of the Settlement
12 Class allege that Defendant violated the same Labor Code provisions in connection with their
13 employment. All members of the Class seek the same relief under the same California laws (related
14 to unpaid wages, unpaid meal and rest period premiums, unreimbursed business expenses,
15 inaccurate or incomplete wage statements, failure to timely pay wages due upon separation, and
16 derivative claims). Under these circumstances, the commonality requirement is satisfied for
17 purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 29.

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

20 A class representative's claims are typical when they arise from the same event or course
21 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
22 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
23 Class Representative Brandon Velazquez is a former non-exempt employee who worked for
24 Defendant in the State of California during the Class Period. He contends that Defendant failed to
25 pay all wages due, failed to provide meal and rest periods, failed to reimburse business expenses,
26 failed to comply with itemized employee wage statement provisions, and failed to timely pay wages
27 at the separation of employment, in violation of Labor Code §§ 201-203, 226, 226.3, 226.7, 510,
28 512, 558, 1194, 1194.2, 2698, 2699, and 2802 among other Labor Code provisions. He has the

1 same claims as those that the members of the Settlement Class would reasonably be expected to
2 bring based on the course of conduct alleged herein. Gaines Decl. ¶ 30.

3 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
4 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
5 conflicts with other class members. Gaines Decl. ¶ 31. Furthermore, Plaintiff has retained
6 competent counsel, experienced in litigating class action claims in the employment context. *See*
7 Gaines Decl. ¶¶ 2-5.

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

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

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

1 Decl. ¶¶ 2-5, 10-12.

2 Here, the Parties' counsel have a great deal of experience in class action litigation and
3 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
4 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
5 in a broad exchange of documents, data, records and other information. Each side has apprised the
6 other, informally and at a formal mediation, of their respective factual contentions, legal theories
7 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*
8 *Gaines Decl. ¶¶ 2-5, 10-12.*

9 1. **The Settlement Falls Within The "Ballpark" of Reasonableness**

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

19 Plaintiff alleges that Defendant failed to pay Plaintiff and Class Members all minimum and
20 overtime wages due, in violation of Labor Code §§ 510, 1194, and 1194.2 when Plaintiff and Class
21 Members worked off-the-clock: they contend that they were not paid for time spent attending
22 orientation training, during which they were under the control of Defendants and entitled to
23 compensation. Plaintiff and Class Members allege that they would clock out from their shifts at
24 5:30 p.m. but would routinely continue to work an additional 30 to 40 minutes without any
25 compensation. Plaintiff calculates the classwide liability of this claim at \$193,985, with an
26 additional \$61,300 in PAGA civil penalties. *Gaines Decl. ¶ 15.*

27 Plaintiff further contends that Defendant failed to permit or authorize him and Class
28 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation

1 of Labor Code §§ 226.7 and 512 and IWC Wage Order 4-2001. Labor Code § 512 provides that
2 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
3 without providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff
4 and Class Members allege that they were routinely unable to take a proper meal period when they
5 worked shifts in excess of 5 hours in duration and a second meal period when they worked shifts
6 in excess of 10 hours in duration. Plaintiff argues that when employees did receive meal periods,
7 they would typically be late (commencing after the fifth hour of work), short (less than 30 minutes
8 in duration), or employees were prohibited from leaving, and affirmatively required to remain at
9 Defendant's premises, thereby subjecting them to Defendant's control during their meal periods
10 and entitling them to premium meal period wages, which they were not paid. Based on the data
11 provided, Defendant never paid meal period premiums during the Class Period. Plaintiff calculates
12 classwide damages on this claim at \$175,984 and PAGA civil penalties at \$61,300 (based on a
13 100% violation rate. Gaines Decl. ¶ 16.

14 Plaintiff also argues that Defendant failed to pay Class Members premium wages for
15 missed, denied and unauthorized rest periods in violation of Labor Code § 226.7 and IWC Wage
16 Order 4-2001. Plaintiff and Class Members contend that they were denied, and therefore unable to
17 take, 10-minute on-the-clock rest periods for every four hours of work or major fraction thereof,
18 but were not paid premium wages of one hour's pay for each missed, denied and unauthorized rest
19 period. Defendant's rest period practice of requiring employees to stay on the company premises
20 during rest periods allegedly violates our Supreme Court's mandate in *Augustus v. ABM Security*
21 *Services, Inc.* (2016) 5 Cal. 5th 257, 269 (holding that the rest period requirement "obligates
22 employers to permit and authorizes employees to take off-duty rest periods. That is, during rest
23 periods employers must relieve employees of all duties and relinquish control over how employees
24 spend their time." An employer may not place any limitations on where employees may go or not
25 go during their rest periods). Plaintiff calculates classwide damages on this claim at \$175,984 and
26 PAGA civil penalties at \$61,300 (based on a 100% violation rate). Gaines Decl. ¶ 17.

27 Plaintiff contends that Defendant failed to issue Plaintiff and Class Members accurately
28 itemized wage statements. Specifically, Plaintiff and Class Members were not paid all wages due,

1 as alleged above. As a result, the wage statements issued by Defendant to Plaintiff and Class
2 Members fail to accurately state all gross wages earned, in violation of Labor Code § 226(a)(1),
3 total hours worked, in violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor
4 Code § 226(a)(5), and all applicable hourly rates in effect during the pay period and the
5 corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226(a)(9).
6 Furthermore, and independent of the above allegations, the wage statements issued to Plaintiff and
7 Class Members allegedly failed to set forth the inclusive dates of the period for which the employee
8 is paid, in violation of Labor Code § 226(a)(6). Plaintiff calculates statutory penalties on this claim
9 at \$54,700, with PAGA civil penalty liability of \$153,250. Gaines Decl. ¶ 18.

10 Plaintiff also alleges that Class Members were required to incur expenses in the
11 performance of their job duties for which they are not fully reimbursed, in violation of Labor Code
12 § 2802. Plaintiff and Class Members were required to use their personal cellular phones as part of
13 their work tasks for Defendants and purchase and provide their own gloves and safety glasses
14 needed to carry out their work duties but were not fully reimbursed by Defendants for these
15 expenses. This practice allegedly violates Labor Code § 2802. Plaintiff calculates damages on this
16 claim at \$23,454, based off an estimated \$15 of unreimbursed expenses per pay period, and PAGA
17 civil penalties at \$61,300. Gaines Decl. ¶ 19.

18 Plaintiff sought penalties for waiting time (Labor Code section 203) predicated on all the
19 claims alleged in the Action. The value of these penalties may approach close to \$331,486. These
20 claims also required a significant compromise at this juncture of the litigation, and the compromise
21 reached is fair given the risk of loss on the merits and as to class certification as to the unpaid wage
22 claims from which they derive. Gaines Decl. ¶ 20.

23 The discount negotiated for settlement here is a reasonable compromise, particularly
24 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
25 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
26 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
27 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
28 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers

1 various arguments why class treatment is not appropriate, including but not limited to that
2 individualized inquires among class members predominate over common ones. If Defendant was
3 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
4 most Class Members would likely not file individual claims. Gaines Decl. ¶ 21.

5 Plaintiff also faced the risk of a loss on the merits on his claims. It is very possible that the
6 Court would agree with Defendant's position that its rest period practices complied with the
7 requirements of California law or could not be certified. In such a case, the value of the majority
8 of Plaintiff's claims would be zero. Gaines Decl. ¶ 22.

9 Finally, Plaintiff faced the risk that he would not obtain a maximum damage/penalty award
10 on all (or any of) his claims. For example, Plaintiff seeks discretionary penalties pursuant to the
11 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
12 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 23.

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

17 When the costs and risks of non-certification and loss on the merits are considered,
18 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
19 Decl. ¶¶ 12-25.

20 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
21 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
22 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
23 Decl. ¶ 26.

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

26 Despite the asserted fairness of the settlement terms, any potential Class Member who
27 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
28 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member

1 would otherwise retain any claim he or she may have against Defendant.

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

5 **V. CONCLUSION**

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

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

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

11 3. Appointing Plaintiff Brandon Velasquez as Class Representative;

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

14 5. Approving Phoenix Class Action Administration Solutions as Settlement
15 Administrator;

16 6. Preliminarily approving the allocation of \$8,000 from the Maximum Settlement
17 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
18 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
19 (25%) shall be included in the Net Settlement Proceeds for payment to Class Members;

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

22 8. Setting the following schedule of settlement proceedings:

23 \\\

24 \\\

25 \\\

26 \\\

27 \\\

28 \\\

<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")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Class Notice and Exclusion Form to Class Members	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written request for exclusion to the Settlement 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 Settlement 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 Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice and Exclusion Form	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2023, at _____.m. (approximately 90 days after entry of this Order)

DATED: January 24, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL E. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Brandon Velazquez and Proposed
Class Counsel