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Attorneys for Plaintiff Margarita Garcia
and Proposed Class Counsel

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

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

Plaintiff,

v.

GREENS OPERATIONS, INC., a
California corporation, GMPM
HOSPITALITY, LLC, a California limited
liability company, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: CVBL2200087

Assigned to the Hon. Kira Klatchko, Dept. PS1

CLASS ACTION

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

Date: November 9, 2023

Time: 8:30 a.m.

Dept.: PS1

Reservation ID: 004329928978

Complaint Filed: June 14, 2022

1 **PLEASE TAKE NOTICE THAT** on November 9, 2023 at 8:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department PS1 of the above-entitled Court, located at 3255 E.
3 Tahquitz Canyon Way, Palm Springs, California 92262, Plaintiff Margarita Garcia (“Plaintiff”)
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 Margarita Garcia as Class
8 Representative, (4) approving the appointment of Gaines & Gaines, APLC as Class Counsel,
9 (5) approving the appointment of Phoenix Settlement Administrators as settlement administrator,
10 (6) preliminarily approving the allocation of \$100,000 from the Gross Settlement Amount to settle
11 Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et
12 seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development
13 Agency and twenty-five percent (25%) shall be paid to Aggrieved Employees as part of the Net
14 Settlement Proceeds; (7) approving as to content and form the notice to the settlement class, and
15 directing it be disseminated by the Settlement Administrator; (8) setting a final fairness and
16 approval hearing; and (9) granting Plaintiff leave to file a First Amended Complaint.

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

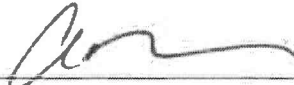
20 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
21 reasonable and in the best interests of the settlement class as a whole, and that the procedures
22 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,
23 opt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

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

1 DATED: September 1, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES
7 ALEX P. KATOFISKY
8 Attorneys for Plaintiff Margarita Garcia
9 and Proposed 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 Margarita Garcia (“Garcia” or
6 “Plaintiff”) and Defendant Greens Operations, Inc. (“Defendant”).

7 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
8 counsel with the assistance of a respected mediator with experience in the area of employment class
9 actions. Most importantly, the settlement will result in significant financial benefit to the
10 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
11 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
12 for a non-revisionary class settlement in the gross amount of \$1,000,000 to a settlement class of
13 approximately 307 Class Members and 727 PAGA Aggrieved Employees, yielding average class
14 payments of approximately \$1,856 and average PAGA payments of \$34.39. As detailed below,
15 the settlement is in the best interests of the class in light of all of the facts and circumstances and
16 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 Margarita Garcia as
21 Class Representative; (d) approve the appointment of Gaines & Gaines, APLC as Class Counsel;
22 (e) approve appointment of Phoenix Settlement Administrators as the Settlement Administrator; (f)
23 authorize the mailing of the proposed class action notice packet; (g) schedule a final fairness and
24 approval hearing; and (9) grant Plaintiff leave to file a First Amended Complaint.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On March 28, 2022, Plaintiff Garcia exhausted the pre-filing requirements of the Labor
27 Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
28 Decl.”) at ¶ 6.

1 On June 14, 2022, Plaintiff Garcia initiated her Action in the Riverside County Superior
2 Court by filing a complaint, pursuant to PAGA, on behalf of herself and all other aggrieved
3 employees. Gaines Decl. at ¶ 7.

4 Thereafter, Plaintiff dismissed Defendant GMPM Hospitality, LLC from the Action
5 following an individual resolution of her claims. Gaines Decl. at ¶ 8.

6 As set forth in the proposed First Amended Complaint (attached to the Settlement as
7 **Exhibit 3**), which the Parties hereby seek to file in the Action as part of the motion for preliminary
8 approval of this Settlement Agreement, the Action assert claims against Defendant for (1) failure
9 to pay all minimum and overtime wages due (Labor Code §§ 510, 1194, and 1194.2 and IWC Wage
10 Order 5-2001); (2) failure to provide rest periods or compensation in lieu thereof (Labor Code §
11 226.7 and IWC Wage Order 5-2001); (3) failure to provide meal periods or compensation in lieu
12 thereof (Labor Code §§ 226.7, 512, 1174, 1174.5, and 1198 and IWC Wage Order 5-2001); (4)
13 knowing and intentional failure to comply with itemized employee wage statement provisions
14 (Labor Code §§ 226(a) and (e)); (5) failure to maintain and produce payroll records (Labor Code
15 §§ 1174 and 1174.5); (6) failure to timely pay wages due at the separation of employment (Labor
16 Code §§ 201-203); (7) violation of Business and Professions Code § 17200 for underlying
17 violations of the Labor Code as set forth in the Action; and (8) civil penalties pursuant to PAGA
18 for underlying violations of the Labor Code as set forth in the Action, including Labor Code §
19 432.5. Gaines Decl. at ¶ 9.

20 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
21 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
22 other than this settlement. Defendant contends that it has complied at all times with the California
23 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification would
24 be inappropriate because Plaintiff is not an adequate Class Representative, Plaintiff's claims are
25 not typical of putative class members, and individual issues predominate over class issues, among
26 other defenses. The Action, the negotiation and execution of this Settlement Agreement, and all
27 acts performed or documents executed pursuant to or in furtherance of this Settlement Agreement
28 (i) shall not be used as an admission, or as evidence of wrongdoing by the Defendant, or for any

1 other purpose whatsoever; (ii) shall not be an admission or evidence of fault on behalf of Defendant
2 in any action before a civil court, criminal court, administrative agency of any type, or other
3 tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
4 the appropriateness of these or similar claims for class certification in the Action or with respect to
5 any other proceeding whatsoever. Gaines Decl. at ¶ 10.

6 The Class Representative contends that Defendant violated the California Labor Code and
7 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
8 certification. Gaines Decl. at ¶ 11.

9 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

10 Class Counsel have conducted a thorough investigation into the facts and law during the
11 prosecution of this class action case, including the exchange of extensive formal and informal
12 discovery and the review and verification of statistical data and other facts and information
13 provided by Defendant. Counsel for the Parties have investigated the applicable law as applied to
14 the facts discovered regarding the alleged claims of Plaintiff and potential defenses thereto, and the
15 damages and other losses claimed by Plaintiff. Gaines Decl. at ¶ 12.

16 On July 24, 2023, following their exchange of information and documents regarding the
17 Settlement Class and Aggrieved Employees and the claims and defenses asserted by the Parties,
18 the Parties engaged in arm's-length negotiations with the assistance of an experienced wage and
19 hour mediator, Steve Pearl, Esq., where the Parties were able to reach the resolution of the Action
20 set forth herein. Gaines Decl. at ¶ 13.

21 Based on their own independent investigation and evaluation, Class Counsel are of the
22 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
23 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
24 the Settlement Class in light of all known facts and circumstances, including the risk of significant
25 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
26 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
27 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 14.

28 The Parties agree that the Settlement Class described herein may be certified for settlement

1 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
2 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
3 certification will have no force or effect and will immediately be revoked. The Parties further agree
4 that certification for purposes of the settlement is in no way an admission that class certification is
5 proper under the more stringent standard applied for litigation and that evidence of this limited
6 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
7 or any other proceeding. Gaines Decl. at ¶ 15.

8 **IV. LEGAL ANALYSIS**

9 **A. The Proposed Settlement Terms**

10 **1. The Settlement Class**

11 The Parties have agreed to a settlement class composed of all non-exempt employees of
12 Defendant Greens Operations, Inc. in California at any time between July 24, 2019 and July 24,
13 2023 who have not entered into an arbitration agreement with Defendant. Stip. at ¶ A(4).

14 The Aggrieved Employees are defined as all non-exempt employees of Defendant Greens
15 Operations, Inc. in California at any time between March 28, 2021 and July 24, 2023. Stip. at ¶
16 A(5).

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

18 The Parties agree to settle this Action for a Gross Settlement Amount of \$1,000,000 (the
19 “Gross Settlement Amount”)¹. The Gross Settlement Amount includes the attorneys’ fees of
20 Class Counsel; litigation costs and expenses (which includes, without limitation, all such fees and
21 costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
22 providing any notices required as part of the settlement, securing Court approval of the
23 settlement, and obtaining judgment in the Action); the Service Payment to the Class
24 Representative, as approved by the Court; the payment to the California Labor and Workforce
25 Development Agency (“LWDA”); and all costs of administration, including, without limitation,
26 settlement administration fees and expenses. All employer payroll tax obligations due on wage

27 ¹ Defendant has represented that Class Members worked no more than 9,122 workweeks during the
28 Class Period. Should this number increase over a 10% grace, the Gross Settlement Amount will
increase proportionately. Stip. at ¶ H(16).

1 payments made from the Net Settlement Proceeds shall be paid by Defendant separately and apart
2 from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

3 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
4 application to the Court for up to 35% of the Gross Settlement Amount for attorneys' fees (projected
5 to be \$350,000). Stip. at ¶ C(1)(g).

6 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
7 application to the Court for up to \$20,000 in reimbursement of litigation costs and expenses. Stip.
8 at ¶ C(1)(g).

9 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
10 application to the Court for Service Payment to the Plaintiff Margarita Garcia in the gross amount
11 of \$15,000, in consideration for her efforts in instituting and participating in the Action and in
12 exchange for the general release of all claims by Plaintiff Garcia. Stip. at ¶ C(1)(f).

13 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
14 Settlement Administrators will be no more than \$20,000. Stip. at ¶ C(1)(i).

15 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
16 claims for penalties under the PAGA is \$100,000 ("PAGA Payment"), 75% (\$75,000) of which
17 shall be paid directly to the LWDA and 25% (\$25,000) of which shall be paid to Aggrieved
18 Employees as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

24 The Individual Payment Amount means the portion of the Net Settlement Proceeds
25 distributable to each Class Member who participates in the Class Settlement (i.e., who does not
26 submit a valid request for exclusion form) and each Aggrieved Employee, whether they participate
27 in the Class Settlement or not. As to participating Class Members, the class portion of the
28 Individual Payment Amount will be determined by dividing the Net Settlement Proceeds, less the

1 \$25,000 PAGA allocation, by the total number of weeks worked by the entire Settlement Class
2 during the Class Period, net of opt outs, resulting in the class workweek value; and then multiplying
3 the class workweek value by the number of weeks worked by each participating Class Member
4 during the Class Period. As to the Aggrieved Employees, the PAGA portion of the Individual
5 Payment Amount will be determined by dividing the PAGA settlement amount (\$25,000) by the
6 total number of weeks worked by all Aggrieved Employees during the PAGA Period, resulting in
7 the PAGA workweek value; and then multiplying the PAGA workweek value by the number of
8 weeks worked by each Aggrieved Employee during the PAGA Period. Stip. at ¶ C(1)(c).

9 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
10 (a) 20% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
11 80% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
12 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
13 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
14 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
15 mandated treatment as required by law. Stip. at ¶ C(1)(d).

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

17 Pursuant to PAGA, the Parties have agreed that \$100,000 of the Gross Settlement Amount
18 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
19 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
20 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
21 employees.” As such, 75% of the apportioned PAGA settlement amount – or \$75,000 – shall be
22 paid directly to the LWDA, and 25%, i.e., \$25,000, shall be paid to Aggrieved Employees as part
23 of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

25 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
26
27
28

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

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

16 Thus, the preliminary approval by the trial court is simply a conditional finding that the
17 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
18 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
19 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
20 may find that the settlement proposal contains some merit, is within the range of reasonableness
21 required for a settlement offer, or is presumptively valid subject only to any objections that may be
22 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
23 (4th ed. 2002).

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

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

32 *Id.* at § 11.24.

33 ² The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
34 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
35 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
36 Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 Here, the Parties have reached such an agreement and have submitted the Stipulation
2 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 16.

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

4 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
5 approval stage, request that the court provisionally approve certification of the class – conditioned
6 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
7 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
8 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
9 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
10 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
11 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

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

17 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
18 Stipulation to the Court, her counsel is transmitting it, together with this Motion, to the LWDA.
19 Gaines Decl. at ¶ 33.

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

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

27
28 ³ In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

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

2 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
3 and the means for identifying the members of the class determine whether the class is ascertainable.
4 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
5 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
6 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
7 comprises approximately 307 members. Gaines Decl. ¶ 29.

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

10 The Class Members' claims all stem from a common source: members of the Settlement
11 Class allege that Defendant violated the same Labor Code provisions in connection with their
12 employment in non-exempt positions. All members of the Class seek the same relief under the
13 same California laws (related to unpaid wages, unpaid meal and rest period premiums, inaccurate
14 or incomplete wage statements, failure to timely pay wages due upon separation, and derivative
15 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
16 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 30.

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

19 A class representative's claims are typical when they arise from the same event or course
20 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
21 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
22 Class Representative Margarita Garcia is a former non-exempt employee who worked for
23 Defendant in the State of California during the Class Period. She contends that Defendant failed
24 to pay all wages, failed to provide meal and rest periods, failed to comply with itemized employee
25 wage statement provisions, and failed to timely pay wages at the separation of employment, in
26 violation of Labor Code §§ 201, 202, 226(a), 226.3, 226.7, 432.5, 510, 512, 558, 1194, 1198, 2698,
27 and 2699, among other Labor Code provisions. She has the same claims as those that the members
28 of the Settlement Class would reasonably be expected to bring based on the course of conduct

1 alleged herein. Gaines Decl. ¶ 31.

2 Plaintiff has also demonstrated that she will aggressively and competently assert the
3 interests of the proposed Settlement Class; she has taken an active role in the litigation and has no
4 apparent conflicts with other class members. Gaines Decl. ¶ 32. Furthermore, Plaintiff has retained
5 competent counsel, experienced in litigating class action claims in the employment context. *See*
6 Gaines Decl. ¶¶ 2-5.

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

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

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

1 Here, the Parties' counsel have a great deal of experience in class action litigation and
2 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
3 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
4 in a broad exchange of documents, data, records and other information. Each side has apprised the
5 other, informally and at a formal mediation, of their respective factual contentions, legal theories
6 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*
7 *Gaines Decl.* ¶¶ 2-5, 12-13.

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

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

18 Plaintiffs' counsel created a comprehensive damage analysis using sampling information
19 obtained through informal discovery. The sampling included 226 employees (approximately
20 24.6% of the proposed class) and data from 92,118 shifts (nearly 24% of all shifts). The sample
21 included all class members together with individuals who entered into arbitration agreements who
22 are carved out of the class but many of whom remain part of the PAGA settlement. The damage
23 analysis reveals that the negotiated settlement falls within a realistic range of recovery on Class
24 Members' claims. *Gaines Decl.* ¶ 17.

25 Plaintiff contends that Defendant failed to pay Class Members all wages due in two separate
26 ways. First, Defendant allegedly paid Class Members bonuses and/or non-base hourly wages,
27 including, but not limited to, "Bonus (BON)," that were not included in their regular rate of pay for
28 purposes of paying them meal period premiums, sick pay, overtime, and double-time wages at the

1 correct rates, in violation of Labor Code §§ 226.7, 246, 510, 512, 558, and 1194 and IWC Wage
2 Order No. 5-2001. California Labor Code § 510 requires the payment of premium overtime
3 compensation based on employees' regular rate of pay. Labor Code § 207(e) defines the "regular
4 rate" to include all remuneration for employment paid to or on behalf of the employee. California
5 law mirrors federal law on the issue of computation of the regular rate of pay. The leading case on
6 this issue is *Walling v. Youngerman-Reynolds Hardware Co.* (1945) 324 U.S. 419, 424, which
7 explains that the "regular rate" is "all payments which the parties have agreed shall be received
8 regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen
9 by the parties; it is an actual fact." This includes all forms of bonuses and other non-base hourly
10 wages. Here, when Class Members worked overtime hours and double-time hours, they contend
11 that they were paid at one and one-half times and double-time the base hourly rate of pay. The
12 bonuses and/or non-base hourly wages earned by Plaintiff and Class Members were not
13 discretionary within the meaning of the applicable regulation (29 U.S.C. § 207(e)), and accordingly,
14 must have been included in their regular rate of pay for purposes of determining their overtime pay,
15 double-time pay, sick pay, and meal period premiums. Gaines Decl. ¶ 18.

16 Defendant also allegedly failed to pay Class Members all minimum and overtime wages
17 earned, in violation of Labor Code §§ 510, 1194, and 1194.2, when it occasionally paid Class
18 Members straight time wages only, with no adjustment for premium overtime wages. Specifically,
19 Class Members would work in excess of 8 hours per day and 40 hours per week, but were not
20 properly compensated for work performed in excess of eight (8) hours in a workday and work
21 performed in excess of forty (40) hours in a workweek at a rate of no less than one and one-half
22 times the regular rate of pay. Plaintiff calculates damages on these claims at no more than \$96,466.
23 Gaines Decl. ¶ 19.

24 Plaintiff argues that Defendant failed to permit or authorize Class Members to take timely
25 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
26 226.7, 512, and 558 and IWC Wage Order 5-2001. Labor Code § 512 provides that employers may
27 not employ an employee for a work period of more than five hours without providing a 30-minute
28 meal period starting no later than the end of the fifth hour. Class Members contend they were

1 routinely unable to take a proper meal period when they worked shifts in excess of 5 hours in
2 duration and a second meal period when they worked shifts in excess of 10 hours in duration.
3 Despite maintaining a legally compliant meal period policy, Plaintiff alleges that Defendant's
4 practice was to impermissibly require Class Members to forego their meal periods, even if they
5 worked more than ten hours in a day. The wage and time data provided by Defendant through
6 informal discovery demonstrates a meal period violation rate of 47.6% and a remarkable 67.7% of
7 all pay periods during the PAGA Period exhibiting some form of meal period violation. 97.2% of
8 shifts between 10 and 12 hours did not record a second meal period, and 95.7% of shifts greater
9 than 12 hours did not record a second meal period. Significant meal period premiums are
10 owed. Plaintiff calculates damages on this claim at \$370,116. Gaines Decl. ¶ 20.

11 Defendant allegedly failed to pay Class Members premium wages for missed, denied, and
12 unauthorized rest periods in violation of Labor Code § 226.7 and IWC Wage Order 5-2001. Class
13 Members allege that they were denied, and therefore unable to take, 10-minute rest periods for
14 every four hours of work or major fraction thereof, but were not paid premium wages of one hour's
15 pay for each missed, denied, and unauthorized rest period. As with meal periods, despite
16 maintaining a legally compliant rest period policy, Defendant's practice was to impermissibly
17 require Class Members to interrupt their rest periods and continue working in order to assist waiting
18 customers. An additional rest period was not provided when Class Members' rest periods were
19 interrupted or otherwise uncompliant. Plaintiff calculates damages on this claim at up to
20 \$813,823. Gaines Decl. ¶ 21.

21 Plaintiff argues that Defendant failed to issue Class Members accurately itemized wage
22 statements. Specifically, Class Members were allegedly not paid all wages due, as detailed above.
23 As a result, the wage statements issued by Defendant to Class Members failed to accurately state
24 all gross wages earned, in violation of Labor Code § 226(a)(1), total hours worked, in violation of
25 Labor Code § 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all
26 applicable hourly rates in effect during the pay period and the corresponding number of hours
27 worked at each hourly rate, in violation of Labor Code § 226(a)(9). Plaintiff calculates damages
28 on this claim at \$342,300. Gaines Decl. ¶ 22.

1 Finally, Plaintiff alleges that Defendant failed to pay certain Class Members all wages due
2 upon separation of employment, in violation of Labor Code §§ 201-203. As Defendant purportedly
3 failed to pay them all wages due during the course of their employment, as described above, these
4 wages were due and owing upon separation of employment yet went unpaid. Plaintiff calculates
5 damages on this claim at \$693,458. Gaines Decl. ¶ 23.

6 There were numerous risks to recovery here which required a compromise to resolve the
7 Actions at this juncture of the litigation. The vast majority of employees entered into binding
8 arbitration agreements with Defendant, which would likely foreclose their participation in a class
9 action altogether. Defendant argued that any bonus or premium wages paid were discretionary,
10 such that it properly paid all wages, including overtime, sick pay, and meal and rest premiums at
11 the correct rates. It forcefully maintained that it enforced legally compliant written policies
12 regarding meal and rest periods that provided all employees with proper, timely meal and rest
13 breaks, and any missed meal and rest periods were waived by employees. Defendant argued that
14 no wage statement penalties or waiting time penalties would be recovered because it paid all wages
15 due, it acted in good faith at all times, and Class Members suffered no actionable injury. It also
16 took the position that PAGA penalties could not be stacked, and the Court would likely exercise its
17 discretion to reduce or eliminate them altogether, based on the alleged weakness of the claims
18 asserted. It also contended that a class could not be certified because of manageability concerns,
19 among other issues, particularly with respect to the claims for meal and rest periods. Finally,
20 Defendant argued that Plaintiff faced the risk that she would not obtain a maximum damage/penalty
21 award on all (or any of) her claims. Gaines Decl. ¶ 24.

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

26 When the costs and risks of non-certification and loss on the merits are considered,
27 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
28 Decl. ¶ 26.

1 The settlement for each Class Member and Aggrieved Employee and the State of California
2 is fair, reasonable and adequate, given the inherent risk of litigation, the risk relative to class
3 certification and the costs of pursuing such litigation. The settlement shall finally resolve all claims
4 alleged in the Actions. Gaines Decl. ¶ 27.

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

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

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

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

15 In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached
16 to the Stipulation as **Exhibit 3**, which conforms to all claims to be released the Settlement. The
17 Parties agreed that, as part of this motion for preliminary approval, Plaintiff would concurrently
18 seek leave to file the First Amended Complaint, 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 the filing of the First Amended Complaint,
22 and consent that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶ 9.

23 V. **CONCLUSION**

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

- 26 1. Preliminarily finding that the settlement falls within the range of reasonableness and
27 approving the proposed settlement;
- 28 2. Conditionally certifying, for settlement purposes only, the Settlement Class;

- 1 3. Appointing Plaintiff Margarita Garcia as the Class Representative;
- 2 4. Appointing Gaines & Gaines, ALPC as Class Counsel;
- 3 5. Approving Phoenix Settlement Administrators as Settlement Administrator;
- 4 6. Preliminarily approving the allocation of \$100,000 from the Gross Settlement
- 5 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
- 6 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
- 7 (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;
- 8 7. Approving as to content and form the notice to the Settlement Class, and directing
- 9 it to be disseminated by the Settlement Administrator;
- 10 8. Permitting Plaintiff to file the First Amended Complaint, attached to the Stipulation
- 11 as **Exhibit 3**, no later than ten (10) calendar days after notice of the entry of the Order granting this
- 12 motion has been given, and consent that Defendant not be required to file a responsive pleading
- 13 thereto; and,
- 14 9. Setting the following schedule of settlement proceedings:

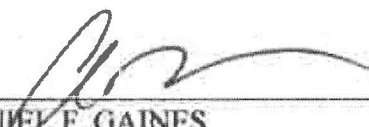
<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members and Aggrieved Employees, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period (for Class Members) and the PAGA Period (for Aggrieved Employees) ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail 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 Exclusion Form to the Settlement Administrator	45 calendar days after the initial mailing of the 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 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

<u>EVENT</u>	<u>TIMING</u>
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	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2024, at _____.m. (approximately 95 days after entry of the Order granting this Motion)

DATED: September 1, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

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and Proposed Class Counsel