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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. Harold W. Hopp, Dept. 1

CLASS ACTION

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

Date: December 15, 2023

Time: 8:30 a.m.

Dept.: 1

Complaint Filed: June 14, 2022

1 **PLEASE TAKE NOTICE THAT** on December 15, 2023 at 8:30 a.m., or as soon
2 thereafter as the matter may be heard, in Department 1 of the above-entitled Court, located at 4050
3 Main Street, Riverside, California 92501, Plaintiff Margarita Garcia (“Plaintiff”) will and hereby
4 does move unopposed for an Order (1) preliminarily finding that the settlement between the parties
5 falls within the range of reasonableness and approving the proposed class action settlement in the
6 above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class,
7 (3) approving the appointment of Plaintiff Margarita Garcia as Class Representative, (4) approving
8 the appointment of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of
9 Phoenix Settlement Administrators as settlement administrator, (6) preliminarily approving the
10 allocation of \$100,000 from the Gross Settlement Amount to settle Plaintiff’s representative claims
11 under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent
12 (75%) will be paid to the Labor and Workforce Development Agency and twenty-five percent
13 (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds; (7) approving
14 as to content and form the notice to the settlement class, and directing it be disseminated by the
15 Settlement Administrator; and (8) setting a final fairness and approval hearing.

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

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

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

5
6 DATED: December 8, 2023

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Margarita Garcia
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. The highest paid Class
15 Member who worked the entire Class Period would be paid approximately \$11,286.08 and the
16 lowest paid Class Member would be paid approximately \$54.26. As for the PAGA payments, the
17 highest paid Aggrieved Employee who worked the entire PAGA Period would be paid
18 approximately \$198.56, and the lowest paid Aggrieved Employee would be paid approximately
19 \$1.64. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 17. As detailed below, the settlement
20 is in the best interests of the class in light of all of the facts and circumstances and the risks and
21 delays of further litigation.

22 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
23 preliminary approval of the settlement agreement and preliminarily find that the settlement falls
24 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement
25 Class, for settlement purposes only; (c) approve the appointment of Plaintiff Margarita Garcia as
26 Class Representative; (d) approve the appointment of Gaines & Gaines, APLC as Class Counsel;
27 (e) approve appointment of Phoenix Settlement Administrators as the Settlement Administrator; (f)
28 authorize the mailing of the proposed class action notice packet; (g) schedule a final fairness and

1 approval hearing.

2 **II. BACKGROUND AND PROCEDURAL HISTORY**

3 On March 28, 2022 and March 29, 2022, Plaintiff Garcia exhausted the pre-filing
4 requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Gaines Decl.
5 at ¶ 6.

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

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

11 On November 9, 2023, Plaintiff filed her First Amended Complaint. As set forth in the First
12 Amended Complaint, the Action assert claims against Defendant for (1) failure to pay all minimum
13 and overtime wages due (Labor Code §§ 510, 1194, and 1194.2 and IWC Wage Order 5-2001); (2)
14 failure to provide rest periods or compensation in lieu thereof (Labor Code § 226.7 and IWC Wage
15 Order 5-2001); (3) failure to provide meal periods or compensation in lieu thereof (Labor Code §§
16 226.7, 512, 1174, 1174.5, and 1198 and IWC Wage Order 5-2001); (4) knowing and intentional
17 failure to comply with itemized employee wage statement provisions (Labor Code §§ 226(a) and
18 (e)); (5) failure to maintain and produce payroll records (Labor Code §§ 1174 and 1174.5); (6)
19 failure to timely pay wages due at the separation of employment (Labor Code §§ 201-203); (7)
20 violation of Business and Professions Code § 17200 for underlying violations of the Labor Code
21 as set forth in the Action; and (8) civil penalties pursuant to PAGA for underlying violations of the
22 Labor Code as set forth in the Action, including Labor Code § 432.5. Gaines Decl. at ¶ 9.

23 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
24 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
25 other than this settlement. Defendant contends that it has complied at all times with the California
26 Labor Code. It is Defendant’s position that, if this case were to be litigated, class certification would
27 be inappropriate because Plaintiff is not an adequate Class Representative, Plaintiff’s claims are
28 not typical of putative class members, and individual issues predominate over class issues, among

1 other defenses. The Action, the negotiation and execution of this Settlement Agreement, and all
2 acts performed or documents executed pursuant to or in furtherance of this Settlement Agreement
3 (i) shall not be used as an admission, or as evidence of wrongdoing by the Defendant, or for any
4 other purpose whatsoever; (ii) shall not be an admission or evidence of fault on behalf of Defendant
5 in any action before a civil court, criminal court, administrative agency of any type, or other
6 tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
7 the appropriateness of these or similar claims for class certification in the Action or with respect to
8 any other proceeding whatsoever. Gaines Decl. at ¶ 10.

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

12 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

13 Class Counsel have conducted a thorough investigation into the facts and law during the
14 prosecution of this class action case, including the exchange of extensive informal discovery and
15 the review and verification of statistical data and other facts and information provided by
16 Defendant. Counsel for the Parties have investigated the applicable law as applied to the facts
17 discovered regarding the alleged claims of Plaintiff and potential defenses thereto, and the damages
18 and other losses claimed by Plaintiff. Gaines Decl. at ¶ 12. Specifically, Defendant provided
19 Plaintiff's counsel with Plaintiff's employee file, Defendant's employee handbook, an exemplar of
20 the arbitration agreement signed by many of Defendant's employees, a redacted list of employees,
21 together with their dates of employment, during the Class Period (including those who signed an
22 arbitration agreement), and wage and time data for nearly 100% of the total shifts worked by all
23 non-exempt employees during the Class Period. *Id.*

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

1 Prior to mediation, Plaintiff's counsel and Defendant's counsel confirmed that they were
2 not aware of any class, representative, or collective action in any other court or in this jurisdiction
3 that asserts claims similar to those asserted in the action on behalf of a class or group of individuals
4 some or all of whom would also be members of the Class defined in this Action. Gaines Decl. at ¶
5 13. *See also* Declaration of Rachael L. Marko at ¶¶ 2-4. At the time of filing this Motion, Plaintiff's
6 counsel and Defendant's counsel are aware of one former employee of Defendant who complied
7 with the administrative requirements of PAGA and mailed a letter to Defendant and to the LWDA
8 outlining her claims. Defendant's counsel attests that they informed the former employee's counsel
9 of Plaintiff's pending settlement. At the time of filing this Motion, the former employee has not
10 filed their complaint. Plaintiff's counsel performed one final search on Courthouse News Service
11 and the Department of Industrial Relations' PAGA search site on December 7, 2023, which
12 confirmed there are no other pending wage and hour lawsuits or PAGA notice letters. Gaines Decl.
13 at ¶ 13.

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

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 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
28 or any other proceeding. Gaines Decl. at ¶ 15.

1 **IV. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class**

4 The Parties have agreed to a settlement class composed of all non-exempt employees of
5 Defendant Greens Operations, Inc. in California at any time between July 24, 2019 and July 24,
6 2023 who have not entered into an arbitration agreement with Defendant. Stip. at ¶ A(4).

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

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

11 The Parties agree to settle this Action for a Gross Settlement Amount of \$1,000,000 (the
12 “Gross Settlement Amount”)¹. The Gross Settlement Amount includes the attorneys’ fees of
13 Class Counsel; litigation costs and expenses (which includes, without limitation, all such fees and
14 costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
15 providing any notices required as part of the settlement, securing Court approval of the
16 settlement, and obtaining judgment in the Action); the Service Payment to the Class
17 Representative, as approved by the Court; the payment to the California Labor and Workforce
18 Development Agency (“LWDA”); and all costs of administration, including, without limitation,
19 settlement administration fees and expenses. All employer payroll tax obligations due on wage
20 payments made from the Net Settlement Proceeds shall be paid by Defendant separately and apart
21 from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a). Gaines Decl. ¶ 18.

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

25 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
26 application to the Court for up to \$20,000 in reimbursement of litigation costs and expenses. Stip.

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 at ¶ C(1)(g).

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

6 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
7 Settlement Administrators will be no more than \$20,000. Stip. at ¶ C(1)(i). Plaintiff's counsel
8 attests that it obtained bids from both Phoenix Settlement Administrators and ILYM Group, Inc.
9 Phoenix Settlement Administrators' bid was the least expensive option. Plaintiff's counsel has used
10 Phoenix Settlement Administrators as the settlement administrator in many of their cases and attest
11 that their work is excellent. Gaines Decl. at ¶ 19. Jodey Lawrence from Phoenix Settlement
12 Administrators has provided a declaration describing the administrator's experience and outlining
13 the details of its fee. Ms. Lawrence's declaration is being filed concurrently with this Motion. *See*
14 *generally* Declaration of Jodey Lawrence.

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). The Parties determined that
19 allocating 10% of the Gross Settlement Amount to resolve Plaintiff's PAGA claims was fair,
20 reasonable, and appropriate because the realistic penalties recoverable under PAGA in this Action
21 are roughly 10% of Plaintiff's damage model. Gaines Decl. at ¶ 20.

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

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

1 submit a valid request for exclusion form) and each Aggrieved Employee, whether they participate
2 in the Class Settlement or not. As to participating Class Members, the class portion of the
3 Individual Payment Amount will be determined by dividing the Net Settlement Proceeds, less the
4 \$25,000 PAGA allocation, by the total number of weeks worked by the entire Settlement Class
5 during the Class Period, net of opt outs, resulting in the class workweek value; and then multiplying
6 the class workweek value by the number of weeks worked by each participating Class Member
7 during the Class Period. As to the Aggrieved Employees, the PAGA portion of the Individual
8 Payment Amount will be determined by dividing the PAGA settlement amount (\$25,000) by the
9 total number of weeks worked by all Aggrieved Employees during the PAGA Period, resulting in
10 the PAGA workweek value; and then multiplying the PAGA workweek value by the number of
11 weeks worked by each Aggrieved Employee during the PAGA Period. Stip. at ¶ C(1)(c).

12 Subject to Defendant's full payment of the Gross Settlement Amount and all associated
13 employer payroll tax obligations, Plaintiff and Class Members who do not timely opt-out of the
14 Settlement will release Defendant, together with its officers, directors, employees, and agents from
15 any and all claims alleged or that could have been alleged in the First Amended Complaint based
16 on the facts therein. No PAGA claims are encompassed in the released class claims. Stip. at ¶ D(1)
17 and D(3). Gaines Decl. at ¶ 21.

18 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
19 (a) 20% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
20 80% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
21 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
22 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
23 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
24 mandated treatment as required by law. Stip. at ¶ C(1)(d). Determining the Individual Payment
25 Amounts' tax allocations is an art, not a science. The Parties believed that since the majority of
26 Plaintiff's claims and Defendant's potential liability came from penalties and interest, as discussed
27 below, that the majority of the Individual Payment Amounts should allocated as such. Gaines Decl.
28 at ¶ 22.

1 Finally, under the terms of the Settlement Agreement, the value of checks uncashed more
2 than 180 days after issuance shall be proportionately redistributed to those Class Members who
3 have cashed their checks based on the value of their first Settlement payment. Stip. at ¶ G(14).
4 Gaines Decl. at ¶ 23.

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

6 Pursuant to PAGA, the Parties have agreed that \$100,000 of the Gross Settlement Amount
7 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
8 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
9 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
10 employees.” As such, 75% of the apportioned PAGA settlement amount – or \$75,000 – shall be
11 paid directly to the LWDA, and 25%, i.e., \$25,000, shall be paid to Aggrieved Employees as part
12 of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

13 Subject to Defendant’s full payment of the Gross Settlement Amount and all associated
14 employer payroll tax obligations, Plaintiff and the State of California will release Defendant,
15 together with its officers, directors, employees, and agents from any and all claims alleged in
16 Plaintiff’s March 29, 2022 pre-filing letter to the LWDA. Aggrieved Employees’ claims for wages
17 or damages are not being released. Stip. at ¶ D(2) and D(4). Gaines Decl. at ¶ 24.

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

19 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
20 3.769; Fed. R. Civ. P. 23(e).² This is done in two steps: (1) an early (preliminary) review by the
21 trial court, and (2) a final review after notice has been distributed to the Class Members informing
22 them of the terms of the settlement and allowing them to exclude themselves from, participate in
23 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

24 Approval of class action settlements involves a two-step process.
25 First, counsel submit the proposed terms of settlement and the court
26 makes a preliminary fairness evaluation. If the preliminary
evaluation of the proposed settlement does not disclose grounds to

27 ² The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
28 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 doubt its fairness or other obvious deficiencies, such as unduly
2 preferential treatment of class representatives or of segments of the
3 class, or excessive compensation for attorneys, and appears to fall
4 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.

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

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

15 When the parties to an action reach a monetary settlement, they will
16 usually prepare and execute a joint stipulation of settlement, which
17 is submitted to the court for preliminary approval. The stipulation
18 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.

19 *Id.* at § 11.24.

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

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

23 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
24 approval stage, request that the court provisionally approve certification of the class – conditioned
25 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
26 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
27 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
28 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*

1 Corp. (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
2 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

3 The strength of the findings made by a judge at a preliminary hearing
4 or conference concerning a tentative settlement proposal . . . may be
5 set out in conditional orders granting tentative approval to the various
6 items submitted to the court. Three basic rulings are often
7 conditionally entered at this preliminary hearing. These conditional
8 rulings may approve a temporary settlement class, the proposed
9 settlement, and the class counsel’s application for fees and expenses.

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

11 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
12 Stipulation to the Court, her counsel is transmitting it, together with this Motion, to the LWDA.
13 Gaines Decl. at ¶ 46; **Exhibit C**.

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

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

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

22 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
23 and the means for identifying the members of the class determine whether the class is ascertainable.
24 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
25 are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class
26 is sufficiently numerous to warrant certification. According to Defendant’s records, the Class
27 comprises approximately 307 members. Gaines Decl. ¶ 42.

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

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

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

23 Here, the Parties’ counsel have a great deal of experience in class action litigation and
24 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
25 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
26 in a broad exchange of documents, data, records and other information. Each side has apprised the
27 other, informally and at a formal mediation, of their respective factual contentions, legal theories
28 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*

1 Gaines Decl. ¶¶ 2-5, 12-13.

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

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

12 Plaintiff’s counsel, with the assistance of an expert statistician, Bennett Berger of Berger
13 Consulting Group, created a comprehensive damage analysis using sampling information obtained
14 through informal discovery. The sampling included 90% of all non-exempt California employees
15 employed during the Class Period (even those who signed an arbitration agreement and are not
16 included in the Settlement) and data from 99.9% of shifts worked by all non-exempt California
17 employees during the Class Period. The sample included all class members together with
18 individuals who entered into arbitration agreements who are carved out of the class but many of
19 whom remain part of the PAGA settlement. Accordingly, the damage model crafted by Plaintiff’s
20 counsel’s statistician, Mr. Berger, was significantly more substantial than the actual amount of
21 damages recoverable on behalf of the Class. Plaintiff’s counsel therefor took the actual number of
22 Class Members (307) and divided it by the higher extrapolated number of total Class Members
23 (773) to determine what percentage (approximately 39.7%) to use to be able to create an accurate
24 analysis which revealed the maximum value of Class Members’ and Aggrieved Employees’ claims.
25 Plaintiff’s counsel did not re-create the PAGA portion of the damage analysis as those numbers
26 were still accurate and based off of 10,025 bi-weekly pay periods worked by Aggrieved Employees
27 during the PAGA Period. The damage analysis reveals that the negotiated settlement falls within a
28 realistic range of recovery on Class Members’ claims. Gaines Decl. ¶ 25.

1 Plaintiff contends that Defendant failed to pay Class Members all wages due in two separate
2 ways. First, Defendant allegedly paid Class Members bonuses and/or non-base hourly wages,
3 including, but not limited to, “Bonus (BON),” that were not included in their regular rate of pay for
4 purposes of paying them meal period premiums, sick pay, overtime, and double-time wages at the
5 correct rates, in violation of Labor Code §§ 226.7, 246, 510, 512, 558, and 1194 and IWC Wage
6 Order No. 5-2001. California Labor Code § 510 requires the payment of premium overtime
7 compensation based on employees’ regular rate of pay. Labor Code § 207(e) defines the “regular
8 rate” to include all remuneration for employment paid to or on behalf of the employee. California
9 law mirrors federal law on the issue of computation of the regular rate of pay. The leading case on
10 this issue is *Walling v. Youngerman-Reynolds Hardware Co.* (1945) 324 U.S. 419, 424, which
11 explains that the “regular rate” is “all payments which the parties have agreed shall be received
12 regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen
13 by the parties; it is an actual fact.” This includes all forms of bonuses and other non-base hourly
14 wages. Here, when Class Members worked overtime hours and double-time hours, they contend
15 that they were paid at one and one-half times and double-time the base hourly rate of pay. The
16 bonuses and/or non-base hourly wages earned by Plaintiff and Class Members were not
17 discretionary within the meaning of the applicable regulation (29 U.S.C. § 207(e)), and accordingly,
18 must have been included in their regular rate of pay for purposes of determining their overtime pay,
19 double-time pay, sick pay, and meal period premiums. Gaines Decl. ¶ 26. This claim was valued at
20 approximately \$4,713. Based on the data provided, Mr. Berger found that only 2.3% of pay periods
21 showed a Class Member earning overtime and additional compensation which could trigger a
22 potential violation. Mr. Berger found that only 315 pay periods during the PAGA Period exhibited
23 an alleged underpayment of overtime premium wages due to miscalculation of the regular rate and
24 calculated that Defendant could be liable for up to \$31,500 in PAGA civil penalties. Accordingly,
25 this claim has minimal damages. *Id.*

26 Defendant also allegedly failed to pay Class Members all minimum and overtime wages
27 earned, in violation of Labor Code §§ 510, 1194, and 1194.2, when it occasionally paid Class
28 Members straight time wages only, with no adjustment for premium overtime wages. Specifically,

1 Class Members would work in excess of 8 hours per day and 40 hours per week, but were not
2 properly compensated for work performed in excess of eight (8) hours in a workday and work
3 performed in excess of forty (40) hours in a workweek at a rate of no less than one and one-half
4 times the regular rate of pay. Defendant produced policies and data that showed that it compensated
5 its employees for premium overtime wages. Based on Plaintiff's experiences, Plaintiff's counsel
6 estimated that Class Members worked off-the-clock for approximately seven minutes for about half
7 of the total shifts. This totaled approximately \$91,753 in damages. Gaines Decl. ¶ 27. To calculate
8 the PAGA civil penalties for this claim, Mr. Berger assumed one violation per pay period and
9 valued Defendant's total potential PAGA civil penalties on this claim at \$1,002,500. However,
10 based on the data provided, Plaintiff's experience, and conversations with Defendant's counsel,
11 Plaintiff's counsel believes this number is quite high, and if Aggrieved Employees did work off-
12 the-clock during their employment, not every pay period was affected. *Id.*

13 Plaintiff argues that Defendant failed to permit or authorize Class Members to take timely
14 30-minute meal periods for shifts greater than 5 hours in length or second timely 30-minute meal
15 periods for shifts greater than 10 hours in length, in violation of Labor Code §§ 226.7, 512, and 558
16 and IWC Wage Order 5-2001. Labor Code § 512 provides that employers may not employ an
17 employee for a work period of more than five hours without providing a 30-minute meal period
18 starting no later than the end of the fifth hour. The wage and time data provided by Defendant
19 through informal discovery demonstrates a facial meal period violation rate of 47.6%; Mr. Berger
20 determined that 67.7% of all pay periods during the PAGA Period exhibited some form of meal
21 period violation. 97.2% of shifts between 10 and 12 hours did not record a second meal period, and
22 95.7% of shifts greater than 12 hours did not record a second meal period. Accordingly, meal period
23 premiums were allegedly owed. Based on these numbers, the damages on this claim were valued
24 up to \$370,116. Gaines Decl. ¶ 28. Based on a 67.7% violation rate and 10,025 pay periods during
25 the PAGA Period, Mr. Berger found that Defendant could be liable for up to \$678,900 PAGA civil
26 penalties. *Id.*

27 Defendant allegedly failed to pay Class Members premium wages for missed, denied, and
28 unauthorized rest periods in violation of Labor Code § 226.7 and IWC Wage Order 5-2001. Class

1 Members allege that they were denied, and therefore unable to take, 10-minute rest periods for
2 every four hours of work or major fraction thereof, but were not paid premium wages of one hour's
3 pay for each missed, denied, and unauthorized rest period. Based on Plaintiff's experiences,
4 Plaintiff's counsel assumed a 100% violation rate for rest periods. Accordingly, damages were
5 calculated on this claim at up to \$813,823, which assumes a one hour premium payment due for
6 every shift greater than 3.5 hours in length (i.e., \$16.27 for approximately 50,020 shifts). Gaines
7 Decl. ¶ 29. Mr. Berger's analysis concluded that Defendant could be liable for up to \$1,002,500 in
8 PAGA civil penalties on this claim.

9 Plaintiff argues that Defendant failed to issue Class Members accurately itemized wage
10 statements. Specifically, Class Members were allegedly not paid all wages due, as detailed above.
11 As a result, the wage statements issued by Defendant to Class Members failed to accurately state
12 all gross wages earned, in violation of Labor Code § 226(a)(1), total hours worked, in violation of
13 Labor Code § 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all
14 applicable hourly rates in effect during the pay period and the corresponding number of hours
15 worked at each hourly rate, in violation of Labor Code § 226(a)(9). The statutory damages on this
16 claim are valued at approximately \$342,300, calculated at the rate of \$50 for each of 217 initial
17 wage statements during the applicable one-year limitations period and \$100 for each of 3,314
18 subsequent wage statements during that period. Gaines Decl. ¶ 30. Mr. Berger further calculated
19 Defendant's potential PAGA civil penalties at approximately \$1,002,500 on this claim.

20 Finally, Plaintiff alleges that Defendant failed to pay certain Class Members all wages due
21 upon separation of employment, in violation of Labor Code §§ 201-203. As Defendant purportedly
22 failed to pay them all wages due during the course of their employment, as described above, these
23 wages were due and owing upon separation of employment yet went unpaid. Plaintiff calculates
24 damages on this claim at \$693,458 based on approximately 197 Class Members who left their
25 employment with Defendant during the Class Period. Based on approximately 338 former
26 Aggrieved Employees during the PAGA Period, Mr. Berger calculated that Defendant could be
27 liable for up to \$33,800 in PAGA civil penalties on this claim. Gaines Decl. ¶ 31.

28 Based on the numbers provided by Mr. Berger, the estimated maximum amount of damages

1 that Class Members theoretically could be awarded at trial is approximately \$2,316,163, inclusive
2 of unpaid wages, meal and rest period premiums, waiting time penalties, and wage statement
3 penalties. The estimated maximum amount of PAGA civil penalties that Aggrieved Employees
4 theoretically could be awarded at trial is approximately \$3,751,700. However, Plaintiff's counsel
5 believes that a more accurate number is \$1,002,500, based on one penalty per pay period at \$100
6 per penalty. As discussed below, it is unlikely that this Court would allow Plaintiff to stack PAGA
7 penalties, and therefore, this number is the most accurate estimation of potential PAGA civil
8 penalties Defendant could be found liable for. Gaines Decl. ¶ 32.

9 There were numerous risks to recovery here which required a compromise to resolve the
10 Actions at this juncture of the litigation. The vast majority of employees entered into binding
11 arbitration agreements with Defendant, which would likely foreclose their participation in a class
12 action altogether. Defendant argued that any bonus or premium wages paid were discretionary,
13 such that it properly paid all wages, including overtime, sick pay, and meal and rest premiums at
14 the correct rates. It forcefully maintained that it enforced legally complaint written policies
15 regarding meal and rest periods that provided all employees with proper, timely meal and rest
16 breaks, and any missed meal and rest periods were waived by employees. Defendant argued that
17 no wage statement penalties or waiting time penalties would be recovered because it paid all wages
18 due, it acted in good faith at all times, and Class Members suffered no actionable injury. It also
19 took the position that PAGA penalties could not be stacked, and the Court would likely exercise its
20 discretion to reduce or eliminate them altogether, based on the alleged weakness of the claims
21 asserted. It also contended that a class could not be certified because of manageability concerns,
22 among other issues, particularly with respect to the claims for meal and rest periods. Finally,
23 Defendant argued that Plaintiff faced the risk that she would not obtain a maximum damage/penalty
24 award on all (or any of) her claims. Gaines Decl. ¶ 33.

25 Defendant strongly contends that its policies and practices do not violate any laws. It
26 contends that it properly paid all wages and provided for all meal and rest periods and fully
27 compensated its employees for all time worked. It further contends that the wage statements it
28 provided to its employees are fully compliant with California law. Gaines Decl. ¶ 34.

1 Defendant also contended that the Ninth Circuit has held that heightened PAGA penalties
2 are not appropriate where the defendant was not notified by the Labor Commissioner or any court
3 that it was committing any violation of the law. *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144
4 (9th Cir. 2021). *See also Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 340
5 (reversing heightened penalties awarded by trial court for Labor Code § 226.3 because “the plain
6 language of the statute [Labor Code § 226.3] provides that heightened penalties apply only where
7 the employer fails to provide wage statements or fails to keep required records.”) Further, courts
8 are often hesitant to award a heightened penalty where there is no prior citation by the Labor
9 Commissioner. *See Bernstein* at 1144. *See also Amaral v. Cintas Corp. No. 2* (2008) 163
10 Cal.App.4th 1157, 1209 (holding that “[u]ntil the employer has been notified that it is violating a
11 Labor Code provision...the employer cannot be presumed to be aware that its continuing
12 underpayment of employee’s is a violation subject to penalties.”) (internal quotations omitted).
13 Defendant was not notified by the Labor Commissioner or any court that it was subject to the
14 California Labor Code, and has not been previously cited by the Labor Commissioner for Labor
15 Code violations. Therefore, any violations prior to Plaintiff’s LWDA letter are not subject to
16 heightened penalties. Gaines Decl. at ¶ 35.

17 Additionally, Defendant contended that there is no California authority that expressly
18 permits the practice of counting multiple PAGA violations/penalties that occur within the same pay
19 period, known as “stacking” penalties. Plaintiff’s counsel is aware of no court that has actually
20 stacked such PAGA penalties for multiple violations (meaning the “market” for PAGA settlements
21 is based on no stacking of penalties) and given the circumstances of this case, it is unlikely that this
22 Court would impose a massive penalty by stacking the PAGA penalty claims against Defendant.
23 Gaines Decl. at ¶ 30. Although stacking penalties is not unlawful, the majority of cases that address
24 awards of PAGA penalties focus on the court’s discretion to reduce awards. *See Romo v. GMRI,*
25 *Inc.*, 2014 WL 11320647, at *7 (C.D. Cal. Feb. 18, 2014) (“The court retains discretion over awards
26 under a PAGA claim”); *Cardenas v. McLane Foodservice, Inc.*, 2011 WL 379413, at *4 (C.D.
27 Cal. Jan. 31, 2011) (“The PAGA text also provides the Court with the discretion to limit the amount
28 Plaintiffs may recover from the employer.”); *Bright v. 99c Only Stores* (2010) 189 Cal. App. 4th

1 1472, 1480 n.8 (“The trial court has discretion to award less than the maximum amount of the civil
2 penalty”). Based thereon, the non-stacking/one penalty per pay period is an appropriate
3 evaluation for maximum potential PAGA civil penalties exposure in this case. Gaines Decl., ¶ 36.

4 Finally, Defendant contended it acted within the requirements of California law at all times
5 as to all Class Members and Aggrieved Employees. In particular, Defendant contends that it paid
6 all employees all minimum and overtime wages due. Defendant also contends that it has compliant
7 meal and rest break practices. Defendant further contends that not every pay period at issue
8 involved an alleged Labor Code violation. Moreover, Defendant maintained that even if the Court
9 did award PAGA civil penalties, the Court could and would *substantially* reduce the penalties
10 awarded based on the discretionary factors contained in Labor Code § 2699(e)(2) (“In any action
11 by an aggrieved employee . . . , a court may award a lesser amount than the maximum civil penalty
12 amount specified by this part if, based on the facts and circumstances of the particular case, to do
13 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”).
14 Gaines Decl., ¶ 37.

15 The reasonable damages and/or penalties that Class Members could expect to be awarded
16 at trial are uncertain. Class certification is a tremendous risk, and Plaintiff’s counsel believes that
17 the risk entailed in losing a class certification motion is up to 50%, particularly as to the meal and
18 rest break claims. All penalty claims alleged are wholly derivative of the unpaid wage claims, such
19 that if Plaintiff does not prevail on those claims, she will not recover a penny of penalties (and these
20 penalties represent a substantial portion of her damage model). Accordingly, when the costs and
21 risks of non-certification and loss on the merits are considered, Plaintiff’s counsel are of the opinion
22 that the settlement reached is clearly a favorable one. Gaines Decl., ¶ 38.

23 The table below shows the maximum potential recovery on each claim alleged by Plaintiff
24 and the realistic recovery on each such claim, as gauged by Plaintiff’s counsel, applying a 75%
25 discount (representing a 50% discount for class certification risks and a 50% discount for the risk
26 of a loss on the merits). Gaines Decl., ¶ 39

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CLAIM	MAXIMUM POTENTIAL RECOVERY	REALISTIC RECOVERY
Unpaid Wages – Failure to Blend	\$4,713	\$1,178.25
Unpaid Wages – Off-the-Clock	\$91,752	\$22,938
Meal Breaks	\$370,116	\$92,529
Rest Breaks	\$813,823	\$203,455.75
Wage Statements	\$342,300	\$85,575
Waiting Time Penalties	\$693,458	\$173,364.50
PAGA Penalties – All Claims	\$3,751,700	\$250,625
TOTAL:	\$6,067,862	\$829,665.50

The settlement for each Class Member and Aggrieved Employee and the State of California is fair, reasonable and adequate, given the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The settlement shall finally resolve all claims alleged in the Actions. Gaines Decl. ¶ 40.

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

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

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

V. CONCLUSION

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

1. Preliminarily finding that the settlement falls within the range of reasonableness and approving the proposed settlement;
2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiff Margarita Garcia as the Class Representative;
4. Appointing Gaines & Gaines, ALPC as Class Counsel;

- 1 5. Approving Phoenix Settlement Administrators as Settlement Administrator;
- 2 6. Preliminarily approving the allocation of \$100,000 from the Gross Settlement
- 3 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
- 4 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
- 5 (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;
- 6 7. Approving as to content and form the notice to the Settlement Class, and directing
- 7 it to be disseminated by the Settlement Administrator;

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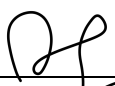
8. Setting the following schedule of settlement proceedings:

<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
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	March 20, 2024, at 8:30 a.m. (or, _____, 2024, at _____.m. [approximately 95 days after entry of this Order])

DATED: December 8, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Margarita Garcia
and Proposed Class Counsel