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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

12 JESSICA VARGAS ZARAGOZA, on
13 behalf of herself and on behalf of all
similarly situated individuals,

14 Plaintiffs,

15 v.

16 AMERICAN TAX SOLUTIONS, a
17 California corporation, and DOES 1 through
18 10, inclusive,

19 Defendants.

CASE NO: 22STCV09469

Assigned to the Hon. Carolyn B. Kuhl, Dept. 12

CLASS ACTION

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

DATE: September 5, 2023

TIME: 11:00 a.m.

DEPT.: SS-12

Complaint Filed: March 17, 2022

1 **PLEASE TAKE NOTICE THAT** on September 5, 2023 at 11:00 a.m., or as soon
2 thereafter as the matter may be heard, in Department SS-12 of the above-entitled Court, located at
3 312 North Spring Street, Los Angeles, CA 90012, Plaintiffs Jessica Vargas Zaragoza, Sean
4 Richardson, Kayla Salas, Selina Taing, Alizae Vargas, and Ricki Freitas will and hereby do move
5 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
6 the range of reasonableness and approving the proposed class action settlement in the above-
7 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
8 approving the appointment of Plaintiffs Jessica Vargas Zaragoza, Sean Richardson, Kayla Salas,
9 Selina Taing, Alizae Vargas, and Ricki Freitas as the Class Representatives, (4) approving the
10 appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
11 Counsel, (5) approving the appointment of Phoenix Settlement Administration as settlement
12 administrator, (6) preliminarily approving the allocation of \$60,000 from the Maximum Settlement
13 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
14 Code §§ 2698 et seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and
15 Workforce Development Agency and twenty-five percent (25%) shall be included in the Net
16 Settlement Proceeds for payment to Aggrieved Employees; (7) approving as to content and form
17 the notice to the settlement class, and directing it be disseminated by the Settlement Administrator;
18 (8) permitting Plaintiffs to file a Third Amended Class and Representative Action Complaint; and
19 (9) setting a final fairness and approval hearing.

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

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

27 \\

28 \\

1 DATED: July 31, 2023

GAINES & GAINES,
A Professional Law Corporation

2
3
4 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiffs Jessica Vargas Zaragoza, Sean
Richardson, Kayla Salas, Selina Taing, Alizae Vargas,
and Ricki Freitas and Proposed Class Counsel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 A. Case Summary and Procedural History

4 Plaintiffs Jessica Vargas Zaragoza, Sean Richardson, Kayla Salas, Selina Taing, Alizae
5 Vargas, and Ricki Freitas (together, “Plaintiffs”) and Defendant American Tax Solutions
6 (“Defendant”) (collectively, the “Parties”) have reached a resolution of this class action and hereby
7 submit their settlement agreement to the Court for its preliminary approval.

8 On or about March 17, 2022, Plaintiff Jessica Vargas Zaragoza initiated the Action by filing
9 a class action complaint on behalf of herself and all other class members (the “Action”).
10 Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

11 On March 18, 2022, Plaintiff Zaragoza exhausted the pre-filing requirements of the Labor
12 Code Private Attorneys General Act of 2004 (“PAGA”) (the “LWDA Letter”). Thereafter, on May
13 25, 2022, Plaintiff Zaragoza filed a First Amended Complaint that added PAGA allegations based
14 on those alleged in the LWDA Letter. Gaines Decl. at ¶ 7.

15 On September 21, 2022, Plaintiffs Sean Richardson, Kayla Salas, Selina Taing, Alizae
16 Vargas, and Ricki Freitas (the “Additional Plaintiffs”) exhausted the pre-filing requirements of the
17 PAGA. The Second Amended Complaint was filed on January 25, 2023 to add the Additional
18 Plaintiffs and their respective class and PAGA allegations. Gaines Decl. at ¶ 8.

19 On June 13, 2023, in contemplation of settlement, Plaintiffs again exhausted PAGA to
20 allege additional claims, all of which are encompassed in the Settlement’s PAGA release. Gaines
21 Decl. at ¶ 9.

22 The Third Amended Complaint in the form attached to the Settlement Agreement as
23 **Exhibit 3** will be filed upon Court approval as sought herein and asserts class and PAGA
24 representative action claims against Defendant for (1) failure to pay all minimum and overtime
25 wages due (Labor Code §§ 204, 510, 1174, 1174.5, 1194, 1197, 1197.1, and 1199); (2) failure to
26 provide compliant rest periods or compensation in lieu thereof (Labor Code § 226.7; IWC Wage
27 Order 4-2001); (3) failure to provide compliant meal periods or compensation in lieu thereof (Labor
28 Code §§ 226.7, 512, 1174, and 1174.5; IWC Wage Order 4-2001); (4) knowing and intentional

1 failure to comply with itemized employee wage statement provisions (Labor Code § 226(a), (e),);
2 (5) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203); (6)
3 failure to reimburse all business-related expenses (Labor Code § 2802); (7) injunctive relief and
4 restitution for the violation of Business and Professions Code § 17200; and (8) civil penalties
5 pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201-202, 204, 226(a),
6 226.7, 226.8, 246, 510, 510, 1194, 1197, 1197.1, 1199, and 2802 and pursuant to Labor Code §
7 2699(A) for violation of Labor Code §§ 226.3 and 558 (the “Third Amended Complaint”). Gaines
8 Decl. at ¶ 10.

9 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
10 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
11 other than this settlement. Defendant contends that it has complied at all times with the California
12 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
13 and local laws and regulations. It is Defendant’s position that, if this case were to be litigated, class
14 certification would be inappropriate because Plaintiffs are not adequate class representatives,
15 Plaintiffs’ claims are not typical of putative class members, and individual issues predominate over
16 class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts
17 performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i)
18 shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not
19 be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal,
20 or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission
21 or evidence of the appropriateness of these or similar claims for class certification in the Action or
22 with respect to any other proceeding. Gaines Decl. at ¶ 11.

23 The Class Representatives contend that Defendant violated the California Labor Code and
24 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
25 certification. Gaines Decl. at ¶ 12.

26 **B. Investigation and Settlement Discussions**

27 Class Counsel represent that they have conducted a thorough investigation into the facts
28 and law during the prosecution of this class action case, including the exchange of extensive

1 informal discovery and the review and verification of statistical data and other facts and information
2 provided by Defendant. Counsel for the Parties also represent that they have investigated the
3 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
4 potential defenses thereto, and the damages and other losses claimed by Plaintiffs. Gaines Decl. at
5 ¶ 13.

6 On March 13, 2023, following their exchange of information and documents regarding the
7 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
8 length negotiations with the assistance of mediator Henry Bongiovi, Esq., through which they were
9 able to reach the resolution of the Action set forth herein.¹ Gaines Decl. at ¶ 14.

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

17 The Parties agree that the Settlement Class described herein may be certified for settlement
18 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
19 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
20 certification will have no force or effect and will immediately be revoked. The Parties further agree

21 ¹ Two separate and related individual and representative PAGA actions entitled *Michael Castaneda*
22 *v. American Tax Solutions, et al.*, Los Angeles Superior Court Case No. 21STCV13626 (the
23 "*Castaneda Action*") and *Francisco Javier Covarrubias v. American Tax Solutions, et al.*, Los
24 Angeles Superior Court Case No. 22STCV23603 (the "*Covarrubias Action*") were also resolved
25 at the mediation, but on an individual basis. The *Castaneda Action* and *Covarrubias Action* both
26 alleged individual claims *only* on behalf of plaintiffs Michael Castaneda and Francisco
27 Covarrubias, representative PAGA claims on their behalf, and did not allege any class claims.
28 Counsel in the *Castaneda Action* and *Covarrubias Action* also engaged in some work related to
the litigation of PAGA claims but primarily focused its efforts on the individual claims of their
clients, not a PAGA group. However, pursuant to a written fee sharing agreement between all
counsel and approved by all clients, all counsel in the *Castaneda Action*, *Covarrubias Action*, and
this Action will share all attorneys' fees and costs recovered in all cases. Gaines Decl. at ¶ 15.

1 that certification for purposes of the settlement is in no way an admission that class certification is
2 proper under the more stringent standard applied for litigation and that evidence of this limited
3 Stipulation for settlement purposes only will not be admissible for any purpose in this or any other
4 proceeding. Gaines Decl. at ¶ 17.

5 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
6 preliminary approval of the settlement agreement and preliminarily find that the settlement falls
7 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement
8 Class, for settlement purposes only; (c) approve the appointment of Plaintiffs Jessica Vargas
9 Zaragoza, Sean Richardson, Kayla Salas, Selina Taing, Alizae Vargas, and Ricki Freitas as the
10 Class Representatives; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
11 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
12 Administrator; (f) permit the filing of a Third Amended Complaint; (g) authorize the mailing of the
13 proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

14 **II. LEGAL ANALYSIS**

15 **A. The Proposed Settlement Terms**

16 The “Settlement Class” shall be defined as “all persons who are or previously were
17 employed as non-exempt employees and/or commissioned Settlement Officers by Defendant in
18 California during the Class Period.” Defendant represents that the Class includes approximately
19 285 employees who worked approximately 10,411 workweeks during the Class Period. Settlement
20 at ¶ A(4). The Settlement contains an escalator clause which requires an increase to the Maximum
21 Settlement Amount or shortened Class and PAGA Periods if the representations regarding class
22 workweeks veer by more than 10%. Settlement at ¶ H(16).

23 The “Aggrieved Employees” are defined as: all persons who are or previously were
24 employed as non-exempt employees and/or commissioned Settlement Officers by Defendant in
25 California during the PAGA Period. Aggrieved Employees will receive a share of the PAGA
26 Payment whether or not they participate in the class settlement. Settlement at ¶ A(4).

27 The Parties stipulate to the conditional certification of the Settlement Class for settlement
28 purposes only. Settlement at ¶ B(11).

1 The Settlement Agreement provides that Defendant shall pay the total, non-reversionary
2 fund in the sum of \$600,000 (the "Maximum Settlement Amount"), subject to any increase based
3 on the escalator provision in paragraph H(16). The Maximum Settlement Amount includes the
4 attorneys' fees of Class Counsel; litigation costs and expenses (which includes, without limitation,
5 all such fees and costs incurred to date, as well as such fees and costs to be incurred in documenting
6 the settlement, providing any notices required as part of the settlement, securing Court approval of
7 the settlement, and obtaining judgment in the Action); the Enhancement Payments to the Class
8 Representatives, as approved by the Court; the payment to the California Labor and Workforce
9 Development Agency ("LWDA"); and all costs of administration, including, without limitation,
10 settlement administration fees and expenses. All employer payroll tax obligations due on wage
11 payments made from the Net Settlement Proceeds shall be paid by Defendant separate and apart
12 from the Maximum Settlement Amount. Settlement at ¶ C(1)(a).

13 The Maximum Settlement Amount is to be paid and disbursed over three years due to
14 Defendant's financial constraints. Settlement at ¶ G(3).

15 Class Members need not submit a claim form to receive their share of the Settlement. Class
16 Members who timely exclude themselves from the Settlement will not be part of the final
17 Settlement Class and not bound by the releases herein. Settlement at ¶ E(6).

18 The Settlement Agreement further provides that Plaintiffs' counsel may request an award
19 of attorneys' fees not to exceed \$200,000 (i.e., one-third of the Maximum Settlement Amount) and
20 seek reimbursement of litigation costs necessarily incurred, not to exceed \$50,000. Settlement at ¶
21 C(1)(g), C(1)(h). It also provides that Plaintiffs will seek, and Defendant will not oppose, a service
22 payment to each named Plaintiff Jessica Vargas Zaragoza, Sean Richardson, Kayla Salas, Selina
23 Taing, Alizae Vargas, and Ricki Freitas in the amount of \$7,500 (for a total of \$45,000). Settlement
24 at ¶ C(1)(f).

25 The Parties have agreed that Phoenix Settlement Administration ("Phoenix") an
26 experienced and competent settlement administration company, will administer the settlement.
27 Phoenix's credentials are attached to the Declaration of Jodey Lawrence. Up to \$17,250 has been
28 allocated to compensate Phoenix for its work related to the administration, including disbursements

1 and tax reporting for a three-year period.

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

3 Pursuant to PAGA, the Parties have agreed that \$60,000 of the Maximum Settlement
4 Amount will be allocated to settle the claims brought under Labor Code § 2699 et. seq. Pursuant
5 to Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
6 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
7 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
8 \$45,000 – shall be payable to the Labor and Workforce Development Agency. The remaining 25
9 percent, or \$15,000, shall be included in the Net Settlement Proceeds for payment to Aggrieved
10 Employees. Settlement at ¶ C(1)(e).

11 As required by Labor Code § 2699(l)(2), concurrent with Plaintiffs’ submission of the
12 Settlement Agreement to the Court, they are transmitting it, together with this Motion, to the
13 LWDA. Gaines Decl. at ¶ 18; **Exhibit C**.

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

15 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
16 3.769; Fed. R. Civ. P. 23(e).² This is done in two steps: (1) an early (preliminary) review by the
17 trial court, and (2) a final review after notice has been distributed to the Class Members informing
18 them of the terms of the settlement and allowing them to exclude themselves from, participate in
19 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

20 Approval of class action settlements involves a two-step process.
21 First, counsel submit the proposed terms of settlement and the court
22 makes a preliminary fairness evaluation. If the preliminary
23 evaluation of the proposed settlement does not disclose grounds to
24 doubt its fairness or other obvious deficiencies, such as unduly
25 preferential treatment of class representatives or of segments of the
26 class, or excessive compensation for attorneys, and appears to fall
27 within the range of possible approval, the court should direct that
28 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.

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) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

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

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

11 When the parties to an action reach a monetary settlement, they will
12 usually prepare and execute a joint stipulation of settlement, which
13 is submitted to the court for preliminary approval. The stipulation
14 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.

15 *Id.* at § 11.24.

16 Here, the Parties have reached such an agreement and have submitted the Settlement
17 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
18 *See* ; Gaines Decl. ¶ 18, **Exhibit B**.

19 **D. Procedures for Settlement Before Class Certification.**

20 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
21 approval stage, request that the court provisionally approve certification of the class – conditioned
22 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
23 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
24 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
25 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
26 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
27 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

8 4 *Newberg on Class Actions*, at §11.26.

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

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

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

17 The proposed settlement class is ascertainable. The class definition, the size of the class
18 and the means for identifying the members of the class determine whether the class is ascertainable.
19 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
20 are identifiable from Defendant's records. Further, the settlement class is sufficiently numerous to
21 warrant certification. According to Defendant's records, the Class is comprised of approximately
22 285 individuals. Gaines Decl. ¶ 38.

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

25 The Class Members' claims all stem from a common source: all Class Members allege that
26 Defendant violated the same Labor Code and Wage Order provisions in connection with their work
27 for Defendant. The same Labor Code and Wage Order violations are alleged on behalf of all
28 persons encompassed in the settlement class, including claims for failure to pay minimum and
overtime wages, failure to provide compliant meal periods and associated premium pay, failure to
provide compliant rest periods and associated premium pay, failure to provide compliant wage
statements, failure to timely pay wages upon termination of employment, failure to timely pay

1 wages during employment, and unreimbursed business expenses – all arising out of the Labor Code
2 violations alleged in the proposed Third Amended Complaint. All members of the Settlement Class
3 seek the same legal remedies under the same state laws, all related to their employment under
4 uniform policies and practices. Under these circumstances, the commonality requirement is
5 satisfied for purposes of certifying the settlement class for settlement. Gaines Decl. ¶ 39.

6 c. **The Proposed Class Representatives' Claims are Typical of the**
7 **Class Members' Claims**

8 A class representative's claims are typical when they arise from the same event or course
9 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
10 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiffs and
11 proposed Class Representatives Jessica Vargas Zaragoza, Sean Richardson, Kayla Salas, Selina
12 Taing, Alizae Vargas, and Ricki Freitas are former non-exempt employees of Defendant whom,
13 Plaintiffs allege, were not paid all wages (including minimum wages and overtime wages), were
14 not provided compliant meal periods and associated premium pay, were not provided compliant
15 rest periods and associated premium pay, were not provided compliant wage statements, were not
16 timely paid wages upon termination of employment, were not timely paid wages during
17 employment, and were not reimbursed business expenses incurred. Plaintiffs allege the same
18 claims as those that the members of the Settlement Class would reasonably be expected to bring
19 based on the course of conduct alleged herein. Gaines Decl. ¶ 40.

20 Plaintiffs have also demonstrated that they will aggressively and competently assert the
21 interests of the proposed Settlement Class; they have taken active roles in this litigation and have
22 no apparent conflicts with other class members. Plaintiffs participated actively in the litigation,
23 including participation in a full day mediation. Gaines Decl. ¶ 41. Furthermore, Plaintiffs have
24 retained competent counsel, experienced in litigating class action claims in the employment
25 context. See Gaines Decl. ¶¶ 2-5.

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

28 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless

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

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, such counsel have been involved in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence with the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines Decl. ¶¶ 2-5, 20-41.

Here, the Parties’ counsel have a great deal of experience in class action litigation and specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted an extensive investigation of the factual allegations involved in this case. The Parties have engaged in a broad exchange of documents, statistics, records and other information. Each side has apprised the other, informally and at a formal mediation, of their respective factual contentions, legal theories and defenses, resulting in extensive arms-length negotiations taking place among the Parties. *See* Gaines Decl. ¶ 2-5, 20-41.

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

The Court must make an “independent assessment of the reasonableness of the terms of the

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

9 In the lawsuit, Plaintiffs allege that Defendant failed to pay Class Members all wages due
10 in three separate ways: 1) Regular Rate of Pay miscalculations; 2) Off-The-Clock work; and 3)
11 Minimum, Overtime, and Non-Productive Time Wages for misclassified inside sales employees.
12 Gaines Decl. ¶ 21.

13 First, Defendant paid Class Members bonuses, commissions, and other forms of non-base
14 hourly wages that were allegedly not included in their regular rate of pay for purposes of computing
15 the proper overtime rate, meal and rest period premiums, and sick pay rate, in violation of Labor
16 Code §§ 226.7, 246, 510, 512, 558, and 1194. California Labor Code § 510 requires the payment
17 of premium overtime compensation, meal and rest period premium compensation, and sick pay
18 based on employees’ regular rate of pay. Labor Code § 207(e) defines the “regular rate” to include
19 all remuneration for employment paid to or on behalf of the employee. California law mirrors
20 federal law on the issue of computation of the regular rate of pay. *See Walling v. Youngerman-*
21 *Reynolds Hardware Co.*, 324 U.S. 419, 424 (1945) (holding that the “regular rate” is “all payments
22 which the parties have agreed shall be received regularly during the workweek, exclusive of
23 overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.”). *See also*
24 *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863 (holding that “the calculation
25 of premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime
26 pay, must account for not only hourly wages but also other nondiscretionary payments for work
27 performed by the employee” because the terms “regular rate of compensation under section
28 226.7(c)” and “regular rate of pay under section 510(a)” are “synonymous” and “encompasses all

1 nondiscretionary payments, not just hourly wages.”) Here, when Class Members worked overtime
2 hours, they were paid at one and one-half times the base hourly rate of pay. The non-base hourly
3 wages earned by Plaintiff and Class Members were not discretionary within the meaning of the
4 applicable regulation (29 U.S.C. § 207(e)), and accordingly, must have been included in their
5 regular rate of pay for purposes of determining their overtime pay and sick pay. Plaintiff and Class
6 Members are entitled to significant damages and penalties as a result. Plaintiffs calculate damages
7 on this claim at \$3,533. Gaines Decl. ¶ 22.

8 Second, Plaintiffs contend that Defendant failed to pay Class Members all minimum and
9 overtime wages due, in violation of Labor Code §§ 510, 558, 1194, and 1194.2 by requiring them
10 to perform work-related activities off-the-clock. Plaintiffs contend that they were regularly
11 contacted by supervisors on their cell phones after work to discuss work related matters. Plaintiffs
12 also contend that they were also required to clock out for their meal periods and continue working,
13 off-the-clock. When Class Members performed work-related activities off-the-clock, they were
14 under the control of Defendant and required to be compensated for all hours worked. Defendants,
15 however, failed to do so, in violation of Labor Code §§ 510, 558, 1194, and 1194.2. Plaintiffs
16 calculate damages on this claim at \$418,000, based on an estimated 15-minutes of off-the-clock
17 work per shift per employee. Gaines Decl. ¶ 23.

18 Third, some Class Members were paid commissions, but contend that they were not
19 separately paid for tasks that did not earn a commission, including, but not limited to, attending
20 mandatory meetings and trainings and rest periods. Gaines Decl. ¶ 24. *See Gonzalez v. Downtown*
21 *LA Motors, LP* (2013) 215 Cal.App.4th 36 (mandating the payment of at least the minimum wage
22 for all hours worked, including rest periods, which are taken on-the-clock and considered time
23 worked and holding that the technicians, who were paid on a “piece-rate” basis, must also be paid
24 at least the minimum hourly wage for the time that they are required to wait between their piece-
25 rate paid repair jobs.). *See also Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98,
26 110-111 (holding that while most case law regarding non-productive time does not involve
27 commissioned employees, as long as the applicable wage order specifically mentions
28 commissioned employees, then the applicable case law “applies equally to commissioned

1 employees, employees paid by piece rate, or any other compensation system that does not provide
2 compensation for rest breaks and other nonproductive time.” “[N]othing about commission
3 compensation plans justifies treating commissioned employees differently from other employees.”)
4 Gaines Decl. ¶ 25.

5 In addition, according to Plaintiffs’ expert’s analysis, about 20% of pay periods with
6 commission payments (and no noted hours worked) have commission payments which result in
7 total payments of less than one and one half times the minimum wage. When extrapolated to the
8 entire class period, this results in underpayments in roughly 5.5% of total pay periods, or 330 pay
9 periods where commission was paid less than 1.5x the minimum wage. Plaintiffs calculate damages
10 on these claims for uncompensated time for commissioned employees at \$527,333. Gaines Decl.
11 ¶ 25.

12 Next, Defendant allegedly failed to permit or authorize Class Members to take timely 30-
13 minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§ 226.7,
14 510, 512, 558, and 1194, and IWC Wage Order 4-2001. Labor Code § 512 provides that employers
15 (like Defendant) may not employ an employee for a work period of more than 5 hours without
16 providing a 30-minute meal period starting no later than the end of the 5th hour. Class Members
17 contend that they were routinely unable to take a proper meal break when they worked shifts in
18 excess of 5 hours in duration and a second meal break when they worked shifts in excess of 10
19 hours in duration. When they were able to take a meal period, they were oftentimes late, cut short
20 or they would be required to work through them. Plaintiffs calculate damages on this claim at
21 \$762,187 based on an overall facial meal period violation rate of 61.7% across all shifts. Gaines
22 Decl. ¶ 26.

23 Defendant also allegedly failed to provide Class Members with legally compliant rest
24 periods, or premium wages of one hour’s pay in lieu thereof, as required by Labor Code §§ 226.7
25 and 558, and IWC Wage Order 4-2001. Class Members contend that they were too busy to take
26 their rest periods or would be required to work through them. Based on an analysis of wage and
27 time data provided by Defendant through informal discovery (Defendant’s records include
28 notations when rest breaks were taken), Plaintiffs have ascertained a rest period violation rate of

1 99.2% for all rest period violations. Plaintiffs calculate damages on this claim at \$1,194,514.
2 Gaines Decl. ¶ 27.

3 Plaintiffs contend that some Class Members were required to incur expenses in the
4 performance of their job duties for which they are not fully reimbursed, in violation of Labor Code
5 § 2802, including for their personal cell phones and computers. Plaintiffs calculate \$111,332 in
6 unreimbursed expenses (based on \$30 per month/employee). Gaines Decl. ¶ 28.

7 Defendant also allegedly failed to issue Class Members accurately itemized wage
8 statements. This is a derivative claim based on the unpaid wage allegations above, and Plaintiffs
9 calculate statutory penalties on this claim at \$498,650. Gaines Decl. ¶ 29.

10 Defendant also allegedly failed to pay Class Members all wages due upon separation of
11 employment, in violation of Labor Code §§ 201-203, as on a derivative basis premised on the
12 unpaid wage allegations set forth above. Plaintiffs calculate statutory penalties on this claim at
13 \$1,274,828. Gaines Decl. ¶ 30.

14 Finally, Plaintiffs' PAGA claims are valued at up to \$493,600, based on 4,936 total pay
15 periods at issue. When stacked, the violations could be worth up to a massive \$1,981,500, although
16 these penalties are discretionary and wholly derivative and premised on claims which Defendant
17 challenges on numerous bases. Gaines Decl. ¶ 31.

18 There were multiple and significant litigation risks that justify the compromised settlement
19 amount here. Class certification is a substantial risk in any class action case. Here, while Plaintiffs
20 maintain that the requirements of class certification are met, Defendant proffers various arguments
21 why class treatment is not appropriate here, including but not limited to that individualized inquires
22 among class members predominate over common ones. If Defendant was to defeat Plaintiffs' class
23 certification motion, there would be no class wide relief whatsoever, and most class members would
24 likely not file individual claims. Gaines Decl. ¶ 32.

25 Plaintiffs also faced the risk of a loss on the merits on their claims. Defendant argued it
26 properly blended all bonuses and commissions into the regular rate of pay, and that any bonuses it
27 did not so calculate were discretionary and not required to be included in the computation. It
28 contends that all inside sales employees were properly classified based on a California-compliant

1 pay structure that yielded no off the clock time or unpaid wages. It contends that its meal and rest
2 break policies, both written and in practice, comply in full with California law, and that any late,
3 short or missed meal breaks were the result of waiver by employees rather than unlawful policies
4 or practices. It contends that although it has records of when employees took their rest breaks,
5 those records are not conclusive because it did not require – and California law didn’t require –
6 employees to track their rest periods. It also challenges that Plaintiffs’ wage statement claims and
7 waiting time penalty claims are wholly derivative of their underlying wage claims. It is possible
8 that the Court would find that Defendant substantially complied with the requirements of Labor
9 Code section 226(a) such that no penalties would be awarded. It is also possible that the Court
10 would agree with Defendant’s position that their policies and practices complied with the
11 requirements of California law. In such a case, the value of most of Plaintiffs’ claims would be
12 zero. Gaines Decl. ¶ 33.

13 Defendant strongly contends that its policies and practices do not violate any laws. It
14 contends that it provided all required wages in a timely manner. Gaines Decl. ¶ 34.

15 When the costs and risks of non-certification and loss on the merits are considered,
16 Plaintiffs’ counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
17 Decl. ¶¶ 21-34.

18 The settlement for each participating Class Member is fair, reasonable and adequate, given
19 the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such
20 litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the
21 Action. Gaines Decl. ¶ 35.

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

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

28 \\\

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

III. PLAINTIFFS SHOULD BE PERMITTED TO FILE THEIR THIRD AMENDED COMPLAINT

In connection with this Settlement, Plaintiffs shall file a Third Amended Complaint, attached to the Settlement as **Exhibit 3** and which includes claims to comport with the release provided for in the Settlement. The Parties agreed that, as part of their motion for preliminary approval, Plaintiffs would concurrently seek leave to file the Third Amended Complaint, the filing of which is a condition of the Stipulation.

To effectuate the class settlement of the Action, Defendant does not oppose the filing of the Third Amended Complaint for settlement purposes only. As part of its order preliminarily approving the settlement, Plaintiffs request that the Court approve their filing of the Third Amended Complaint, and consent that Defendant need not file a responsive pleading thereto.

IV. CONCLUSION

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

1. Preliminarily finding that the settlement falls within the range of reasonableness and approving the proposed settlement;
2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiffs Jessica Vargas Zaragoza, Sean Richardson, Kayla Salas, Selina Taing, Alizae Vargas, and Ricki Freitas as the Class Representatives;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel;
5. Approving Phoenix Settlement Administration as the Settlement Administrator;
6. Preliminarily approving the allocation of \$50,000 from the Maximum Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent

(75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be included in the Net Settlement Proceeds for payment to Aggrieved Employees;

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

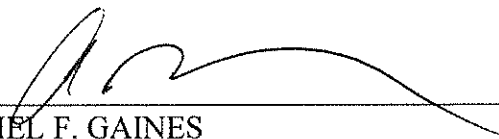
8. Permitting Plaintiff to file their Third Amended Complaint, attached to the Settlement as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order granting this motion has been given, and consent that Defendant not be required to file a responsive pleading thereto; and

9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide the Settlement Administrator with a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment as non-exempt employees and/or commissioned Settlement Officers in California during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail 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 Class Notice to Class Members
Last day for Class Members to submit a written objection to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	No later than 16 Court days before the final approval hearing
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice and Exclusion Form	No later than 16 Court days before the final approval hearing
Final settlement approval hearing	at _____. The Parties suggest the final approval hearing be held approximately 120 days after the preliminary approval order is entered.

1 DATED: July 31, 2023

GAINES & GAINES,
A Professional Law Corporation

2
3
4 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiffs Jessica Vargas Zaragoza, Sean
Richardson, Kayla Salas, Selina Taing, Alizae Vargas,
and Ricki Freitas and Proposed Class Counsel