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and Proposed Class Counsel
8

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

12 ROBERT YANEZ, on behalf of himself
and all "aggrieved employees" pursuant to
13 Labor Code § 2698 *et seq.*,

14 Plaintiffs,

15 v.

16 THE REINFORCED EARTH
COMPANY, a Delaware corporation, and
DOES 1 through 10, inclusive,

17 Defendants.
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CASE NO: CIVSB2212908

Assigned to the Hon. Gilbert Ochoa, Dept. S24

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

Date: November 1, 2023

Time: 8:30 a.m.

Dept.: S24

Complaint Filed: June 21, 2022

1 **PLEASE TAKE NOTICE THAT** on November 1, 2023 at or about 8:30 a.m., or as soon
2 thereafter as the matter may be heard, in Department S24 of the above-entitled Court, located at
3 247 West Third Street San Bernardino, CA 92415-0210, Plaintiff Robert Yanez 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 Robert Yanez as the Class Representative, (4) approving
8 the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement
10 administrator, (6) preliminarily approving the allocation of \$20,000 from the Gross Settlement
11 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
12 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce
13 Development Agency and twenty-five percent (25%) will be allocated to the Aggrieved Employees;
14 (7) approving as to content and form the notice to the settlement class, and directing it be
15 disseminated by the Settlement Administrator; (8) permitting Plaintiff to file a First Amended
16 Complaint, and (9) setting a final fairness and approval hearing.

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

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

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

5
6 DATED: August 16, 2023

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

11 Attorneys for Plaintiff Robert Yanez and Proposed Class
12 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 review
5 and approval. The Settlement is made and entered into by and between Plaintiff Robert Yanez
6 (“Plaintiff”), individually and on behalf of all others similarly situated, and Defendant The
7 Reinforced Earth Company (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. The
12 proposed settlement provides for a non-revisionary class settlement in the gross amount of
13 \$260,000 to a settlement class of approximately 80 individuals who worked an estimated 4,723
14 workweeks during the Class Period through May 8, 2023, yielding gross payments of
15 approximately **\$3,250 per employee**. As detailed below, the settlement is in the best interests of
16 the class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

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1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On April 15, 2022, Plaintiff Yanez exhausted the pre-filing requirements of the Labor Code
3 Private Attorneys General Act of 2004 ("PAGA"). Declaration of Daniel F. Gaines ("Gaines
4 Decl.") at ¶ 6.

5 On June 21, 2022, Plaintiff Yanez initiated his Action in the San Bernardino County
6 Superior Court by filing a complaint, pursuant to PAGA, on behalf of himself and all other
7 aggrieved employees. Gaines Decl. at ¶ 7.

8 As set forth in the proposed First Amended Complaint (see Settlement, Exhibit 3), which
9 the Parties seek to file as part of this Motion, the Action assert claims against Defendant for (1)
10 Failure to Pay All Minimum and Overtime Wages Due (Labor Code §§ 510, 1194, and 1194.2);
11 (2) Failure to Provide Rest Periods or Compensation In Lieu Thereof (Labor Code § 226.7; IWC
12 Wage Order 16-2001); (3) Failure to Provide Meal Periods or Compensation In Lieu Thereof
13 (Labor Code §§ 226.7 and 512; IWC Wage Order 16-2001); (4) Knowing and Intentional Failure
14 to Comply With Itemized Employee Wage Statement Provisions (Labor Code § 226(a), (e)); (5)
15 Failure to Timely Pay Wages Due at Separation of Employment (Labor Code §§ 201-203); (6)
16 Violation of Business and Professions Code § 17200; (7) Penalties Pursuant to Labor Code §
17 2699(f) for Violations of Labor Code §§ 201, 202, 226(a), 226.7, 510, 512, and 1194 and Pursuant
18 to Labor Code § 2699(a) for Violations of Labor Code §§ 226.3 and 558. Gaines Decl. at ¶ 8.

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

1 on behalf of Defendant in any action before a civil court, criminal court, administrative agency of
2 any type, or other tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission
3 or evidence of the appropriateness of these or similar claims for class certification in the Actions
4 or with respect to any other proceeding whatsoever. Gaines Decl. at ¶ 9.

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

8 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

15 On May 8, 2023, following their exchange of information and documents regarding the
16 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
17 length negotiations with the assistance of an experienced wage and hour mediator, Michael H. Leb,
18 Esq., after which the Parties were able to reach the resolution of the Actions set forth herein
19 following their acceptance of a mediator's proposal. Gaines Decl. at ¶ 12.

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

27 The Parties agree that the Settlement Class described herein may be certified for settlement
28 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement

1 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
2 certification will have no force or effect and will immediately be revoked. The Parties further agree
3 that certification for purposes of the settlement is in no way an admission that class certification is
4 proper under the more stringent standard applied for litigation and that evidence of this limited
5 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
6 or any other proceeding. Gaines Decl. at ¶ 14.

7 **IV. LEGAL ANALYSIS**

8 **A. The Proposed Settlement Terms**

9 **1. The Settlement Class**

10 The settlement agreement, signed by all parties and their counsel, is “Exhibit B” to the
11 accompanying Declaration of Daniel Gaines. Gaines Decl., **Exhibit B** (“the Settlement
12 Agreement”). The Parties have agreed to a Settlement Class composed of all current and former
13 employees of Defendant who were employed in California as a non-exempt, hourly paid employee
14 during the Class Period, excluding those who executed a release of Defendant (“Settlement Class”).
15 Stip. at ¶ 27.

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

17 The Parties agree to settle the Action for a Gross Settlement Amount of Two Hundred Sixty
18 Thousand Dollars (\$260,000) (the “Gross Settlement Amount”). The Gross Settlement Amount
19 includes the following: all Individual Settlement Payments to “Class Members,” defined as all
20 members of the Settlement Class; all awards to Class Counsel for attorneys’ fees and litigation costs
21 and expenses, including, without limitation, all such fees and costs incurred to date, as well as such
22 fees and costs to be incurred in documenting the settlement, providing any notices required as part
23 of the settlement, securing Court approval of the settlement, and obtaining judgment in the Action;
24 the incentive Award to the Class Representative as approved by the Court; the PAGA Payment;
25 and all Settlement Administration Costs, including, without limitation, settlement administration
26 fees and expenses. The Gross Settlement Amount does not include Defendant’s share of Employer
27 Taxes. Defendant shall pay Employer Taxes separately from, and in addition to, the Gross
28 Settlement Amount. Stip. at ¶ A(12).

1 From the Gross Settlement Amount, Plaintiff will request an award of attorneys' fees not to
2 exceed 33-1/3% of the Gross Settlement Amount (i.e., \$86,666.67). Stip. at ¶ C(5).

3 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
4 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
5 at ¶ C(6).

6 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
7 application to the Court for an Incentive Award and General Release Payment to the Class
8 Representative in the gross amount of \$12,000, in consideration for his efforts in instituting and
9 participating in the Action and his full general release of all claims. Stip. at ¶ C(4).

10 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
11 Settlement Administrators will be no more than \$7,000. Stip. at ¶¶ C(7).

12 The Parties have agreed that Twenty Thousand Dollars (\$20,000) of the Gross Settlement
13 Amount shall be allocated to the resolution of any and all Aggrieved Employees' and the State of
14 California's claims arising under PAGA. Pursuant to PAGA, Seventy-Five Percent (75%), or
15 Fifteen Thousand Dollars (\$15,000) shall be paid to the LWDA, and twenty-five percent (25%), or
16 Five Thousand Dollars (\$5,000), shall be included in the Net Settlement Proceeds and distributed
17 to the Aggrieved Employees on a *pro rata* basis as their Individual PAGA Payment. Stip. at ¶ C(1).

18 The Net Settlement Proceeds is defined as the Gross Settlement Amount, less the amounts
19 approved and awarded by the Court for: attorney's fees and documented litigation costs and
20 expenses incurred or advanced by Class Counsel; the Incentive Award to the Class Representative;
21 the payment to the LWDA pursuant to PAGA; and the costs of administering the settlement. Stip.
22 at ¶ A(16).

23 The Net Settlement Proceeds, less the allocation to PAGA for the Individual PAGA
24 Payments to Aggrieved Employees, shall be divided among Class Members based on the Class
25 Members' number of Class Workweeks worked during the Class Period. The Settlement
26 Administrator will calculate each Class Member's pro rata share of the Net Settlement Proceeds by
27 dividing the total number of Class Workweeks worked by all Class Members, net of opt outs, during
28 the Class Period into the Net Settlement Proceeds (i.e., the "Workweek Value"), and then

1 multiplying the Workweek Value by the number of Class Workweeks actually worked by each
2 participating Class Member during the Class Period. Stip. at ¶ C(3).

3 **3. Settlement of Claims Pursuant to Labor Code § 2698 et seq. (PAGA)**

4 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Gross Settlement Amount
5 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Labor Code § 2699(i)
6 requires that “civil penalties recovered by aggrieved employees shall be distributed as follows: 75
7 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
8 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$15,000 – shall
9 be payable to the LWDA. The remaining 25 percent, or \$5,000, shall be included in the Net
10 Settlement Proceeds and distributed to the Aggrieved Employees on a *pro rata* basis as their
11 Individual PAGA Payment. Stip. at ¶ C(1).

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

13 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
14 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
15 trial court, and (2) a final review after notice has been distributed to the Class Members informing
16 them of the terms of the settlement and allowing them to exclude themselves from, participate in
17 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

18 Approval of class action settlements involves a two-step process.
19 First, counsel submit the proposed terms of settlement and the court
20 makes a preliminary fairness evaluation. If the preliminary
21 evaluation of the proposed settlement does not disclose grounds to
22 doubt its fairness or other obvious deficiencies, such as unduly
23 preferential treatment of class representatives or of segments of the
24 class, or excessive compensation for attorneys, and appears to fall
25 within the range of possible approval, the court should direct that
26 notice ... be given to the class members of a formal fairness hearing,
27 at which arguments and evidence may be presented in support of and
28 in opposition to the settlement.

24 Thus, the preliminary approval by the trial court is simply a conditional finding that the
25 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*

26
27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

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

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

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

13 *Id.* at § 11.24.

14 Here, the Parties have reached such an agreement and have submitted the Stipulation
15 herewith. See Gaines Decl., **Exhibit B**; Gaines Decl. ¶ __.

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

17 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
18 approval stage, request that the court provisionally approve certification of the class – conditioned
19 upon final approval of the settlement. "[P]re-certification settlements are routinely approved if
20 found to be fair and reasonable." *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
21 48 Cal. App. 4th at 1803 (although the settlement was reached before any "adversary certification,"
22 the court was satisfied that it was "fair, adequate and reasonable."). See also *In re Baldwin-United*
23 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² ("many courts have employed this practice in the
24 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.")

25 The strength of the findings made by a judge at a preliminary hearing
26 or conference concerning a tentative settlement proposal . . . may be
27 set out in conditional orders granting tentative approval to the various
items submitted to the court. Three basic rulings are often
conditionally entered at this preliminary hearing. These conditional

28 ² In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. See *Wershba*, 91 Cal. App. 4th at 239-40.

1 rulings may approve a temporary settlement class, the proposed
2 settlement, and the class counsel's application for fees and expenses.
3 4 *Newberg on Class Actions*, at § 11.26.

4 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff's submission of the
5 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
6 Gaines Decl. at ¶ 33; **Exhibit C**.

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

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

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

15 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
16 and the means for identifying the members of the class determine whether the class is ascertainable.
17 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
18 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
19 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
20 comprises approximately 80 employees through May 8, 2023. Gaines Decl. ¶ 29.

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

23 The Class Members' claims all stem from a common source: members of the Settlement
24 Class allege that Defendant violated the same Labor Code provisions in connection with their
25 employment. All members of the Class seek the same relief under the same California laws (related
26 to unpaid wages, meal and rest period premiums, inaccurate or incomplete wage statements, failure
27 to timely pay wages due upon separation, and derivative claims). Under these circumstances, the
28 commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement

1 purposes. Gaines Decl. ¶ 30.

2 c. **The Proposed Class Representative's Claims Are Typical of the**
3 **Class Members' Claims**

4 A class representative's claims are typical when they arise from the same event or course
5 of conduct that gives rise to the claims of the class and are based on the same legal theory.
6 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
7 Class Representative Robert Yanez is a former non-exempt employee who worked for Defendant
8 in the State of California during the Class Period. He contends that Defendant failed to pay all
9 wages, failed to provide meal and rest periods, failed to comply with itemized employee wage
10 statement provisions, and failed to timely pay wages at the separation of employment, in violation
11 of Labor Code §§ 201-202, 226(a), 226.7, 227.3, 510, 512, 558, 1194, 2698, and 2699. He has the
12 same claims as those that the members of the Settlement Class would reasonably be expected to
13 bring based on the course of conduct alleged herein. Gaines Decl. ¶ 31.

14 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
15 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
16 conflicts with other class members. Gaines Decl. ¶ 32. Furthermore, Plaintiff has retained
17 competent counsel, experienced in litigating wage and hour class action claims in state and federal
18 courts. See Gaines Decl. ¶¶ 2-5.

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

21 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
22 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
23 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
24 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
25 judgment for that of the proponents, particularly where, as here, settlement has been reached with
26 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
27 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
28 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*

1 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
2 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

3 While the recommendations of counsel proposing the settlement are not conclusive, the
4 Court can properly take them into account, particularly where, as here, such counsel have been
5 involved in informal discovery and negotiations for some period of time, appear to be competent,
6 have experience with this type of litigation, and have exchanged substantial evidence with the
7 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
8 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
9 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
10 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
11 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
12 Decl. ¶¶ 2-5, 11-13.

13 Here, the Parties’ counsel have a great deal of experience in class action litigation and
14 specialize in employment wage and hour matters. Moreover, counsel for all Parties conducted an
15 extensive investigation of the factual allegations involved in this case. The Parties have engaged
16 in a broad exchange of documents, data, records and other information. Each side has apprised the
17 other, informally, at a formal mediation with the assistance of one of California’s most highly
18 regarded mediators, and through lengthy negotiations, of their respective factual contentions, legal
19 theories and defenses, resulting in extensive arm’s-length negotiations taking place among the
20 Parties. *See* Gaines Decl. ¶¶ 2-5, 11-13.

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

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

1 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
2 *Kullar, supra*, 168 Cal.App.4th at 133.

3 Plaintiff contends that Defendant failed to pay Class Members all wages due by rounding
4 their time records and failing to include all remuneration when computing the regular rate of pay.
5 Defendant rounded down the hours reflected on Class Members’ time records to pay fewer hours
6 than were actually worked, and did not include bonus wages in the regular rate of pay calculation
7 when computing the applicable overtime rates, both in violation of Labor Code §§ 510, 558, 1194,
8 and 1194.2. On a weekly basis, Plaintiff argues these practices deprived Class Members of
9 significant hours worked and wages due. Rounding is only permissible if the employer applies a
10 consistent rounding policy that, on average, favors neither overpayment or nor underpayment.
11 *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014. Plaintiff contends that
12 Class Members were adversely affected as a result of the rounding policy. Plaintiff calculates
13 Defendant’s damages for its failure to pay all wages due at \$6,517 and PAGA civil penalty liability
14 for this claim at up to \$102,000. Gaines Decl. ¶ 16.

15 Defendant allegedly failed to provide Plaintiff and Class Members with legally compliant
16 rest periods, or premium wages of one hour’s pay in lieu thereof, as required by Labor Code §§
17 226.7 and IWC Wage Order 16-2001. Class Members were not permitted or authorized to take their
18 second and/or third rest periods. Defendant failed to maintain any written rest period policy.
19 Plaintiff contends that he regularly worked ten (10) or more hours in a day, but rarely received any
20 rest periods. Plaintiff calculates Defendant’s rest period damages at \$847,713 and PAGA civil
21 penalty liability for this claim of up to \$416,700. Gaines Decl. ¶ 17.

22 Plaintiff argues that Defendant failed to permit or authorize Class Members to take timely
23 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
24 226.7, 512, and 558 and IWC Wage Order 16-2001. Labor Code § 512 provides that employers
25 may not employ employees for work periods of more than five (5) hours without providing a 30-
26 minute meal period starting no later than the end of the fifth hour. Class Members were routinely
27 unable to take a proper meal period when they worked shifts in excess of five (5) hours in duration
28 and a second meal period when they worked shifts in excess of ten (10) hours in duration. As with

1 rest periods, Defendant failed to maintain any written meal period policy whatsoever. When Class
2 Members did receive a meal period, they were frequently late (occurring after the fifth hour of
3 work). Defendant did not produce any sort of meal period waivers signed by Plaintiff or any other
4 Class Members justifying this practice. In addition, Plaintiff also never received a second meal
5 period when he worked (10) or more hours in a day, nor did most employees in Defendant's data
6 sampling. The wage and time data provided by Defendant through informal discovery show **a meal**
7 **period violation rate of 76.5% and a remarkable 92.1% of all pay periods during the PAGA**
8 **Period exhibit some form of meal period violation.** 65% of meal periods were recorded after the
9 end of the fifth hour of work. 99.3% of shifts between 10 and 12 hours did not record a second meal
10 period, and 92.1% of shifts greater than 12 hours did not record a second meal period. Significant
11 meal period premiums are owed. Plaintiff calculates Defendant's meal period damages at \$622,421
12 and PAGA civil penalty liability for this claim of \$385,100. Gaines Decl. ¶ 18.

13 Defendant purportedly failed to issue Class Members accurately itemized wage statements.
14 Class Members were not paid all wages due, as detailed above. As a result, the wage statements
15 issued by Defendant to Plaintiff and Class Members failed to accurately state all gross wages
16 earned, in violation of Labor Code § 226(a)(1), and net wages earned, in violation of Labor Code
17 § 226(a)(5). Separately, the wage statements fail to set forth all applicable hourly rates in effect
18 during the pay period, in violation of Labor Code §§ 226(a)(9) and 226.3. The wage statements do
19 not include any applicable hourly rate for "Regular Pay," "Overtime 1.0," "Overtime Prem," and
20 "Holiday." In addition, Defendant allegedly violated Labor Code §§ 226(a)(7) and 226.3 by setting
21 forth the full social security number of Class Members on the wage statements provided
22 electronically to employees, instead of only the last four digits of their social security number and/or
23 an employee identification number. Plaintiff calculates the damages for this claim at \$288,000 in
24 addition to \$418,300 in PAGA civil penalties. Gaines Decl. ¶ 19.

25 Defendant failed to pay Plaintiff and Class Members all wages due upon separation of
26 employment, in violation of Labor Code §§ 201-203. As Defendant failed to pay Plaintiff and Class
27 Members all wages due during the course of employment, as discussed above, these wages
28 remained due and owing upon separation of employment. Plaintiff calculates statutory penalties

1 on this claim at \$370,630, with PAGA civil penalty liability of \$3,100. Gaines Decl. ¶ 20.

2 A discount on the maximum value of Class members' claims was required (and warranted)
3 to resolve the matter at this stage of the litigation. As to the merits of Plaintiff's claims, Defendant
4 strongly argued that no wages are due because its rounding practice was neutral and it always
5 properly computed the regular rate of pay because any bonuses paid were not subject to
6 incorporation into the regular rate of pay – they were discretionary. It argued that employees took
7 or waived any missed meal and rest periods, such that no premiums are due. It argued that
8 employees were always afforded the right to take their breaks, and as to rest periods, lulls in
9 business allowed for ample time to take rest periods. It argued that it adopted and enforced legally
10 complaint policies and practices which authorized meal and rest periods as required by law, and
11 employees did not voice concern over meal and rest periods being denied. It vehemently denies
12 that it issued deficient wage statements or paid wages late, and even if it did, it acted without willful
13 intent and in good faith at all times. Gaines Decl. ¶ 21.

14 The discount negotiated for settlement here is a reasonable compromise, particularly
15 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
16 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
17 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
18 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
19 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
20 various arguments why class treatment is not appropriate, including but not limited to that
21 individualized inquires among class members predominate over common ones. If Defendant was
22 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
23 most class members would likely not file individual claims. Gaines Decl. ¶ 22.

24 Plaintiff is also faced the risk of a loss on the merits on his claims. It is very possible that
25 the Court would agree with Defendant's position that its practices complied with the requirements
26 of California law or could not be certified. In such a case, the value of the majority of Plaintiff's
27 claims would be zero. Gaines Decl. ¶ 23.

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1 Finally, Plaintiff faced the risk that he would not obtain a maximum damage/penalty award
2 on all (or any of) his claims. For example, Plaintiff's wage statement claim and waiting time
3 penalty claim are primarily derivative of his unpaid wage claims. If he did not prevail on those
4 claims, he would not prevail on a claim for deficient wage statements or failure to timely pay wages.
5 In addition, Plaintiff seeks discretionary penalties pursuant to the PAGA. Even if Plaintiff did
6 prevail on his claims, it is possible that the Court would not impose all such penalties pursuant to
7 its discretionary power to reduce them. Gaines Decl. ¶ 24.

8 Defendant strongly contends that its policies and practices do not violate any laws.
9 Defendant asserts its meal and rest period policies were adequate and in compliance with California
10 law. It contends that it properly provided for all meal and rest periods and fully compensated its
11 employees for all time worked. It further contends that the wage statements it provides to its
12 employees are fully compliant with California law. Gaines Decl. ¶ 25.

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

16 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
17 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
18 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
19 Decl. ¶ 27.

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

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

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

1 **E. Plaintiff Should Be Permitted to File His First Amended Complaint**

2 In connection with the Settlement, Plaintiff shall file a First Amended Complaint, attached
3 to the Stipulation as **Exhibit 3**, which adds allegations and claims to comport with the release
4 provided for in the Stipulation. The Parties agreed that, as part of their motion for preliminary
5 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
6 of which is a condition of the Stipulation.

7 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the
8 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving
9 the settlement, Plaintiff requests that the Court approve his filing of the First Amended Complaint,
10 and consents that Defendant not be required to file a responsive pleading thereto.

11 **V. CONCLUSION**

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

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

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

17 3. Appointing Plaintiff Robert Yanez as the Class Representative;

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

20 5. Approving Phoenix Settlement Administrators as the claims administrator and its
21 estimated fees not to exceed \$7,000;

22 6. Preliminarily approving the allocation of \$20,000 from the Gross Settlement
23 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
24 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
25 (25%) will be allocated to the Aggrieved Employees;

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

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

5 9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including the names, last known addresses, telephone numbers, social security numbers, each Class Member's dates of employment in California during the Class Period, and such other information that the Settlement Administrator requires to identify Class Members ("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 an Objection to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	10 calendar days before the final settlement approval hearing date
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2024, at _____m. (approximately 90 days after entry of this Order)

1 DATED: August 16, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Robert Yanez and Proposed Class
8 Counsel