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7 Attorneys for Plaintiff Lee Allen Cowin
and Proposed Class Counsel
8

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

10 **FOR THE COUNTY OF PLACER**

11
12 LEE ALLEN COWIN, individually on
behalf of himself, and on behalf of all
13 similarly situated individuals,

14 Plaintiff,

15 v.

16 NEKI, INC., a California corporation, d/b/a
PIZZA GUYS, and DOES 1 through 10,
17 inclusive,

18 Defendants.
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CASE NO: S-CV-0049770

Assigned to the Hon. Trisha Hirashima, Dept. 40

CLASS ACTION

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

DATE: May 25, 2023

TIME: 8:30 a.m.

DEPT.: 3

Action Filed: January 19, 2023

1 **PLEASE TAKE NOTICE THAT** on May 25, 2023 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 3 of the above-entitled Court, located at 10820 Justice
3 Center Drive, Roseville, California 95678, Plaintiff Lee Allen Cowin (“Plaintiff” or “Cowin”) will
4 and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between
5 the parties falls within the range of reasonableness and approving the proposed class action
6 settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only,
7 a settlement class, (3) approving the appointment of Plaintiff as Class Representative, (4) approving
8 the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Class Action Administration Solutions as
10 settlement administrator, (6) preliminarily approving the allocation of \$5,000 from the Maximum
11 Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General
12 Act (Lab. Code §§ 2698 et seq.); (7) approving as to content and form the notice to the settlement
13 class, and directing it be disseminated by the Settlement Administrator; and (8) setting a final
14 fairness and approval hearing.

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

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

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

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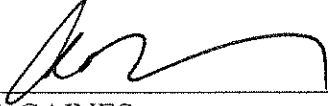
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1 DATED: April 17, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Lee Allen Cowin and Proposed
8 Class Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Settlement
4 Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiff Lee Allen Cowin (“Plaintiff” or
6 “Cowin”), individually and on behalf of all others similarly situated, and Defendant NEKI, Inc.
7 (“Defendant”), a corporation doing business as a Pizza Guys restaurant franchise.

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-revisionary class settlement in the gross amount of \$117,500 to a settlement class of
14 approximately 166 Class Members. As detailed below, the settlement is in the best interests of the
15 class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

24 **II. BACKGROUND AND PROCEDURAL HISTORY**

25 On July 25, 2022 and August 8, 2022, Plaintiff exhausted the pre-filing requirements of the
26 Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698 *et seq.* (“PAGA”).
27 Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

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1 On or about October 12, 2022, the Parties entered into an agreement to toll the statute of
2 limitations of Plaintiff's alleged wage and hour claims. Gaines Decl. at ¶ 7.

3 On January 12, 2023, the Parties participated in a full day mediation session with Hon.
4 David Brown (Ret.), a highly respected jurist and mediator with experience resolving employment
5 actions. The Parties were able to agree to the basic terms of this settlement agreement with the
6 assistance of Judge Brown. Gaines Decl. at ¶ 8.

7 On or about January 19, 2023, Plaintiff initiated the Action by filing a Complaint as a class
8 and representative action, pursuant to California Code of Civil Code section 382 and PAGA, on
9 behalf of himself and all other non-exempt California employees employed by Defendant. The
10 Action asserts class and representative action claims against Defendant for (1) failure to pay all
11 wages due (Labor Code §§ 510, 1194, and 1194.2); (2) failure to pay all gratuities (Labor Code §
12 351); (3) failure to provide rest periods or compensation in lieu thereof (Labor Code § 226.7); (4)
13 failure to provide meal periods or compensation in lieu thereof (Labor Code §§ 226.7, and 512);
14 (5) failure to reimburse employee business expenses (Labor Code § 2802); (6) knowing and
15 intentional failure to comply with itemized employee wage statement provisions (Labor Code §§
16 226(a), (e), (h)); (7) failure to timely pay wages due at separation of employment (Labor Code §§
17 201-203); (8) violation of Business and Professions Code § 17200; and (9) penalties pursuant to
18 Labor Code § 2699(f) for violations of Labor Code §§ 201, 202, 204, 210, 226(a), 226.3, 226.7,
19 351, 510, 512, 558, 1194, and 2802 (the "Complaint"). Gaines Decl. at ¶ 9.

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

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

5 The Class Representative contends that Defendant violated the California Labor Code and
6 that this case is appropriate for class certification. Gaines Decl. at ¶ 11.

7 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

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. While each Class Member should decide for themselves the fairness of the agreement,
20 Defendant and its counsel also agree (and so represent to the Court) their joint belief that this
21 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 13.

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

proceeding. Gaines Decl. at ¶ 14.

IV. LEGAL ANALYSIS

A. The Proposed Settlement Terms

1. The Settlement Class

The Parties have agreed to a settlement class composed of all non-exempt, hourly employees who have, or continue to, work for Defendant in California from October 12, 2018 up to April 15, 2023 , whichever is earlier” (the “Class Period”). Defendant represents that this Class contains approximately 166 individuals who worked no more than 11,478 workweeks during the Class Period.

2. Allocations to be Paid from the Maximum Settlement Amount

The Parties agree to settle this Action for a Maximum Settlement Amount of One Hundred Seventeen Thousand Five Hundred Dollars (\$117,500) (the “Maximum Settlement Amount”), subject to any increase based on the escalator provision in paragraph H(2) of the Settlement. The Maximum Settlement Amount is non-reversionary; no portion of the Maximum Settlement Amount will return to Defendant. The Maximum Settlement Amount plus any applicable employer-side payroll taxes shall be the maximum amount Defendant is required to pay under the Settlement. Stip. at ¶ C(1)(a).

From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application to the Court for up to 35% of the Maximum Settlement Amount for attorneys’ fees (or \$41,125 based on the projected Maximum Settlement Amount of \$117,500). Stip. at ¶ C(1)(g).

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

From the Maximum Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s application to the Court for an Enhancement Payment to the Class Representative in the gross amount of \$5,000, in consideration for his efforts in instituting and participating in the Action.¹

¹ Plaintiff has entered into a full and complete general release in favor of the Defendant in exchange

1 Stip. at ¶ C(1)(f).

2 From the Maximum Settlement Amount, settlement administration fees paid to Phoenix
3 Class Action Administration Solutions will be no more than \$5,000. Stip. at ¶ C(1)(i).

4 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
5 and all claims for penalties under the PAGA is \$5,000 (the “PAGA Payment”), 75% of which shall
6 be paid to the LWDA and 25% shall be paid to Aggrieved Employees as part of the Net Settlement
7 Proceeds. PAGA Members shall receive their portion of the PAGA Payment and release the PAGA
8 claims alleged regardless of their decision to opt-out of the class settlement. Stip. at ¶ C(1)(e).

9 The Net Settlement Proceeds is defined as the Maximum Settlement Amount less the
10 amounts approved and awarded by the Court for: attorneys’ fees and documented litigation costs
11 and expenses incurred or advanced by Class Counsel, the enhancement payment to the Class
12 Representative, the payment to the LWDA pursuant to PAGA, and the costs of administering the
13 settlement. Stip. at ¶ C(1)(b).

14 The Individual Settlement Payments will be the portion of the Net Settlement Proceeds
15 distributable to each Class Member who participates in the Class Settlement (i.e., who does not
16 submit a valid request for exclusion form) and each Aggrieved Employee, whether they participate
17 in the Class Settlement or not. As to participating Class Members, the class portion of the
18 Individual Payment Amount will be determined by dividing the Net Settlement Proceeds, less the
19 \$1,250 PAGA allocation, by the total number of weeks worked by the entire Settlement Class
20 during the Class Period, net of opt outs, resulting in the class workweek value; and then multiplying
21 the class workweek value by the number of weeks worked by each participating Class Member
22 during the Class Period. As to the Aggrieved Employees, the PAGA portion of the Individual
23 Payment Amount will be determined by dividing the PAGA settlement amount (\$1,250) by the
24 total number of weeks worked by all Aggrieved Employees during the PAGA Period, resulting in
25

26
27 for a payment. His general release payment relates to claims not otherwise resolved through the
28 class action settlement, including allegations relating to claims for wrongful termination. Gaines
Decl. at ¶ 16.

1 the PAGA workweek value; and then multiplying the PAGA workweek value by the number of
2 weeks worked by each Aggrieved Employee during the PAGA Period. Stip. at ¶ C(1)(c).

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

4 Pursuant to PAGA, the Parties have agreed that \$5,000 of the Maximum Settlement Amount
5 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
6 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
7 75 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 \$3,750 – shall
9 be payable to the LWDA. The remaining 25 percent, or \$1,250, shall be paid to Aggrieved
10 Employees as part of the Net Settlement Proceeds, who shall receive their portion of the PAGA
11 Payment and release the PAGA claims alleged regardless of their decision to opt-out of the class
12 settlement. Stip. at ¶¶ C(1)(e).

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

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

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

25 Thus, the preliminary approval by the trial court is simply a conditional finding that the

26
27 ² 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 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
2 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
3 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
4 may find that the settlement proposal contains some merit, is within the range of reasonableness
5 required for a settlement offer, or is presumptively valid subject only to any objections that may be
6 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
7 (4th ed. 2002).

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

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

16 *Id.* at § 11.24.

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

19 **C. 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.”)

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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 As required by Labor Code § 2699(l)(2), concurrent with Plaintiff's submission of the
10 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
11 Gaines Decl. at ¶ 34.

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

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

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

20 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
21 and the means for identifying the members of the class determine whether the class is ascertainable.
22 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
23 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
24 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
25 comprises approximately 166 employees. Gaines Decl. ¶ 30.

26 b. **Questions of Law or Fact Common to Members of the Settlement**
27 **Class Predominate**

28 The Class Members' claims all stem from a common source: members of the Settlement
Class allege that Defendant violated the same Labor Code provisions in connection with their
employment. All members of the Class seek the same relief under the same California laws (related
to unpaid wages, unpaid meal and rest period premiums, inaccurate or incomplete wage statements,

1 failure to reimburse expenses, failure to pay all gratuities, failure to timely pay wages due, and
2 derivative claims). Under these circumstances, the commonality requirement is satisfied for
3 purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 31.

4 c. **The Proposed Class Representative's Claims Are Typical of the**
5 **Class Members' Claims**

6 A class representative's claims are typical when they arise from the same event or course
7 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
8 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
9 Class Representative Lee Allen Cowin is a former non-exempt employee who worked for
10 Defendant in the State of California during the Class Period. He contends that Defendant failed to
11 pay all wages due, failed to provide meal and rest periods, failed to comply with itemized employee
12 wage statement provisions, failed to pay gratuities, failed to reimburse expenses, and failed to
13 timely pay wages, in violation of Labor Code §§ 201-204, 226(a), 226.7, 351, 510, 512, 1194,
14 1194.2, 2698, 2699, and 2802, among other Labor Code provisions. He has the same claims as
15 those that the members of the Settlement Class would reasonably be expected to bring based on the
16 course of conduct alleged herein. Gaines Decl. ¶ 32.

17 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
18 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
19 conflicts with other class members. Gaines Decl. ¶ 33. Furthermore, Plaintiff has retained
20 competent counsel, experienced in litigating class action claims in the employment context. *See*
21 Gaines Decl. ¶¶ 2-5.

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

24 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
25 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
26 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
27 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
28 judgment for that of the proponents, particularly where, as here, settlement has been reached with

1 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
2 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
3 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
4 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
5 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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

16 Here, the Parties’ counsel have a great deal of experience in class action litigation and
17 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
18 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
19 in a broad exchange of documents, data, records and other information. Each side has apprised the
20 other, informally and at a formal mediation, of their respective factual contentions, legal theories
21 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*
22 *Gaines Decl.* ¶¶ 2-5, 12-28.

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

24 The Court must make an “independent assessment of the reasonableness of the terms of the
25 settlement” prior to granting preliminary and final approval. *Clark v. American Residential*
26 *Services LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
27 Cal.App.4th 116, 127-28, 130, 133. To do so requires the Parties to submit “basic information
28 about the nature and magnitude of the claims in question and the basis for concluding that the

1 consideration being paid for the release of those claims represents a reasonable compromise.”
2 *Clark, supra*, 175 Cal.App.4th at 800. However, the Court should *not* “attempt to decide the merits
3 of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.”
4 *Kullar, supra*, 168 Cal.App.4th at 133.

5 Defendant allegedly failed to pay Class Members all minimum and overtime wages earned,
6 in violation of Labor Code §§ 510, 558, 1194, and 1194.2. Plaintiff contends that Defendant
7 required Class Members to perform work-related activities off-the-clock, but did not compensate
8 them for this time. An employer is obligated to pay the wages of an hourly employee for all time
9 that the employee is under the control of the employer, and this includes all the time the employee
10 is suffered or permitted to work, whether or not required to do so. When Class Members performed
11 work-related activities off-the-clock, they were allegedly under the control of Defendant and
12 required to be compensated for all hours worked. Defendant, however, failed to do so, in violation
13 of Labor Code §§ 510, 558, 1194, and 1194.2. Plaintiff calculates damages on this claim at
14 \$136,806, with PAGA civil penalty liability of \$126,400. Gaines Decl. ¶ 17.

15 Plaintiff argues that Defendant failed to permit or authorize Class Members to take timely
16 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§
17 226.7, 512, and 558 and IWC Wage Order 5-2001. Labor Code § 512 provides that employers (like
18 Defendant) may not employ an employee for a work period of more than 5 hours without providing
19 a 30-minute meal period starting no later than the end of the fifth hour. Plaintiff contends that he
20 and Class Members were routinely unable to take a proper meal period when they worked shifts in
21 excess of 5 hours in duration and a second meal period when they worked shifts in excess of 10
22 hours in duration. Further, Plaintiff contends that Defendant maintains an illegal meal period policy
23 which omits any requirement for a second meal period for shifts greater than ten hours. Plaintiff’s
24 expert has ascertained a meal period violation rate of 70% based on Defendant’s time records
25 supplied through informal discovery. Based on the data provided, Defendant never meal period
26 premiums. Plaintiff calculates damages on this claim at \$211,517, with PAGA civil penalty
27 liability of \$88,500. Gaines Decl. ¶ 18.

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1 Plaintiff also contends that Class Members are owed premium wages for missed, denied
2 and unauthorized rest periods, as authorized by Labor Code § 226.7 and IWC Wage Order 5-2001.
3 Plaintiff alleges that Class Members were denied, and therefore unable to take, 10-minute on-the-
4 clock rest periods for every four hours of work or major fraction thereof, but were not paid premium
5 wages of one hour's pay for each missed, denied and unauthorized rest period. When Class
6 Members were able to take a rest period, Plaintiff believes that Defendant maintained a policy and
7 practice requiring employees to remain on the company premises, which he argues would violate
8 the California Supreme Court's mandate in *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal.
9 5th 257, 269 (holding that the rest period requirement "obligates employers to permit and authorizes
10 employees to take off-duty rest periods. That is, during rest periods employers must relieve
11 employees of all duties and relinquish control over how employees spend their time." An employer
12 may not place any limitations on where employees may go or not go during their rest periods).
13 Plaintiff calculates damages on this claim at \$391,356, with PAGA civil penalty liability of
14 \$120,900. Gaines Decl. ¶ 19.

15 Plaintiff contends that Class Members were required to incur expenses in the performance
16 of their job duties for which they were not fully reimbursed, in violation of Labor Code § 2802,
17 because they were required to use their personal cell phones, vehicles, and maintain a uniform with
18 Defendant's logo, but were not fully reimbursed by Defendant for these expenses. This practice
19 violates Labor Code § 2802. Based on the evidence assessed by Plaintiff, he calculates damages
20 on this claim at \$116,181, with PAGA civil penalty liability of \$137,500. Gaines Decl. ¶ 20.

21 Defendant also allegedly failed to issue Class Members accurately itemized wage
22 statements because, based on the allegations of unpaid wages, the wage statements issued by
23 Defendant failed to accurately state all gross wages earned, in violation of Labor Code § 226(a)(1),
24 total hours worked, in violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor
25 Code § 226(a)(5), and all applicable hourly rates in effect during the pay period and the
26 corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226(a)(9).
27 They also allegedly improperly set forth employees' entire social security numbers, in violation of
28 Labor Code §§ 226(a)(7) and 226.3. Plaintiff calculates statutory damages on this claim at

1 approximately \$125,000, with PAGA civil penalty liability of \$126,400. Gaines Decl. ¶ 21.

2 Defendant also allegedly failed to pay Class Members all wages due upon separation of
3 employment, in violation of Labor Code §§ 201-203. As Defendant allegedly failed to pay them
4 all wages due during the course of their employment, as described above, these wages were due
5 and owing upon separation of employment yet went unpaid. Plaintiff calculates statutory penalties
6 on this claim at \$233,463, with PAGA civil penalty liability of \$4,500. Gaines Decl. ¶ 22.

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

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

22 Finally, Plaintiff faced the risk that he would not obtain a maximum damage/penalty award
23 on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the
24 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
25 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 25.

26 Defendant strongly contends that its policies and practices do not violate any laws. It
27 contends that it properly provided for all meal and rest periods and fully compensated its employees
28 for all time worked and all expenses incurred. It further contends that the wage statements it

1 provides to its employees are fully compliant with California law. Gaines Decl. ¶ 26.

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

5 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
6 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
7 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
8 Decl. ¶ 28.

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

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

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

18 **V. CONCLUSION**

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

- 21 1. Preliminarily finding that the settlement falls within the range of reasonableness and
22 approving the proposed settlement;
- 23 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 24 3. Appointing Plaintiff Lee Allen Cowin as Class Representative;
- 25 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
26 Class Counsel;
- 27 5. Approving Phoenix Class Action Administration Solutions as Settlement
28 Administrator;

6. Preliminarily approving the allocation of \$5,000 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 paid to Aggrieved Employees as part of the Net Settlement Proceeds;

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

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, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in California during the Class Period ("Settlement Class Information")	21 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Class Notice to Class Members	14 calendar days after Settlement Administrator's receipt of the Settlement Class Information
Last day for Class Members to submit a written request for exclusion to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Members to submit an Objection to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	10 calendar days before the final settlement approval hearing date
Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2023, at _____.m. (approximately 100 days after entry of the Order granting this Motion)

1 DATED: April 17, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

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5 By: 

6 DANIEL H. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Lee Allen Cowin and Proposed
9 Class Counsel
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