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and Proposed Class Counsel

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

NICHOLAS WILKERSON, individually
and on behalf of all similarly situated
individuals,

Plaintiff,

v.

OFFICIAL PEST PREVENTION, INC., a
Delaware corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: 34-2022-00328182

Assigned to the Hon. Laura Damrell, Dept. 28

CLASS ACTION

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

DATE: August 18, 2023

TIME: 9:00 a.m.

DEPT.: 28

Reservation # A-328182-001

Action Filed: October 10, 2022

1
2 **PLEASE TAKE NOTICE THAT** on August 18, 2023 at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, in Department 28 of the above-entitled Court, located at 720 9th Street,
4 Sacramento, California 95814, Plaintiff Nicholas Wilkerson will and hereby does move unopposed
5 for an Order (1) preliminarily finding that the settlement between the parties falls within the range
6 of reasonableness and approving the proposed class action settlement in the above-captioned case,
7 (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the
8 appointment of Plaintiff Nicholas Wilkerson as the Class Representative, (4) approving the
9 appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
10 Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement
11 administrator, (6) preliminarily approving the allocation of \$100,000 from the Gross Settlement
12 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
13 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce
14 Development Agency and twenty-five percent (25%) shall be paid to Aggrieved Employees as part
15 of the Net Settlement Proceeds; (7) approving as to content and form the notice to the settlement
16 class, and directing it be disseminated by the Settlement Administrator; and (8) setting a final
17 fairness and approval hearing.

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

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

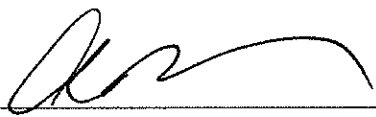
25 This Motion will be based on the accompanying Memorandum of Points and Authorities,
26 the Settlement Agreement and Release of Claims, the Declarations of Daniel F. Gaines and
27 Nicholas Wilkerson, such evidence or oral argument as may be presented at the hearing, and on the
28 complete record and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

1 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
2 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for
3 the department may be downloaded off the court's website. If the party does not have online access,
4 they may call the dedicated phone number for the department as referenced in the local telephone
5 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and
6 receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the
7 court day before the hearing, no hearing will be held.

8
9 DATED: July 25, 2023

Respectfully submitted,

10 GAINES & GAINES,
11 A Professional Law Corporation

12
13 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

14 Attorneys for Plaintiff Nicholas Wilkerson and Proposed
15 Class Counsel
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I. INTRODUCTION

The Parties have reached a resolution of this class action and hereby submit their Settlement Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s review and approval. The Settlement is made and entered into by and between Plaintiff Nicholas Wilkerson (“Wilkerson” or “Plaintiff”), individually and on behalf of all others similarly situated, and Defendant Official Pest Prevention, Inc. (“Defendant”).

The settlement occurred as a result of extensive arm's-length negotiations by experienced counsel with the assistance of a respected mediator with experience in the area of employment class actions. Most importantly, the settlement will result in significant financial benefit to the participating claimants, on terms that are by any measure fair, reasonable and adequate. The proposed settlement provides for a non-revisionary class settlement in the gross amount of \$994,500, subject to any increase based on an escalator provision, to a settlement class of approximately 818 Class Members who worked approximately 24,000 workweeks during the applicable time frame, yielding gross payments of approximately **\$1,216 per employee**. As detailed below, the settlement is in the best interests of the class in light of all of the facts and circumstances and the risks and delays of further litigation.

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

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1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On August 4, 2022, Plaintiff 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 October 10, 2022, Plaintiff initiated his Action in the Sacramento County Superior Court
6 by filing a class and representative action complaint, pursuant to PAGA, on behalf of himself and
7 all other similarly situated individuals. Gaines Decl. at ¶ 7.

8 As set forth in the operative Complaint, the Action assert claims against Defendant for (1)
9 failure to pay all minimum and overtime wages due (Labor Code §§ 510, 1194, and 1194.2 and
10 IWC Wage Order 4-2001); (2) failure to pay all wages due (Labor Code §§ 226.7, 246, 510, 512,
11 and 1194; IWC Wage order 4-2001); (3) failure to provide rest periods or compensation in lieu
12 thereof (Labor Code § 226.7 and IWC Wage Order 4-2001); (4) knowing and intentional failure to
13 comply with itemized employee wage statement provisions (Labor Code §§ 226(a) and (e)); (5)
14 failure to timely pay wages due at the separation of employment (Labor Code §§ 201-203 and
15 227.3); (7) violation of Business and Professions Code § 17200 for underlying violations of the
16 Labor Code as set forth in the complaint in the Action; and (8) civil penalties pursuant to PAGA
17 for underlying violations of the Labor Code as set forth in the complaint in the Action. Gaines
18 Decl. at ¶ 8.

19 Defendant sought to compel arbitration of some of Plaintiff’s claims, and the Court entered
20 an order compelling Plaintiff’s class and PAGA claims to arbitration. Plaintiff subsequently
21 commenced an arbitration with AAA that was dismissed by AAA shortly thereafter due to
22 nonpayment of fees by Defendant. Defendant filed an appeal of the trial court’s order, case no.
23 C098019, which was dismissed by the Third Appellate District of the California Court of Appeal
24 because the order was not immediately appealable under California law. Gaines Decl. at ¶ 9.

25 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
26 in the Action, and further denies that the Action are appropriate for class treatment for any purpose
27 other than this settlement. Defendant contends that it has complied at all times with the California
28 Labor Code. It is Defendant’s position that, if this case were to be litigated, class certification

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

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

14 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

22 The Parties agreed to participate in nonbinding mediation of Plaintiff's claims while
23 Defendant's appeal was pending. On May 2, 2023, following their exchange of information and
24 documents regarding the Settlement Class and the claims and defenses asserted by the Parties, the
25 Parties engaged in arm's-length negotiations with the assistance of an experienced wage and hour
26 mediator, Brandon McKelvey, Esq. Mr. McKelvey ended the mediation session with a mediator's
27 proposal, which both Parties accepted to reach the resolution of the Action detailed herein. Gaines
28 Decl. at ¶ 13.

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

8 The Parties agree that the Settlement Class described herein may be certified for settlement
9 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
10 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
11 certification will have no force or effect and will immediately be revoked. The Parties further agree
12 that certification for purposes of the settlement is in no way an admission that class certification is
13 proper under the more stringent standard applied for litigation and that evidence of this limited
14 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
15 or any other proceeding. Gaines Decl. at ¶ 15.

16 **IV. LEGAL ANALYSIS**

17 **A. The Proposed Settlement Terms**

18 **1. The Settlement Class**

19 The Parties have agreed to a settlement class composed of all non-exempt employees of
20 Defendant in California at any time between October 10, 2018 and the earlier of August 5,
21 2023 or the date the Court grants preliminary approval of this Settlement. Stip. at ¶ A(4).

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

23 The Parties agree to settle the Action for a Gross Settlement Amount of Nine Hundred
24 Ninety-Four Thousand Five Hundred Dollars (\$994,500). The Gross Settlement Amount includes
25 the attorney's fees of Class Counsel; litigation costs and expenses (which includes, without
26 limitation, all such fees and costs incurred to date, as well as such fees and costs to be incurred in
27 documenting the settlement, providing any notices required as part of the settlement, securing Court
28 approval of the settlement, and obtaining judgment in the Action); the Service Payment to the Class

1 Representative, as approved by the Court; the payment to the California Labor and Workforce
2 Development Agency ("LWDA"); and all costs of administration, including, without limitation,
3 settlement administration fees and expenses. All employer payroll tax obligations due on wage
4 payments made from the Net Settlement Proceeds shall be paid by Defendant separate and apart
5 from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

6 From the Gross Settlement Amount, Plaintiff will request an award of attorneys' fees not to
7 exceed one-third of the Gross Settlement Amount (i.e., \$331,500). Stip. at ¶ C(1)(g).

8 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
9 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
10 at ¶ C(1)(h).

11 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
12 application to the Court for a Service Payment and General Release Payment to the Class
13 Representative in the gross amount of \$12,000, in consideration for his effort in instituting and
14 participating in the Action and his full general release of all claims. Stip. at ¶¶ C(1)(f).

15 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
16 Settlement Administrators will be no more than \$12,000. Stip. at ¶¶ C(1)(i).

17 The Parties have agreed that One Hundred Thousand Dollars (\$100,000) of the Gross
18 Settlement Amount shall be allocated to the resolution of any and all Aggrieved Employees' and
19 the State of California's claims arising under PAGA. Pursuant to PAGA, seventy-five percent
20 (75%), or Seventy-Five Thousand Dollars (\$75,000) shall be paid to the LWDA, and twenty-five
21 percent (25%), or Twenty-Five Thousand Dollars (\$25,000), shall be paid to Aggrieved Employees
22 as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

28 \\\

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

16 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
17 (a) 20% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
18 80% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
19 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
20 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
21 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
22 mandated treatment as required by law. Stip. at ¶ C(1)(d).

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

24 Pursuant to PAGA, the Parties have agreed that \$100,000 of the Gross Settlement Amount
25 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Labor Code § 2699(i)
26 requires that “civil penalties recovered by aggrieved employees shall be distributed as follows: 75
27 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
28 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$75,000 – shall

1 be payable to the LWDA. The remaining 25 percent, or \$25,000, shall be paid to Aggrieved
2 Employees as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

4 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
5 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
6 trial court, and (2) a final review after notice has been distributed to the Class Members informing
7 them of the terms of the settlement and allowing them to exclude themselves from, participate in
8 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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

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¹ 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, Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

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

7 *Id.* at § 11.24.

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

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

11 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
12 approval stage, request that the court provisionally approve certification of the class – conditioned
13 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
14 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
15 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
16 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
17 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
18 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

19 The strength of the findings made by a judge at a preliminary hearing
20 or conference concerning a tentative settlement proposal . . . may be
21 set out in conditional orders granting tentative approval to the various
22 items submitted to the court. Three basic rulings are often
23 conditionally entered at this preliminary hearing. These conditional
24 rulings may approve a temporary settlement class, the proposed
25 settlement, and the class counsel’s application for fees and expenses.

26 4 *Newberg on Class Actions*, at § 11.26.

27 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
28 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
Gaines Decl. at ¶ 37; Exhibit C.

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

2 It is well established that trial courts should use a lower standard for determining the
3 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal.

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

1 App. 4th at 1807, n. 19. The reason for this is that no trial is anticipated in a settlement class, so
2 the case management issues inherent in determining if the class should be certified need not be
3 confronted. *Amchem Products, Inc. v. Windsor* (1987) 521 U.S. 591, 620. The proposed
4 Settlement Class meets all requirements for certification, as discussed below.

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

6 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
7 and the means for identifying the members of the class determine whether the class is ascertainable.
8 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
9 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
10 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
11 comprises approximately 818 employees. Gaines Decl. ¶ 33.

12 b. **Questions of Law or Fact Common to Members of the Settlement**
13 **Class Predominate**

14 The Class Members' claims all stem from a common source: members of the Settlement
15 Class allege that Defendant violated the same Labor Code provisions in connection with their
16 employment. All members of the Class seek the same relief under the same California laws (related
17 to unpaid wages, meal and rest period premiums, inaccurate or incomplete wage statement, failure
18 to timely pay wages due upon separation, and derivative claims). Under these circumstances, the
19 commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement
20 purposes. Gaines Decl. ¶ 34.

21 c. **The Proposed Class Representative's Claims Are Typical of the**
22 **Class Members' Claims**

23 A class representative's claims are typical when they arise from the same event or course
24 of conduct that gives rise to the claims of the class and are based on the same legal theory.
25 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiff and proposed
26 Class Representative Nicholas Wilkerson is a former non-exempt employee who worked for
27 Defendant in the State of California during the Class Period. He contends that Defendant failed to
28 pay all wages, failed to provide meal and rest periods, failed to comply with itemized employee

1 wage statement provisions, and failed to timely pay wages at the separation of employment, in
2 violation of Labor Code §§ 201-202, 226(a), 226.3, 226.7, 227.3, 510, 512, 558, 1194, 2698, and
3 2699. He has the same claims as those that the members of the Settlement Class would reasonably
4 be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 35.

5 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
6 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
7 conflicts with other class members. Gaines Decl. ¶ 36. Furthermore, Plaintiff has retained
8 competent counsel, experienced in litigating wage and hour class action claims in state and federal
9 courts. See Gaines Decl. ¶¶ 2-5.

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

12 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
13 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
14 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
15 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
16 judgment for that of the proponents, particularly where, as here, settlement has been reached with
17 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
18 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
19 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
20 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
21 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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

1 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
2 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
3 Decl. ¶¶ 2-5, 12-15.

4 Here, the Parties’ counsel have a great deal of experience in class action litigation and
5 specialize in employment wage and hour matters. Moreover, counsel for all Parties conducted an
6 extensive investigation of the factual allegations involved in this case. The Parties have engaged
7 in a broad exchange of documents, data, records and other information. Each side has apprised the
8 other, informally, at a formal mediation with the assistance of one of California’s highly regarded
9 mediators, and through lengthy negotiations, of their respective factual contentions, legal theories
10 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*
11 Gaines Decl. ¶¶ 2-5, 12-15.

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

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

22 Plaintiff contends that Defendant failed to pay Class Members all wages due because it
23 required them to work off-the-clock, without pay, and because it failed to properly compute the
24 regular rate of pay when paying overtime and other forms of wages. Plaintiff argues that Class
25 Members were required to perform work-related activities off-the-clock, resulting in Defendant’s
26 failure to pay all minimum and overtime wages earned, in violation of Labor Code §§ 510, 558,
27 1194, and 1194.2. Plaintiff contends that Class Members were only paid for limited time while
28 working from home, including time spent speaking with customers on the phone; other work time

1 was unpaid. While working in an office setting, Class Members were allegedly required to arrive
2 early to work and begin preparing for the day, but were not permitted to clock in until their shift
3 start time. Gaines Decl. ¶ 17.

4 Plaintiff also alleges that Class Members were paid bonuses, commissions, and other forms
5 of non-base hourly wages that were not included in their regular rate of pay for purposes of
6 computing the proper meal and rest period premiums and sick pay rates, in violation of Labor Code
7 §§ 226.7, 246, 510, 512, 558, and 1194. California Labor Code § 510 requires the payment of meal
8 and rest period premium compensation and sick pay based on employees' regular rate of pay. *Ferra*
9 *v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863 (holding that "the calculation of
10 premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime
11 pay, must account for not only hourly wages but also other nondiscretionary payments for work
12 performed by the employee" because the terms "regular rate of compensation under section
13 226.7(c)" and "regular rate of pay under section 510(a)" are "synonymous" and "encompasses all
14 nondiscretionary payments, not just hourly wages.") Here, when Class Members earned meal
15 period premiums and sick pay, they were allegedly paid at their base rate. Gaines Decl. ¶ 18.

16 Plaintiff calculates classwide damages on his unpaid wages claim at approximately
17 \$650,000, with PAGA civil penalty liability of \$1,517,600. Gaines Decl. ¶ 18. Of course, this
18 claim was subject to numerous defenses which had the potential to defeat the claims in their
19 entirety. Defendant argued that all employee time was compensated, that off-the-clock work was
20 forbidden by company policy, that there were no miscalculations of the regular rate because any
21 bonuses paid were discretionary and not required to be computed into the regular rate of pay, and
22 that these claims – particularly the off-the-clock claim – could never be certified based on
23 manageability and typicality concerns. The negotiated settlement amount is a product of
24 compromise here. Gaines Decl. ¶ 19.

25 Plaintiff also argues that Defendant failed to permit or authorize Class Members to take
26 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
27 §§ 226.7, 512, 558, and 1194 and IWC Wage Order 4-2001. Labor Code § 512 provides that
28 employers (like Defendant) may not employ an employee for a work period of more than five hours

1 without providing a 30-minute meal period starting no later than the end of the fifth hour. Class
2 Members were routinely unable to take a proper meal period when they worked shifts in excess of
3 five hours and a second meal period when they worked shifts in excess of ten hours. In advance of
4 mediation, Defendant provided timecards which reflected a meal period violation rate of 12.6%,
5 although some meal period premium payments were made (albeit at a rate Plaintiff contends was
6 too low, as detailed above). Plaintiff calculates maximum class damages on this claim at \$430,000
7 with PAGA civil penalty liability of \$737,900. Defendant strongly argues that it fully complied at
8 all times with California's meal break laws, and that the high rates of compliance in its payroll
9 records demonstrate that its policies and practices conform with California law. It also argues
10 manageability concerns in certifying this claim. The compromise reached here reflects a fair
11 resolution of the claim in light of the risks of further litigation. Gaines Decl. ¶ 20.

12 Plaintiff also argues that Defendant failed to pay Class Members premium wages for
13 missed, denied and unauthorized rest periods in violation of Labor Code § 226.7 and IWC Wage
14 Order 4-2001. When employees were able to take a rest period, Defendant purportedly maintained
15 a policy and practice requiring employees to remain on the premises, which Plaintiff contends
16 violates the mandate in *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th 257, 269 (holding
17 that the rest period requirement "obligates employers to permit and authorizes employees to take
18 off-duty rest periods. That is, during rest periods employers must relieve employees of all duties
19 and **relinquish control over how employees spend their time.**" An employer may not place any
20 limitations on where employees may go or not go during their rest periods). (Emphasis
21 added). These restrictions and requirements contravene California law with respect to rest periods.
22 Gaines Decl. ¶ 21.

23 Plaintiff calculates damages on this claim at up to approximately \$2,733,000, with PAGA
24 civil penalty liability of \$1,474,100. This claim was also subject to substantial litigation risk and
25 required a discount for settlement purposes at this juncture of litigation. Defendant argued that its
26 policies were always California compliant, that it never exerted any control over employees during
27 their rest periods, that any rest periods not taken were waived by employees, and that this proffered
28 waiver defense would render class certification unmanageable. The resolution reached reflects a

1 fair compromise of this claim. Gaines Decl. ¶ 22.

2 Plaintiff contends that Defendant failed to issue Plaintiff and Class Members accurately
3 itemized wage statements. Because Class Members were not paid all wages due, as Plaintiff argues,
4 the wage statements issued to Class Members fail to accurately state all gross wages earned, in
5 violation of Labor Code § 226(a)(1), and net wages earned, in violation of Labor Code § 226(a)(5).
6 Plaintiff calculates statutory penalties on this claim at \$1,256,900, with PAGA civil penalty liability
7 of \$1,517,600. He also recognizes that this claim had several litigation hurdles which required a
8 discount for settlement at this juncture, including defenses for willfulness and injury, and
9 Defendant's key argument that no wages were ever underpaid, such that there could be no
10 derivative wage statement claim at all. The compromise reached as to this claim reflects a fair
11 discount for litigation risk. Gaines Decl. ¶ 23.

12 Plaintiff also argues Defendant failed to pay Class Members all wages due upon separation
13 of employment, in violation of Labor Code §§ 201-203. As Defendant failed to pay them all wages
14 due during the course of their employment, as described above, these wages were due and owing
15 upon separation of employment yet went unpaid. Plaintiff calculates statutory penalties on this
16 claim at \$1,001,532, with PAGA civil penalty liability of \$12,200. Defendant proffered defenses
17 to this claim – specifically, that even if wages were unpaid (which it denies), there would have been
18 a good faith dispute as to whether those wages were ever due, eliminating liability under the statute.
19 The compromise reached represents a fair resolution of the claim in light of the risks involved in
20 prevailing on it and the unpaid wage claims on which it is based. Gaines Decl. ¶ 24.

21 A discount on the maximum value of Class members' claims was required (and warranted)
22 to resolve the matter at this stage of the litigation. Defendant always maintained multiple defenses
23 to each claim as to class certification and on the merits. It also argued that Plaintiff and Class
24 Members could not litigate their claims on a classwide basis due to the language in their arbitration
25 agreements, which the Court found to be enforceable (albeit with a different interpretation than
26 Defendant proffered). It argued that it adopted and enforced legally complaint policies and
27 practices which authorized meal and rest periods as required by law, and employees did not voice
28 concern over meal and rest periods being denied. Gaines Decl. ¶ 25.

1 The discount negotiated for settlement here is a reasonable compromise, particularly
2 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves
3 a 50% or higher hurdle, especially with respect to the meal and rest period and off-the-clock claims,
4 to which Defendant maintains strong arguments to defeat class certification (in addition to multiple
5 defenses on the merits of the claims). Class certification is a substantial risk in any class action
6 case. Here, while Plaintiff maintains that the requirements of class certification are met, Defendant
7 proffers various arguments why class treatment is not appropriate, including but not limited to that
8 individualized inquires among class members predominate over common ones. If Defendant was
9 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
10 most class members would likely not file individual claims. Gaines Decl. ¶ 26.

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

15 Finally, Plaintiff faced the risk that he would not obtain a maximum damage/penalty award
16 on all (or any of) his claims. For example, Plaintiff's wage statement claims and waiting time
17 penalty claim are wholly derivative of his unpaid wage claims. If he did not prevail on those claims,
18 he would not prevail on a claim for deficient wage statements or failure to timely pay wages. In
19 addition, Plaintiff seeks discretionary penalties pursuant to the PAGA. Even if Plaintiff did prevail
20 on his claims, it is possible that the Court would not impose all penalties pursuant to its
21 discretionary power to reduce them. Gaines Decl. ¶ 28.

22 Defendant strongly contends that its policies and practices do not violate any laws. It
23 contends that it properly provided for all meal and rest periods and fully compensated its employees
24 for all time worked. It further contends that the wage statements it provides to its employees are
25 fully compliant with California law. Gaines Decl. ¶ 29.

26 When the costs and risks of non-certification and loss on the merits are considered,
27 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
28 Decl. ¶ 30.

1 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
2 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
3 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
4 Decl. ¶ 31.

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

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

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

14 **V. CONCLUSION**

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

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

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

20 3. Appointing Plaintiff Nicholas Wilkerson as the Class Representative;

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

23 5. Approving Phoenix Settlement Administrators as the claims administrator and its
24 estimated fees not to exceed \$12,000;

25 6. Preliminarily approving the allocation of \$100,000 from the Gross Settlement
26 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
27 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
28 (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;

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

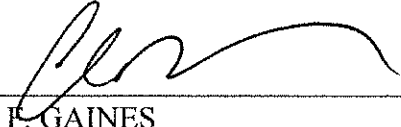
3 8. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Claims Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Claims 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 Claims 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 Claims 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 Claims 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 90 days after entry of the Order granting this Motion)

1 DATED: July 25, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

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5 By: 

6 DANIEL P. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiff Nicholas Wilkerson and Proposed
8 Class Counsel
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