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and Proposed Class Counsel
8

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

10 **FOR THE COUNTY OF IMPERIAL**

11
12 DAVID FERGONISE, on behalf of
13 himself and on behalf of all similarly
situated individuals,

14 Plaintiff,

15 v.

16 TRI-ROTOR, L.L.C., an Arizona limited
17 liability company, and DOES 1 through 10,
inclusive,

18 Defendants.
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CASE NO: ECU002469

*Assigned to the Honorable L. Brooks Anderholt,
Dept. 9*

CLASS ACTION

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

DATE: March 1, 2023

TIME: 8:30 a.m.

DEPT.: 9

Action Filed: July 7, 2022

1 **PLEASE TAKE NOTICE THAT** on March 1, 2023 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 9 of the above-entitled Court, located at 939 West Main
3 Street, El Centro, California 92243, Plaintiff David Fergonise will and hereby does move
4 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
5 the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiff as the Class Representative, (4) approving the appointment
8 of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel,
9 (5) approving the appointment of Phoenix Settlement Administrators as settlement administrator,
10 (6) preliminarily approving the allocation of \$4,000 from the Gross Settlement Amount to settle
11 Plaintiff's representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et
12 seq., "PAGA"), of which seventy-five percent (75%) will be paid to the Labor and Workforce
13 Development Agency and twenty-five percent (25%) shall be paid 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 Class
16 and Representative Action Complaint; and (9) setting a final fairness and approval hearing.

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

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

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

1 DATED: January 27, 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 David Fergonise and Proposed
8 Class Counsel

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MEMORANDUM OF POINTS AND AUTHORITIES

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 approval. The Settlement is made and entered into by and between Plaintiff David Fergonise (“Plaintiff” or “Fergonise”), individually and on behalf of all others similarly situated, and Defendant Tri-Rotor, L.L.C. (“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. *See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides for a non-revisionary class settlement in the gross amount of \$85,000 to a settlement class of approximately 14 employees who worked approximately 350 workweeks, yielding gross payments of **\$6,701 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 David Fergonise 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) approve the allocation of \$4,000 from the Gross Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq., “PAGA”) (g) permit the filing of a First Amended Complaint; (h) authorize the mailing of the proposed class action notice packet; and (i) schedule a final fairness and approval hearing.

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1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On July 7, 2022, Plaintiff initiated the Action by filing a class action complaint, on behalf
3 of himself and all other putative class members. Plaintiff asserts class claims for violations of
4 Labor Code sections 201-203, 226(a), 226.3, 226.7, 227.3, 510, 512, 1194, 2802, IWC Wage Order
5 9-2001, and the Business and & Professions Code related to the Labor Code violations set forth
6 above. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

7 On November 15, 2022, following their exchange of information regarding the Settlement
8 Class and the claims and defenses asserted by the Parties, counsel for the Parties engaged in arm’s-
9 length negotiations with the help of mediator Brandon McKelvey, Esq., to reach the basic terms of
10 this Settlement. Gaines Decl. at ¶ 7.

11 On November 17, 2022, Plaintiff submitted a letter to the Labor & Workforce Development
12 Agency (“LWDA”) and Defendant asserting the violation of the Private Attorneys General Act,
13 Labor Code section 2698 *et seq.*, “PAGA”) based on Defendant’s alleged failure to pay all wages
14 due, failure to provide meal and rest periods or premium wages in lieu thereof, failure to issue
15 accurate wage statements, failure to reimburse expenses, and failure to timely pay wages, including
16 vacation wages, at separation of employment, premised on the violation of Labor Code sections
17 201-203, 226(a), 226.3, 226.7, 227.3, 510, 512, 558, 1194, and 2802 and IWC Wage Order 9-2001.
18 As part of this Motion for Preliminary Approval, Plaintiff seeks to file a First Amended Complaint
19 in the form attached to the Gaines Declaration as Exhibit B-3, which adds the cause of action
20 pursuant to PAGA (the “First Amended Complaint”). Gaines Decl. at ¶ 8.

21 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
22 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
23 other than this settlement. Defendant contends that it has complied at all times with the California
24 Labor Code. It is Defendant’s position that, if this case were to be litigated, class certification
25 would be inappropriate because the case fails to meet numerosity requirements, Plaintiff is not an
26 adequate class representative, Plaintiff’s claims are not typical of putative class members, and
27 individual issues predominate over class issues. Similarly, on the PAGA cause of action,
28 Defendant’s position is that Plaintiff is not an “aggrieved employee” and is not a proper

1 representative to bring a PAGA cause of action. The Action, the negotiation and execution of this
2 Settlement Agreement, and all acts performed or documents executed pursuant to or in furtherance
3 of the Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on
4 behalf of Defendant; (ii) shall not be an admission or evidence of fault on behalf of Defendant in
5 any action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be,
6 and may not be used as, an admission or evidence of the appropriateness of these or similar claims
7 for class certification in the Action or with respect to any other proceeding. If the First Amended
8 Complaint is not authorized to be filed before or at the time when the Court grants preliminary
9 approval of this Settlement, Defendant has the right to withdraw from the settlement. If Defendant
10 so withdraws, the Parties will return to the same position that they were in prior to mediation and
11 the First Amended Complaint will be deemed withdrawn. The Parties also agree that in the event
12 the Court does not grant final approval of the Settlement, the First Amended Complaint shall be
13 deemed withdrawn and the Parties will return to the same position that they were in prior to
14 mediation. The parties further agree that Defendant does not waive any defense to the First
15 Amended Complaint and the PAGA claim contained therein. The parties further acknowledge that
16 the filing of the First Amended Complaint is for settlement purposes only. Gaines Decl. at ¶ 9.

17 The Class Representative contends that Defendant violated the California Labor Code and
18 that this case is appropriate for class certification. Gaines Decl. at ¶ 10.

19 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

26 Based on their own independent investigation and evaluation, Class Counsel are of the
27 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
28 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of

1 the Settlement Class in light of all known facts and circumstances, including the risk of significant
2 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
3 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
4 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 12.

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

13 **IV. LEGAL ANALYSIS**

14 **A. The Proposed Settlement Terms**

15 **1. The Settlement Class**

16 The Parties have agreed to a settlement class composed of all non-exempt employees
17 employed by Defendant in California at any time between July 7, 2018 and January 14, 2023.
18 Defendant represents that this Class contains approximately 14 members who worked no more than
19 350 workweeks during the Class Period. Stip. at ¶ A(4).

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

21 The Parties agree to settle this Action for a Gross Settlement Amount of Eighty-Five
22 Thousand Dollars (\$85,000) (the “Gross Settlement Amount”), subject to any increase based on the
23 escalator provision in paragraph H(18) of the Settlement. The Gross Settlement Amount includes
24 payments to the class, payments to Aggrieved Employees, the attorneys’ fees of Class Counsel,
25 litigation costs and expenses (which includes, without limitation, all such fees and costs incurred
26 to date, as well as such fees and costs to be incurred in documenting the settlement, providing any
27 notices required as part of the settlement, securing Court approval of the settlement, and obtaining
28 judgment in the Action), the enhancement payment to the Class Representative, as approved by the

1 Court, a PAGA payment to the State of California, and all costs of administration, including,
2 without limitation, settlement administration fees and expenses. Defendant shall pay all employer
3 payroll tax obligations due on wage payments made from the Net Settlement Sum in addition to,
4 and separate and apart from, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

5 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
6 application to the Court for up to 40% of the Gross Settlement Amount for attorneys' fees (or
7 \$34,000). Stip. at ¶ C(1)(e).

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

11 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
12 application to the Court for an Enhancement Payment to the Class Representative in the gross
13 amount of \$5,000, in consideration for his efforts in instituting and participating in the Action. Stip.
14 at ¶ C(1)(d).

15 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
16 Settlement Administrators will be no more than \$3,500. Stip. at ¶ C(1)(g).

17 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
18 claims for penalties under the PAGA is \$4,000 ("PAGA Payment"), 75% of which shall be paid to
19 the LWDA and 25% shall be paid to the Aggrieved Employees. Stip. at ¶ C(1)(h).

20 The Net Settlement Sum is the Gross Settlement Amount less the amounts approved and
21 awarded by the Court for: attorneys' fees and documented litigation costs and expenses incurred or
22 advanced by Class Counsel, the enhancement payment to the Class Representative, the PAGA
23 payments to the LWDA and the Aggrieved Employees, and the costs of administering the
24 settlement. Stip. at ¶ C(1)(b).

25 The Individual Settlement Payments are the portion of the Net Settlement Sum distributable
26 to each Class Member who participates in the Settlement (i.e., who does not submit a valid request
27 for exclusion form). The Individual Settlement Payments will be calculated by dividing the Net
28 Settlement Sum by the total weeks worked by all participating Class Members in California in a

1 non-exempt position during the Class Period, which will yield the applicable weekly rate. The
2 weekly rate shall be multiplied by the number of weeks each individual participating Class Member
3 worked for Defendant in California in a non-exempt position during the Class Period to yield their
4 Individual Class Payment Amount. Each Participating Settlement Class Member who does not opt
5 out will receive an Individual Class Payment Amount. Stip. at ¶ C(1)(c).

6 As to the allocation of the PAGA Payment among the Aggrieved Employees, \$1,000 (25%
7 of the PAGA allocation), shall be paid to the Aggrieved Employees, apportioned among them by
8 dividing the \$1,000 by the total weeks worked by all Aggrieved Employees in California in a non-
9 exempt position during the PAGA Period, which will yield the applicable weekly rate. The weekly
10 rate shall be multiplied by the number of weeks each individual Aggrieved Employee worked for
11 Defendant in California in a non-exempt position during the PAGA Period to yield their Individual
12 PAGA Payment Amount. Each Aggrieved Employee, whether they opt out of the class settlement
13 or not, will receive an Individual PAGA Payment Amount. Stip. at ¶ C(1)(h).

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

15 Pursuant to PAGA, the Parties have agreed that \$4,000 of the Gross Settlement Amount
16 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
17 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
18 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
19 employees.” As such, 75 percent of the apportioned PAGA settlement amount – or \$3,000 – shall
20 be payable to the LWDA. The remaining 25 percent, or \$1,000, shall be paid to the Aggrieved
21 Employees, apportioned among them as set forth above. Stip. at ¶ C(1)(h).

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

23 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
24 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
25 trial court, and (2) a final review after notice has been distributed to the Class Members informing
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 them of the terms of the settlement and allowing them to exclude themselves from, participate in
2 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

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

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

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

Id. at § 11.24.

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

C. Procedures for Settlement Before Class Certification.

Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
approval stage, request that the court provisionally approve certification of the class – conditioned

1 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
2 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
3 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
4 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
5 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
6 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

14 4 *Newberg on Class Actions*, at § 11.26.

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

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

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

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

26 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
27 and the means for identifying the members of the class determine whether the class is ascertainable.
28 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class

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 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
2 comprises approximately 14 employees. Gaines Decl. ¶ 30.

3 b. **Questions of Law or Fact Common to Members of the Settlement**
4 **Class Predominate**

5 The Class Members' claims all stem from a common source: members of the Settlement
6 Class allege that Defendant violated the same Labor Code provisions in connection with their
7 employment. All members of the Class seek the same relief under the same California laws (related
8 to unpaid wages due, unpaid meal and rest period premiums, inaccurate or incomplete wage
9 statements, failure to timely pay wages due during employment and upon separation, failure to
10 reimburse expenses, and derivative claims). Under these circumstances, the commonality
11 requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes.
12 Gaines Decl. ¶ 31.

13 c. **The Proposed Class Representative's Claims Are Typical of the**
14 **Class Members' Claims**

15 A class representative's claims are typical when they arise from the same event or course
16 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
17 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
18 Class Representative David Fergonise is a former non-exempt employee who worked for Defendant
19 in the State of California during the Class Period. He contends that Defendant failed to pay all
20 wages due, failed to provide meal and rest periods, failed to comply with itemized employee wage
21 statement provisions, failed to reimburse expenses, and failed to timely pay wages due at the
22 separation of employment, in violation of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512,
23 558, 1194, 2698, 2699, and 2802, among other Labor Code provisions. He has the same claims as
24 those that the members of the Settlement Class would reasonably be expected to bring based on the
25 course of conduct alleged herein. Gaines Decl. ¶ 32.

26 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
27 of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent
28 conflicts with other class members. Gaines Decl. ¶ 33. Furthermore, Plaintiff has retained

competent counsel, experienced in litigating class action claims in the employment context. See Gaines Decl. ¶¶ 2-5.

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

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

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

Here, the Parties’ counsel have a great deal of experience in class action litigation and specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted an extensive investigation of the factual allegations involved in this case. The Parties have engaged in a broad exchange of documents, data, records and other information. Each side has apprised the

1 other, informally and at a formal mediation, of their respective factual contentions, legal theories
2 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*
3 Gaines Decl. ¶¶ 2-5, 11-28.

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

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

14 Plaintiff’s counsel created a comprehensive damage analysis using sampling information
15 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
16 falls within a realistic range of recovery on Class Members’ claims. Gaines Decl. ¶ 15.

17 Plaintiff contends that Defendant failed to pay all wages due in three separate fashions:
18 Reporting Time Pay, Overtime Wages, and Off-The-Clock Work. First, Plaintiff argues that
19 Defendant would require Plaintiff and Class Members to report to work only to be told they were
20 no longer needed and be sent home within two hours of reporting to work, in violation of Labor
21 Code §§ 510 and 1194 and IWC Wage Order 9-2001. Plaintiff calculates the liability of this claim
22 at \$8,735.48. Gaines Decl. ¶ 16.

23 Next, Plaintiff believes that Defendant failed to pay Plaintiff and Class Members all
24 overtime wages due, in violation of Labor Code §§ 510 and 1194, because Defendant allegedly
25 paid Plaintiff and Class Members straight time wages only, with no adjustment for premium
26 overtime wages. Plaintiff calculates the liability of this claim at \$17,470.96. Gaines Decl. ¶ 17.

27 Finally, Plaintiff suggests that Defendant failed to pay Plaintiff and Class Members all
28 minimum and overtime wages due, in violation of Labor Code §§ 510, 1194, and 1194.2 when

1 Plaintiff and Class Members worked off-the-clock: they were not paid for time spent making work
2 related calls before and after their shifts. Plaintiff calculates the liability of this claim at \$4,367.74.
3 Gaines Decl. ¶ 18.

4 Plaintiff also alleges that Defendant failed to permit or authorize Plaintiff and Class
5 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation
6 of Labor Code §§ 226.7 and 512 and IWC Wage Order 9-2001. Labor Code § 512 provides that
7 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
8 without providing a 30-minute meal period starting no later than the end of the 5th hour. Plaintiff
9 and Class Members were routinely unable to take a proper meal period when they worked shifts in
10 excess of 5 hours in duration and a second meal period when they worked shifts in excess of 10
11 hours in duration. Significant meal period premiums are owed. Plaintiff calculates damages on
12 this claim at \$26,206.44. Gaines Decl. ¶ 19.

13 Next, Plaintiff argues that Defendant failed to pay Plaintiff and Class Members premium
14 wages for missed, denied and unauthorized rest periods in violation of Labor Code § 226.7 and
15 IWC Wage Order 9-2001. Plaintiff and Class Members were allegedly denied, and therefore unable
16 to take, 10-minute on-the-clock rest periods for every four hours of work or major fraction thereof,
17 but were not paid premium wages of one hour's pay for each missed, denied and unauthorized rest
18 period. Plaintiff and Class Members were never paid a rest period premium during their
19 employment. Plaintiff calculates damages on this claim at \$26,206.44. Gaines Decl. ¶ 20.

20 Plaintiff and Class Members were allegedly required to incur expenses in the performance
21 of their job duties for which they are not fully reimbursed, in violation of Labor Code § 2802.
22 Plaintiff and Class Members were required to use their personal cellphones for work-related calls
23 and operate their personal trucks while working for Defendant, but were not fully reimbursed by
24 Defendant for these expenses, including, but not limited to, mileage, gas, insurance, maintenance,
25 depreciation, and other costs of ownership. Plaintiff calculates statutory penalties on this claim at
26 \$4,710, based off an estimated \$15 of unreimbursed expenses per week. Gaines Decl. ¶ 21.

27 Defendant allegedly failed to pay Plaintiff and Class Members all wages due upon
28 separation of employment, in violation of Labor Code §§ 201-203, failed to issue them accurate

1 wage statements, in violation of Labor Code § 226, and is subject to PAGA civil penalties as
2 authorized by Labor Code § 2698 *et seq.* These claims are all derivative of those for unpaid wages
3 set forth above. For these claims, Plaintiff calculates statutory penalties of at up to \$79,000 and
4 PAGA civil penalties of approximately \$8,000. Gaines Decl. ¶ 22.

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

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

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

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

1 When the costs and risks of non-certification and loss on the merits are considered,
2 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
3 Decl. ¶¶ 15-27.

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

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

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

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

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

18 In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached
19 to the Stipulation as **Exhibit 3**, which adds PAGA allegations and claims to comport with the
20 release provided for in the Stipulation. The Parties agreed that, as part of his motion for preliminary
21 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
22 of which is a condition of the Stipulation.

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

27 V. **CONCLUSION**

28 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties

request that the Court enter an order:

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

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

3. Appointing Plaintiff David Fergonise as the Class Representative;

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

5. Approving Phoenix Settlement Administrators as Settlement Administrator;

6. Preliminarily approving the allocation of \$4,000 from the Gross 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 the Aggrieved Employees;

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

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

9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide 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 a non-exempt position in California during the Class Period ("Settlement Class Information")	20 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	30 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

<u>EVENT</u>	<u>TIMING</u>
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 95 days after entry of the Order granting this Motion)

DATED: January 27, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff David Fergonise and Proposed
Class Counsel