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and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PETER OUN, on behalf of himself and all
“aggrieved employees” pursuant to Labor
Code § 2698 *et seq.*,

Plaintiffs,

v.

DUNCAN INDUSTRIES, INC., a
California corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: 23NWCV00280

Assigned to the Hon. Olivia Rosales, Department F

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

Date: March 13, 2024

Time: 10:30 a.m.

Dept.: C

RSVP 408156518546

Complaint Filed: January 26, 2023

1 **PLEASE TAKE NOTICE THAT** on March 13, 2024 at 10:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department F of the above-entitled Court, located at 12720 Norwalk
3 Blvd., Norwalk, California 90650, Plaintiff Peter Oun will and hereby does move unopposed for
4 an Order (1) preliminarily finding that the settlement between the parties falls within the range of
5 reasonableness and approving the proposed class action settlement in the above-captioned case, (2)
6 conditionally certifying, for settlement purposes only, a settlement class, (3) approving the
7 appointment of Plaintiff Peter Oun as Class Representative, (4) approving the appointment of
8 Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of Phoenix Settlement
9 Administrators as settlement administrator, (6) preliminarily approving the allocation of \$20,000
10 from the Gross Settlement Amount to settle Plaintiff's representative claims under the Private
11 Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be
12 paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be paid
13 to Aggrieved Employees as part of the Net Settlement Proceeds; (7) approving as to content and
14 form the notice to the settlement class, and directing it be disseminated by the Settlement
15 Administrator; (8) setting a final fairness and approval hearing; and (9) granting Plaintiff leave to
16 file a First Amended Complaint.

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.

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

5
6 DATED: September 21, 2023

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: 

DANIEL F. GAINES
ALEX P. KATOFISKY
Attorneys for Plaintiff Peter Oun
and Proposed 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 Peter Oun (“Plaintiff” or “Oun”),
6 individually and on behalf of all others similarly situated, and Defendant Duncan Industries, Inc.
7 (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-reversionary class settlement in the gross amount of \$300,000 to a settlement class of
14 approximately 50 Class Members, yielding gross recovery of nearly **\$6,000** each. As detailed
15 below, the settlement is in the best interests of the class in light of all of the facts and circumstances
16 and the risks and delays of further litigation.

17 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
18 preliminary approval of the settlement agreement and preliminarily find that the settlement falls
19 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement
20 Class, for settlement purposes only; (c) approve the appointment of Plaintiff Peter Oun as Class
21 Representative; (d) approve the appointment of Gaines & Gaines, APLC as Class Counsel; (e)
22 approve appointment of Phoenix Settlement Administrators as the Settlement Administrator; (f)
23 authorize the mailing of the proposed class action notice packet; (g) schedule a final fairness and
24 approval hearing; and (9) grant Plaintiff leave to file a First Amended Complaint.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On November 17, 2022, Plaintiff exhausted the pre-filing requirements of the Labor Code
27 Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
28 Decl.”) at ¶ 6.

1 On January 26, 2023, Plaintiff initiated his Action in the Los Angeles County Superior
2 Court by filing a representative action complaint, pursuant to PAGA, on behalf of himself and all
3 other similarly situated individuals. Gaines Decl. at ¶ 7.

4 As part of the approval of this Settlement, Plaintiff will file a First Amended Complaint
5 substantially in the form attached to the Settlement as **Exhibit 3** which asserts claims against
6 Defendant for (1) failure to pay all wages due (Labor Code §§ 226.7, 246, 510, 512, 1194, and
7 1194.2 and IWC Wage Order 4-2001); (2) failure to provide rest periods or compensation in lieu
8 thereof (Labor Code § 226.7 and IWC Wage Order 4-2001); (3) failure to provide meal periods or
9 compensation in lieu thereof (Labor Code §§ 226.7 and 512 and IWC Wage Order 4-2001); (4)
10 knowing and intentional failure to comply with itemized employee wage statement provisions
11 (Labor Code §§ 226(a) and (e)); (5) failure to timely pay wages due at the separation of employment
12 (Labor Code §§ 201-203); (7) violation of Business and Professions Code § 17200 for underlying
13 violations of the Labor Code as set forth in the complaint in the Action; and (8) civil penalties
14 pursuant to PAGA for underlying violations of the Labor Code as set forth in the complaint in the
15 Action. Gaines Decl. at ¶ 8.

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

1 with respect to any other proceeding whatsoever. Gaines Decl. at ¶ 9.

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

5 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

6 Class Counsel represent that they have conducted a thorough investigation into the facts
7 and law during the prosecution of this class action case, including the exchange of extensive
8 informal discovery, including but not limited to documents regarding Defendant's
9 employment/workplace policies in place during the applicable period and a sample of records
10 relating to hours worked and wages paid to Defendant's non-exempt employees during the relevant
11 time periods, and the review and verification of statistical data, financial data, and other facts and
12 information provided by Defendant. Class Counsel also represents that they have investigated the
13 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
14 potential defenses thereto, and the damages and other losses claimed by Plaintiff. Gaines Decl. at
15 ¶ 11.

16 The Parties agreed to participate in nonbinding mediation of Plaintiff's claims. On August
17 11, 2023, following their exchange of information and documents, the Parties engaged in arm's-
18 length negotiations with the assistance of an experienced wage and hour mediator, Steve Pearl, Esq.
19 The mediation ended with the resolution set forth herein. Gaines Decl. at ¶ 12.

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

26 The Parties agree that the Settlement Class described herein may be certified for settlement
27 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
28 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the

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

6 **IV. LEGAL ANALYSIS**

7 **A. The Proposed Settlement Terms**

8 **1. The Settlement Class**

9 The Parties have agreed to a settlement class composed of all current and former employees
10 of Defendant who were employed in California as a non-exempt employee during the Class Period.
11 Stip. at ¶ A(4).

12 The Aggrieved Employees are defined as all current and former employees of Defendant
13 who were employed in California as a non-exempt employee during the PAGA Period. Stip. at ¶
14 A(6).

15 **2. Allocations to be Paid from the Maximum Settlement Amount**

16 The Parties agree to settle the Action for a Gross Settlement Amount of \$300,000 (the
17 “Gross Settlement Amount”).¹ The Gross Settlement Amount includes the attorney’s fees of
18 Class Counsel; litigation costs and expenses (which includes, without limitation, all such fees and
19 costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
20 providing any notices required as part of the settlement, securing Court approval of the
21 settlement, and obtaining judgment in the Action); the Incentive Award to the Class
22 Representative, as approved by the Court; the payment to the California Labor and Workforce
23 Development Agency (“LWDA”); and all costs of administration, including, without limitation,
24 settlement administration fees and expenses. All employer payroll tax obligations due on wage
25 payments made from the Net Settlement Proceeds shall be paid by Defendant separate and apart

26 ¹ Defendant has represented that there are 50 Class Members who worked approximately 5,987
27 workweeks during the Class Period. Should either of these numbers increase by more than 10%,
28 the Gross Settlement Amount will increase proportionately above the 10% threshold. For example,
if there are 6,885 workweeks (i.e., a 15% increase) and 55 Class Members (i.e., a 10% increase),
the Gross Settlement Amount shall increase by 5%. Stip. at ¶ H(16).

1 from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

2 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
3 application to the Court for up to 35% of the Gross Settlement Amount for attorneys' fees (projected
4 to be \$105,000). Stip. at ¶ C(1)(g).

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

8 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
9 application to the Court for Incentive Award and General Release Payment to Plaintiff Peter Oun
10 in the gross amount of \$10,000, in consideration for his efforts in instituting and participating in
11 the Action and in exchange for the general release of all claims by Mr. Oun. Stip. at ¶ C(1)(f).

12 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
13 Settlement Administrators will be no more than \$9,000. Stip. at ¶ C(1)(i).

14 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
15 claims for penalties under the PAGA is \$20,000 ("PAGA Payment"), 75% (\$15,000) shall be paid
16 directly to the LWDA and 25% (\$5,000) shall be paid to Aggrieved Employees as part of the Net
17 Settlement Proceeds. Stip. at ¶ C(1)(e).

18 The Net Settlement Proceeds is defined as the Gross Settlement Amount less the amounts
19 approved and awarded by the Court for: attorney's fees and documented litigation costs and
20 expenses incurred or advanced by Class Counsel; the Incentive Award to the Class Representative;
21 the payment to the LWDA pursuant to PAGA; and the costs of administering the settlement. Stip.
22 at ¶ C(1)(b).

23 The Individual Payment Amount means the portion of the Net Settlement Proceeds
24 distributable to each Class Member who participates in the Class Settlement (i.e., who does not
25 submit a valid request for exclusion form) and each Aggrieved Employee, whether they participate
26 in the Class Settlement or not. As to participating Class Members, the class portion of the
27 Individual Payment Amount will be determined by dividing the Net Settlement Proceeds, less the
28 \$5,000 PAGA allocation, by the total number of weeks worked by the entire Settlement Class in a

1 non-exempt position in California during the Class Period, net of opt outs, resulting in the class
2 workweek value; and then multiplying the class workweek value by the number of weeks worked
3 by each participating Class Member in a non-exempt position in California during the Class Period.
4 As to the Aggrieved Employees, the PAGA portion of the Individual Payment Amount will be
5 determined by dividing the PAGA settlement amount (\$5,000) by the total number of weeks
6 worked by all Aggrieved Employees in a non-exempt position in California during the PAGA
7 Period, resulting in the PAGA workweek value; and then multiplying the PAGA workweek value
8 by the number of weeks worked by each Aggrieved Employee in a non-exempt position in
9 California during the PAGA Period. Stip. at ¶ C(1)(c).

10 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
11 (a) 20% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
12 80% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
13 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
14 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
15 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
16 mandated treatment as required by law. Stip. at ¶ C(1)(d).

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

18 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Maximum Settlement
19 Amount will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to
20 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
21 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
22 aggrieved employees.” As such, 75% of the apportioned PAGA settlement amount – or \$15,000 –
23 shall be paid directly to the LWDA, and 25%, i.e., \$5,000, shall be paid to Aggrieved Employees
24 as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

26 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
27
28

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

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

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

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

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

Id. at § 11.24.

² The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

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

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

4 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
5 approval stage, request that the court provisionally approve certification of the class – conditioned
6 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
7 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
8 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
9 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
10 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
11 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

16 4 *Newberg on Class Actions*, at § 11.26.

17 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
18 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
19 Gaines Decl. at ¶ 32.

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

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

27 _____
28 ³ In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

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

2 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
3 and the means for identifying the members of the class determine whether the class is ascertainable.
4 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
5 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
6 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
7 comprises approximately 50 members. Gaines Decl. ¶ 28.

8 b. **Questions of Law or Fact Common to Members of the Settlement**
9 **Class Predominate**

10 The Class Members' claims all stem from a common source: members of the Settlement
11 Class allege that Defendant violated the same Labor Code provisions in connection with their
12 employment in non-exempt positions. All members of the Class seek the same relief under the
13 same California laws (related to unpaid wages, unpaid meal and rest period premiums, inaccurate
14 or incomplete wage statements, failure to timely pay wages due upon separation, and derivative
15 claims). Under these circumstances, the commonality requirement is satisfied for purposes of
16 certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 29.

17 c. **The Proposed Class Representative's Claims Are Typical of the**
18 **Class Members' Claims**

19 A class representative's claims are typical when they arise from the same event or course
20 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
21 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
22 Class Representative Peter Oun is a former non-exempt employee who worked for Defendant in
23 the State of California during the Class Period. He contends that Defendant failed to pay all wages,
24 failed to provide meal and rest periods, failed to comply with itemized employee wage statement
25 provisions, and failed to timely pay wages at the separation of employment, in violation of Labor
26 Code §§ 201, 202, 226(a), 226.3, 226.7, 246, 510, 512, 558, 1194, 1194.2, 2698, and 2699, among
27 other Labor Code provisions. He has the same claims as those that the members of the Settlement
28 Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines

1 Decl. ¶ 30.

2 Plaintiff has also demonstrated that he will aggressively and competently assert the interests
3 of the proposed Settlement Class; he has taken an active role in the litigation and has no apparent
4 conflicts with other class members. Gaines Decl. ¶ 31. Furthermore, Plaintiff has retained
5 competent counsel, experienced in litigating class action claims in the employment context. See
6 Gaines Decl. ¶¶ 2-5.

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

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

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

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

8 1. **The Settlement Falls Within The "Ballpark" of Reasonableness**

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

18 Plaintiff contends that Defendant failed to pay Class Members all wages due. First, Plaintiff
19 contends Defendant rounded down the hours reflected on Class Members' time records to pay fewer
20 hours than were actually worked, in violation of Labor Code §§ 510, 558, 1194, and 1194.2.
21 Plaintiff contends that, on a weekly basis, this rounding practice deprived Class Members of
22 significant hours worked and wages due. Rounding is only permissible if the employer applies a
23 consistent rounding policy that, on average, favors neither overpayment nor underpayment. *AHMC*
24 *Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014. Plaintiff contends that Class
25 Members were adversely affected because of the rounding policy. *Gaines Decl.* ¶ 16. Defendant
26 denies that any rounding practice it employed resulted, on average, in an underpayment to any
27 employee.

28 \\\

1 Next, Plaintiff contends Defendant paid Class Members non-discretionary bonuses that
2 were not included in their regular rate of pay for purposes of paying them meal and rest period
3 premiums, sick pay, and overtime wages at the correct rates, in violation of Labor Code §§ 226.7,
4 246, 510, 512, 558, and 1194 and IWC Wage Order No. 4-2001. Plaintiff contends Defendant
5 allegedly failed to properly blend these non-discretionary bonuses and instead paid Class Members
6 meal and rest period premiums, sick pay wages, and overtime wages based only on the base hourly
7 rate of pay, thus depriving them of all wages earned, in violation of Labor Code §§ 226.7, 246, 510,
8 512, 558, and 1194 and IWC Wage Order No. 4-2001. California Labor Code § 510 requires the
9 payment of premium overtime compensation based on employees' regular rate of pay. Labor Code
10 § 207(e) defines the "regular rate" to include all remuneration for employment paid to or on behalf
11 of the employee. Here, when Class Members worked overtime hours, they were paid at one and
12 one-half times the base hourly rate of pay. Plaintiff contends that the bonuses earned by Class
13 Members were not discretionary within the meaning of the applicable regulation (29 U.S.C. §
14 207(e)), and accordingly, must have been included in their regular rate of pay for purposes of
15 determining their overtime pay, sick pay, and meal and rest period premiums. Plaintiff contends
16 Class Members are entitled to significant restitution as a result. Plaintiff calculates Defendant's
17 damages for these unpaid wages claims at \$177,406 (\$68,775 from rounding and \$108,631 from
18 blending) and PAGA civil penalty liability for these claims of \$352,800. Gaines Decl. ¶ 17.
19 Defendant denies that any non-discretionary bonuses were paid and asserts that any and all bonuses
20 paid to its employees were wholly discretionary.

21 Plaintiff also contends that Defendant allegedly failed to pay employees overtime wages
22 when overtime was worked, and only paid straight time wages. Defendant also denies this
23 contention and asserts that it paid overtime premium pay for all overtime worked. Gaines Decl. ¶
24 18.

25 Plaintiff contends Defendant allegedly failed to provide Class Members with legally
26 compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor
27 Code §§ 226.7 and IWC Wage Order 4-2001. Plaintiff contends that Defendant did not maintain
28 any written rest period policies prior to 2022. Despite Defendant maintaining legally compliant

1 written policies since 2022, Plaintiff contends Class Members were denied, and therefore unable to
2 take, 10-minute rest periods for every four hours of work or major fraction thereof, but were not
3 paid premium wages of one hour's pay for each missed, denied, and unauthorized rest period. When
4 they were able to take a rest period, they were often late, cut short, or on-duty. Plaintiff calculates
5 Defendant's rest period damages at \$933,985 and PAGA civil penalty liability for this claim of
6 \$266,900. Gaines Decl. ¶ 19. Defendant denies this allegation and contends that legally compliant
7 rest breaks were provided at all times relevant where all employees were provided and took rest
8 breaks on a set schedule.

9 Plaintiff contends Defendant allegedly failed to permit or authorize Class Members to take
10 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
11 §§ 226.7, 512, and 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers
12 may not employ employees for work periods of more than five (5) hours without providing a 30-
13 minute meal period starting no later than the end of the 5th hour. Plaintiff contends Class Members
14 were routinely unable to take a proper meal period when they worked shifts in excess of five (5)
15 hours in duration and a second meal period when they worked shifts in excess of ten (10) hours in
16 duration. Gaines Decl. ¶ 20.

17 Plaintiff contends that Defendant did not maintain any written meal period policies prior to
18 2022. Plaintiff also contends Defendant maintained non-compliant written meal period policies
19 since 2022. Further, Defendant contends that when Class Members did receive a meal period, they
20 were frequently late (after the fifth hour of work). Plaintiff contends that significant meal period
21 premiums are owed. Plaintiff calculates Defendant's meal period damages at \$814,384 and PAGA
22 civil penalty liability for this claim of \$266,900. Gaines Decl. ¶ 21. Defendant contends that duty
23 free and timely meal periods were provided at all relevant times where all employees were provided
24 and took meal periods on a set schedule.

25 Plaintiff contends Defendant also purportedly failed to issue Class Members accurately
26 itemized wage statements because Class Members were not paid all wages due, as detailed above.
27 As a result, Plaintiff contends the wage statements issued by Defendant to Class Members fail to
28 accurately state all gross wages earned, in violation of Labor Code § 226(a)(1), total hours worked,

1 in violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5),
2 and all applicable hourly rates in effect during the pay period and the corresponding number of
3 hours worked at each hourly rate, in violation of Labor Code § 226(a)(9). Plaintiff calculates the
4 damages for this claim at \$143,500 in addition to \$266,900 in PAGA civil penalties. Gaines Decl.
5 ¶ 22. Defendant denies this claim and contends that, at all relevant times, it provided employees
6 with compliant pay stubs meeting all requirements of Labor Code section 226(a).

7 Plaintiff contends Defendant allegedly failed to pay Class Members all wages due upon
8 separation of employment, in violation of Labor Code §§ 201-202. Plaintiff contends that since
9 Defendant failed to pay Class Members all wages due during the course of employment, as
10 discussed above, and these wages remained due and owing upon separation of employment.
11 Plaintiff calculates statutory penalties on this claim at \$116,162, with PAGA civil penalty liability
12 of \$1,400. Gaines Decl. ¶ 23. Defendant denies this claim.

13 The compromise reached here is fair and reasonable considering the factual and legal
14 disputes among the Parties, the defenses raised by Defendant as to class certification and the merits
15 of Plaintiff's claims, the risk the Court would reduce or eliminate any award of penalties, and the
16 fact that Defendant has a limited ability to pay any judgment due to financial constraints. Defendant
17 strongly contends that its policies and practices do not violate any laws. It contends that it properly
18 paid all wages, that its rounding practice are neutral and lawful, that any bonuses paid were
19 discretionary and not required to be blended into premium rates of pay, and that it provided for all
20 meal and rest periods and fully compensated its employees for all time worked. It further contends
21 that the wage statements it provided to its employees were fully compliant with California law.
22 Gaines Decl. ¶ 24.

23 When the costs and risks of non-certification and loss on the merits are considered,
24 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
25 Decl. ¶¶ 16-25.

26 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
27 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
28 settlement shall finally resolve all claims of the Class Members as alleged in the Actions. Gaines

Decl. ¶ 26.

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

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

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

E. Plaintiff Should Be Permitted to File Its First Amended Complaint

In connection with this Settlement, Plaintiff shall file a First Amended Complaint, attached to the Stipulation as **Exhibit 3**, which conforms to all claims to be released in the Settlement. The Parties agreed that, as part of this motion for preliminary approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing of which is a condition of the Stipulation.

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

V. CONCLUSION

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 Peter Oun as the Class Representative;
4. Appointing Gaines & Gaines, APLC as Class Counsel;
5. Approving Phoenix Settlement Administrators as Settlement Administrator;

6. Preliminarily approving the allocation of \$20,000 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 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;

8. Permitting Plaintiff to file the First Amended Complaint, attached to the Stipulation as **Exhibit 3**, no later than ten (10) calendar 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:

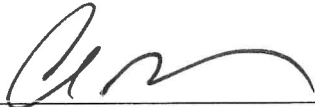
<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written exclusion form to the Settlement Administrator	45 calendar days after the initial mailing of the 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 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

<u>EVENT</u>	<u>TIMING</u>
Final settlement approval hearing	_____, 2024, at _____.m. (approximately 90 days after entry of the Order granting this Motion)

DATED: September 21, 2023

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 

DANIEL F. GAINES
ALEX P. KATOFISKY
Attorneys for Plaintiff Peter Oun
and Proposed Class Counsel