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Attorneys for Plaintiff Colette Appel
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COLETTE APPEL, on behalf of herself
and all others similarly situated and on
behalf of the general public,

Plaintiff,

v.

INVITATION HOMES REALTY
CALIFORNIA INC., a California
corporation, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 56-2022-00572240-CU-OE-VTA

Assigned to the Honorable Mark Borrell, Dept. 40

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

Date: December 15, 2023

Time: 8:30 a.m.

Dept.: 40

Complaint Filed: November 18, 2022

1 **PLEASE TAKE NOTICE THAT** on December 15, 2023 at 8:30 a.m., or as soon
2 thereafter as the matter may be heard, in Department 40 of the above-entitled Court, located at 800
3 South Victoria Avenue, Ventura, California 93009, Plaintiff Colette Appel will and hereby does
4 move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls
5 within 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 Colette Appel as Class Representative, (4) approving the
8 appointment of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of
9 Phoenix Settlement Administrators as settlement administrator, (6) preliminarily approving the
10 allocation of \$10,000 from the Gross Settlement Amount to settle Plaintiff's representative claims
11 under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent
12 (75%) will be paid to the Labor and Workforce Development Agency and twenty-five percent
13 (25%) will be paid to Aggrieved Employees as part of the Net Settlement Proceeds; (7) approving
14 as to content and form the notice to the settlement class, and directing it be disseminated by the
15 Settlement Administrator; (8) setting a final fairness and approval hearing; and (9) granting Plaintiff
16 leave to 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 Colette Appel, such evidence or oral argument as may be presented at the hearing,
4 and on the complete record and file herein.

5
6 DATED: November 9, 2023

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9 *Daniel F. Gaines*
10 By: _____

DANIEL F. GAINES
ALEX P. KATOFISKY
Attorneys for Plaintiff Colette Appel
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 Colette Appel (“Plaintiff” or
6 “Appel”), individually and on behalf of all others similarly situated, and Defendant Invitation
7 Homes Realty California Inc. (“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-revisionary class settlement in the gross amount of \$285,000 to a settlement class of
14 approximately 13 individuals, yielding gross payments of approximately **\$21,923** 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 Colette Appel 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 16, 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 November 18, 2022, Plaintiff initiated her Action in the Ventura County Superior Court
2 by filing a class and FLSA collective action on behalf of herself and all other similarly situated
3 individuals. Gaines Decl. at ¶ 7.

4 As part of the approval of this Settlement, Plaintiff will file a First Amended Complaint in
5 the form attached to the Gaines Decl. as **Exhibit B-3**, which asserts claims against Defendant
6 stemming from its alleged misclassification of Class Members as independent contractors,
7 including for (1) failure to pay all minimum and overtime wages due (FLSA 29 U.S.C. §§ 206 and
8 207); (2) failure to pay all minimum and overtime wages due (Labor Code §§ 226.8, 510, 1194,
9 and 1194.2); (3) failure to provide rest periods or compensation in lieu thereof (Labor Code § 226.7
10 and IWC Wage Order 4-2001); (4) failure to provide meal periods or compensation in lieu thereof
11 (Labor Code §§ 226.7, 512, 558, 1174, 1174.5, and 1198 and IWC Wage Order 4-2001); (5)
12 knowing and intentional failure to comply with itemized employee wage statement provisions
13 (Labor Code §§ 226(a) and (e)); (6) violation of Business and Professions Code § 17200 for
14 underlying violations of the Labor Code as set forth in the complaint in the Action; (7) failure to
15 timely pay wages due at the separation of employment (Labor Code §§ 201-203); and (8) civil
16 penalties pursuant to PAGA for underlying violations of the Labor Code as set forth in the
17 complaint in the Action. The First Amended Complaint adds PAGA claims to the Action, but
18 otherwise mirrors the original Complaint. Gaines Decl. at ¶ 8.

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

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

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

8 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

16 The Parties agreed to participate in nonbinding mediation of Plaintiff's claims. On
17 September 11, 2023, following their exchange of information and documents regarding the
18 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
19 length negotiations with the assistance of an experienced wage and hour mediator, Steven G.
20 Mehta, Esq. The mediation ended with the resolution set forth herein. Gaines Decl. at ¶ 12.

21 Based on their own independent investigation and evaluation, Class Counsel are of the
22 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
23 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
24 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
25 will not be certified by the Court, and the defenses asserted by 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 limited
4 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
5 or any 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 persons who worked for
10 Defendant in California as a “Leasing Experience Specialist” and were classified as an independent
11 contractor during the Class Period [May 22, 2018 through February 28, 2022]. Stip. at ¶¶ A(4),
12 A(5).

13 The Aggrieved Employees are defined all persons who worked for Defendant in California
14 as a “Leasing Experience Specialist” and were classified as an independent contractor during the
15 PAGA Period [November 16, 2021 through February 8, 2022]. Stip. at ¶ A(6).

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

17 The Parties agree to settle the Action for a Gross Settlement Amount of \$285,000 (the
18 “Gross Settlement Amount”).¹ The Gross Settlement Amount includes the attorney’s fees of
19 Class Counsel; litigation costs and expenses (which includes, without limitation, all such fees and
20 costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement,
21 providing any notices required as part of the settlement, securing Court approval of the
22 settlement, and obtaining judgment in the Action); the Incentive Award to the Class
23 Representative, as approved by the Court; the payment to the California Labor and Workforce
24 Development Agency (“LWDA”); and all costs of administration, including, without limitation,
25 settlement administration fees and expenses. All employer payroll tax obligations due on wage

26
27 ¹ Defendant has represented that Class Members worked approximately 1,912 workweeks during
28 the Class Period. If the actual number of workweeks increases by more than five percent (5%),
Defendant will pay an additional \$149.06 to the Gross Settlement Amount for every extra
workweek in excess of 1,912 (the “Escalator Payment”). Stip. at ¶ H(16).

1 payments made from the Net Settlement Proceeds shall be paid by Defendant separate and apart
2 from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

3 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
4 application to the Court for up to 35% of the Gross Settlement Amount for attorneys' fees (projected
5 to be \$99,750). Stip. at ¶ C(1)(g).

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

9 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
10 application to the Court for Incentive Award to Plaintiff Colette Appel in the gross amount of
11 \$10,000, in consideration for her efforts in instituting and participating in the Action. Stip. at ¶
12 C(1)(f).

13 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
14 Settlement Administrators will be no more than \$5,000. Stip. at ¶ C(1)(i).

15 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
16 claims for penalties under the PAGA is \$10,000 ("PAGA Payment"), 75% (\$7,500) shall be paid
17 directly to the LWDA and 25% (\$2,500) shall be paid to Aggrieved Employees as part of the Net
18 Settlement Proceeds. Stip. at ¶ C(1)(e).

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

24 The Individual Payment Amount "Individual Payment Amount" means the portion of the
25 Net Settlement Proceeds distributable to each Class Member who participates in the Class
26 Settlement (i.e., who does not submit a valid request for exclusion form) and each Aggrieved
27 Employee, whether they participate in the Class Settlement or not. As to participating Class
28 Members, the class portion of the Individual Payment Amount will be determined by dividing the

1 Net Settlement Proceeds, less the \$2,500 PAGA allocation, by the total number of weeks worked
2 by the entire Settlement Class during their work for Defendant as a “Leasing Experience Specialist”
3 classified as an independent contractor in California during the Class Period, net of opt outs,
4 resulting in the class workweek value; and then multiplying the class workweek value by the
5 number of weeks worked by each participating Class Member as a “Leasing Experience Specialist”
6 classified as an independent contractor in California during the Class Period. As to the Aggrieved
7 Employees, the PAGA portion of the Individual Payment Amount will be determined by dividing
8 the PAGA settlement amount (\$2,500) by the total number of weeks worked by all Aggrieved
9 Employees during their work for Defendant as a “Leasing Experience Specialist” classified as an
10 independent contractor in California during the PAGA Period, resulting in the PAGA workweek
11 value; and then multiplying the PAGA workweek value by the number of weeks worked by each
12 Aggrieved Employee with the job title of “Leasing Experience Specialist” classified as an
13 independent contractor in California during the PAGA Period. Stip. at ¶ C(1)(c).

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

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

22 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Gross Settlement Amount
23 will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to Labor
24 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
25 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
26 employees.” As such, 75% of the apportioned PAGA settlement amount – or \$7,500 – shall be
27 paid directly to the LWDA, and 25%, i.e., \$2,500, shall be paid to Aggrieved Employees as part of
28 the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

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

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

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

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

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

23 When the parties to an action reach a monetary settlement, they will
24 usually prepare and execute a joint stipulation of settlement, which
25 is submitted to the court for preliminary approval. The stipulation
26 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.

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

1 *Id.* at § 11.24.

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

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

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

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

17 4 *Newberg on Class Actions*, at § 11.26.

18 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
19 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
20 Gaines Decl. at ¶ 33.

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

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

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 Settlement Class meets all requirements for certification, as discussed below.

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

3 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
4 and the means for identifying the members of the class determine whether the class is ascertainable.
5 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
6 are identifiable from Defendant's records. Further, the Settlement Class is sufficiently numerous
7 to warrant certification. According to Defendant's records, the Class comprises approximately 13
8 members. Gaines Decl. ¶ 29.

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

11 The Class Members' claims all stem from a common source: members of the Settlement
12 Class allege that Defendant violated the same Labor Code provisions in connection with their work
13 as independent contractors. All members of the Class seek the same relief under the same
14 California laws (related to alleged misclassification as independent contractors, including unpaid
15 wages, unpaid meal and rest period premiums, inaccurate or incomplete wage statements, failure
16 to timely pay wages due upon separation, and derivative claims). Under these circumstances, the
17 commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement
18 purposes. Gaines Decl. ¶ 30.

19 c. **The Proposed Class Representative's Claims Are Typical of the**
20 **Class Members' Claims**

21 A class representative's claims are typical when they arise from the same event or course
22 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
23 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
24 Class Representative Colette Appel is a former independent contractor who worked for Defendant
25 in the State of California during the Class Period. She contends that Defendant failed misclassified
26 her as an independent contractor and thereby failed to pay all wages, failed to provide meal and rest
27 periods, failed to comply with itemized employee wage statement provisions, and failed to timely
28 pay wages at the separation of employment, in violation of Labor Code §§ 201, 202, 226, 226.3,

226.7, 226.8, 510, 512, 558, 1174, 1174.5, 1194, 1198, 2698, and 2699, among other Labor Code provisions, and FLSA, 29 U.S.C. §§ 206 and 207. She has the same claims as those that the members of the Settlement Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 31.

Plaintiff has also demonstrated that she will aggressively and competently assert the interests of the proposed Settlement Class; she has taken an active role in the litigation and has no apparent conflicts with other class members. Gaines Decl. ¶ 32. 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

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, 11-12.

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 both Parties conducted
6 an 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 and at a formal mediation, of their respective factual contentions, legal theories
9 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*
10 Gaines Decl. ¶¶ 2-5, 11-12.

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

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

21 Plaintiff alleges that until February 28, 2022, Defendant improperly classified Class
22 Members as independent contractors instead of non-exempt employees (they were reclassified as
23 non-exempt employees starting March 1, 2022). California uses the *Borello* test to determine if a
24 licensed real estate agent (otherwise exempt from AB5 and the ABC test) is properly classified as
25 an employee, assessed based on whether the person to whom service is rendered has the right to
26 control the manner and means of accomplishing the result desired. Plaintiff contends that
27 Defendant cannot satisfy the *Borello* test; Defendant steadfastly disagrees and contends that Class
28 Members were always properly classified, such that it owes no damages, no wages, and no penalties

1 at all. Gaines Decl. ¶ 16.

2 As a result of their misclassification, Defendant allegedly failed to pay Class Members all
3 minimum and overtime wages earned, in violation of Labor Code §§ 510, 1194, and 1194.2. Class
4 Members were required to work overtime hours, but were not paid premium overtime wages of
5 one-and-one-half times the regular rate of pay for all hours worked over eight hours in a workday
6 and over forty hours in a workweek. Furthermore, Class Members were paid commissions *only*—
7 they were not paid for all time spent working for Defendant even though they were under
8 Defendant’s control, resulting in significant unpaid wages for work performed off the clock. They
9 were also not separately paid for their rest periods. *See Gonzalez v. Downtown LA Motors, LP*, 215
10 Cal.App.4th 36 (2013) (holding that the employees, who were paid on a “piece-rate” basis, must
11 also be paid at least the minimum hourly wage for the time that they are required to wait between
12 their piece-rate paid tasks). Gaines Decl. ¶ 17.

13 Defendant did not pay Class Members premium wages for missed, denied, and unauthorized
14 rest periods in violation of Labor Code § 226.7 and IWC Wage Order 4-2001. Class Members
15 were denied, and therefore unable to take, 10-minute rest periods for every four hours of work or
16 major fraction thereof, but were not paid premium wages of one hour’s pay for each missed, denied
17 and unauthorized rest periods. Gaines Decl. ¶ 18.

18 When Class Members were able to take a rest period, they were impermissibly
19 uncompensated and off-the-clock, as discussed above. The California Court of Appeal has held that
20 rest periods “must be separately paid at an hourly rate.” *Bluford v. Safeway Stores, Inc.* (2013) 216
21 Cal.App.4th 864, 873. Gaines Decl. ¶ 19.

22 Defendant allegedly failed to permit or authorize Class Members to take a timely 30-minute
23 meal periods for shifts greater than five hours in length, in violation of Labor Code §§ 226.7 and
24 512 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers may not employ an
25 employee for a work period of more than five hours without providing a 30-minute meal period
26 starting no later than the end of the fifth hour. Gaines Decl. ¶ 20.

27 Class Members contend that they were rarely permitted to take a meal period. When they
28 were able to take a meal period, they were cut short, late, or on-duty. Defendant also failed to

1 maintain any meal period records showing the start and stop time of meal periods. This violates
2 Labor Code §§ 226.7, 512, 1174, 1174.5, and 1198 and IWC Wage Order 4-2001. Gaines Decl. ¶
3 21.

4 Because Defendant cannot prove that Class Members received meal periods (because they
5 did not maintain any sort of time records for them), this “raise[s] a rebuttable presumption of meal
6 period violations.” *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61. *Donohue* also
7 confirmed that it is the employer’s obligation to ensure an employee is advised of his rights to a
8 meal break. “To place the burden elsewhere would offer an employer an incentive to avoid its
9 recording duty and a potential windfall from the failure to record meal periods.” *Donohue, supra*,
10 11 Cal.5th 75.

11 Defendant allegedly failed to provide Class Members with wage statements that fully and
12 accurately itemize the requirements set forth in Labor Code § 226(a). As Class Members were not
13 paid all wages due during the course of their employment, as detailed above, the wage statements
14 issued by Defendant failed to state the correct gross wages earned, in violation of Labor Code §
15 226(a)(1), total hours worked, in violation of Labor Code § 226(a)(2), all deductions, in violation
16 of Labor Code § 226(a)(4), net wages earned, in violation of Labor Code § 226(a)(5), and all
17 applicable hourly rates in effect during the pay period and the corresponding numbers of hours
18 worked at each rate, in violation of Labor Code § 226(a)(9). Gaines Decl. ¶ 22.

19 Defendant also allegedly engaged in a practice of not timely paying all wages due and owing
20 upon termination or resignation, per Labor Code §§ 201-203. Because Defendant failed to pay
21 Class Members all wages due during the course of employment, as alleged above, all wages which
22 must have been paid at separation of employment were not. Only one Class Member was affected
23 by this claim; as a consequence of Defendant’s allegedly willful conduct in not paying all wages
24 owed timely upon separation of employment, this Class Member would be entitled to waiting time
25 penalties. Gaines Decl. ¶ 23.

26 Defendant did not keep time records for Class Members due to their classification as
27 independent contractors. Plaintiff’s reasonable assumptions based on the total 1,912 weeks worked
28 by Class Members during the Class Period yield unpaid wages of approximately \$624,860.72

(based on 10 unpaid hours per week), unpaid meal and rest period premiums of a combined \$312,450 (based on a 50% violation rate), wage statement penalties of \$11,800, waiting time penalties of \$8,656.93, and PAGA penalties (without stacking) of \$12,700 (based on 127 PAGA pay periods at issue), yielding total maximum damages and penalties of up to just less than \$1 million. Gaines Decl. ¶ 24.

A discount was required to resolve this matter at this juncture of the litigation. It is possible that Plaintiff would not prevail on her misclassification theory, such that Class Members would recover nothing. It is also possible that Plaintiff would not successfully certify a class, which would also yield a net zero result for Class Members. Even if Plaintiff did prevail on class certification and on the merits of her misclassification claim, it is possible that she would not be able to demonstrate the damages she contends were incurred for unpaid wages, meal and rest period premiums and all penalties she seeks. In short, the action involved substantial risk; the compromise reached is a fair resolution of that risk, particularly where the gross payments to each Class Member are substantial. Gaines Decl. ¶ 25.

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

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

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.

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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 the 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 (i.e. adding the PAGA claim to the Action). 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 consents 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 Colette Appel 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 \$10,000 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 they worked for Defendant as a “Leasing Experience Specialist” 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 and Exclusion Form to Class Members	20 calendar days after entry of Court’s Order granting preliminary approval of Settlement
Last day for Class Members to submit a written exclusion form to the Settlement Administrator	45 calendar days after the initial mailing of the 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
Final settlement approval hearing	_____, 2024, at _____.m. (approximately 90 days after entry of the Order granting this Motion)

1 DATED: November 9, 2023

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

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5 By: *Daniel F. Gaines*

6 DANIEL F. GAINES
7 ALEX P. KATOFISKY
8 Attorneys for Plaintiff Colette Appel
9 and Proposed Class Counsel
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