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Attorneys for Plaintiff Kristine Kaestner
and Proposed Class Counsel

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

KRISTINE KAESTNER, on behalf of
herself and all similarly situated
individuals,

Plaintiff,

v.

MY JOURNEY TRANSPORT, a
California corporation, JOURNEY VIA
GURNEY, LLC, a California limited
liability company, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 34-2022-00330013

Assigned to the Hon. Lauri Damrell, Dept. 28

CLASS ACTION

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

Date: January 19, 2024

Time: 9:00 a.m.

Dept.: 28

Reservation #A-330013-001

Complaint Filed: February 15, 2023

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

PLEASE TAKE NOTICE THAT on January 19, 2024 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 28 of the above-entitled Court, located at 720 9th Street, Sacramento, California 95814, Plaintiff Kristine Kaestner will and hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within the range of reasonableness and approving the proposed class action settlement in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the appointment of Plaintiff Kristine Kaestner as Class Representative, (4) approving the appointment of Gaines & Gaines, APLC as Class Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement administrator, (6) preliminarily approving the allocation of \$40,000 from the Gross Settlement Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will 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 be disseminated by the Settlement Administrator; (8) setting a final fairness and approval hearing; and (9) granting Plaintiff leave to file a Second Amended Complaint.

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

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

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

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

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

8 DATED: October 27, 2023

Respectfully submitted,

9 GAINES & GAINES,
10 A Professional Law Corporation

11
12 By: *Daniel F. Gaines*
13 DANIEL F. GAINES
14 ALEX P. KATOFISKY
15 Attorneys for Plaintiff Kristine Kaestner
16 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 Kristine Kaestner (“Plaintiff” or
6 “Kaestner”), individually and on behalf of all others similarly situated, and Defendants My Journey
7 Transport and Journey Via Gurney, LLC (together, “Defendants”).

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 \$315,000 to a settlement class of
14 approximately 200 Class Members, yielding gross payments of nearly \$1,600 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 Kristine Kaestner as
21 Class Representative; (d) approve the appointment of Gaines & Gaines, APLC as Class Counsel;
22 (e) 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 Second Amended Complaint.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On November 9, 2022, Plaintiff Kaestner exhausted the pre-filing requirements of the Labor
27 Code Private Attorneys General Act of 2004 (“PAGA”). On November 18, 2022, Plaintiff Kaestner
28 initiated her Action in the Sacramento County Superior Court by filing a class action complaint.

1 On February 15, 2023, Plaintiff filed a First Amended Complaint that added a cause of action
2 pursuant to PAGA. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

3 As set forth in the proposed Second Amended Complaint (attached to the Settlement as
4 **Exhibit 3**), which the Parties seek to file in the Action as part of this motion for preliminary
5 approval, the Action asserts claims against Defendants for (1) failure to pay all minimum and
6 overtime wages due (Labor Code §§ 221, 225.5, 510, 1194, 1194.2, 1197, 1197.1, 1198, and 1199);
7 (2) failure to provide rest periods or compensation in lieu thereof (Labor Code §§ 226.2 and 226.7
8 and IWC Wage Order 9-2001); (3) failure to provide meal periods or compensation in lieu thereof
9 (Labor Code §§ 226.7, 510, 512, and 1194 and IWC Wage Order 9-2001); (4) knowing and
10 intentional failure to comply with itemized employee wage statement provisions (Labor Code §§
11 226(a), (e), and (h)); (5) failure to maintain required records (Labor Code §§ 226, 1174, and 1174.5);
12 (6) failure to timely pay wages due at the separation of employment (Labor Code §§ 201-204 and
13 210); (7) violation of Business and Professions Code § 17200 for underlying violations of the Labor
14 Code as set forth in the Action; and (8) civil penalties pursuant to PAGA for underlying violations
15 of the Labor Code as set forth in the Action. Gaines Decl. at ¶ 7.

16 Defendants deny any liability or wrongdoing of any kind associated with the claims alleged
17 in the Action and LWDA Letter, and further deny that the Action is appropriate for class treatment
18 for any purpose other than this settlement. Defendants contend that they have complied at all times
19 with the California Labor Code, Industrial Welfare Commission Wage Orders, and all other
20 applicable federal, state and local laws and regulations. It is Defendants’ position that, if this case
21 were to be litigated, class certification would be inappropriate because Plaintiff is not an adequate
22 Class Representative, Plaintiff’s claims are not typical of putative class members, and individual
23 issues predominate over class issues, among other defenses. The Action, the negotiation and
24 execution of this Settlement Agreement, and all acts performed or documents executed pursuant to
25 or in furtherance of this Settlement Agreement (i) shall not be used as an admission, or as evidence
26 of wrongdoing by the Defendants, or for any other purpose whatsoever; (ii) shall not be an
27 admission or evidence of fault on behalf of Defendants in any action before a civil court, criminal
28 court, administrative agency of any type, or other tribunal; and (iii) shall not be deemed to be, and

1 may not be used as, an admission or evidence of the appropriateness of these or similar claims for
2 class certification in the Action or with respect to any other proceeding whatsoever. Gaines Decl.
3 at ¶ 8.

4 The Class Representative contends that Defendants violated the California Labor Code and
5 Industrial Welfare Commission Wage Order(s), and that this case is appropriate for class
6 certification. Gaines Decl. at ¶ 9.

7 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

15 On August 21, 2023, following their exchange of information and documents regarding the
16 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
17 length negotiations with the assistance of an experienced wage and hour mediator, Gig Kyriacou,
18 Esq., where the Parties were able to reach the resolution of the Action set forth herein. Gaines
19 Decl. at ¶ 11.

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 Defendants. Defendants and their counsel also agree (and will so represent to the Court) that this
26 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 12.

27 The Parties agree that the Settlement Class described herein may be certified for settlement
28 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement

Class is for purposes of the settlement only. If for any reason the settlement is not approved, the certification will have no force or effect and will immediately be revoked. The Parties further agree that certification for purposes of the settlement is in no way an admission that class certification is proper under the more stringent standard applied for litigation and that evidence of this limited Settlement Agreement for settlement purposes only will not be admissible for any purpose in this or any other proceeding. Gaines Decl. at ¶ 13.

IV. LEGAL ANALYSIS

A. The Proposed Settlement Terms

1. The Settlement Class

The Parties have agreed to a settlement class composed of all persons who are or were previously employed by Defendants in a non-exempt position in the State of California between November 18, 2018 and November 8, 2023. Stip. at ¶ A(4).

The Aggrieved Employees are defined as all persons who are or were previously employed by Defendants in a non-exempt position in the State of California between November 9, 2021 and November 8, 2023. Stip. at ¶ A(5).

2. Allocations to be Paid from the Maximum Settlement Amount

The Parties agree to settle the Action for a Gross Settlement Amount of \$315,000 (“the Gross Settlement Amount”).¹ The Gross Settlement Amount includes the attorneys’ fees of Class Counsel; litigation costs and expenses (which includes, without limitation, all such fees and costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement, providing any notices required as part of the settlement, securing Court approval of the settlement, and obtaining judgment in the Action); the Enhancement Payment to the Class Representative, as approved by the Court; the payment to the California Labor and Workforce Development Agency (“LWDA”); and all costs of administration, including, without limitation,

¹ Defendants represent that there are 13,119 workweeks worked by Class Members through the date of mediation (August 21, 2023). Should the number of workweeks increase by more than 10% through the conclusion of the Class Period, this will increase the Gross Settlement Amount proportionally over the 10% increase. For example, if the number of workweeks increase by 11% through the last day of the Class Period, the Gross Settlement Amount shall increase by 1%. Alternatively, Defendants may elect to end the Class Period and PAGA Period as of the date that the number of class workweeks reaches but does not exceed 10%. Stip. at ¶ H(17).

1 settlement administration fees and expenses. All employer payroll tax obligations due on wage
2 payments made from the Net Settlement Proceeds shall be paid by Defendants separately and
3 apart from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

4 From the Gross Settlement Amount, Defendants will not oppose Plaintiff's counsel's
5 application to the Court for up to one-third of the Gross Settlement Amount for attorneys' fees
6 (projected to be \$105,000). Stip. at ¶ C(1)(g).

7 From the Gross Settlement Amount, Defendants will not oppose Plaintiff's counsel's
8 application to the Court for up to \$18,000 in reimbursement of litigation costs and expenses. Stip.
9 at ¶ C(1)(h).

10 From the Gross Settlement Amount, Defendants will not oppose Plaintiff's counsel's
11 application to the Court for an Enhancement Payment to Plaintiff Kristine Kaestner in the gross
12 amount of up to \$5,000, in consideration for her efforts in instituting and participating in the
13 Action.² Stip. at ¶ C(1)(f).

14 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
15 Settlement Administrators will be no more than \$7,500. Stip. at ¶ C(1)(i).

16 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
17 claims for penalties under the PAGA is \$40,000 ("PAGA Payment"), 75% (\$30,000) shall be paid
18 directly to the LWDA and 25% (\$10,000) shall be paid to Aggrieved Employees as part of the Net
19 Settlement Proceeds. Stip. at ¶ C(1)(e).

20 The Net Settlement Proceeds is defined as the Gross Settlement Amount less the amounts
21 approved and awarded by the Court for: attorneys' fees and documented litigation costs and
22 expenses incurred or advanced by Class Counsel; the Enhancement Payment to the Class
23 Representative; the payment to the LWDA pursuant to PAGA; 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 Proceeds

26
27 ² Through a separate agreement, Ms. Kaestner agreed to sever her employment with Defendants,
28 effective as of the mediation date, and to release all claims against Defendants. Defendants are
separately compensating Ms. Kaestner for this release and severance so that she can survive
financially until she once again obtains employment. Gaines Decl. at ¶ 29.

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

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

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

25 Pursuant to PAGA, the Parties have agreed that \$40,000 of the Gross Settlement Amount
26 will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to Labor
27 Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as follows:
28 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved

employees.” As such, 75% of the apportioned PAGA settlement amount – or \$30,000 – shall be paid directly to the LWDA, and 25%, i.e., \$10,000, shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(e).

B. Two-Step Approval Process

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

Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly 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.

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

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

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

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

5 *Id.* at § 11.24.

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

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

9 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
10 approval stage, request that the court provisionally approve certification of the class – conditioned
11 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
12 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
13 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
14 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
15 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478⁴ (“many courts have employed this practice in the
16 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

17 The strength of the findings made by a judge at a preliminary hearing
18 or conference concerning a tentative settlement proposal . . . may be
19 set out in conditional orders granting tentative approval to the various
20 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.

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

22 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
23 Stipulation to the Court, her counsel is transmitting it, together with this Motion, to the LWDA.
24 Gaines Decl. at ¶ ____.

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

26 It is well established that trial courts should use a lower standard for determining the

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

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

a. **The Settlement Class is Ascertainable**

The proposed Settlement Class is ascertainable. The class definition, the size of the Class, and the means for identifying the members of the class determine whether the class is ascertainable. *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members are identifiable from Defendants' employment and payroll records. Further, the Settlement Class is sufficiently numerous to warrant certification. According to Defendants' records, the Class comprises approximately 200 members. Gaines Decl. ¶ 26.

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

The Class Members' claims all stem from a common source: members of the Settlement Class allege that Defendants violated the same Labor Code provisions in connection with their employment in non-exempt positions. All members of the Class seek the same relief under the same California laws (related to unpaid wages, unpaid meal and rest period premiums, inaccurate or incomplete wage statements, failure to timely pay wages due upon separation, and derivative claims). Under these circumstances, the commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 27.

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

A class representative's claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class, and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed Class Representative Kristine Kaestner is a former non-exempt employee who worked for Defendants in the State of California during the Class Period. She contends that Defendants failed

1 to pay all wages, failed to provide meal and rest periods, failed to comply with itemized employee
2 wage statement provisions, and failed to timely pay wages at the separation of employment, in
3 violation of Labor Code §§ 201-204, 210, 221, 225.5, 226, 226.2, 226.7, 510, 512, 1174, 1174.5,
4 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2698, and 2699, among other Labor Code provisions. She
5 has the same claims as those that the members of the Settlement Class would reasonably be
6 expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 28.

7 Plaintiff has also demonstrated that she will aggressively and competently assert the
8 interests of the proposed Settlement Class; she has taken an active role in the litigation and has no
9 apparent conflicts with other class members. Gaines Decl. ¶ 29. Furthermore, Plaintiff has retained
10 competent counsel, experienced in litigating class action claims in the employment context. *See*
11 Gaines Decl. ¶¶ 2-5.

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

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

24 While the recommendations of counsel proposing the settlement are not conclusive, the
25 Court can properly take them into account, particularly where, as here, such counsel have been
26 involved in informal discovery and negotiations for some period of time, appear to be competent,
27 have experience with this type of litigation, and have exchanged substantial evidence with the
28 opposing party. *See Newberg on Class Actions*, *supra*, § 11.47; *In re Paine Webber Ltd. P'ships*

1 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
2 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
3 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
4 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
5 Decl. ¶¶ 2-5, 10-11.

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

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

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

23 Plaintiff contends that Defendants failed to pay Class Members all wages due for work
24 performed while on-call for Defendants, in violation of Labor Code §§ 510 and 1194 and IWC
25 Wage Order 9-2001. Plaintiff contends that Defendants have an unlawful on-call policy that
26 requires Class Members to be on call for twelve hours (from 6:00 a.m. to 6:00 p.m. or vice versa):
27 if they were not called into work, they were paid for two hours, and if they were called into work,
28 they were only paid for the time spent working, notwithstanding the fact they were allegedly subject

1 to Defendants' control during this on-call time. Courts have identified various factors bearing on
2 an employer's control during on-call time: (1) whether there was an on-premises living
3 requirement; (2) whether there were excessive geographical restrictions on employee's movements;
4 (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response
5 was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities;
6 (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually
7 engaged in personal activities during call-in time." See *Mendiola v. CPS Security Solutions, Inc.*
8 (2015) 60 Cal.4th 833, 841 (internal quotations and citations omitted). No single factor is
9 dispositive. Additionally, the determination is often factually intensive. An employer is obligated
10 to pay the wages of an hourly employee for all time that the employee is under the control of the
11 employer, and this includes all the time the employee is suffered or permitted to work, whether or
12 not required to do so. Plaintiff contends that when Class Members were on-call, they were arguably
13 under the control of Defendants and required to be compensated for all hours worked, but that
14 Defendants failed to do this, in violation of Labor Code §§ 510, 1194, and 1194.2 and IWC Wage
15 Order 9-2001. Defendants maintained steadfastly that they did not exert sufficient control over
16 Class Members such that no compensation was due for on-call time; that employees were overpaid
17 based on pay issued for on-call time, and that this claim could never be certified because
18 discrepancies between Class Members would render the claims individualized and unmanageable.
19 The maximum realistic recovery on this claim is estimated to be \$75,889, but it required a discount
20 for settlement based on the risks noted above. Gaines Decl. ¶ 16.

21 Defendants allegedly failed to permit or authorize Class Members to take timely 30-minute
22 meal periods for shifts greater than 5 hours in length, in violation of Labor Code §§ 226.7, 512, 558
23 and IWC Wage Order 9-2001. Labor Code § 512 provides that employers (like Defendants) may
24 not employ an employee for a work period of more than 5 hours without providing a 30-minute
25 meal period starting no later than the end of the 5th hour. Although Defendants' written meal period
26 policies appear to be compliant, Plaintiff contends that their practices significantly deviate;
27 specifically, that when Class Members did receive a meal period, it was typically late, short,
28 interrupted, or they would have to clock out and continue working, which also deprived them of all

1 wages due since they were not paid for all hours worked. Plaintiff argued that Defendants'
2 transportation scheduling does not provide for sufficient time for Plaintiff and Class Members to
3 take their timely, legally compliant meal period such that they will clock out for their meal period,
4 but continue driving so they can make their next transport timely, in violation of Labor Code §§
5 226.7, 510, 512, 1194 and IWC Wage Order 9-2001. Plaintiff contends that time and wage data
6 produced by Defendants in advance of mediation demonstrated a 16.9% facial meal period violation
7 rate, yielding maximum damages of \$41,347 (net of meal premiums paid). Risks of litigation favor
8 the compromise reached to resolve this claim at this juncture of litigation, including the risk
9 Defendants would prevail on their waiver argument and the risk of a denial of class certification.
10 Gaines Decl. ¶ 17.

11 Defendants allegedly failed to provide Class Members with legally compliant rest periods,
12 or premium wages of one hour's pay in lieu thereof, as required by Labor Code § 226.7 and Wage
13 Order 9-2001. As with rest periods, although Defendants' rest break policies appear to be
14 compliant, Plaintiff contends that their practices significantly deviate. Labor Code § 226.7(b)
15 mandates: "(b) An employer shall not require an employee to work during a meal or rest or recovery
16 period mandated pursuant to an applicable statute, or applicable regulation, standard, *or order of*
17 *the Industrial Welfare Commission*, the Occupational Safety and Health Standards Board, or the
18 Division of Occupational Safety and Health." With respect to rest periods, Wage Order No. 4,
19 subdivision 12 provides: "Every employer shall authorize and permit all employees to take rest
20 periods, which insofar as practicable shall be in the middle of each work period. The authorized
21 rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net
22 rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized
23 for employees whose total daily work time is less than three and one-half (3) hours. Authorized rest
24 period time shall be counted, as hours worked, for which there shall be no deduction from wages.
25 If an employer fails to provide an employee a rest period in accordance with the applicable
26 provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's
27 regular rate of compensation for each workday that the rest period is not provided." Plaintiff argues
28 that Class Members were simply denied and not authorized to take their legally entitled rest periods

1 and were never paid premium wages for missed rest periods. Plaintiff has assumed a 100% violation
2 rate, yielding exposure of up to \$262,673. Risks of litigation required a discount for settlement at
3 this juncture, and the compromise reached is fair based on these risks. For example, Plaintiff faced
4 the significant risk of denial of class certification – a risk that would render this claim’s value at
5 zero on a class basis. Defendants consistently maintained that they provided all required rest breaks
6 and that their written policies complied with the law. Gaines Decl. ¶ 18.

7 Plaintiff argued that Class Members received deficient and inaccurate wage statements on
8 a derivative basis because Defendants allegedly underpaid all wages due, such that the wage
9 statements misstate all gross wages earned, in violation of Labor Code §§ 226(a)(1), net wages
10 earned, in violation of Labor Code §§226(a)(5), and all applicable hourly rates in effect during the
11 pay period and the corresponding number of hours worked, in violation of Labor Code §§ 226(a)(9).
12 Plaintiff assesses the maximum value of this claim at \$84,850, but a discount was required because
13 of the risk that she would not prevail on the unpaid wage claims which form the basis of this claim.
14 Gaines Decl. ¶ 19.

15 Defendants allegedly knowingly and intentionally failed to maintain records as required
16 under California Labor Code §§ 226, 1174, 1175, and IWC Wage Order No. 9-2001, § 7.
17 Defendants allegedly refused to produce Plaintiff’s requested employee file, pursuant to her written
18 request under Labor Code §§ 1198.5, 432, 226, 1174, 1175, etc., in violation of Labor Code §§
19 1174 and 1174.5. This recordkeeping requirement is alleged for Plaintiff only and had a value of
20 \$100 under PAGA. Gaines Decl. ¶ 20.

21 Defendants also allegedly failed to timely pay Plaintiff and certain Class Members all wages
22 due upon separation of employment, in violation of Labor Code §§ 201-203 (waiting time
23 penalties), on a derivative basis based on their failure to pay all wages due during employment.
24 This claim is valued at up to \$467,588 based on 132 separated employees, but also required a
25 discount for settlement purposes based on the risk inherent in prevailing on the underlying unpaid
26 wage claims which form the basis for this claim. Gaines Decl. ¶ 21.

27 Finally, Plaintiff seeks up to \$467,300 in PAGA penalties (without stacking multiple
28 violations per pay period), based on 4,673 pay periods worked during the applicable limitations

1 period. Like the waiting time penalty claim, this claim was wholly derivative on the unpaid wage
2 claims alleged and the recovery of these discretionary penalties was neither guaranteed nor certain.
3 The Court could reduce the amount of any recovery and could find that all wages were indeed paid,
4 such that their value could be significantly reduced or even zero. The compromise reached is fair
5 based on the risks of prevailing on this claim. Gaines Decl. ¶ 22.

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

9 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
10 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
11 settlement shall finally resolve all claims of the Class Members as alleged in the Actions. Gaines
12 Decl. ¶ 24.

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

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

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

22 E. **Plaintiff Should Be Permitted to File Her Second Amended Complaint**

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

28 \\\

1 To effectuate the class settlement of the Action, Defendants do not oppose the filing of the
2 Second Amended Complaint for settlement purposes only. As part of its order preliminarily
3 approving the settlement, Plaintiff requests that the Court approve the filing of the Second
4 Amended Complaint, and consent that Defendants not be required to file a responsive pleading
5 thereto. Gaines Decl. ¶ 7.

6 **V. CONCLUSION**

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

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

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

12 3. Appointing Plaintiff Kristine Kaestner as the Class Representative;

13 4. Appointing Gaines & Gaines, APLC as Class Counsel;

14 5. Approving Phoenix Settlement Administrators as Settlement Administrator;

15 6. Preliminarily approving the allocation of \$40,000 from the Gross Settlement
16 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
17 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
18 (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;

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

21 8. Permitting Plaintiff to file the Second Amended Complaint, attached to the
22 Stipulation as **Exhibit 3**, no later than ten (10) calendar days after notice of the entry of the Order
23 granting this motion has been given, and consent that Defendant not be required to file a responsive
24 pleading thereto; and,

25 9. Setting the following schedule of settlement proceedings:
26
27
28

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator a list of all Class Members and Aggrieved Employees, 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 (for Class Members) and the PAGA Period (for Aggrieved Employees) ("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 this Order)

DATED: October 27, 2023

Respectfully submitted,

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