

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
GAINES & GAINES, APLC
4550 E. Thousand Oaks Blvd., Suite 100
Westlake Village, CA 91362
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Darryl Burrows
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

DARRYL BURROWS, on behalf of
himself and all "aggrieved employees"
pursuant to Labor Code § 2698 *et seq.*,

Plaintiff,

v.

HOSPITALITY SERVICES GROUP LLC,
an Indiana limited liability company, and
DOES 1 through 10, inclusive,

Defendants.

CASE NO: 37-2023-00013910-CU-OE-CTL

Assigned to the Hon. Richard S. Whitney, Dept. C-68

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

DATE: January 24, 2025

TIME: 10:30 a.m.

DEPT.: C-68

Reservation # 3145201

Action Filed: April 4, 2023

1 **PLEASE TAKE NOTICE THAT** on January 24, 2025 at 10:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department C-68 of the above-entitled Court, located at 330 W.
3 Broadway, San Diego, California 92101, Plaintiff Darryl Burrows will and hereby does move
4 unopposed for an Order (1) preliminarily finding that the settlement between the parties falls within
5 the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3)
7 approving the appointment of Plaintiff Darryl Burrows as the Class Representative, (4) approving
8 the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
9 Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement
10 administrator, (6) preliminarily approving the allocation of \$20,000 from the Gross Settlement
11 Amount to settle Plaintiff's representative claims under the Private Attorneys General Act (Lab.
12 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce
13 Development Agency and twenty-five percent (25%) shall be paid to Aggrieved Employees as part
14 of the Net Settlement Proceeds; (7) approving as to content and form the notice to the settlement
15 class, and directing it be disseminated by the Settlement Administrator; (8) permitting Plaintiff to
16 file a First Amended Complaint, and (9) setting a final fairness and approval hearing.

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

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

24 ///

25 ///

26 ///

27 ///

28 ///

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

5
6 DATED: June 24, 2024

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Darryl Burrows and Proposed
Class Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY	1
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....	3
IV. LEGAL ANALYSIS.....	4
A. The Proposed Settlement Terms	4
1. The Settlement Class.....	4
2. Allocations to be Paid from the Gross Settlement Amount	4
3. Settlement of Claims Pursuant to Labor Code § 2698 et seq. (PAGA)	6
B. Two-Step Approval Process.....	6
C. Procedures for Settlement Before Class Certification	8
1. The Settlement Class Should Be Certified for Settlement Purposes	8
a. The Settlement Class is Ascertainable	9
b. Questions of Law or Fact Common to Members of the Settlement Class Predominate.....	9
c. The Proposed Class Representative’s Claims are Typical of the Class Members’ Claims	9
D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	10
1. The Settlement Falls Within The “Ballpark” of Reasonableness	11
2. Despite the Asserted Fairness of the Settlement Terms, Class Members May Request Exclusion From, Or Object To, The Settlement.....	13
E. Plaintiff Should Be Permitted to File His First Amended Complaint.....	14
V. CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

<i>Amchem Products, Inc. v. Windsor</i> (1987) 521 U.S. 591	8
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785	11
<i>Classen v. Weller</i> (1983) 145 Cal. App. 3d 27.....	9
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794	8
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	7
<i>Hammon v. Barry</i> (D.D.C. 1990) 752 F. Supp. 1087	10
<i>In re Armored Car Antitrust Litig.</i> (N.D. Ga. 1979) 472 F. Supp. 1357	10
<i>In re Baldwin-United Corp.</i> (S.D.N.Y. 1984) 105 F.R.D. 475	8
<i>In re Chicken Antitrust Litig.</i> (N.D. Ga. 1980) 560 F. Supp. 957	10
<i>In re Paine Webber Ltd. P'ships Litig.</i> (S.D.N.Y. 1997) 171 F.R.D. 104	10
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	11
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7th Cir. 1987) 834 F.2d 677.....	10
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> (C.D. Cal. 2004) 221 F.R.D. 523	10
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438.....	10
<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263.....	9

TABLE OF AUTHORITIES

(continued)

Page

<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> (E.D. Pa. 1978).....	10
<i>Steinberg v. Carey</i> (S.D.N.Y. 1979) 470 F. Supp. 471.....	9
<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800	7
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224	7, 8

STATUTES

Cal. Labor Code §§ 201-203.....	2, 9, 13
Cal. Labor Code § 226	2, 9, 12
Cal. Labor Code § 226.3	9
Cal. Labor Code § 226.7	2, 9, 11
Cal. Labor Code § 510	12
Cal. Labor Code § 512	2, 9, 11
Cal. Labor Code § 558	9, 11
Cal. Labor Code § 1174	2, 9, 12
Cal. Labor Code § 1174.5	2, 9, 12
Cal. Labor Code § 1194	12
Cal. Labor Code § 1194.2	12
Cal. Labor Code § 1198	2, 9, 12
Cal. Labor Code § 2698	6, 9
Cal. Labor Code § 2699	6, 8, 9

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	6, 7, 8
Fed. R. Civ. P. 23(e).....	7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	7
Manual for Complex Litigation (Third) § 30.41	7

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 review
5 and approval. The Settlement is made and entered into by and between Plaintiff Darryl Burrows
6 (“Burrows” or “Plaintiff”), individually and on behalf of all others similarly situated, and Defendant
7 Hospitality Services Group LLC (“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. The
12 proposed settlement provides for a non-revisionary class settlement in the gross amount of
13 \$340,000 to a settlement class of approximately 209 Class Members who worked approximately
14 2,607 workweeks during the applicable time frame, yielding gross payments of approximately
15 **\$1,627 per employee**. As detailed below, the settlement is in the best interests of the class in light
16 of all of the facts and circumstances 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 Darryl Burrows as the
21 Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
22 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
23 Administrator; (f) permit the filing of a First Amended Complaint; (g) authorize the mailing of the
24 proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On January 23, 2023, Plaintiff Darryl Burrows exhausted the pre-filing requirements of the
27 Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines
28 (“Gaines Decl.”) at ¶ 6.

1 On April 4, 2023, Plaintiff Burrows initiated his Action in the San Diego County Superior
2 Court by filing a complaint, pursuant to PAGA, on behalf of himself and all other aggrieved
3 employees. Gaines Decl. at ¶ 7.

4 As set forth in the First Amended Complaint, in the form attached to the Settlement
5 Agreement as Exhibit 3 which the Parties seek to file through this motion, the Action asserts class
6 action claims against Defendant for (1) failure to provide compliant meal periods or correct
7 compensation in lieu thereof (Labor Code §§ 226.7, 512, 1174, 1174.5 and 1198; IWC Wage Order
8 4-2001); (2) failure to provide compliant rest periods or correct compensation in lieu thereof (Labor
9 Code § 226.7; IWC Wage Order 4-2001); (3) failure to comply with itemized employee wage
10 statement provisions (Labor Code § 226(a), (e)); (4) failure to timely pay wages due at the
11 separation of employment (Labor Code §§ 201-203); (5) violation of Business and Professions
12 Code § 17200 for underlying violations of the Labor Code as set forth in the Action; and (6) civil
13 penalties pursuant to PAGA for underlying violations of the Labor Code as set forth in the Action.
14 Gaines Decl. at ¶ 8.

15 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
16 in the Action, and further denies that the Action are appropriate for class treatment for any purpose
17 other than the settlement. Defendant contends that it has complied at all times with the California
18 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification would
19 be inappropriate because Plaintiff is not an adequate Class Representative, Plaintiff's claims are
20 not typical of putative class members, and individual issues predominate over class issues, among
21 other defenses. The Action, the negotiation and execution of the Settlement Agreement, and all
22 acts performed or documents executed pursuant to or in furtherance of this Settlement Agreement
23 (i) shall not be used as an admission, or as evidence of wrongdoing by the Defendant, or for any
24 other purpose whatsoever; (ii) shall not be an admission or evidence of fault on behalf of Defendant
25 in any action before a civil court, criminal court, administrative agency of any type, or other
26 tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
27 the appropriateness of these or similar claims for class certification in the Action or with respect to
28 any other proceeding whatsoever. Gaines Decl. at ¶ 9.

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

4 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

12 On November 20, 2023 and again on March 18, 2024, following their exchange of
13 information and documents regarding the Settlement Class and the claims and defenses asserted by
14 the Parties, the Parties engaged in arm's-length negotiations with the assistance of an experienced
15 wage and hour mediator, Hon. Francisco Firmat (Retired), where the Parties were able to reach a
16 resolution of the Action. Gaines Decl. at ¶ 12.

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

24 The Parties agree that the Settlement Class described herein may be certified for settlement
25 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
26 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the
27 certification will have no force or effect and will immediately be revoked. The Parties further agree
28 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 ¶ 14.

IV. LEGAL ANALYSIS

A. The Proposed Settlement Terms

1. The Settlement Class

The Parties have agreed to a settlement class composed of all non-exempt employees of Defendant Hospitality Services Group LLC in California at any time between April 4, 2019 and March 18, 2024. Stip. at ¶ A(4).

The “Aggrieved Employees” encompassed by the PAGA release are all non-exempt employees of Defendant Hospitality Services Group LLC in California at any time between January 23, 2022, and March 18, 2024. Stip. at ¶ A(6).

2. Allocations to be Paid from the Gross Settlement Amount

The Parties agree to settle the Action for a Gross Settlement Amount of Three Hundred Forty Thousand Dollars (\$340,000) (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 Service 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, settlement administration fees and expenses. All employer payroll tax obligations due on wage payments made from the Net Settlement Proceeds shall be paid by Defendant separately and apart from, and in addition to, the Gross Settlement Amount. Stip. at ¶ C(1)(a).

¹ Defendant has represented that Class Members worked no more than 2607 workweeks during the Class Period. Should this number increase, the Gross Settlement Amount will increase proportionately. For example, if there are 2868 workweeks (a 10% increase), the Gross Settlement Amount shall increase by 10%. See Stip. at ¶ H(16).

1 From the Gross Settlement Amount, Plaintiff will request an award of attorneys' fees not to
2 exceed 35% of the Gross Settlement Amount (i.e., \$119,000). Stip. at ¶ C(1)(g).

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

6 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
7 application to the Court for a Service Payment to the Class Representative in the gross amount of
8 \$1,000, in consideration for his efforts in instituting and participating in the Action.² Stip. at ¶
9 C(1)(f).

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

12 The Parties have agreed that Twenty Thousand Dollars (\$20,000) of the Gross Settlement
13 Amount shall be allocated to the resolution of any and all Aggrieved Employees' and the State of
14 California's claims arising under PAGA. Pursuant to PAGA, Seventy-Five Percent (75%), or
15 Fifteen Thousand Dollars (\$15,000) shall be paid to the LWDA, and twenty-five percent (25%), or
16 Five Thousand Dollars (\$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: attorneys' fees and documented litigation costs and
20 expenses incurred or advanced by Class Counsel; the Service Payment 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
28 ² The Parties have entered into a separate agreement providing for the full and complete release of
Plaintiff's individual claims against Defendant for a confidential sum.

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

12 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
13 (a) 10% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
14 90% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
15 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
16 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
17 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
18 mandated treatment as required by law. Stip. at ¶ C(1)(d).

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

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

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

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

1 3.769; Fed. R. Civ. P. 23(e).³ 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.

Here, the Parties have reached such an agreement and have submitted the Stipulation

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.

herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 12.

C. Procedures for Settlement Before Class Certification.

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

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

4 Newberg on Class Actions, at § 11.26.

As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA. Gaines Decl. at ¶ 31.

1. The Settlement Class Should Be Certified for Settlement Purposes

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

⁴ 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 209 employees who were employed during the Class Period. Gaines
8 Decl. ¶ 27.

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
13 employment. All members of the Class seek the same relief under the same California laws (related
14 to meal and rest period premiums, inaccurate or incomplete wage statements, failure to timely pay
15 wages due upon separation, and derivative claims). Under these circumstances, the commonality
16 requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes.
17 Gaines Decl. ¶ 28.

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

20 A class representative's claims are typical when they arise from the same event or course
21 of conduct that gives rise to the claims of the class and are based on the same legal theory.
22 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
23 Class Representative Darryl Burrows is a former non-exempt employee who worked for Defendant
24 in the State of California during the Class Period. He contends that Defendant failed to provide
25 meal and rest periods, failed to comply with itemized employee wage statement provisions, and
26 failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201,
27 202, 203, 226(a), 226.3, 226.7, 512, 558, 1174, 1174.5, 1198, 2698, and 2699. He has the same
28 claims as those that the members of the Settlement Class would reasonably be expected to bring

1 based on the course of conduct alleged herein. Gaines Decl. ¶ 29.

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 this litigation and has no apparent
4 conflicts with other class members. Gaines Decl. ¶ 30. Furthermore, Plaintiff has retained
5 competent counsel, experienced in litigating wage and hour class action claims in state and federal
6 courts. See 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, 11-14.

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 all Parties conducted an
3 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, at formal mediations with the assistance of one of a highly regarded mediator,
6 and through lengthy negotiations, of their respective factual contentions, legal theories and
7 defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*
8 *Gaines Decl.* ¶¶ 2-5, 11-14.

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

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

19 Plaintiff contends that Defendant failed to provide Class Members with legally compliant
20 rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor Code §§
21 226.7 and IWC Wage Order 4-2001. Defendant allegedly maintained two separate unlawful written
22 meal and rest period policies for 2022 and 2023, with no written policies prior thereto. Plaintiff
23 contends that he rarely was able to take a rest period due to the busy nature of his job and the lack
24 of a policy providing rest periods. Plaintiff calculates Defendant's rest period damages at \$306,397
25 and PAGA civil penalty liability for this claim of up to \$344,600. *Gaines Decl.* ¶ 16.

26 Plaintiff further argues that Defendant failed to permit or authorize Class Members to take
27 timely 30-minute meal periods for shifts greater than 5 hours in length, in violation of Labor Code
28 §§ 226.7, 512, and 558 and IWC Wage Order 4-2001. Labor Code § 512 provides that employers

1 may not employ employees for work periods of more than five (5) hours without providing a 30-
2 minute meal period starting no later than the end of the 5th hour. Class Members were routinely
3 unable to take a proper meal period when they worked shifts in excess of five (5) hours in duration
4 and a second meal period when they worked shifts in excess of ten (10) hours in duration.
5 Additionally, Plaintiff alleges that Defendant does not maintain accurate records indicating the start
6 and end time of each meal period, if one ever occurred, in violation of Labor Code §§ 1174, 1174.5,
7 and 1198 and IWC Wage Order 4-2001. Gaines Decl. ¶ 17.

8 The basis for Plaintiff's meal period claim stems from deficient or non-existent written
9 policies. As with rest periods, Plaintiff contends that he was rarely permitted to take a meal period
10 due to the busy nature of his job. Plaintiff further contends that Defendant automatically deducted
11 a thirty-minute meal period from his pay, despite never receiving a meal period. This also results
12 in an underpayment of all minimum and overtime wages due, in violation of Labor Code §§ 510,
13 1194, and 1194.2. Gaines Decl. ¶ 18.

14 The wage and time data provided by Defendant through informal discovery show a meal
15 period violation rate of 97.4% and a remarkable 98.3% of all pay periods during the PAGA Period
16 exhibit some form of meal period violation. 99.4% of shifts between 10 and 12 hours had no second
17 meal period recorded. 64.5% of shifts had an automatically deducted meal break. Significant meal
18 period premiums are owed. Plaintiff calculates Defendant's meal period damages at \$300,717 and
19 PAGA civil penalty liability for this claim of \$342,900. Gaines Decl. ¶ 19.

20 Defendant also allegedly failed to issue Class Members accurately itemized wage
21 statements. Class Members were not paid all wages due, as detailed above. As a result, the wage
22 statements issued by Defendant to Class Members fail to accurately state all gross wages earned,
23 in violation of Labor Code § 226(a)(1), total hours worked, in violation of Labor Code § 226(a)(2),
24 net wages earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates in effect
25 during the pay period and the corresponding number of hours worked at each hourly rate, in
26 violation of Labor Code § 226(a)(9). Plaintiff calculates the damages for this claim at up to
27 \$305,250 in addition to \$349,000 in PAGA civil penalties. Gaines Decl. ¶ 20.

28 \\\

1 Defendant also allegedly failed to pay Class Members all wages due upon separation of
2 employment, in violation of Labor Code §§ 201-202. As Defendant failed to pay Class Members
3 all wages due during the course of employment, as discussed above, and these wages remained due
4 and owing upon separation of employment. Plaintiff calculates statutory penalties on this claim at
5 \$728,492, with PAGA civil penalty liability of up to \$15,100. Gaines Decl. ¶ 21.

6 Defendant disputes Plaintiff's claims. It contends that it authorized rest periods for all
7 employees in accordance with California laws. It maintains that its meal period practices complied
8 with the law at all times. It argues that any missed meal and rest periods were waived by employees,
9 not affirmatively denied. It believes that Plaintiff is unlikely to be awarded any penalties – PAGA
10 or otherwise - based on its good faith belief that it complied with the laws and its lack of willfulness.
11 Finally, Defendant does not believe Plaintiff will be able to obtain class certification as to any of
12 his claims due to manageability issues, among others. Gaines Decl. ¶ 22.

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

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

20 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
21 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The
22 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
23 Decl. ¶ 25.

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

26 Despite the asserted fairness of the settlement terms, any potential Class Member who
27 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
28 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member

1 would otherwise retain any claim he or she may have against Defendant.

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

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

6 In connection with the Settlement, Plaintiff shall file a First Amended Complaint, attached
7 to the Stipulation as **Exhibit 3**, which adds allegations and claims to comport with the release
8 provided for in the Stipulation. The Parties agreed that, as part of their motion for preliminary
9 approval, Plaintiff would concurrently seek leave to file the First Amended Complaint, the filing
10 of which is a condition of the Stipulation.

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

15 **V. CONCLUSION**

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

- 18 1. Preliminarily finding that the settlement falls within the range of reasonableness and
19 approving the proposed settlement;
- 20 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 21 3. Appointing Plaintiff Darryl Burrows as the Class Representative;
- 22 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
23 Class Counsel;
- 24 5. Approving Phoenix Settlement Administrators as the claims administrator and its
25 estimated fees not to exceed \$12,000;
- 26 6. Preliminarily approving the allocation of \$20,000 from the Gross Settlement
27 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
28

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

9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Claims Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period and the PAGA Period ("Settlement Class Information")	10 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Claims Administrator to mail Notice and Exclusion Form to Class Members	20 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written Exclusion Form to the Claims Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Members to submit an Objection to the Claims Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	10 calendar days before the final settlement approval hearing date
Last day for Class Counsel to file with the Court and serve declaration by Claims Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days before the final settlement approval hearing date
Final settlement approval hearing	_____, 2025, at _____.m. (approximately 90 days after entry of the Order granting this Motion)

1 DATED: June 24, 2024

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiff Darryl Burrows and Proposed Class
8 Counsel