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Attorneys for Plaintiff Eleanor Jacobs
and Proposed Class Counsel

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

ELEANOR JACOBS, on behalf of herself
and all "aggrieved employees" pursuant to
Labor Code § 2698 *et seq.*,

Plaintiff,

v.

WESTERN LIVING CONCEPTS, a
California corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: CV2300926

Assigned to the Hon. Timothy Canning, Dept. 4

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

DATE: July 29, 2024

TIME: 10:30 a.m.

DEPT.: 4

Action Filed: June 13, 2023

1 **PLEASE TAKE NOTICE THAT** on July 29, 2024 at 10:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 4 of the above-entitled Court, located at 421 I Street,
3 Eureka, California 95501, Plaintiff Eleanor Jacobs will and hereby does move unopposed for an
4 Order (1) preliminarily finding that the settlement between the parties falls within the range of
5 reasonableness and approving the proposed class action & PAGA settlement in the above-captioned
6 case, (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving
7 the appointment of Plaintiff Eleanor Jacobs as the Class Representative, (4) approving the
8 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 This Motion will be based on the accompanying Memorandum of Points and Authorities,
25 the Settlement Agreement and Release of Claims, the Declarations of Daniel F. Gaines and Eleanor
26 Jacobs, such evidence or oral argument as may be presented at the hearing, and on the complete
27 record and file herein.

1 DATED: June 25, 2024

Respectfully submitted,

2 GAINES & GAINES,
3 A Professional Law Corporation

4
5 By: 

6 DANIEL F. GAINES

7 ALEX P. KATOFISKY

8 Attorneys for Plaintiff Eleanor Jacobs and Proposed
9 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 & PAGA action and hereby submit their
4 Settlement Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the
5 Court’s review and approval. The Settlement is made and entered into by and between Plaintiff
6 Eleanor Jacobs (“Jacobs” or “Plaintiff”), individually and on behalf of all others similarly situated,
7 and Defendant Western Living Concepts (“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 \$427,500 (plus a \$20,000 PAGA settlement) to a settlement class of approximately 339 Class
14 Members who worked approximately 13,716 workweeks during the applicable time frame, yielding
15 gross payments of approximately **\$1,261.06 per employee**. As detailed below, the settlement is in
16 the best interests of the class in light of all of the facts and circumstances and the risks and delays
17 of further litigation.

18 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
19 preliminary approval of the settlement agreement and preliminarily find that the settlement falls
20 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement
21 Class, for settlement purposes only; (c) approve the appointment of Plaintiff Eleanor Jacobs as the
22 Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of
23 Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement
24 Administrator; (f) permit the filing of a First Amended Complaint; (g) authorize the mailing of the
25 proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

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II. BACKGROUND AND PROCEDURAL HISTORY

On April 5, 2023, Plaintiff Jacobs exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”) by filing a letter with the Labor and Workforce Development Agency (“LWDA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On June 13, 2023, Plaintiff Jacobs initiated her Action in the Humboldt County Superior Court by filing a complaint, pursuant to PAGA, on behalf of herself and all other aggrieved employees. Gaines Decl. at ¶ 7.

As set forth in the First Amended Complaint, in the form attached to the Settlement Agreement as Exhibit 3 which the Parties hereby seek to file, the Action asserts class and PAGA claims against Defendant for (1) failure to provide compliant rest periods or correct compensation in lieu thereof (Labor Code § 226.7; IWC Wage Order 5-2001); (2) failure to provide compliant meal periods or correct compensation in lieu thereof (Labor Code §§ 226.7, 510, 512, 1174, 1174.5 and 1194; IWC Wage Order 5-2001); (3) failure to comply with itemized employee wage statement provisions (Labor Code § 226(a), (e)); (4) failure to timely pay wages due at the separation of employment (Labor Code §§ 201-203); (5) violation of Business and Professions Code § 17200 for underlying violations of the Labor Code as set forth in the Action; and (6) civil penalties pursuant to PAGA for underlying violations of the Labor Code as set forth in the Action. Gaines Decl. at ¶ 8.

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

1 in any action before a civil court, criminal court, administrative agency of any type, or other
2 tribunal; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
3 the appropriateness of these or similar claims for class certification in the Action or with respect to
4 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 and other facts and information
12 provided by Defendant. Counsel for the Parties also represent that they have investigated the
13 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and
14 potential defenses thereto, and the damages and other losses claimed by Plaintiff. Gaines Decl. at
15 ¶ 11.

16 On April 2, 2024, following their exchange of information and documents regarding the
17 Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in arm's-
18 length negotiations with the assistance of an experienced wage and hour mediator, Brandon
19 McKelvey, Esq., where the Parties were able to reach the resolution of the Action set forth herein.
20 Gaines Decl. at ¶ 12.

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

1 The Parties agree that the Settlement Class may be certified for settlement purposes only
2 and that any motion for approval seeking, *inter alia*, certification of the Settlement Class is for
3 purposes of the settlement only. If for any reason the settlement is not approved, the certification
4 will have no force or effect and will immediately be revoked. The Parties further agree that
5 certification for purposes of the settlement is in no way an admission that class certification is
6 proper under the more stringent standard applied for litigation and that evidence of this limited
7 Settlement Agreement for settlement purposes only will not be admissible for any purpose in this
8 or any other proceeding. Gaines Decl. at ¶ 14.

9 **IV. LEGAL ANALYSIS**

10 **A. The Proposed Settlement Terms**

11 **1. The Settlement Class**

12 The Parties have agreed to a settlement class composed of all non-exempt employees of
13 Defendant Western Living Concepts in California at any time between June 13, 2019 and March
14 30, 2024 who have not entered into an arbitration agreement with Defendant. Stip. at ¶ A(4).

15 The “Aggrieved Employees” encompassed by the PAGA release are all non-exempt
16 employees of Defendant Western Living Concepts in California at any time between April 5, 2022
17 and the date the Court grants preliminary approval, or July 1, 2024, whichever occurs first. Stip. at ¶
18 A(6).

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

20 The Parties agree to settle the Action for a Gross Settlement Amount of Four Hundred
21 Forty-Seven Thousand Five Hundred Dollars (\$447,500)¹. The Gross Settlement Amount includes
22 the attorneys’ fees of Class Counsel; litigation costs and expenses (which includes, without

23 ¹ Defendant has represented that Class Members worked no more than 13,716 workweeks during
24 the Class Period and Aggrieved Employees worked no more than 6,667 pay periods during the
25 PAGA Period for a combined total of 20,383 workweeks / pay periods. Should this number
26 increase by more than 10% (i.e. be more than 22,421 workweeks / pay periods), the Gross
27 Settlement Amount will increase proportionately by the workweeks / pay periods in excess of
28 22,421. For example, if there are actually 22,625 workweeks / pay periods in the Class and PAGA
Periods (an 11% increase over the representation), then the increase to the Gross Settlement
Amount shall be equal to 1.0% (11% actual increase-10% grace) of the Gross Settlement, or \$4,475
In the alternative, Defendant shall have the option of changing the final date of the Class Period
and the PAGA Period to the last date before the combined Class Period workweeks / PAGA Period
pay periods exceeded 22,421. See Stip. at ¶ H(17).

1 limitation, all such fees and costs incurred to date, as well as such fees and costs to be incurred in
2 documenting the settlement, providing any notices required as part of the settlement, securing Court
3 approval of the settlement, and obtaining judgment in the Action); the Service and General Release
4 Payment to the Class Representative, as approved by the Court; the payment to the LWDA; and all
5 costs of administration, including, without limitation, settlement administration fees and expenses.
6 All employer payroll tax obligations due on wage payments made from the Net Settlement Proceeds
7 shall be paid by Defendant separately and apart from, and in addition to, the Gross Settlement
8 Amount. Stip. at ¶ C(1)(a).

9 From the Gross Settlement Amount, Plaintiff will request an award of attorneys' fees not to
10 exceed 35% of the Gross Settlement Amount (i.e., \$156,652). Stip. at ¶ C(1)(g).

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

14 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
15 application to the Court for a Service Payment to the Class Representative in the gross amount of
16 \$10,000, in consideration for her efforts in instituting and participating in the Action. Stip. at ¶
17 C(1)(f).

18 From the Gross Settlement Amount, settlement administration fees paid to Phoenix
19 Settlement Administrators will be no more than \$15,000. Stip. at ¶¶ C(1)(i).

20 The Parties have agreed that Twenty Thousand Dollars (\$20,000) of the Gross Settlement
21 Amount shall be allocated to the resolution of any and all Aggrieved Employees' and the State of
22 California's claims arising under PAGA. Pursuant to PAGA, Seventy-Five Percent (75%), or
23 Fifteen Thousand Dollars (\$15,000) shall be paid to the LWDA, and twenty-five percent (25%), or
24 Five Thousand Dollars (\$5,000), shall be paid to Aggrieved Employees as part of the Net
25 Settlement Proceeds. Stip. at ¶ C(1)(e).

26 The Net Settlement Proceeds is defined as the Gross Settlement Amount less the amounts
27 approved and awarded by the Court for: attorneys' fees and documented litigation costs and
28 expenses incurred or advanced by Class Counsel; the Service and General Release Payment to the

1 Class Representative; the payment to the LWDA pursuant to PAGA; and the costs of administering
2 the settlement. Stip. at ¶ C(1)(b).

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

18 For tax purposes, the class portion of each Individual Payment Amount will be apportioned
19 (a) 10% as wages (reported on an IRS Form W-2 and subject to applicable withholdings); and (b)
20 90% equally as penalties and interest (reported on an IRS Form 1099, if required). The PAGA
21 portion of each Individual Payment Amount will be apportioned 100% as penalties (reported on an
22 IRS Form 1099, if required). All Individual Payment Amounts paid to Class Members and
23 Aggrieved Employees will be subject to any applicable wage garnishments, liens, or other legally
24 mandated treatment as required by law. Class Members and Aggrieved Employees assume full
25 responsibility and liability for any employee taxes owed on their Individual Payment Amount. Stip.
26 at ¶ C(1)(d).

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

28 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Gross Settlement Amount

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

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

8 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
9 3.769; Fed. R. Civ. P. 23(e).² This is done in two steps: (1) an early (preliminary) review by the
10 trial court, and (2) a final review after notice has been distributed to the Class Members informing
11 them of the terms of the settlement and allowing them to exclude themselves from, participate in
12 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

24 Thus, the preliminary approval by the trial court is simply a conditional finding that the
25 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
26 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
27 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
28 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

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

1 (4th ed. 2002).

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

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

10 *Id.* at § 11.24.

11 Here, the Parties have reached such an agreement and have submitted the Stipulation
12 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 12.

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

14 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
15 approval stage, request that the court provisionally approve certification of the class – conditioned
16 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
17 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
18 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
19 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
20 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
21 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

22 The strength of the findings made by a judge at a preliminary hearing
23 or conference concerning a tentative settlement proposal . . . may be
24 set out in conditional orders granting tentative approval to the various
25 items submitted to the court. Three basic rulings are often
26 conditionally entered at this preliminary hearing. These conditional
27 rulings may approve a temporary settlement class, the proposed
28 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 ¶ 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 1. **The Settlement Class Should Be Certified for Settlement Purposes**

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

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

9 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
10 and the means for identifying the members of the class determine whether the class is ascertainable.
11 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
12 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
13 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
14 comprises approximately 339 employees who were employed during the Class Period. Gaines
15 Decl. ¶ 24.

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

18 The Class Members' claims all stem from a common source: members of the Settlement
19 Class allege that Defendant violated the same Labor Code provisions in connection with their
20 employment. All members of the Class seek the same relief under the same California laws (related
21 to meal and rest period premiums, inaccurate or incomplete wage statements, failure to timely pay
22 wages due upon separation, and derivative claims). Under these circumstances, the commonality
23 requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes.
24 Gaines Decl. ¶ 25.

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

27 A class representative's claims are typical when they arise from the same event or course
28 of conduct that gives rise to the claims of the class and are based on the same legal theory.

1 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
2 Class Representative Eleanor Jacobs is a former non-exempt employee who worked for Defendant
3 in the State of California during the Class Period. She contends that Defendant failed to provide
4 meal and rest periods, failed to comply with itemized employee wage statement provisions, and
5 failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201,
6 202, 203, 226(a), 226.7, 510, 512, 558, 1174, 1174.5, 1194, 2698, and 2699. She has the same
7 claims as those that the members of the Settlement Class would reasonably be expected to bring
8 based on the course of conduct alleged herein. Gaines Decl. ¶ 26.

9 Plaintiff has also demonstrated that she will aggressively and competently assert the
10 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no
11 apparent conflicts with other class members. Gaines Decl. ¶ 27. Furthermore, Plaintiff has retained
12 competent counsel, experienced in litigating wage and hour class action claims in state and federal
13 courts. See Gaines Decl. ¶¶ 2-5.

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

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

26 While the recommendations of counsel proposing the settlement are not conclusive, the
27 Court can properly take them into account, particularly where, as here, such counsel have been
28 involved in informal discovery and negotiations for some period of time, appear to be competent,

1 have experience with this type of litigation, and have exchanged substantial evidence with the
2 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
3 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
4 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
5 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
6 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
7 Decl. ¶¶ 2-5, 11-14.

8 Here, the Parties’ counsel have a great deal of experience in class action litigation and
9 specialize in employment wage and hour matters. Moreover, counsel for all Parties conducted an
10 extensive investigation of the factual allegations involved in this case. The Parties have engaged
11 in a broad exchange of documents, data, records and other information. Each side has apprised the
12 other, informally, at formal mediations with the assistance of one of a highly regarded mediator,
13 and through lengthy negotiations, of their respective factual contentions, legal theories and
14 defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*
15 Gaines Decl. ¶¶ 2-5, 11-14.

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

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

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

1 employers may not employ an employee for a work period of more than 5 hours without providing
2 a 30-minute meal period starting no later than the end of the 5th hour. Class Members and
3 Aggrieved Employees contend that they were routinely unable to take a proper meal period when
4 they worked shifts in excess of 5 hours in duration. Despite maintaining legally compliant written
5 meal period policies, Plaintiff argues that Defendant's practice was to automatically deduct a meal
6 period from its employees' wages, regardless of if they took a meal period or not. This resulted in
7 Class Members and Aggrieved Employees not being compensated for all hours worked and
8 constitutes unpaid minimum and overtime wages. Based on the documents provided by Defendant
9 informally, 88.4% of meal breaks recorded during the Class Period were exactly 30 minutes in
10 length. Overall, other than these auto-deducted meal breaks, 21.3% of shifts during the Class Period
11 had a unique meal break violation and 39.3% pay periods during the PAGA Period had at least one
12 unique meal break violation. No meal period premiums were paid. Plaintiff calculates damages on
13 this claim at \$205,129, with PAGA civil penalty liability of \$262,300. Gaines Decl. ¶ 16.

14 Class Members and Aggrieved Employees were allegedly denied, and therefore unable to
15 take, 10-minute rest periods for every four hours of work or major fraction thereof, but were not
16 paid premium wages of one hour's pay for each missed, denied and unauthorized rest period. When
17 Class Members and Aggrieved Employees were able to take a rest period, Plaintiff argues that
18 Defendant maintained a policy and practice requiring employees to remain on the company
19 premises, which she contended would violate our Supreme Court's mandate in *Augustus v. ABM*
20 *Security Services, Inc.* (2016) 5 Cal. 5th 257, 269 (holding that the rest period requirement
21 "obligates employers to permit and authorizes employees to take off-duty rest periods. That is,
22 during rest periods employers must relieve employees of all duties and relinquish control over how
23 employees spend their time."). Plaintiff calculates damages on this claim at \$1,039,433, with PAGA
24 civil penalty liability of \$667,700. Gaines Decl. ¶ 17.

25 Defendant also allegedly failed to issue Class Members and Aggrieved Employees
26 accurately itemized wage statements. Specifically, Class Members and Aggrieved Employees were
27 purportedly not paid all wages due, as detailed above. As a result, the wage statements issued by
28 Defendant to Class Members and Aggrieved Employees fail to accurately state all gross wages

1 earned, in violation of Labor Code § 226(a)(1), total hours worked, in violation of Labor Code §
2 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates
3 in effect during the pay period and the corresponding number of hours worked at each hourly rate,
4 in violation of Labor Code § 226(a)(9). Separately, the wage statements issued to Class Members
5 and Aggrieved Employees also allegedly violate Labor Code §§ 226(a)(7), (8), and (9) as the wage
6 statements improperly set forth the employees' entire social security number, fail to set forth the
7 address of the legal entity that is the employer, and fail to set forth all hourly rates in effect during
8 the pay period and the corresponding number of hours worked. There were approximately 3,063
9 paystubs issued during the PAGA Period prior July 29, 2023 that contained a non-derivative facial
10 paystub defect. Plaintiff calculates statutory penalties on this claim at \$593,800, with PAGA civil
11 penalty liability of \$667,700. Gaines Decl. ¶ 18.

12 Finally, Defendant allegedly failed to pay certain Class Members and Aggrieved Employees
13 all wages due upon separation of employment, in violation of Labor Code §§ 201-203. As
14 Defendant failed to pay them all wages due during the course of their employment, as described
15 above, these wages were due and owing upon separation of employment yet went unpaid. Plaintiff
16 calculates statutory penalties on this claim at \$921,082, with PAGA civil penalty liability of
17 \$11,800. Gaines Decl. ¶ 19.

18 Defendant strongly contends that its policies and practices do not violate any laws. It
19 contends that it properly provided for all meal and rest periods and fully compensated its employees
20 for all time worked. It argues that any meal or rest periods not taken were waived, and that these
21 claims could not be certified. It further contends that the wage statements it provides to its
22 employees are fully compliant with California law, and any defects were not willful. Gaines Decl.
23 ¶ 20.

24 When the costs and risks of non-certification and loss on the merits are considered,
25 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
26 Decl. ¶ 21.

27 The settlement for each Class Member is fair, reasonable and adequate, given the inherent
28 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The

1 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines
2 Decl. ¶ 22.

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

5 Despite the asserted fairness of the settlement terms, any potential Class Member who
6 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit
7 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member
8 would otherwise retain any claim he or she may have against Defendant.⁴

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

12 E. **Plaintiff Should Be Permitted to File Her First Amended Complaint**

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

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

22 V. **CONCLUSION**

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

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

27 _____
28 ⁴ Defendant has the discretion to withdraw from the settlement if the number of valid requests for
exclusion exceeds 10% of the total of all Class Members. Stip. at ¶ H.2.

2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiff Eleanor Jacobs as the Class Representative and approving a proposed Service Payment to her in an amount not to exceed \$10,000, to be paid from the Gross Settlement amount;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel;
5. Approving Phoenix Settlement Administrators as the claims administrator and its estimated fees not to exceed \$15,000, to be paid from the Gross Settlement amount;
6. Preliminarily approving the allocation of \$20,000 from the Gross Settlement Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be paid to Aggrieved Employees as part of the Net Settlement Proceeds;
7. Approving as to content and form the notice to the Settlement Class, and directing it to be disseminated by the Settlement Administrator;
8. Permitting Plaintiff to file her 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 and Aggrieved Employees, including their last known addresses, telephone numbers, and social security numbers ("Settlement Class Information")	14 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Claims Administrator to mail Notice to Class Members and Aggrieved Employees	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

<u>EVENT</u>	<u>TIMING</u>
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)

DATED: June 25, 2024

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: 
 DANIEL F. GAINES
 ALEX P. KATOFISKY
 Attorneys for Plaintiff Eleanor Jacobs and Proposed Class
 Counsel