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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN JOAQUIN**
12

13 BYRON HIGUERA, on behalf of himself
14 and a class of similarly situated employees,

15 Plaintiffs,

16 v.

17 INTERNATIONAL BONDED COURIERS,
INC., a Florida corporation, and DOES 1
18 through 10, inclusive,

19 Defendants.
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CASE NO: STK-CV-UOE-2020-8988

*Assigned to the Honorable George J. Abdallah,
Dept. 10A*

CLASS ACTION

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

**DATE: December 29, 2020;
December 30, 2020;
December 31, 2020;
January 5, 2021; or
January 7, 2021**

**TIME: 9:00 a.m.
DEPT.: 10A**

Action Filed: October 23, 2020

PLEASE TAKE NOTICE THAT on _____, 2020 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 10A of the above-entitled Court, located at 180 E. Weber Avenue, Stockton, California 95202, Plaintiff Byron Higuera will and hereby does move unopposed for an Order (1) preliminarily approving the proposed class action settlement in the above-captioned case, (2) provisionally certifying the settlement class, (3) provisionally approving the appointment of Plaintiff Byron Higuera as Class Representative, (4) provisionally approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel, (5) provisionally approving the appointment of Simpluris, Inc. as settlement administrator, (6) approving and directing distribution of notice to the settlement class, and (7) setting a final fairness and approval hearing.

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 the 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, such evidence or oral argument as may be presented at the hearing, and on the complete record and file herein.

DATED: November 23, 2020

GAINES & GAINES, APLC

By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFSKY

Attorneys for Plaintiff Byron Higuera and Proposed Class Counsel]

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 **A. Case Summary and Procedural History**

4 Plaintiff Byron Higuera (“Plaintiff” or “Higuera”) and Defendant International Bonded
5 Couriers, Inc. (“Defendant”) (collectively, the “Parties”) have reached a resolution of this class
6 action and hereby submit their settlement agreement to the Court for its preliminary approval.

7 On January 27, 2020 Plaintiff exhausted the pre-filing requirements of the Labor Code
8 Private Attorneys General Act of 2004, Labor Code sections 2698 *et seq.* (“PAGA”). Declaration
9 of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

10 Plaintiff’s claims were thereafter tolled based on the Judicial Council’s emergency rule 9
11 regarding the statutes of limitations for filing civil cases during the COVID-19 pandemic. Gaines
12 Decl. at ¶ 7.

13 On October 23, 2020, following extensive informal discovery and settlement negotiations,
14 Plaintiff initiated the Action by filing a Complaint as a class and representative action, pursuant to
15 California Code of Civil Code section 382 and PAGA, on behalf of himself and all other non-
16 exempt California employees. The Action asserts class and representative action claims against
17 Defendant for (1) failure to pay all wages due, including minimum wage and overtime wages
18 (Labor Code §§ 510, 1174, 1194, 1197, 1197.1, 1198 and 1198.5) (2) failure to provide rest periods
19 or compensation in lieu thereof (Labor Code § 226.7); (3) failure to provide meal periods or
20 compensation in lieu thereof (Labor Code §§ 226.7, and 512); (4) knowing and intentional failure
21 to comply with itemized employee wage statement provisions (Labor Code §§ 226); (5) failure to
22 timely pay wages due at separation of employment (Labor Code §§ 201, 202, 203); (6) failure to
23 reimburse employee business expenses (Labor Code § 2802); (7) violation of Business and
24 Professions Code § 17200, *et seq.*; and (8) penalties pursuant to Labor Code § 2698, *et seq.* for
25 violations of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512, 1174, 1194, 1197, 1197.1,
26 1198, 1198.5 and 2802 (the “Complaint”). Gaines Decl. at ¶ 8.

27 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
28 in the Action, and further denies that the Action is appropriate for class treatment for any purpose

1 other than this settlement. Defendant contends that it has complied at all times with the California
2 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification
3 would be inappropriate because Plaintiff is not an adequate class representative, Plaintiff's claims
4 are not typical of putative class members, and individual issues predominate over class issues. The
5 Action, the negotiation and execution of this Settlement Agreement, and all acts performed or
6 documents executed pursuant to or in furtherance of the Settlement Agreement (i) shall not be used
7 as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not be an admission
8 or evidence of fault on behalf of Defendant in any action before a civil, criminal, or administrative
9 agency; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of
10 the appropriateness of these or similar claims for class certification in the Action or with respect to
11 any other proceeding. Gaines Decl. at ¶ 9.

12 The Class Representative contends that Defendant violated the California Labor Code and
13 that this case is appropriate for class certification. Gaines Decl. at ¶ 10.

14 **B. Investigation and Settlement Discussions**

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

21 Based on their own independent investigation and evaluation, Class Counsel are of the
22 opinion that settlement for the consideration and on the terms set forth in this Settlement Agreement
23 is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all
24 known facts and circumstances, including the risk of significant delay, the risk the Settlement Class
25 will not be certified by the Court, and the defenses asserted by Defendant. Defendant and its counsel
26 also agree that this settlement is fair and in the best interest of the Settlement Class. Gaines Decl.
27 at ¶ 12.

28 \\\

1 The Parties agree that the Settlement Class described herein may be certified for settlement
2 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement
3 Class is for purposes of the settlement only. If for any reason the Settlement is not approved,
4 including but not limited to the Court denying final approval and/or failing to enter a final judgment,
5 the certification will have no force or effect and will immediately be revoked. The Parties further
6 agree that certification for purposes of the Settlement is in no way an admission that class
7 certification is proper under the more stringent standard applied for litigation and that evidence of
8 this limited stipulation for settlement purposes only will not be admissible for any purpose in this
9 or any other proceeding. The parties further agree that if the Settlement is not approved for any
10 reason, Defendant retains all rights previously available to it, and any provisional certification of
11 any class, or the adoption of any procedure herein, shall be undone and the Parties restored to their
12 pre-settlement status as if no settlement had been reached and no decisions were made pursuant to
13 it. In that event, nothing in this Settlement Agreement or other papers or proceedings related to the
14 Settlement shall be used as evidence or argument by any party, including any Class Members who
15 opt out, concerning whether or not the claims advanced in the Complaint may properly be
16 maintained as a class action, whether the purported class is ascertainable, or whether Class Counsel
17 or the Plaintiff can adequately represent the members of the class under applicable law. Gaines
18 Decl. at ¶ 13.

19 The parties jointly prepared the Joint Stipulation of Settlement and Release (“Settlement
20 Agreement”, “Settlement”, or “Stip.”). Gaines Decl. at ¶ 14; Exhibit B.

21 **II. LEGAL ANALYSIS**

22 **A. The Proposed Settlement Terms**

23 The Parties have agreed upon a settlement class: all current and former non-exempt
24 California employees of Defendant International Bonded Couriers, Inc. employed from January 27,
25 2016 through October 31, 2020, who have not signed class action waivers. Defendant represents
26 that this Class contains no more than 140 members. Settlement at ¶ A(4).

27 The Settlement Agreement provides that Defendant shall pay the total, non-reversionary
28 sum of \$190,000 to resolve the claims alleged in the Action on behalf of the Settlement Class (the

1 “Maximum Settlement Amount”). Stip. at ¶ C(1)(a).

2 This is a non-reversionary “all-in” settlement. No unclaimed amounts will revert to
3 Defendant. To the extent any eligible Class Members submit requests to be excluded from the
4 Settlement, the amounts that would otherwise be paid to them under the Settlement will be
5 redistributed to the other participating Class Members. There will not be a claims process; the
6 members of the Settlement Class will not be required to submit a claim to receive a settlement
7 payment.

8 The Settlement Agreement further provides that Plaintiff’s counsel may request an award
9 of attorneys’ fees not to exceed \$76,000 (i.e., 40% of the Maximum Settlement Amount) and seek
10 reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed \$5,000.
11 Stip. at ¶ C(1)(f), (g). It also provides that Plaintiff will seek, and Defendant will not oppose, a
12 service payment and general release to the named Plaintiff Byron Higuera in the amount of \$7,500.
13 Stip. at ¶ C(1)(e).

14 The Parties have agreed that Simpluris, Inc., an experienced and competent settlement
15 administration company, will administer the settlement. Up to \$6,000 has been allocated to
16 compensate Simpluris, Inc. for its work related to the administration. Stip. at ¶ C(1)(h).

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

18 Pursuant to PAGA, the Parties have agreed that \$10,000 of the Maximum Settlement
19 Amount will be allocated to settle the claims brought under Labor Code § 2699 *et. seq.* Pursuant to
20 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
21 follows: 75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
22 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
23 \$7,500 – shall be payable to the Labor and Workforce Development Agency. The remaining 25
24 percent, or \$2,500, shall be paid to Class Members who have not submitted a valid and timely
25 Request for Exclusion Form as part of the Net Settlement Proceeds. Stip. at ¶ C(1)(d).

26 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
27 Settlement Agreement to the Court, he is transmitting it, together with this Motion, to the LWDA.
28 Gaines Decl. at ¶ 33.

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

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

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

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

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

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

27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 *Id.* at § 11.24.

2 Here, the Parties have reached such an agreement and have submitted the Settlement
3 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
4 *See* Gaines Decl., Exhibit B; Gaines Decl. ¶ 14.

5 **D. Procedures for Settlement Before Class Certification.**

6 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
7 approval stage, request that the court provisionally approve certification of the class – conditioned
8 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
9 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
10 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
11 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
12 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
13 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

18 4 *Newberg on Class Actions*, at §11.26.

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

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

26 \\\n

27 _____
28 ² 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.

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 records. Further, the settlement class is sufficiently numerous to
6 warrant certification. According to Defendant's records, the Class is comprised of approximately
7 140 members. Gaines Decl. ¶ 29.

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

10 The Class Members' claims all stem from a common source: all Class Members allege that
11 Defendant violated the same Labor Code and Wage Order provisions in connection with their work
12 for Defendant. The same Labor Code and Wage Order violations are alleged on behalf of all
13 persons encompassed in the settlement class, including claims for: (1) Failure to Pay All Wages
14 Due (Labor Code §§ 510, 1174, 1194, 1197, 1197.1, 1198 and 1198.5); (2) Failure to Provide Rest
15 Periods Or Compensation In Lieu Thereof (Labor Code § 226.7; IWC Wage Order 9-2001); (3)
16 Failure to Provide Meal Periods or Compensation In Lieu Thereof (Labor Code §§ 226.7 and 512;
17 IWC Wage Order 9-2001); (4) Knowing and Intentional Failure to Comply With Itemized
18 Employee Wage Statement Provisions (Labor Code § 226(a), (e), (h)); (5) Failure to Pay Wages
19 Due at Separation of Employment (Labor Code §§ 201-203); (6) Failure to Reimburse Expenses
20 (Labor Code § 2802); (7) Violation of Business and Professions Code § 17200; (8) Penalties
21 Pursuant to Labor Code § 2699(f) for Violations of Labor Code §§ 201-202, 226(a), 226.7, 510,
22 512, 1174, 1194, 1197, 1197.1, 1198, and 2802 and Pursuant to Labor Code § 2699(a) for
23 Violations of Labor Code §§ 226.3 and 1198.5. All members of the Settlement Class seek the same
24 legal remedies under the same state laws, all related to their employment under uniform policies
25 and practices. Under these circumstances, the commonality requirement is satisfied for purposes
26 of certifying the settlement class for settlement. Gaines Decl. ¶ 30.

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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, the named Plaintiff and proposed Class Representative Byron Higuera is a former non-exempt California employee. Plaintiff alleges the same claims as those that the members of the Settlement Class would reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 31.

Plaintiff has also demonstrated that he will aggressively and competently assert the interests of the proposed Settlement Class; he has taken an active role in this litigation and has no apparent conflicts with other class members. Plaintiff participated actively in the litigation and the mediation. Gaines Decl. ¶ 32. Furthermore, Plaintiff has retained competent counsel, experienced in litigating class action claims in the employment context. *See* Gaines Decl. ¶¶ 2-5.

E. **The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion**

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

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

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, 11-13.

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

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

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

25 Prior to settlement, Plaintiff’s counsel created a comprehensive damage analysis using
26 sampling information obtained through informal discovery. This damage analysis reveals that the
27 negotiated settlement falls within a realistic range of recovery on class members’ claims. Gaines
28 Decl. ¶ 15.

1 Plaintiff alleges Defendant failed to pay all overtime wages due during the course of
2 employment, in violation of Labor Code §§ 510, 1174, 1194, 1197, 1197.1, 1198 and 1198.5. He
3 contends that Defendant failed to pay all minimum and overtime wages earned during the course
4 of employment, in violation of Labor Code §§ 510, 1174, 1194, 1197, 1197.1, 1198 and 1198.5,
5 when it rounded down the hours reflected on our client's and other Class Members' time records
6 to pay fewer hours than were actually worked. On a weekly basis, this rounding deprived our client
7 and Class Members of significant hours worked. These failures to pay all minimum and overtime
8 wages due constitute violations of Labor Code §§ 510, 1174, 1194, 1197, 1197.1, 1198 and 1198.5.
9 The maximum value of this claim is \$131,662.50, and perhaps far less based on the defenses
10 asserted by Defendant. Gaines Decl. ¶ 16.

11 Plaintiff also argues that Defendant failed to provide all legally required rest periods due to
12 its allegedly improper practices. Plaintiff contends that Defendant failed to pay premium wages to
13 him and Class Members who were denied rest periods, in violation of Labor Code § 226.7 and IWC
14 Wage Order No. 9-2001. Class Members were routinely unable to take a 10-minute rest period for
15 every four (4) hours of work or major fraction thereof, but were not paid premium wages of one
16 hour's pay for each missed rest period. Class Members were simply not authorized and unable to
17 take off-duty rest periods during their employment as their rest periods were routinely interrupted,
18 they were required to work or otherwise be under Defendant's control during their rest periods, or
19 they were not offered rest periods. This violates Labor Code § 226.7 and IWC Wage Order No. 9-
20 2001. The potential value of this claim is approximately \$263,325.00, but it was subject to multiple
21 defenses. These defenses to class certification and the merits required a discount for settlement
22 purposes. Gaines Decl. ¶ 17.

23 Plaintiff further contends that Defendant maintained illegal meal period practices. Plaintiff
24 contends that Defendant failed to pay premium wages to Class Members who were denied proper
25 meal periods, in violation of Labor Code §§ 226.7 and 512 and IWC Wage Order 9-2001. Class
26 Members were routinely denied, and not authorized to take, a proper, timely, uninterrupted, 30-
27 minute meal period for every shift worked that exceeded five hours, or a second proper, timely,
28 uninterrupted, 30-minute meal period for every shift worked that exceeded ten hours, but were not

1 paid premium wages of one hour's pay for each missed first or second meal period. When Class
2 Members did receive a meal period, it would be later he would be required to clock out for his meal
3 period and continue working, or it would be interrupted, requiring him to perform work duties while
4 he was on his meal period in violation of Labor Code §§ 226.7, 510, 512 and 1194. Plaintiff alleges
5 that Defendant never paid such premiums; as a result, the potential value of this claim is
6 approximately \$189,594.00. Defendant asserts numerous defenses to this claim based on both the
7 class certification front and on the merits, thru requiring a discount for settlement purposes. Gaines
8 Decl. ¶ 18.

9 Plaintiff further alleges that Defendant failed to reimburse all business-related expenses
10 incurred by Class Members, in violation of Labor Code § 2802. Plaintiff asserts that Class
11 Members were required to use their personal cellular phones to perform their work tasks for
12 Defendant, but were not fully reimbursed by Defendant for these expenses. This practice violates
13 Labor Code § 2802. The potential value of this claim is approximately \$15,000.00. Defendant has
14 asserted numerous defenses to this claim as regards both class certification and the merits, thus
15 requiring a discount for settlement purposes. Gaines Decl. ¶ 19.

16 Plaintiff further alleges that Defendant failed to issue accurately itemized wage statements,
17 in violation of Labor Code § 226(a), and seeks penalties as follows: statutory penalties of \$100 per
18 wage statement pursuant to Labor Code § 226(e) and civil penalties of \$100 per wage statement
19 pursuant to PAGA. Although Plaintiff could theoretically recover up to \$200 per allegedly defective
20 wage statement (one civil penalty and one statutory penalty), Plaintiff believed it highly unlikely
21 that the Court would permit a double penalty recovery based on the technical violation alleged, and
22 believed that a significant discount on the maximum value of his PAGA claims was warranted
23 based on the Court's discretionary power to reduce penalties under PAGA (*Labor Code* §
24 2699(e)(2)). Gaines Decl. at ¶ 20.

25 Indeed, one United States District Court reduced PAGA penalties by 83% for a similar wage
26 statement related PAGA claim after a bench trial on the merits. *Fleming v. Covidien Inc.*, No.
27 (OPX), 2011 WL 7563047, at *1 (C.D. Cal. Aug. 12, 2011). As to Plaintiff's derivative wage
28 statement claims, it is possible that the Court would find that Defendant substantially complied

1 with the requirements of Labor Code section 226(a) such that no penalties would be awarded. It is
2 also possible that the Court would agree with Defendant's position that its policies and practices
3 complied with the requirements of California law. In such a case, the value of most of Plaintiff's
4 derivative wage statement claims would be zero. The potential value of this claim is approximately
5 \$92,750.00. Gaines Decl. at ¶ 21.

6 Plaintiff also sought statutory penalties for waiting time (valued at \$295,200.00). It is
7 possible that, because Plaintiff would likely be required to prevail on his underlying claims for
8 unpaid wages in order to establish a waiting time claim, Plaintiff would not recover on these
9 penalties at all. As a result, Plaintiff gave them little more than nominal value for settlement
10 purposes. Gaines Decl. at ¶ 22.

11 The PAGA claims alleged by Plaintiff could be valued at over \$238,000.00. However, any
12 recovery on these claims is not certain either. PAGA claims are discretionary, such that the Court
13 could decline to award their full value. They are also derivative, so Plaintiff must prevail on his
14 underlying Labor Code claims to prevail on these claims. Finally, the Court may award far less
15 than the maximum value on these penalty claims, particularly if they approach or exceed the value
16 of the underlying wage claims. Gaines Decl. at ¶ 23.

17 A discount on the maximum value of Class members' claims was required (and warranted)
18 to resolve the matter at this stage of the litigation. Class certification is a substantial risk in any
19 class action case. Here, while Plaintiff maintains that the requirements of class certification are met,
20 Defendant proffers various arguments why class treatment is not appropriate here, including but
21 not limited to that individualized inquiries among class members predominate over common ones.
22 If Defendant was to defeat Plaintiff's class certification motion, there would be no class wide relief
23 whatsoever, and most class members would likely not file individual claims. Gaines Decl. at ¶ 24.

24 Defendant strongly contends that its policies and practices do not violate any laws. It
25 contends that it provided all required wages in a timely manner. Gaines Decl. ¶ 25.

26 When the costs and risks of non-certification and loss on the merits are considered,
27 Plaintiff's counsel are of the opinion that the settlement reached is clearly a favorable one. Gaines
28 Decl. ¶¶ 15-26.

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

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

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

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

14 **III. CONCLUSION**

15 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties
16 request that the Court:

- 17 1. Review the proposed Settlement Agreement setting forth the settlement terms.
- 18 2. Consider whether the proposed settlement preliminarily appears to be fair,
19 reasonable and adequate, and whether the proposed settlement class preliminarily appear to meet
20 the applicable certification criteria.
- 21 3. Appoint Plaintiff Byron Higuera as the Class Representative.
- 22 4. Appoint Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class
23 Counsel.
- 24 5. Approve Simpluris, Inc. as Settlement Administrator with regard to handling the
25 notice procedure as set forth more particularly in the Settlement Agreement.
- 26 6. Enter an Order provisionally approving the proposed settlement class on a non-
27 mandatory basis, approve forms to be distributed to the settlement class, direct notice to be given
28 to the settlement class, and set the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator list of all Class Members, including their last known addresses, telephone numbers, social security numbers , and their dates of employment in California during the Class Period (“Settlement Class Information”)	15 calendar days after entry of Court’s Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice and Request for Exclusion Form to Class Members	14 calendar days after Settlement Administrator’s receipt of the Settlement Class Information
Last day for Class Members to submit a written Request for Exclusion Form to Settlement 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 Settlement 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 Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice	10 calendar days prior to the final settlement approval hearing date
Final settlement approval hearing	_____, 2021, at _____. [approximately 90 calendar days after entry of this Order]

DATED: November 23, 2020

GAINES & GAINES, APLC

By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Byron Higuera
and Proposed Class Counsel