

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
EVAN S. GAINES, ESQ. SBN 287668
evan@gaineslawfirm.com
GAINES & GAINES, APLC
27200 Agoura Road, Suite 101
Calabasas, CA 91301
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Jordyn Terry
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

JORDYN TERRY, on behalf of herself and
on behalf of all similarly situated
individuals,

Plaintiff,

v.

PHYSICIANS' SURGERY CENTER OF
MODESTO, INC., a California
corporation, d/b/a RIVER SURGICAL
INSTITUTE, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: CV-21-001716

Assigned to the Honorable Stacy Speiller, Dept. 22

CLASS ACTION

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

DATE: June 3, 2022

TIME: 8:30 a.m.

DEPT.: 22

Action Filed: April 1, 2021

1 **PLEASE TAKE NOTICE THAT** on June 3, 2022 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 22 of the above-entitled Court, located at 801 10th Street,
3 4th Floor, Modesto, California 95354, Plaintiff Jordyn Terry (“Plaintiff” or “Terry”) will and
4 hereby does move unopposed for an Order (1) preliminarily finding that the settlement between the
5 parties falls within the range of reasonableness and approving the proposed class action settlement
6 in the above-captioned case, (2) conditionally certifying, for settlement purposes only, a settlement
7 class, (3) approving the appointment of Plaintiff as 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 Class Action Administration Solutions as
10 settlement administrator, (6) preliminarily approving the allocation of \$18,750 from the Gross
11 Settlement Amount to settle Plaintiff’s representative claims under the Private Attorneys General
12 Act (Lab. Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and
13 Workforce Development Agency and twenty-five percent (25%) shall be paid to the to PAGA
14 Members, (7) approving as to content and form the notice to the settlement class, and directing it
15 be disseminated by the Settlement Administrator; and (8) setting a final fairness and approval
16 hearing.

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

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

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1 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
2 the Joint Stipulation of Class Action Settlement, the Declaration of Daniel F. Gaines, such evidence
3 or oral argument as may be presented at the hearing, and on the complete record and file herein.

4
5 DATED: May 9, 2022

Respectfully submitted,

6 GAINES & GAINES,
7 A Professional Law Corporation

8
9 By: Alex P. Katofsky
10 DANIEL F. GAINES
11 ALEX P. KATOFISKY
12 Attorneys for Plaintiff Jordyn Terry and Proposed Class
13 Counsel
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY	2
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 § 2699 et seq. (PAGA)	5
B. Two-Step Approval Process.....	5
C. Procedures for Settlement Before Class Certification	6
1. The Settlement Class Should Be Certified for Settlement Purposes	7
a. The Settlement Class is Ascertainable	7
b. Questions of Law or Fact Common to Members of the Settlement Class Predominate.....	8
c. The Proposed Class Representative’s Claims are Typical of the Class Members’ Claims	8
D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion	9
1. The Settlement Falls Within The “Ballpark” of Reasonableness	10
2. Despite the Asserted Fairness of the Settlement Terms, Class Members May Request Exclusion From, Or Object To, The Settlement.....	13
V. CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

<i>Amchem Products, Inc. v. Windsor</i> (1987) 521 U.S. 591	7
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785	10
<i>Classen v. Weller</i> (1983) 145 Cal. App. 3d 27.....	8
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794	1, 7
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	5
<i>Hammon v. Barry</i> (D.D.C. 1990) 752 F. Supp. 1087	9
<i>In re Armored Car Antitrust Litig.</i> (N.D. Ga. 1979) 472 F. Supp. 1357	9
<i>In re Baldwin-United Corp.</i> (S.D.N.Y. 1984) 105 F.R.D. 475	7
<i>In re Chicken Antitrust Litig.</i> (N.D. Ga. 1980) 560 F. Supp. 957	9
<i>In re Paine Webber Ltd. P'ships Litig.</i> (S.D.N.Y. 1997) 171 F.R.D. 104	9
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	10
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> (7th Cir. 1987) 834 F.2d 677.....	9
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> (C.D. Cal. 2004) 221 F.R.D. 523	9
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438.....	9
<i>Reyes v. Board of Supervisors</i> (1987) 196 Cal. App. 3d 1263.....	7

TABLE OF AUTHORITIES
(continued)

Page

<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> (E.D. Pa. 1978).....	9
<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	5
<i>Wershba v. Apple Computer</i> (2001) 91 Cal.App.4th 224	6, 7

STATUTES

Cal. Bus. & Prof. Code § 17200	2
Cal. Labor Code §§ 201-203.....	8
Cal. Labor Code § 226	8
Cal. Labor Code § 226.3	8
Cal. Labor Code § 226.7	8, 11
Cal. Labor Code § 510	11
Cal. Labor Code § 512	8
Cal. Labor Code § 558	8
Cal. Labor Code § 1194	11
Cal. Labor Code § 2698	1, 8
Cal. Labor Code § 2699	5, 7, 8

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	5, 6
Fed. R. Civ. P. 23(e).....	5

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	5, 6
Manual for Complex Litigation (Third) § 30.41	6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Joint
4 Stipulation of Class Action Settlement (“Settlement”, “Stipulation” or “Stip.”) for the Court’s
5 approval. The Settlement is made and entered into by and between Plaintiff Jordyn Terry
6 (“Plaintiff” or “Terry”), individually and on behalf of all others similarly situated, and Defendant
7 Physicians’ Surgery Center of Modesto, Inc. (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*
12 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides
13 for a non-revisionary class settlement in the gross amount of \$187,500 to a settlement class of
14 approximately 31 members and 47 PAGA members¹. As detailed below, the settlement is in the
15 best interests of the class in light of all of the facts and circumstances and the risks and delays of
16 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 Jordyn Terry as Class
21 Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines
22 & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement Administrator; (f)
23 authorize the mailing of the proposed class action notice packet; and (g) schedule a final fairness
24 and approval hearing.

25
26
27 ¹ Although the Class Period is longer than the PAGA Period, the Class excludes employees who
28 signed an arbitration agreement with a class action waiver and/or a prior release agreement with
Defendant, whereas PAGA Members are not so limited, such that some PAGA Members are not
Class Members.

II. BACKGROUND AND PROCEDURAL HISTORY

On December 17, 2020, Plaintiff exhausted the pre-filing requirements of the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

On or about April 1, 2021, Plaintiff initiated the Action by filing a Class and Representative Action Complaint, on behalf of herself and on behalf of all similarly situated individuals (the “Complaint”). In her Complaint, Plaintiff alleged the following causes of action: (1) failure to provide rest periods, (2) failure to provide meal periods, (3) failure to provide lawful itemized wage statements, (4) failure to pay wages due at separation of employment, (5) violation of California Business & Professions Code section 17200, and (6) civil penalties under the PAGA. Gaines Decl. at ¶ 7.

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, Industrial Welfare Commission Wage Orders, and all other applicable federal, state, and local laws and regulations. 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. The Action, the negotiation and execution of the Settlement Agreement, and all acts performed or documents executed pursuant to or in furtherance of the Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not be an admission or evidence of fault on behalf of Defendant in any action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of the appropriateness of these or similar claims for class certification in the Action or with respect to any other proceeding. Gaines Decl. at ¶ 8.

The Class Representative contends that Defendant violated the California Labor Code and Industrial Welfare Commission Wage Orders, and that this case is appropriate for class certification. Gaines Decl. at ¶ 9.

1 **IV. LEGAL ANALYSIS**

2 **A. The Proposed Settlement Terms**

3 **1. The Settlement Class**

4 The Parties have agreed to a settlement class composed of any person who was employed
5 by Defendant in California as a non-exempt employee during the period April 1, 2017 through
6 December 21, 2021 (the “Class Period”). Defendant represents that this Class contains
7 approximately 31 members, and excludes some employees who signed an arbitration agreement
8 with a class action waiver and/or a prior release agreement with Defendant. Stip. at ¶¶ A, B.

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

10 The Stipulation provides that Defendant shall pay an amount not to exceed \$187,500 to
11 resolve the Action on a class-wide basis (the “Gross Settlement Amount”). The Gross Settlement
12 Amount includes the Class Participants’ payments, attorneys’ fees, attorneys’ costs, the litigation
13 costs, the General Release Payment, the PAGA Payment and the Settlement Administrator’s
14 expenses. Stip. at ¶ A.

15 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
16 application to the Court for up to 35% of the Gross Settlement Amount for attorneys’ fees (or
17 \$65,625). Stip. at ¶ E(8).

18 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
19 application to the Court for up to \$10,000 in reimbursement of litigation costs and expenses. Stip.
20 at ¶ E(8).

21 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
22 application to the Court for a General Release/Enhancement Payment to the Class Representative
23 in the gross amount of \$7,500, in consideration for her efforts in instituting and participating in the
24 Action. Stip. at ¶ E(5).

25 From the Gross Settlement Amount, settlement administration fees paid to Simpluris, Inc.
26 will be no more than \$4,000. Stip. at ¶ D(2).

27 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
28 claims for penalties under the PAGA is \$18,750 (“PAGA Payment”), 75% of which shall be paid

1 to the LWDA and 25% to be distributed to PAGA Members. Stip. at ¶ A.

2 The Net Settlement Amount means the Gross Settlement Amount less Class Counsel
3 Attorneys' Fees and Costs, Plaintiff's General Release Payment, the PAGA Payment, and the
4 Settlement Administrator's expenses, and shall be the maximum amount to be distributed to Class
5 Participants. Stip. at ¶ A. Employer-side payroll taxes will be paid separately by Defendant. Stip.
6 at ¶ E(2).

7 From the Net Settlement Amount, the Class Participants' base Individual Settlement
8 Amounts will be calculated as follows: The dollar amount payable to each Class Participant will be
9 calculated by taking the Net Settlement Amount, divided by the total number of Weeks Worked by
10 all members of the Class during the Class Period, multiplied by the total number of Weeks Worked
11 by each individual member of the Class during the Class Period. PAGA Members will receive a
12 pro-rata share of the PAGA Payment based on weeks worked during the PAGA Period. Stip. at ¶
13 E(4)(a).

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

15 Pursuant to PAGA, the Parties have agreed that \$18,750 of the Gross Settlement Amount
16 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor
17 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
18 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
19 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$14,062.50 –
20 shall be payable to the LWDA. The remaining 25 percent, or \$4,687.50) to be distributed to PAGA
21 Members. Stip. at ¶ A.

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

23 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
24 3.769; Fed. R. Civ. P. 23(e).² This is done in two steps: (1) an early (preliminary) review by the
25 trial court, and (2) a final review after notice has been distributed to the Class Members informing

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

1 them of the terms of the settlement and allowing them to exclude themselves from, participate in
2 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

14 Thus, the preliminary approval by the trial court is simply a conditional finding that the
15 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
16 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
17 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
18 may find that the settlement proposal contains some merit, is within the range of reasonableness
19 required for a settlement offer, or is presumptively valid subject only to any objections that may be
20 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
21 (4th ed. 2002).

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

24 When the parties to an action reach a monetary settlement, they will
25 usually prepare and execute a joint stipulation of settlement, which
26 is submitted to the court for preliminary approval. The stipulation
27 should set forth the essential terms of the agreement, including but
28 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
herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 14.

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

1 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
2 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
3 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
4 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
5 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478³ (“many courts have employed this practice in the
6 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

14 4 *Newberg on Class Actions*, at § 11.26.

15 As required by Labor Code § 2699(1)(2), concurrent with Plaintiff’s submission of the
16 Stipulation to the Court, his counsel is transmitting it, together with this Motion, to the LWDA.
17 Gaines Decl. at ¶ 30.

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

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

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

26 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,
27 and the means for identifying the members of the class determine whether the class is ascertainable.
28 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class

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 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
2 comprises approximately 31 members. Gaines Decl. ¶ 25.

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

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

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

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

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

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

3 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
4 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
5 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
6 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
7 judgment for that of the proponents, particularly where, as here, settlement has been reached with
8 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
9 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
10 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*
11 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
12 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

13 While the recommendations of counsel proposing the settlement are not conclusive, the
14 Court can properly take them into account, particularly where, as here, such counsel have been
15 involved in informal discovery and negotiations for some period of time, appear to be competent,
16 have experience with this type of litigation, and have exchanged substantial evidence with the
17 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*
18 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length
19 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
20 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
21 counsel, who are most closely acquainted with the facts of the underlying litigation”); *see* Gaines
22 Decl. ¶¶ 2-5, 10-11.

23 Here, the Parties’ counsel have a great deal of experience in class action litigation and
24 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
25 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
26 in a broad exchange of documents, data, records and other information. Each side has apprised the
27 other, informally and at a formal mediation, of their respective factual contentions, legal theories
28 and defenses, resulting in extensive arm’s-length negotiations taking place among the Parties. *See*

1 Gaines Decl. ¶¶ 2-5, 10-11.

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

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

12 Plaintiff’s counsel created a comprehensive damage analysis using sampling information
13 obtained through informal discovery. This damage analysis reveals that the negotiated settlement
14 falls within a realistic range of recovery on Class Members’ claims. Gaines Decl. ¶ 15.

15 Plaintiff alleges that Defendant failed to pay Plaintiff and Class Members premium wages
16 for each missed, denied and unauthorized 30-minute meal period for every five hours of work and
17 each second missed, denied and unauthorized 30-minute meal period for every ten hours of work.
18 An employer must pay an employee one hour of pay at the employee’s regular rate of compensation
19 for each workday that a meal period is not properly provided. When Plaintiff and Class Members
20 did receive meal periods, they would typically be late (commencing after the fifth hour of work) or
21 short (less than 30 minutes in duration). Based on an analysis performed on Plaintiff’s and Class
22 Members’ time and wage records, meal periods were frequently late or cut short, resulting in a
23 violation rate in excess of 46.5% among all shifts worked. More than 80.3% of all pay periods
24 worked exhibit some form of meal period violation, be it late, short, or denied altogether (and
25 reduces to 64.3% when offsetting for meal period premium payments). Although Defendant did
26 pay some meal period premiums, they represent only 25% of alleged applicable meal period
27 violations. Defendant also allegedly failed to blend bonus payments (during Christmas holiday)
28 into the premium meal period rate, thus yielding an underpayment of wages, in violation of Labor

1 Code §§ 510 and 1194. As such, Plaintiff contends that significant damages and penalties are owed.
2 The maximum damages for missed, denied and unauthorized 30-minute meal periods is
3 approximately \$38,460. Gaines Decl. ¶ 16.

4 Plaintiff further alleges that Defendant failed to compensate Plaintiff and Class Members
5 for missed, denied and unauthorized 10-minute rest periods for every four hours of work or major
6 fraction thereof. An employer must pay an employee one hour of pay at the employee's regular rate
7 of compensation for each workday that a rest period is not properly provided. Defendant allegedly
8 failed to do so and therefore has violated Labor Code § 226.7. Plaintiff and Class Members were
9 simply not provided with compliant, off-duty rest periods during their employment with Defendant.
10 Although Plaintiff did receive some rest periods, the vast majority (60%) were not provided or
11 authorized. Typically, Plaintiff contends that there was insufficient staff on schedule to allow
12 Plaintiff to take a rest period, which resulted in Plaintiff having to work through her rest periods.
13 Defendant failed to ever pay any rest period premiums. The maximum damages for missed, denied
14 and unauthorized 10-minute rest periods is approximately \$101,136. Gaines Decl. ¶ 17.

15 Plaintiff alleges that Defendant failed to issue Plaintiff and Class Members accurately
16 itemized wage statements, failed to pay waiting time penalties, and owes PAGA civil penalties, all
17 derivative of the claims alleged above. These penalty claims could total up to approximately
18 \$435,500 for wage statement penalties and waiting time penalties, and \$283,400 for PAGA
19 penalties, but required a substantial discount for settlement purposes because they are wholly
20 derivative of the underlying unpaid meal and rest period claims (i.e. if Plaintiff did not prevail on
21 the underlying claims, she would not prevail on these penalty claims), they are subject to
22 independent defenses of their own (including proof of injury and/or willfulness), and they are
23 subject to reduction in the Court's discretion. Plaintiff believed it was unlikely that the Court would
24 entertain an award of penalties which far exceeded the unpaid meal and rest period premium wages
25 sought. As such, these claims required a compromise to resolve at this juncture of the litigation.
26 Gaines Decl. ¶ 18.

27 The discount negotiated for settlement here is a reasonable compromise, particularly
28 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves

1 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which
2 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
3 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
4 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
5 various arguments why class treatment is not appropriate, including but not limited to that
6 individualized inquires among class members predominate over common ones. If Defendant was
7 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
8 most class members would likely not file individual claims. Gaines Decl. ¶ 19.

9 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the
10 Court would agree with Defendant's position that its meal and rest period policies and practices
11 complied with the requirements of California law or could not be certified. In such a case, the value
12 Plaintiff's claims would be zero. Gaines Decl. ¶ 20.

13 Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award
14 on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the
15 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
16 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 21.

17 Defendant strongly contends that its policies and practices do not violate any laws. It
18 contends that it properly provided for all meal and rest periods and fully compensated their
19 employees for all time worked. It further contends that the wage statements it provides to its
20 employees are fully compliant with California law. Gaines Decl. ¶ 22.

21 When the costs and risks of non-certification and loss on the merits are considered,
22 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
23 Decl. ¶¶ 15-23.

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

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

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

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

V. CONCLUSION

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

1. Preliminarily finding that the settlement falls within the range of reasonableness and approving the proposed settlement;
2. Conditionally certifying, for settlement purposes only, the Settlement Class;
3. Appointing Plaintiff Jordyn Terry as the Class Representative;
4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class Counsel;
5. Approving Simpluris, Inc. as Settlement Administrator;
6. Preliminarily approving the allocation of \$18,750 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%) to be distributed to PAGA Members;
7. Approving as to content and form the notice to the Settlement Class, and directing it to be disseminated by the Settlement Administrator; and
8. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant to provide to the Settlement Administrator an updated list containing names, social security numbers, dates of employment, weeks worked based on Defendant's payroll records, and last-known mailing addresses for each member of the Class and PAGA Members	21 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	30 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written Request for Exclusion form to the 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 before the final settlement approval hearing date
Final settlement approval hearing	_____, 2022, at _____.m. (approximately 95 days after entry of the Order granting this Motion)

DATED: May 9, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: Alex P. Katofsky
DANIEL F. GAINES
ALEX P. KATOFSKY
Attorneys for Plaintiff Jordyn Terry and Proposed Class
Counsel