

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
4550 East Thousand Oaks Boulevard, Suite 100
Westlake Village, CA 91362
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Naomi Haqq
and Proposed Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF EL DORADO

NAOMI HAQQ, on behalf of herself and
all “aggrieved employees” pursuant to
Labor Code § 2698 *et seq.*,

Plaintiff,

v.

HAWTHORN SENIOR LIVING, LLC, a
Delaware limited liability company, and
DOES 1 through 10, inclusive,

Defendants.

CASE NO: PC20210300

Assigned to the Honorable Dylan Sullivan, Dept. 9

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

DATE: June 10, 2022

TIME: 8:30 a.m.

DEPT.: 9

Action Filed: June 9, 2021

1 **PLEASE TAKE NOTICE THAT** on June 10, 2022 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 9 of the above-entitled Court, located at 495 Main Street,
3 Placerville, California 95667, Plaintiff Naomi Haqq (“Plaintiff” or “Haqq”) will and hereby does
4 move unopposed for an Order (1) preliminarily finding that the settlement between the parties falls
5 within the range of reasonableness and approving the proposed class action settlement in the above-
6 captioned case, (2) conditionally certifying, for settlement purposes only, a settlement class and a
7 subclass, (3) approving the appointment of Plaintiff 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 Simpluris, Inc. as settlement administrator,
10 (6) preliminarily approving the allocation of \$40,000 from the Gross Settlement Amount to settle
11 Plaintiff’s representative claims under the Private Attorneys General Act (Lab. Code §§ 2698 et
12 seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce Development
13 Agency and twenty-five percent (25%) shall become the PAGA Settlement Fund for distribution
14 to members of the PAGA Aggrieved Employee Group; (7) approving as to content and form the
15 notice to the settlement class, and directing it be disseminated by the Settlement Administrator; (8)
16 permitting Plaintiff to file a First Amended Class, Collective, and Representative Action
17 Complaint, and (9) setting a final fairness and approval hearing.

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

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

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This Motion will be based on the Memorandum of Points and Authorities set forth herein, the Class and Representative Action Settlement Agreement and Release of Claims, the Declaration 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: May 5, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: Daniel F. Gaines
 DANIEL F. GAINES
 ALEX P. KATOFISKY
 Attorneys for Plaintiff Noami Haqq and Proposed Class
 Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Parties have reached a resolution of this class action and hereby submit their Class and
4 Representative Action Settlement Agreement and Release of Claims (“Settlement”, “Stipulation”
5 or “Stip.”) for the Court’s approval. The Settlement is made and entered into by and between
6 Plaintiff Naomi Haqq (“Plaintiff” or “Haqq”), individually and on behalf of all others similarly
7 situated, and Defendant Hawthorn Senior Living, LLC (“Defendant”).

8 The settlement occurred as a result of extensive arm’s-length negotiations by experienced
9 counsel with the assistance of a respected mediator with experience in the area of employment class
10 actions. Most importantly, the settlement will result in significant financial benefit to the
11 participating claimants, on terms that are by any measure fair, reasonable and adequate. *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 \$850,000 to a settlement class of
14 approximately 1,400 Class Members, yielding gross payments of \$607 per employee. As detailed
15 below, the settlement is in the best interests of the class in light of all of the facts and circumstances
16 and the risks and delays of further litigation.

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

25 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On March 31, 2021, Plaintiff exhausted the pre-filing requirements of the Labor Code
27 Private Attorneys General Act of 2004 (“PAGA”). Declaration of Daniel F. Gaines (“Gaines
28 Decl.”) at ¶ 6.

1 On or about June 9, 2021, Plaintiff initiated the Action by filing a Representative Action
2 Complaint for Penalties, pursuant to PAGA, on behalf of herself and all other aggrieved employees
3 (the “Complaint”). The First Amended Complaint, attached to the Settlement Agreement as
4 **Exhibit B** and which will be filed as part of the settlement approval process, asserts class and
5 PAGA representative action claims against Defendant, all predicated on the facts alleged in the
6 original operative Complaint, for: (1) Failure to Pay All Overtime Wages Due (Labor Code §§ 510
7 and 1194; FLSA 29 U.S.C. §§ 206 and 207); (2) Failure to Provide Rest Periods or Compensation
8 In Lieu Thereof (Labor Code § 226.7; IWC Wage Order 5-2001); (3) Failure to Provide Meal
9 Periods or Compensation In Lieu Thereof (Labor Code §§ 226.7, 510, 512, and 1194; IWC Wage
10 Order 5-2001); (4) Knowing and Intentional Failure to Comply With Itemized Employee Wage
11 Statement Provisions (Labor Code § 226(a), (e)); (5) Failure to Pay Wages Due at Separation of
12 Employment (Labor Code §§ 201-203); (6) Violation of Business and Professions Code § 17200;
13 and (7) Penalties Pursuant to Labor Code § 2699(f) for Violations of Labor Code §§ 201, 202,
14 226(a), (e), 226.7, 510, 512, and 1194 and Pursuant to Labor Code § 699(a) for Violations of Labor
15 Code §§ 226.3 and 558 (the “First Amended Complaint”). Gaines Decl. at ¶ 7.

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

1 with respect to any other proceeding. Gaines Decl. at ¶ 8.

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

5 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

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

13 On February 28, 2022, following their exchange of information and documents regarding
14 the Settlement Class and the claims and defenses asserted by the Parties, the Parties engaged in
15 arm's-length negotiations with the assistance of mediator Henry Bongiovi, Esq., through which
16 they were able to reach the resolution of the Action set forth herein. Gaines Decl. at ¶ 11.

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

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

1 class certification is proper under the more stringent standard applied for litigation and that
2 evidence of this limited stipulation for settlement purposes only will not be admissible for any
3 purpose in this or any other proceeding. Gaines Decl. at ¶ 13.

4 **IV. LEGAL ANALYSIS**

5 **A. The Proposed Settlement Terms**

6 **1. The Settlement Class and its Subclass**

7 The Parties have agreed to a settlement class composed of all non-exempt employees of
8 Defendant who performed work for Defendant in the State of California during the Settlement
9 Period [June 9, 2017 through the earlier of (i) the date of preliminary approval or (ii) July 1, 2022].
10 Defendant represents that this Class contains approximately 1,400 individuals who worked no more
11 than 59,000 workweeks between June 9, 2017 and March 1, 2022. The FLSA Settlement Subclass
12 has been created to effectuate the FLSA Release and apportion settlement funds to those employees
13 who opt-in to the FLSA collective action portion of the Settlement by cashing their settlement
14 checks, and is limited to the relevant three-year limitation period authorized under the FLSA (the
15 FLSA Period). Stip. at ¶¶ 1.18; 1.19; 1.21; 1.22; 5.5.1; 5.5.2; 5.5.4.

16 **2. Allocations to be Paid from the Maximum Settlement Amount**

17 The Parties agree to settle this Action for a Gross Settlement Amount of Eight Hundred
18 Fifty Thousand Dollars (\$850,000) (the “Gross Settlement Amount”), subject to any increase based
19 on the escalator provision in paragraph 8.19 of the Settlement. This sum includes all Individual
20 Settlement Payments (including all payroll taxes), FLSA Settlement Payments, any Class
21 Representative Service Award, the PAGA Payment, Administrative Costs, and the Class Counsel
22 Payment. Stip. at ¶ 1.23.

23 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
24 application to the Court for up to one-third of the Gross Settlement Amount for attorneys’ fees (or
25 \$283,333.33). Stip. at ¶ 5.2.

26 From the Gross Settlement Amount, Defendant will not oppose Plaintiff’s counsel’s
27 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.
28 at ¶ 5.2.

1 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's
2 application to the Court for a Class Representative Service Award to the Class Representative in
3 the gross amount of \$15,000, in consideration for her efforts in instituting and participating in the
4 Action.¹ Stip. at ¶ 5.3.

5 From the Gross Settlement Amount, settlement administration fees paid to Simpluris, Inc.
6 will be no more than \$20,000. Stip. at ¶ 5.1.

7 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all
8 claims for penalties under the PAGA is \$10,000 ("PAGA Payment"), 75% of which shall be paid
9 to the LWDA and 25% shall become the PAGA Settlement Fund. Stip. at ¶ 1.32.

10 The Net Settlement Amount refers to the portion of the Gross Settlement Amount that
11 remains after accounting for any Class Representative Service Award, the portion of the PAGA
12 Payment payable to the LWDA, the PAGA Settlement Fund, Administrative Costs, and the Class
13 Counsel Payment. Stip. at ¶ 1.27.

14 Each Class Member shall be entitled to an Individual Settlement Payment consisting of a
15 share of the Net Settlement Amount. For their Individual Settlement Payment, each Class Member
16 will be eligible to receive a portion of the Net Settlement Amount. The Individual Settlement
17 Payment to a Class Member will be calculated by dividing the number of Eligible Workweeks
18 attributed to the Class Member by all Eligible Workweeks attributed to members of the Settlement
19 Class, multiplied by the Net Settlement Amount, multiplied by 0.95 to account for the portion of
20 the Net Settlement Amount allocated to the FLSA Settlement Payment. Otherwise stated, the
21 formula for a Class Member is: individual's Eligible Workweeks ÷ total Settlement Class Eligible
22 Workweeks x (Net Settlement Amount x 0.95). Stip. at ¶ 5.5.1.

23 Defendant's time and payroll records will be used to calculate the number of Eligible
24 Workweeks worked for each Class Member as set forth in Section 1.15 of the Settlement for
25 purposes of calculating Individual Settlement Payments. The Class Notice will include information
26 for each Class Member showing how much the individual Class Member is expected to receive

27 ¹ Plaintiff, represented by separate counsel in a separate pending action, has resolved her
28 termination-related claims against Defendant for a confidential sum. Gaines Decl. ¶ 33.

1 based on this formula and their number of Eligible Workweeks. The Class Notice will also provide
2 the Class Members an opportunity to dispute the number of Eligible Workweeks indicated on the
3 Class Notice. Such dispute must be made no later than thirty (30) calendar days from the later of
4 the date of the mailing or re-mailing of the Class Notices. Defendant and/or the Claims
5 Administrator shall review any documentation provided by the Class Member to determine whether
6 there was an error in the number of Eligible Workweeks calculated, and adjust any payment to be
7 allocated if necessary. Stip. at ¶ 5.5.1.

8 For allocating the portion of the Net Settlement Amount allocated to the FLSA Settlement
9 Payment, the Settlement Administrator shall use the following methodology to calculate the FLSA
10 Settlement Payments: Individual's Eligible Workweeks in FLSA Period ÷ Total Settlement Class
11 Eligible Workweeks in FLSA Period x (Net Settlement Amount x .05). Stip. at ¶ 5.5.2.

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

13 Pursuant to PAGA, the Parties have agreed that \$40,000 of the Gross Settlement Amount
14 will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to Labor
15 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:
16 75 percent to the Labor and Workforce Development Agency...and 25 percent to the aggrieved
17 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$30,000 – shall
18 be payable to the LWDA. The remaining 25 percent, or \$10,000, shall become the PAGA
19 Settlement Fund to be distributed to members of the PAGA Aggrieved Employee Group based on
20 their Eligible Workweeks during the PAGA Claim Period (the applicable one-year limitations
21 period on PAGA claims). Stip. at ¶ 5.4.3.

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. ¶ ____.

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, her counsel is transmitting it, together with this Motion, to the LWDA.
17 Gaines Decl. at ¶ 34.

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 and its Subclass are ascertainable. The class definition, the
27 size of the Class, and the means for identifying the members of the class determine whether the
28 class is ascertainable. *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.

³ 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 Further, the Settlement Class is sufficiently numerous to warrant certification. According to
2 Defendant's records, the Class comprises approximately 1,400 employees and the FLSA Settlement
3 Subclass comprises more than 500 employees. Gaines Decl. ¶ 28.

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

6 The Class Members' claims all stem from a common source: members of the Settlement
7 Class allege that Defendant violated the same Labor Code provisions in connection with their
8 employment. All members of the Class, including the FLSA Settlement Subclass, seek the same
9 relief under the same California laws (related to unpaid overtime wages due, unpaid meal and rest
10 period premiums, inaccurate or incomplete wage statements, failure to timely pay wages due upon
11 separation, and derivative claims). Under these circumstances, the commonality requirement is
12 satisfied for purposes of certifying the Settlement Class and its subclass for settlement purposes.
13 Gaines Decl. ¶ 30.

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

16 A class representative's claims are typical when they arise from the same event or course
17 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
18 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed
19 Class Representative Naomi Haqq is a former non-exempt employee who worked for Defendant in
20 the State of California during the Class and FLSA Settlement Subclass Periods. She contends that
21 Defendant failed to pay all overtime wages due, failed to provide meal and rest periods, failed to
22 comply with itemized employee wage statement provisions, and failed to timely pay wages at the
23 separation of employment, in violation of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512,
24 558, 1194, 2698, and 2699, among other Labor Code provisions, as well as FLSA 29 U.S.C. §§
25 206 and 207. She has the same claims as those that the members of the Settlement Class and
26 Subclass would reasonably be expected to bring based on the course of conduct alleged herein.
27 Gaines Decl. ¶ 31.

28 \\\

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

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

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

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

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

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

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

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

21 Plaintiff alleges that Defendant paid Plaintiff and Class Members bonuses and other forms
22 of wages that were not included in their regular rate of pay for purposes of computing the overtime
23 rate, thereby denying them all overtime wages due in violation of Labor Code §§ 510, 558 and
24 1194. Plaintiff earned a "Crisis Bonus" during COVID times. The Crisis Bonus was extra pay at
25 the rate of \$1 or \$2 extra per hour worked. Plaintiff also earned these bonuses during pay periods
26 where she also earned and worked overtime hours, but alleges that Defendant did not factor this
27 bonus into Plaintiff's regular rate of pay when calculating her overtime rate. This claim, however,
28 did not apply to all (or even a majority of) Class members, and Defendant maintained numerous

1 defenses to this claim, including that its bonuses were not non-discretionary payments and were
2 therefore not required to be included in the regular rate of pay at all. Plaintiff calculates the damage
3 liability for this claim at \$9,480. Gaines Decl. ¶ 16.

4 Plaintiff further alleges that Defendant failed to permit or authorize Plaintiff and Class
5 Members to take timely and off-duty 30-minute meal periods for shifts greater than 5 hours in
6 length, in violation of Labor Code §§ 226.7, 510, 512, 558 and 1194 and IWC Wage Order 5-2001.
7 Labor Code § 512 provides that employers (like Defendant) may not employ an employee for a
8 work period of more than 5 hours without providing a 30-minute meal period starting no later than
9 the end of the 5th hour. Plaintiff alleges that Class Members were routinely unable to take a proper
10 meal break when they worked shifts in excess of 5 hours in duration and a second meal break when
11 they worked shifts in excess of 10 hours in duration. When they were able to take a meal period,
12 they would typically be required to work through it, also depriving them of all wages due. Gaines
13 Decl. ¶ 17.

14 Based on an analysis of a wage and time data provided by Defendant through informal
15 discovery, Plaintiff has ascertained a meal period violation rate of 16.4% among all shifts worked
16 during the Class Period, and 35.2% of all pay periods during the PAGA Period exhibited some form
17 of meal period violation. Plaintiff calculates Defendant's meal period damages liability at
18 \$558,436. Notwithstanding its maximum potential value, this claim required a discount for
19 settlement purposes. Defendant argued that this claim could not be certified because of
20 individualized issues and manageability concerns, particularly relating to its defense of waiver. It
21 argued that all employees were offered meal breaks and contends it uniformly applies a legally
22 complaint policy in practice. The compromised settlement amount recognizes these risks. Gaines
23 Decl. ¶ 18.

24 Plaintiff also contends that Defendant failed to provide Plaintiff and Class Members with
25 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by
26 Labor Code §§ 226.7 and 558 and Wage Order 5-2001. Plaintiff alleges that Class Members were
27 simply too busy to take their rest periods and would be required to work through them. She also
28 contends that Defendant's illegal policy and practice requiring Class Members to remain on

1 company premises during rest periods resulted in impermissible on-duty rest periods subject to
2 employer control, as forbidden by *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th 257,
3 which held that the rest period requirement “obligates employers to permit and authorizes
4 employees to take off-duty rest periods. That is, during rest periods employers must relieve
5 employees of all duties and relinquish control over how employees spend their time.” *Id.* at 269
6 (emphasis added). Gaines Decl. ¶ 19.

7 If Plaintiff could certify a class on this claim and establish that 25% of rest breaks were not
8 properly provided, Defendant’s rest period damage liability totals \$708,000. Like Plaintiff’s other
9 claims, this claim required a discount for settlement purposes. Defendant argued that this claim
10 could not be certified because of individualized issues and manageability concerns, particularly
11 relating to its defense of waiver. It argued that employees were not forbidden from leaving the
12 work premises, and even if they were, such a practice does not violate California law. It argued
13 that all employees were offered rest breaks and contends it uniformly applies a legally complaint
14 policy in practice. The compromised settlement amount recognizes these risks. Gaines Decl. ¶ 20.

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 would total up to approximately
18 \$4,727,833 but required a substantial discount for settlement purposes because they are wholly
19 derivative of the underlying unpaid wage claims (i.e. if Plaintiff did not prevail on her underlying
20 overtime, meal and rest period claims, she would not prevail on these penalty claims), they are
21 subject to independent defenses of their own (including proof of injury and/or willfulness), and
22 they are subject to reduction in the Court’s discretion. Plaintiff believed it was unlikely that the
23 Court would entertain an award of penalties which was substantial compared to the amount of the
24 unpaid wages sought. As such, these claims required a compromise to resolve at this juncture of
25 the litigation. Gaines Decl. ¶ 21.

26 The discount negotiated for settlement here is a reasonable compromise, particularly
27 considering that the risk of obtaining class certification on all or any of Plaintiff’s claims involves
28 a 50% or higher hurdle, especially with respect to the meal and rest period claims, to which

1 Defendant maintains strong arguments to defeat class certification (in addition to multiple defenses
2 on the merits of the claims). Class certification is a substantial risk in any class action case. Here,
3 while Plaintiff maintains that the requirements of class certification are met, Defendant proffers
4 various arguments why class treatment is not appropriate, including but not limited to that
5 individualized inquires among class members predominate over common ones. If Defendant was
6 to defeat Plaintiff's class certification motion, there would be no class wide relief whatsoever, and
7 most class members would likely not file individual claims. Gaines Decl. ¶ 22.

8 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the
9 Court would agree with Defendant's position that its meal and rest period policies and practices
10 complied with the requirements of California law or could not be certified. In such a case, the value
11 of the majority of Plaintiff's claims would be zero. Gaines Decl. ¶ 23.

12 Finally, Plaintiff faced the risk that she would not obtain a maximum damage/penalty award
13 on all (or any of) her claims. For example, Plaintiff seeks discretionary penalties pursuant to the
14 PAGA. Even if Plaintiff did prevail on these claims, it is possible that the Court would not impose
15 all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 24.

16 Defendant strongly contends that its policies and practices do not violate any laws. It
17 contends that it properly provided for all meal and rest periods and fully compensated their
18 employees for all time worked. It further contends that the wage statements it provides to its
19 employees are fully compliant with California law. Gaines Decl. ¶ 25.

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

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

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

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

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

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

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

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

20 **V. CONCLUSION**

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

- 23 1. Preliminarily finding that the settlement falls within the range of reasonableness and
24 approving the proposed settlement;
- 25 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 26 3. Appointing Plaintiff Naomi Haqq as the Class Representative;
- 27 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as
28 Class Counsel;

- 1 5. Approving Simpluris, Inc. as Settlement Administrator;
- 2 6. Preliminarily approving the allocation of \$40,000 from the Gross Settlement
- 3 Amount to settle Plaintiff's representative claims under the PAGA, of which seventy-five percent
- 4 (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent
- 5 (25%) shall become the PAGA Settlement Fund;
- 6 7. Approving as to content and form the notice to the Settlement Class, and directing
- 7 it to be disseminated by the Settlement Administrator;
- 8 8. Permitting Plaintiff to file her First Amended Complaint, attached to the Stipulation
- 9 as **Exhibit B**, no later than five (5) court days after notice of the entry of the Order granting this
- 10 motion has been given, and consent that Defendant not be required to file a responsive pleading
- 11 thereto; and,
- 12 9. Setting the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendant shall provide to the Settlement Administrator a confidential class list containing, for each Class Member: (1) the name; (2) employee ID number; (3) last known address and telephone number; (4) number of Eligible Workweeks worked during the class, FLSA, and PAGA periods; and (5) social security number ("Class Data")	30 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members	15 calendar days after Settlement Administrator's receipt of Class Data
Last day for Class Members to submit a written request for exclusion to the Settlement Administrator	60 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	60 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

<u>EVENT</u>	<u>TIMING</u>
Final settlement approval hearing	_____, 2022, at _____.m. (approximately 120 days after entry of the Order granting this Motion)

DATED: May 5, 2022

Respectfully submitted,

GAINES & GAINES,
A Professional Law Corporation

By: *Daniel F. Gaines*

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiff Naomi Haqq and Proposed Class
Counsel