

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

7 Attorneys for Plaintiffs Luis Prado and Robert Varela
and Proposed Class Counsel
8

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

12 LUIS PRADO and ROBERT VARELA,
on behalf of themselves and on behalf of all
13 similarly situated individuals,

14 Plaintiffs,

15 v.

16 J.S. HOMEN TRUCKING, INC., a
California corporation, and DOES 1
17 through 10, inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

CASE NO: STK-CV-UOE-2022-1797

*Assigned to the Honorable Robert T. Waters, Dept.
11B*

CLASS ACTION

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

DATE: _____, 2022

TIME: ____ a.m.

DEPT.: 11B

Action Filed: March 9, 2022

1 **PLEASE TAKE NOTICE THAT** on _____, 2022 at ____ a.m., or as soon
2 thereafter as the matter may be heard, in Department 11B of the above-entitled Court, located at
3 180 E. Weber Avenue, Stockton, California 95202, Plaintiffs Luis Prado and Robert Varela
4 (“Plaintiffs”) will and hereby does move unopposed for an Order (1) preliminarily finding that the
5 settlement between the parties falls within the range of reasonableness and approving the proposed
6 class action settlement in the above-captioned case, (2) conditionally certifying, for settlement
7 purposes only, a settlement class, (3) approving the appointment of Plaintiffs as Class
8 Representatives, (4) approving the appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines
9 & Gaines, APLC as Class Counsel, (5) approving the appointment of Simpluris, Inc. as settlement
10 administrator, (6) preliminarily approving the allocation of \$20,000 from the Maximum Settlement
11 Amount to settle Plaintiff’s representative claims under the Private Attorneys General Act (Lab.
12 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce
13 Development Agency and twenty-five percent (25%) shall be included in the Net Settlement
14 Proceeds for payment to Class Members, (7) approving as to content and form the notice to the
15 settlement class, and directing it be disseminated by the Settlement Administrator; and (8) setting
16 a final fairness and approval 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.

24 \\

25 \\

26 \\

27 \\

28 \\

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

5
6 DATED: April 26, 2022

Respectfully submitted,

7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: Alex P. Katofsky

DANIEL F. GAINES

ALEX P. KATOFISKY

11 Attorneys for Plaintiffs Luis Prado and Robert Varela
12 and Proposed Class Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND AND PROCEDURAL HISTORY	1
III. INVESTIGATION AND SETTLEMENT DISCUSSIONS	2
IV. LEGAL ANALYSIS	3
A. The Proposed Settlement Terms	3
1. The Settlement Class	3
2. Allocations to be Paid from the Maximum Settlement Amount	3
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	7
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	14
V. CONCLUSION	14

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.....	8

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<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	2, 8
Cal. Labor Code § 226	2, 8
Cal. Labor Code § 226.3	2, 8
Cal. Labor Code § 226.7	2, 8, 11, 12
Cal. Labor Code § 510	2, 8, 10
Cal. Labor Code § 512	2, 10, 11
Cal. Labor Code § 558	2, 8, 11, 12
Cal. Labor Code § 1194	2, 8, 10
Cal. Labor Code § 2698	1, 2, 8
Cal. Labor Code § 2699	2, 7, 8

RULES AND REGULATIONS

Cal. R. Ct. 3.769.....	5, 7
Fed. R. Civ. P. 23(e).....	5

OTHER AUTHORITIES

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	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 Settlement
4 Agreement and Release of Claims (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval.
5 The Settlement is made and entered into by and between Plaintiffs Luis Prado and Robert Varela
6 (“Plaintiffs”), individually and on behalf of all others similarly situated, and Defendant J.S. Homen
7 Trucking, 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 \$250,000 to a settlement class of
14 approximately 63 Class Members, yielding gross payments of nearly \$4,000 each. 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 Plaintiffs as Class
21 Representatives; (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 **II. BACKGROUND AND PROCEDURAL HISTORY**

26 On March 3, 2021, Plaintiffs 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 March 9, 2022, after tolling their claims and settlement negotiations, Plaintiffs
2 initiated the Action by filing a Class and Representative Action Complaint, on behalf of themselves
3 and all similarly situated individuals (the "Complaint"). The Complaint asserts direct class and
4 PAGA representative action claims against Defendant for (1) failure to pay all minimum, overtime
5 and regular wages due (Labor Code §§ 223, 510, 558, 1194, and 1194.2); (2) failure to provide
6 compliant meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 510, 512, 558 and
7 1194; IWC Wage Order 9-2001); (3) failure to provide compliant rest periods or compensation in
8 lieu thereof (Labor Code §§ 226.2, 226.7 and 558; IWC Wage Order 9-2001); (4) failure to
9 reimburse employee business expenses (Labor Code § 2802; IWC Wage Order 9-2001); (5) failure
10 to provide complete and accurate itemized wage statements (Labor Code §§ 226 and 226.3; IWC
11 Wage Order 9-2001); (6) failure to timely pay wages due at separation of employment (Labor Code
12 §§ 201-203); (7) violation of Business and Professions Code §§ 17200, *et seq.*; and (8) civil
13 penalties pursuant to Labor Code §§ 2698, *et seq.* for violations of Labor Code §§ 201, 202, 203,
14 226, 226.2, 226.3, 226.7, 510, 512, 558, 1194 and 2802. Gaines Decl. at ¶ 7.

15 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged
16 in the Action, and further denies that the Action is appropriate for class treatment for any purpose
17 other than this settlement. Defendant contends that it has complied at all times with the California
18 Labor Code, Industrial Welfare Commission Wage Orders, and all other applicable federal, state,
19 and local laws and regulations. The Action, the negotiation and execution of this Settlement
20 Agreement, and all acts performed or documents executed pursuant to or in furtherance of the
21 Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on behalf
22 of Defendant; (ii) shall not be an admission or evidence of fault on behalf of Defendant in any
23 action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be, and
24 may not be used as, an admission or evidence of the appropriateness of these or similar claims for
25 class certification in the Action or with respect to any other proceeding. Gaines Decl. at ¶ 8.

26 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

27 Class Counsel represent that they have conducted a thorough investigation into the facts
28 and law during the prosecution of this class action case, including the exchange of extensive

1 informal discovery and the review and verification of statistical data and other facts and information
2 provided by Defendant. Counsel for the Parties also represent that they have investigated the
3 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
4 potential defenses thereto, and the damages and other losses claimed by Plaintiffs. Gaines Decl. at
5 ¶ 9.

6 On February 3, 2022, during their tolled period, and following their exchange of information
7 and documents regarding the Settlement Class and the claims and defenses asserted by the Parties,
8 the Parties engaged in arm's-length negotiations with the assistance of mediator Judge Hurl
9 Johnson (Ret.), through which they were able to reach the resolution of the Action set forth herein.
10 Gaines Decl. at ¶ 10.

11 Based on their own independent investigation and evaluation, Class Counsel are of the
12 opinion (and will so represent to the Court) that settlement for the consideration and on the terms
13 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
14 the Settlement Class in light of all known facts and circumstances, including the risk of significant
15 delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by
16 Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this
17 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 11.

18 **IV. LEGAL ANALYSIS**

19 **A. The Proposed Settlement Terms**

20 **1. The Settlement Class**

21 The Parties have agreed to a settlement class composed of all non-exempt truck drivers who
22 worked for J.S. Homen Trucking, Inc. in California at any time during the Class Period [April 30,
23 2017 through April 15, 2022] (the "Class Period"). Defendant represents that this Class contains
24 approximately 63 members as of February 3, 2022. Stip. at ¶ A(5).

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

26 The Parties agree to settle this Action for a Maximum Settlement Amount of Two Hundred
27 Fifty Thousand Dollars (\$250,000.00) ("the Maximum Settlement Amount"), subject to increase
28 based on the escalator provision in paragraph H(16) in the Settlement Agreement. The Maximum

1 Settlement Amount includes the attorneys' fees of Class Counsel; litigation costs and expenses
2 (which includes, without limitation, all such fees and costs incurred to date, as well as such fees
3 and costs to be incurred in documenting the settlement, providing any notices required as part of
4 the settlement, securing Court approval of the settlement, and obtaining judgment in the Action);
5 the General Release/Enhancement payments to the Class Representatives, as approved by the
6 Court; the payments to the California Labor and Workforce Development Agency ("LWDA") and
7 Class Members pursuant to the PAGA claims in the Action; and all costs of administration,
8 including, without limitation, settlement administration fees and expenses. The employer payroll
9 tax obligations due on wage payments made will be paid from the Maximum Settlement Amount.
10 Stip. at ¶ C(a)(1).

11 From the Maximum Settlement Amount, Defendant will not oppose Plaintiffs' counsel's
12 application to the Court for up to 35% of the Maximum Settlement Amount for attorneys' fees (or
13 \$87,500). Stip. at ¶ C(1)(f).

14 From the Maximum Settlement Amount, Defendant will not oppose Plaintiffs' counsel's
15 application to the Court for up to \$12,000 in reimbursement of litigation costs and expenses. Stip.
16 at ¶ C(1)(g).

17 From the Maximum Settlement Amount, Defendant will not oppose Plaintiffs' counsel's
18 application to the Court for a General Release/Enhancement Payments to the Class Representatives
19 in the gross amount of \$10,000 each, in consideration for their efforts in instituting and participating
20 in the Action and in exchange for their general release of all claims. Stip. at ¶ C(1)(f).

21 From the Maximum Settlement Amount, settlement administration fees paid to Simpluris,
22 Inc. will be no more than \$4,000. Stip. at ¶ C(1)(h).

23 From the Maximum Settlement Amount, the portion to be allocated for settlement of any
24 and all claims for penalties under the PAGA is \$20,000 ("PAGA Payment"), 75% of which shall
25 be paid to the LWDA and 25% shall be included in the Net Settlement Proceeds for payment to
26 Class Members. Stip. at ¶ C(1)(d).

27 The Net Settlement Proceeds is the Maximum Settlement Amount less the amounts
28 approved and awarded by the Court for: attorneys' fees and documented litigation costs and

1 expenses incurred or advanced by Class Counsel; the General Release/Enhancement payments to
2 the Class Representatives; the payments to the LWDA pursuant to PAGA; payment of the
3 employer-side payroll taxes; and the costs of administering the settlement. Stip. at ¶ C(1)(b).

4 The Individual Settlement Payment is the portion of the Net Settlement Proceeds
5 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a
6 valid request for exclusion form). The Individual Settlement Payments will be calculated by
7 dividing the Net Settlement Proceeds by the total weeks worked by all participating Class Members
8 in California as a non-exempt truck driver during the Class Period, which will yield the applicable
9 weekly rate. The weekly rate shall be multiplied by the number of weeks each individual
10 participating Class Member worked for Defendant in California as non-exempt truck drivers during
11 the Class Period to yield their Individual Settlement Payments. Each Participating Settlement Class
12 Member who does not opt out will receive an Individual Settlement Payment equal to their
13 individual weeks worked in California in as a non-exempt truck driver during the Class Period
14 multiplied by the weekly rate. Stip. at ¶ C(1)(c).

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

16 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Maximum Settlement
17 Amount will be allocated to settle the claims brought under Labor Code § 2699 *et seq.* Pursuant to
18 Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
19 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the
20 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
21 \$15,000 – shall be payable to the LWDA. The remaining 25 percent, or \$5,000) shall be included
22 in the Net Settlement Proceeds for payment to Class Members. Stip. at ¶ C(1)(d).

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

24 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
25 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the

26
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,
Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

1 trial court, and (2) a final review after notice has been distributed to the Class Members informing
2 them of the terms of the settlement and allowing them to exclude themselves from, participate in
3 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

15 Thus, the preliminary approval by the trial court is simply a conditional finding that the
16 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
17 *Computer* (2001) 91 Cal.App.4th 224, 234-35. "The strength of the findings made by a judge at a
18 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
19 may find that the settlement proposal contains some merit, is within the range of reasonableness
20 required for a settlement offer, or is presumptively valid subject only to any objections that may be
21 raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
22 (4th ed. 2002).

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

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

Id. at § 11.24.

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

\\

\\

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

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

10 The strength of the findings made by a judge at a preliminary hearing
11 or conference concerning a tentative settlement proposal . . . may be
12 set out in conditional orders granting tentative approval to the various
13 items submitted to the court. Three basic rulings are often
14 conditionally entered at this preliminary hearing. These conditional
15 rulings may approve a temporary settlement class, the proposed
16 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 Plaintiffs’ 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
28 ² 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 and the means for identifying the members of the class determine whether the class is ascertainable.
2 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
3 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class
4 is sufficiently numerous to warrant certification. According to Defendant's records, the Class
5 comprises approximately 63 members. Gaines Decl. ¶ 26.

6 b. **Questions of Law or Fact Common to Members of the Settlement**
7 **Class Predominate**

8 The Class Members' claims all stem from a common source: members of the Settlement
9 Class allege that Defendant violated the same Labor Code provisions in connection with their
10 employment in the same job position. All members of the Class seek the same relief under the
11 same California laws (related to unpaid wages, unpaid meal and rest period premiums, inaccurate
12 or incomplete wage statements, unreimbursed business expenses, failure to timely pay wages due
13 upon separation, and derivative claims). Under these circumstances, the commonality requirement
14 is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶
15 27.

16 c. **The Proposed Class Representatives' Claims Are Typical of the**
17 **Class Members' Claims**

18 A class representative's claims are typical when they arise from the same event or course
19 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
20 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiffs and proposed
21 Class Representatives are former non-exempt truck drivers who worked for Defendant in the State
22 of California during the Class Period. They contend that Defendant failed to pay all wages, failed
23 to provide meal and rest periods, failed to comply with itemized employee wage statement
24 provisions, failed to reimburse expenses, and failed to timely pay wages at the separation of
25 employment, in violation of Labor Code §§ 201-203, 223, 226(a), 226.2, 226.3, 226.7, 510, 512,
26 558, 1194, 1194.2, 2698, 2699, and 2802, among other Labor Code provisions. They have the
27 same claims as those that the members of the Settlement Class would reasonably be expected to
28 bring based on the course of conduct alleged herein. Gaines Decl. ¶ 28.

1 Plaintiffs have also demonstrated that they will aggressively and competently assert the
2 interests of the proposed Settlement Class; they have taken active roles in this litigation and have
3 no apparent conflicts with other class members. Gaines Decl. ¶ 29. Furthermore, Plaintiffs have
4 retained competent counsel, experienced in litigating class action claims in the employment
5 context. See 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, 9-10.

28 \\\

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, 9-10.

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 Plaintiffs' 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. ¶ 13.

21 Plaintiffs allege that Defendant failed to pay all minimum wages and overtime wages to
22 Plaintiffs and Class Members, in violation of Labor Code §§ 510, 588, 1194 and 1194.2. Plaintiffs
23 and Class Members were paid piece-rate wages for each load they transported. However, Plaintiffs
24 and Class Members allege that they were not paid for non-productive time when they were not
25 driving, including, but not limited to, pre-trip and post-trip inspections, re-fueling time, and wait
26 time during loading and unloading—time which California law mandates they be paid at least the
27 state minimum wage. See *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36
28 (holding that the technicians, who were paid on a "piece-rate" basis, must also be paid at least the

1 minimum hourly wage for the time that they are required to wait between their piece-rate paid
2 repair jobs.). If Plaintiffs could prove that one hour of wages was denied per day, liability on this
3 claim would total \$974,500. This claim, however, required a discount for settlement purposes
4 based on Defendant's defenses to the merits of the claim (arguing that it paid all wages due and for
5 all time worked) and as to class certification (arguing the claims were unlikely to be certified for a
6 host of reasons, including that individualized issues predominate). Defendant also argues it did
7 have a policy of paying for non-productive time (i.e. excessive standby time and safety trainings).
8 Defendant also argues that drivers are exempt from overtime based on Interstate Commerce rules
9 and reasonable expectation a driver may be asked to drive interstate commerce, or haul product that
10 is considered interstate commerce. Gaines Decl. ¶ 14.

11 Plaintiffs further allege that Defendant failed to permit or authorize Plaintiffs and Class
12 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation
13 of Labor Code §§ 226.7, 512, 558 and IWC Wage Order 9-2001. Labor Code § 512 provides that
14 employers (like Defendant) may not employ an employee for a work period of more than 5 hours
15 without providing a 30-minute meal period starting no later than the end of the fifth hour. Plaintiffs
16 and Class Members contend that they were routinely unable to take a proper meal break when they
17 worked shifts in excess of 5 hours and a second meal break when they worked shifts in excess of
18 10 hours. Plaintiffs also argue that Defendant failed to maintain any meal period policies. .
19 Plaintiffs calculate Defendant's meal period liability at approximately \$649,500, but this claim
20 required a substantial discount for purposes of settlement due to Defendant's position that this claim
21 is preempted under federal laws, including the Federal Motor Carrier Safety Act ("FMCSA"). On
22 January 15, 2021, the U.S. Court of Appeals for the Ninth Circuit ruled that the FMCSA preempts
23 California's meal and rest break rules for drivers of property-carrying commercial motor vehicle.
24 *International Brotherhood of Teamsters, Local 2785, et al. v. Federal Motor Carrier Safety*
25 *Administration*, 986 F.3d 841 (9th Cir. 2021). On January 19, 2022, California's Second District
26 Court of Appeal confirmed the FMCSA's preemptive reach also applies to "short-haul" drivers.
27 *Espinoza v. Hepta Run, Inc.* (January 19, 2022) WL167770. This risk, together with class
28 certification risk, required a substantial discount for settlement purposes. Gaines Decl. ¶ 15.

1 Defendant allegedly failed to provide Plaintiffs and Class Members with legally compliant
2 rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor Code § 226.7
3 and Wage Order 9-2001. As Plaintiffs and Class Members could only earn wages when they
4 performed limited tasks (i.e., transporting loads), they should have been separately paid for their
5 rest breaks when no piece-rate could be earned. *See Gonzalez v. Downtown LA Motors, LP*, 215
6 Cal.App.4th 36 (2013) (mandating the payment of at least the minimum wage for all hours worked).
7 Plaintiffs and Class Members were rarely, if ever, provided with rest periods. An employer must
8 pay an employee one hour of pay at the employee's regular rate of compensation for each workday
9 that a rest period is not properly provided. Defendant has violated Labor Code §§ 226.7 and 558
10 and IWC Wage Order 9-2001 as a result of this failure. Based on Defendant's allegedly improper
11 policy and practice to not pay for rest periods Defendant's rest period liability is approximately
12 \$1,079,280. Notwithstanding the maximum potential exposure on this claim, it required a
13 substantial discount for purposes of settlement due to Defendant's position that it is preempted
14 under the FMCSA, just like the meal period claim. This risk, together with class certification risk,
15 required a substantial discount for settlement purposes. Gaines Decl. ¶ 16.

16 Plaintiffs further allege that Plaintiffs and Class Members were required to incur expenses
17 in the performance of their job duties for which they are not fully reimbursed, in violation of Labor
18 Code § 2802. Plaintiffs and Class Members were required to use their personal cellular phones to
19 communicate with Defendant during the course of their workday, but were not fully reimbursed by
20 Defendant for these expenses. This practice is alleged to violate Labor Code § 2802. Plaintiffs
21 calculate \$50,000 in unreimbursed cellular phone expenses based on estimated damages of \$10 per
22 employee per pay period. Defendant contends it reimbursed all reasonable and necessary expenses
23 incurred by its employees and that Plaintiffs could not certify a class on this expense reimbursement
24 claim. Defendant also argues use of the cellphone was "not" necessary (i.e. two-way radios were
25 available). In short, it required a discount to resolve at this juncture of the litigation. Gaines Decl.
26 ¶ 17.

27 Plaintiffs allege that Defendant failed to issue Plaintiffs and Class Members accurately
28 itemized wage statements, failed to pay waiting time penalties, and owes PAGA civil penalties, all

1 derivative of the claims alleged above. These penalty claims could total up to approximately
2 \$114,500 for wage statement penalties, \$126,720 for waiting time penalties, and \$135,700 for
3 PAGA penalties, but required a substantial discount for settlement purposes because they are
4 wholly derivative of the underlying unpaid wage claims (i.e. if Plaintiffs did not prevail on the
5 underlying claims, they would not prevail on these penalty claims), they are subject to independent
6 defenses of their own (including proof of injury and/or willfulness), and they are subject to
7 reduction in the Court's discretion. Plaintiffs believed it was unlikely that the Court would entertain
8 such a substantial award of penalties against a small employer. As such, these claims required a
9 compromise to resolve at this juncture of the litigation. Gaines Decl. ¶ 18.

10 The discount negotiated for settlement here is a reasonable compromise, particularly
11 considering that the risk of obtaining class certification on all or any of Plaintiffs' claims involves
12 a 50% or higher hurdle, especially with respect to the unpaid wage, meal and rest period claims, to
13 which Defendant maintains strong arguments to defeat class certification (in addition to multiple
14 defenses on the merits of the claims). Class certification is a substantial risk in any class action
15 case. Here, while Plaintiffs maintain that the requirements of class certification are met, Defendant
16 proffers various arguments why class treatment is not appropriate, including but not limited to that
17 individualized inquires among class members predominate over common ones. If Defendant was
18 to defeat Plaintiffs' class certification motion, there would be no class wide relief whatsoever, and
19 most class members would likely not file individual claims. Gaines Decl. ¶ 19.

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

24 Finally, Plaintiffs faced the risk that they would not obtain a maximum damage/penalty
25 award on all (or any of) their claims. For example, Plaintiffs seek discretionary penalties pursuant
26 to the PAGA. Even if Plaintiffs did prevail on these claims, it is possible that the Court would not
27 impose all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 21.

28 \\\

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

5 When the costs and risks of non-certification and loss on the merits are considered,
6 Plaintiffs' counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines
7 Decl. ¶¶ 11-23.

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

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

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

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

21 **V. CONCLUSION**

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

- 24 1. Preliminarily finding that the settlement falls within the range of reasonableness and
25 approving the proposed settlement;
- 26 2. Conditionally certifying, for settlement purposes only, the Settlement Class;
- 27 3. Appointing Plaintiffs as the Class Representatives;

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 \$20,000 from the Maximum Settlement Amount to settle Plaintiffs' representative claims under the PAGA, of which seventy-five percent (75%) shall be paid to the Labor and Workforce Development Agency and twenty-five percent (25%) shall be included in the Net Settlement Proceeds for payment to Class 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 a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment as a non-exempt truck driver 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	10 calendar days after the Settlement Administrator receives the Settlement Class Information
Last day for Class Members to submit a written Request for Exclusion form 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
Final settlement approval hearing	_____, 2022, at _____ .m. (approximately 105 days after entry of the Order granting this Motion)

1
2 DATED: April 26, 2022

Respectfully submitted,

3 GAINES & GAINES,
4 A Professional Law Corporation

5
6 By: *Alex P. Katofsky*

DANIEL F. GAINES

ALEX P. KATOFSKY

7 Attorneys for Plaintiffs Luis Prado and Robert Varela and
8 Proposed Class Counsel
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 Rd., Suite 101
Calabasas, CA 91301
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiffs Luis Prado and Robert Varela
and Proposed Class Counsel

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

LUIS PRADO and ROBERT VARELA,
on behalf of themselves and on behalf of all
similarly situated individuals,

Plaintiffs,

v.

J.S. HOMEN TRUCKING, INC., a
California corporation, and DOES 1
through 10, inclusive,

Defendants.

CASE NO: STK-CV-UOE-2022-1797

*Assigned to the Honorable Robert T. Waters, Dept.
11B*

CLASS ACTION

AVAILABLE DATES

DATE: _____, 2022

TIME: ____ a.m.

DEPT.: 11B

Action Filed: March 9, 2022

May 24, 2022, May 25, 2022, May 30, 2022, May 31, 2022 and June 1, 2022.

5 available dates per Clerk's request.