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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
17 **FOR THE COUNTY OF SAN DIEGO**  
18

19 NEDINE SCOTT, on behalf of herself and  
20 all "aggrieved employees" pursuant to  
Labor Code § 2698 et seq.,

21 Plaintiffs,

22 v.

23 MCALISTER INSTITUTE FOR  
24 TREATMENT & EDUCATION, INC., a  
California corporation, and DOES 1  
25 through 10, inclusive,

26 Defendants.  
27  
28

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**11/30/2021** at 01:10:00 PM  
Clerk of the Superior Court  
By Kristin Sorianosos, Deputy Clerk

CASE NO: 37-2020-00010104-CU-OE-CTL  
CASE NO: 37-2020-00014055-CU-OE-CTL

*Assigned for all Purposes to Hon. Eddie C.  
Sturgeon, Department 67*

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

**DATE: April 29, 2022**  
**TIME: 9:00 a.m.**  
**DEPT.: C-67**

*Action Filed: February 24, 2020*

1       **PLEASE TAKE NOTICE THAT** on April 29, 2022 at 9:00 a.m., or as soon thereafter as  
2 the matter may be heard, in Department 67 of the above-entitled Court, located at 330 West  
3 Broadway, San Diego, California 92101, Plaintiffs Nedine Scott and Rose Smith (“Plaintiffs”) will  
4 and hereby do move unopposed for an Order (1) preliminarily finding that the settlement 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, (3)  
7 approving the appointment of Plaintiffs as Class Representatives, (4) approving the appointment of  
8 Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC and Brian R. Short and Dorota  
9 A. James of ShortLegal, APC as Class Counsel, (5) approving the appointment of Phoenix Class  
10 Action Administration Solutions (“Phoenix”) as settlement administrator, (6) preliminarily  
11 approving the allocation of \$50,000 from the Gross Settlement Amount to settle Plaintiffs’  
12 representative claims under the Private Attorney General Act (Lab. Code §§ 2698 et seq.), of which  
13 seventy-five percent (75%) will be paid to the Labor and Workforce Development Agency and  
14 twenty-five percent (25%) will be paid on a pro rata basis to the Class Members, (7) approving as  
15 to content and form the notice to the settlement class, and directing it be disseminated by the  
16 settlement administrator, (8) permitting Plaintiffs to file a First Amended Complaint, and (9) setting  
17 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.

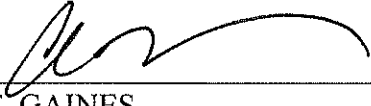
21       The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and  
22 reasonable and in the best interests of the settlement class as a whole, and that the procedures  
23 proposed by the Parties are adequate to ensure the opportunity of class members to participate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

25       This Motion will be based on the Memorandum of Points and Authorities set forth herein,  
26 the Settlement Agreement and Release of Claims, the Declarations of Daniel F. Gaines and Brian  
27 R. Short, and such evidence or oral argument as may be presented at the hearing, and on the  
28 complete record and file herein.

1 DATED: November 30, 2021

Respectfully submitted,

2 GAINES & GAINES,  
3 A Professional Law Corporation

4  
5 By: 

6 DANIEL F. GAINES

ALEX P. KATOFISKY

7 Attorneys for Plaintiffs Nedine Scott and Rose Smith  
8 and Proposed Class Counsel  
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26  
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28

## TABLE OF CONTENTS

|                                                                                                                                             | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. INTRODUCTION .....                                                                                                                       | 1           |
| II. BACKGROUND AND PROCEDURAL HISTORY .....                                                                                                 | 1           |
| III. INVESTIGATION AND SETTLEMENT DISCUSSIONS.....                                                                                          | 3           |
| IV. LEGAL ANALYSIS .....                                                                                                                    | 5           |
| A. The Proposed Settlement Terms .....                                                                                                      | 5           |
| 1. The Settlement Class.....                                                                                                                | 5           |
| 2. Allocations to be Paid from the Maximum Settlement Amount.....                                                                           | 5           |
| 3. Settlement of Claims Pursuant to Labor Code § 2699 et seq.<br>(PAGA) .....                                                               | 7           |
| B. Two-Step Approval Process.....                                                                                                           | 7           |
| C. Procedures for Settlement Before Class Certification .....                                                                               | 8           |
| 1. The Settlement Class Should Be Certified for Settlement Purposes .....                                                                   | 9           |
| a. The Settlement Class is Ascertainable .....                                                                                              | 9           |
| b. Questions of Law or Fact Common to Members of the<br>Settlement Class Predominate.....                                                   | 10          |
| c. The Proposed Class Representative's Claims are Typical of<br>the Class Members' Claims .....                                             | 10          |
| D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or<br>Collusion .....                                                  | 11          |
| 1. The Settlement Falls Within The "Ballpark" of Reasonableness .....                                                                       | 12          |
| 2. Despite the Asserted Fairness of the Settlement Terms, Class<br>Members May Request Exclusion From, Or Object To, The<br>Settlement..... | 15          |
| E. The Proposed General Release Payments To Each Representative Plaintiff<br>Is Reasonable, Justified, And Routinely Awarded.....           | 15          |
| F. The Requested Attorneys' Fees are Reasonable .....                                                                                       | 16          |
| G. Plaintiffs Should Be Permitted to File Their First Amended Complaint.....                                                                | 16          |
| V. CONCLUSION .....                                                                                                                         | 16          |

## TABLE OF AUTHORITIES

### Page

#### CASES

|                                                                                                                 |        |
|-----------------------------------------------------------------------------------------------------------------|--------|
| <i>Amchem Products, Inc. v. Windsor</i><br>(1987) 521 U.S. 591 .....                                            | 8      |
| <i>Clark v. American Residential Services LLC</i><br>(2009) 175 Cal.App.4th 785 .....                           | 11, 15 |
| <i>Classen v. Weller</i><br>(1983) 145 Cal. App. 3d 27.....                                                     | 9      |
| <i>Dunk v. Ford Motor Co.</i><br>(1996) 48 Cal. App. 4th 1794 .....                                             | 1, 8   |
| <i>Green v. Obledo</i><br>(1981) 29 Cal.3d 126 .....                                                            | 7      |
| <i>Hammon v. Barry</i><br>(D.D.C. 1990) 752 F. Supp. 1087 .....                                                 | 10     |
| <i>In re Armored Car Antitrust Litig.</i><br>(N.D. Ga. 1979) 472 F. Supp. 1357 .....                            | 10     |
| <i>In re Baldwin-United Corp.</i><br>(S.D.N.Y. 1984) 105 F.R.D. 475 .....                                       | 8      |
| <i>In re Chicken Antitrust Litig.</i><br>(N.D. Ga. 1980) 560 F. Supp. 957 .....                                 | 10     |
| <i>In re Paine Webber Ltd. P'ships Litig.</i><br>(S.D.N.Y. 1997) 171 F.R.D. 104 .....                           | 10     |
| <i>Kullar v. Foot Locker Retail, Inc.</i><br>(2008) 168 Cal.App.4th 116 .....                                   | 11     |
| <i>Mars Steel Corp. v. Continental Illinois Nat'l Bank &amp; Trust Co.</i><br>(7th Cir. 1987) 834 F.2d 677..... | 10     |
| <i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i><br>(C.D. Cal. 2004) 221 F.R.D. 523 .....                   | 10     |
| <i>Priddy v. Edelman</i><br>(6th Cir. 1989) 883 F.2d 438.....                                                   | 10     |
| <i>Reyes v. Board of Supervisors</i><br>(1987) 196 Cal. App. 3d 1263.....                                       | 9      |

**TABLE OF AUTHORITIES**

**Page**

**CASES**

|                                                                                                                 |        |
|-----------------------------------------------------------------------------------------------------------------|--------|
| <i>Amchem Products, Inc. v. Windsor</i><br>(1987) 521 U.S. 591 .....                                            | 8      |
| <i>Clark v. American Residential Services LLC</i><br>(2009) 175 Cal.App.4th 785 .....                           | 11, 15 |
| <i>Classen v. Weller</i><br>(1983) 145 Cal. App. 3d 27.....                                                     | 9      |
| <i>Dunk v. Ford Motor Co.</i><br>(1996) 48 Cal. App. 4th 1794 .....                                             | 1, 8   |
| <i>Green v. Obledo</i><br>(1981) 29 Cal.3d 126 .....                                                            | 7      |
| <i>Hammon v. Barry</i><br>(D.D.C. 1990) 752 F. Supp. 1087 .....                                                 | 10     |
| <i>In re Armored Car Antitrust Litig.</i><br>(N.D. Ga. 1979) 472 F. Supp. 1357 .....                            | 10     |
| <i>In re Baldwin-United Corp.</i><br>(S.D.N.Y. 1984) 105 F.R.D. 475 .....                                       | 8      |
| <i>In re Chicken Antitrust Litig.</i><br>(N.D. Ga. 1980) 560 F. Supp. 957 .....                                 | 10     |
| <i>In re Paine Webber Ltd. P'ships Litig.</i><br>(S.D.N.Y. 1997) 171 F.R.D. 104 .....                           | 10     |
| <i>Kullar v. Foot Locker Retail, Inc.</i><br>(2008) 168 Cal.App.4th 116 .....                                   | 11     |
| <i>Laffitte v. Robert Half Internat., Inc.</i><br>(2016)1 Cal.5th 480 .....                                     | 16     |
| <i>Mark v. Spencer</i><br>(2008) 166 Cal.App.4th 219 .....                                                      | 16     |
| <i>Mars Steel Corp. v. Continental Illinois Nat'l Bank &amp; Trust Co.</i><br>(7th Cir. 1987) 834 F.2d 677..... | 10     |
| <i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i><br>(C.D. Cal. 2004) 221 F.R.D. 523 .....                   | 10     |

**TABLE OF AUTHORITIES**  
(continued)

|    |                                                                 | <u>Page</u> |
|----|-----------------------------------------------------------------|-------------|
| 3  | <i>Priddy v. Edelman</i>                                        |             |
| 4  | (6th Cir. 1989) 883 F.2d 438.....                               | 10          |
| 5  | <i>Reyes v. Board of Supervisors</i>                            |             |
| 6  | (1987) 196 Cal. App. 3d 1263.....                               | 9           |
| 7  | <i>Sommers v. Abraham Lincoln Federal Sav. &amp; Loan Ass'n</i> |             |
| 8  | (E.D. Pa. 1978).....                                            | 10          |
| 9  | <i>Steinberg v. Carey</i>                                       |             |
| 10 | (S.D.N.Y. 1979) 470 F. Supp. 471.....                           | 10          |
| 11 | <i>Vasquez v. Superior Court</i>                                |             |
| 12 | (1971) 4 Cal.3d 800 .....                                       | 7           |
| 13 | <i>Wershba v. Apple Computer</i>                                |             |
| 14 | (2001) 91 Cal.App.4th 224 .....                                 | 7, 8        |
| 15 | <b>STATUTES</b>                                                 |             |
| 16 | Cal. Bus. & Prof. Code § 17200 .....                            | 2           |
| 17 | Cal. Labor Code §§ 201-203 .....                                | 2, 9, 13    |
| 18 | Cal. Labor Code § 204 .....                                     | 2           |
| 19 | Cal. Labor Code § 210 .....                                     | 2           |
| 20 | Cal. Labor Code § 218 .....                                     | 2           |
| 21 | Cal. Labor Code § 218.5 .....                                   | 2           |
| 22 | Cal. Labor Code § 218.6 .....                                   | 2           |
| 23 | Cal. Labor Code § 223 .....                                     | 2           |
| 24 | Cal. Labor Code § 226 .....                                     | 2, 9, 13    |
| 25 | Cal. Labor Code § 226.3 .....                                   | 2           |
| 26 | Cal. Labor Code § 226.7 .....                                   | 2, 9, 12    |
| 27 | Cal. Labor Code § 247 .....                                     | 2           |
| 28 | Cal. Labor Code § 248.5 .....                                   | 2           |
|    | Cal. Labor Code § 510 .....                                     | 2, 9, 11    |

1 **TABLE OF AUTHORITIES**

2 **(continued)**

**Page**

|    |                                |            |
|----|--------------------------------|------------|
| 3  | Cal. Labor Code § 511 .....    | 2          |
| 4  | Cal. Labor Code § 512 .....    | 2, 9       |
| 5  | Cal. Labor Code § 558 .....    | 11         |
| 6  | Cal. Labor Code § 1174 .....   | 2, 9       |
| 7  | Cal. Labor Code § 1194 .....   | 2, 9, 11   |
| 8  | Cal. Labor Code § 1194.2 ..... | 2          |
| 9  | Cal. Labor Code § 1197 .....   | 2          |
| 10 | Cal. Labor Code § 1197.2 ..... | 2          |
| 11 | Cal. Labor Code § 1198 .....   | 2          |
| 12 | Cal. Labor Code § 2698 .....   | 9          |
| 13 | Cal. Labor Code § 2699 .....   | 2, 6, 8, 9 |
| 14 | Cal. Labor Code § 2810.5 ..... | 2          |

15

16 **RULES AND REGULATIONS**

|    |                            |         |
|----|----------------------------|---------|
| 17 | Cal. R. Ct. 3.769.....     | 1, 7, 8 |
| 18 | Fed. R. Civ. P. 23(e)..... | 7       |

19 **OTHER AUTHORITIES**

|    |                                                                                        |          |
|----|----------------------------------------------------------------------------------------|----------|
| 20 | 4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002)..... | 7, 8, 10 |
| 21 | Manual for Complex Litigation (Third) § 30.41 .....                                    | 7, 15    |

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 Nedine Scott (“Scott”) and Rose  
6 Smith (“Smith”) (herein collectively, “Plaintiffs”), on behalf of themselves and on behalf of all  
7 others similarly situated, and Defendant McAlister Institute for Treatment & Education, Inc  
8 (“Defendant”).

9 The settlement occurred as a result of extensive arm’s-length negotiations by experienced  
10 counsel with the assistance of a respected mediator with experience in the area of employment class  
11 actions. Most importantly, the settlement will result in significant financial benefit to the  
12 participating Class Members, on terms that are by any measure fair, reasonable and adequate. *See*  
13 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801-02. The proposed settlement provides  
14 for a non-revisionary class settlement in the gross amount of \$575,000<sup>1</sup> and the proposed Settlement  
15 Class contains approximately 580 members who worked approximately 18,882 pay periods during  
16 the Class Period. As detailed below, the settlement is in the best interests of the class in light of all  
17 of the facts and circumstances and the risks and delays of further litigation.

18 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant  
19 preliminary approval of the settlement agreement and preliminarily find that the settlement falls  
20 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement  
21 Class, for settlement purposes only; (c) approve the appointment of Plaintiffs Nedine Scott and  
22 Rose Smith as Class Representatives; (d) approve the appointment of Daniel F. Gaines and Alex P.  
23 Katofsky of Gaines & Gaines, APLC and Brian R. Short and Dorota A. James of ShortLegal, APC  
24 as Class Counsel; (e) approve appointment of the settlement administrator; (f) permit the filing of  
25 a First Amended Complaint; (g) authorize the mailing of the proposed class action notice packet;  
26 and (h) schedule a final fairness and approval hearing.

27 <sup>1</sup> As detailed herein, this amount is to be reduced to \$500,000 if Defendant deposits the Gross  
28 Settlement Amount in a qualified settlement fund account no later than December 17, 2021.  
Stipulation at ¶ C(1)(b).

## **II. BACKGROUND AND PROCEDURAL HISTORY**

On December 18, 2019, Plaintiff Scott 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 February 24, 2020, Plaintiff Scott initiated this Action (“Scott Action”) by filing a Complaint pursuant to PAGA on behalf of herself and all other aggrieved employees. As part of the settlement approval process, Plaintiff Scott shall file a First Amended Complaint attached to the concurrently-filed Daniel F. Gaines Declaration as **Exhibit B-3**, asserting direct class and representative action claims against Defendant for (1) failure to provide rest periods or lawful compensation in lieu thereof (Labor Code § 226.7; IWC Wage Order 5-2001); (2) failure to provide meal periods or lawful compensation in lieu thereof (Labor Code §§ 226.7, 512, and 1174; IWC Wage Order 5-2001); (3) knowing and intentional failure to comply with itemized employee wage statement provisions (Labor Code §§ 226(a), (e), (h), 226.3); (4) failure to timely pay wages due at separation of employment (Labor Code §§ 201-203); (5) failure to pay all minimum wages and overtime wages (Labor Code §§ 510 and 1194); (6) violation of Business and Professions Code § 17200; and (6) penalties pursuant to Labor Code § 2699(f) for violations of Labor Code §§ 201-203, 226(a), 226.3, 226.7, 510, 512, and 1194 (the “First Amended Complaint”). Gaines Decl. at ¶ 7.

On March 12, 2020, Plaintiff Smith exhausted the pre-filing requirements of the PAGA. Declaration of Brian R. Short (“Short Decl.”) at ¶ 10.

On or about March 13, 2020, Plaintiff Smith initiated the Smith Action, San Diego Superior Court; Case No.: 37-2020-00014055-CU-OE-CTL, by filing a Complaint on behalf of herself and all similarly-situated employees of Defendant in the State of California (the “Smith Action”) (“Scott Action” and “Smith Action” collectively called hereafter “Actions”). As amended, Plaintiff Smith’s First Amended Complaint asserts PAGA representative claims against Defendant pursuant to Labor Code §§ 201, 202, 204, 210, 218, 218.5, 218.6, 223, 226, 226.7, 247, 248.5, 510, 511, 512, 1174, 1194, 1194.2, 1197, 1197.1, 1198, and 2810.5, for Defendant’s (1) failure to pay all minimum wages and overtime wages, (2) failure to provide rest periods or compensation in lieu thereof, (3)

1 failure to provide meal periods or compensation in lieu thereof, and (4) failure to timely pay wages  
2 due at separation of employment. Short Decl. at ¶10-11.

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

16 The Class Representatives contend that Defendant violated the California Labor Code and  
17 that this case is appropriate for class certification. Gaines Decl. at ¶ 9.

### 18 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

19 Class Counsel represent that they have conducted a thorough investigation into the facts  
20 and law during the prosecution of this class action case, including the exchange of extensive formal  
21 and informal discovery and the review and verification of statistical data and other facts and  
22 information provided by Defendant. Counsel for the Parties also represent that they have  
23 investigated the applicable law as applied to the facts discovered regarding the alleged claims of  
24 Plaintiffs and potential defenses thereto, and the damages claimed by Plaintiffs. Gaines Decl. at ¶  
25 10; Short Decl. at ¶¶ 11-17.

26 On June 28, 2021, following an exchange of information regarding the Settlement Class,  
27 the claims and defenses asserted by the Parties, counsel for the Parties engaged in a global  
28 mediation with Lynn S. Frank, Esq. and were able to reach the material terms of the Settlement.

1 Gaines Decl. at ¶ 11; Short Decl. at ¶¶ 18-20.

2 Based on their own independent investigation and evaluation, Class Counsel are of the  
3 opinion (and will so represent to the Court) that settlement for the consideration and on the terms  
4 set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of  
5 the Settlement Class in light of all known facts and circumstances, including the risk of protracted  
6 litigation, the risk the Settlement Class will not be certified by the Court, and the defenses asserted  
7 by Defendant. Defendant and its counsel also agree (and will so represent to the Court) that this  
8 settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 12. Short Decl.  
9 at ¶¶ 20, 26.

10 The Parties agree that the settlement class described herein may be certified for settlement  
11 purposes only and that any motion for approval seeking, *inter alia*, certification of the Settlement  
12 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the  
13 certification will have no force or effect and will immediately be revoked. The Parties further agree  
14 that certification for purposes of the settlement is in no way an admission that class certification is  
15 proper under the more stringent standard applied for litigation and that evidence of this limited  
16 stipulation for settlement purposes only will not be admissible for any purpose in this or any other  
17 proceeding. Gaines Decl. at ¶ 13.

#### 18 **IV. LEGAL ANALYSIS**

##### 19 **A. The Proposed Settlement Terms**

##### 20 **1. The Settlement Class**

21 The proposed settlement calls for the certification of the following settlement class: All  
22 current and former hourly paid or non-exempt employees who have worked for Defendant in  
23 California from December 18, 2018 through June 28, 2021 (the “Class Period”). Defendant  
24 represents that the Settlement Class includes approximately 580 members who worked  
25 approximately 18,882 pay periods during the Class Period. Stip. at ¶ A(5).

26 \\\

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

2                The Stipulation provides that Defendant shall pay an amount not to exceed \$575,000 to  
3 resolve the Action on a class-wide basis (the “Gross Settlement Settlement”)<sup>2</sup>. The Gross  
4 Settlement Amount includes the attorneys’ fees of Class Counsel, litigation costs and expenses  
5 (which includes, without limitation, all such fees and costs incurred to date, as well as such fees  
6 and costs to be incurred in documenting the settlement, providing any notices required as part of  
7 the settlement, securing Court approval of the settlement, and obtaining judgment in the Actions),  
8 the enhancement/general release payments to each Class Representative, as approved by the Court,  
9 the payment to the LWDA pursuant to the PAGA claims in the Actions, and all costs of  
10 administration, including, without limitation, settlement administration fees and expenses.  
11 Defendant shall pay all employer payroll tax obligations due on wage payments made from the Net  
12 Settlement Amount in addition to, and separate and apart from, the Gross Settlement Amount. Stip.  
13 at ¶ C(1)(a).

14                From the Gross Settlement Amount, Defendant will not oppose Plaintiffs’ counsel’s  
15 application to the Court for up to one-third of the Gross Settlement Amount for attorneys’ fees  
16 (\$166,666.66 based on a \$500,000.00 Gross Settlement Amount or \$191,666.66 based on a  
17 \$575,000 Gross Settlement Amount). Stip. at ¶ C(1)(g).

18                From the Gross Settlement Amount, Defendant will not oppose Plaintiffs’ counsel’s  
19 application to the Court for up to \$15,000 in reimbursement of litigation costs and expenses. Stip.  
20 at ¶ C(1)(h).

21                From the Gross Settlement Amount, Defendant will not oppose Plaintiffs’ counsel’s  
22 application to the Court for service payments to each Class Representative in the gross amount of  
23 \$7,500, in consideration for their efforts in instituting and participating in the Action and in  
24 exchange for their general release of all claims. Stip. at ¶ C(1)(f).

25                From the Gross Settlement Amount, settlement administration fees paid to Phoenix will be  
26 no more than \$9,000. Stip. at ¶ C(1)(i).

27                <sup>2</sup> If Defendant pays the sum of \$500,000 to the designated Qualified Settlement Fund maintained  
28 by the Claims Administrator on or before December 17, 2021, the Gross Settlement Amount shall  
be reduced to \$500,000. See Stip. at ¶ C(1)(b).

1 From the Gross Settlement Amount, the portion to be allocated for settlement of any and all  
2 claims for penalties under the PAGA is \$50,000 ("PAGA Payment"), 75% of which shall be paid  
3 to the LWDA and 25% shall be paid to Class Members who have not submitted a valid and timely  
4 Request for Exclusion Form as part of the Net Settlement Amount. Stip. at ¶ C(1)(e).

5 The Net Settlement Amount is defined as the Gross Settlement Amount less the amounts  
6 approved and awarded by the Court for: attorneys' fees and documented litigation costs and  
7 expenses incurred or advanced by Class Counsel, the general release payment to each Class  
8 Representative, the payment to the LWDA pursuant to PAGA, and the costs of administering the  
9 settlement. Stip. at ¶ C(1)(c).

10 The Individual Payment Amount means the portion of the Net Settlement Amount  
11 distributable to each Class Member who participates in the Settlement (i.e., who does not submit a  
12 valid request for exclusion form). The Individual Payment Amounts will be calculated by dividing  
13 the Net Settlement Amount by the total weeks worked by all participating Class Members for  
14 Defendant in California during the Class Period, which will yield the applicable weekly rate  
15 ("Workweek Value"). The weekly rate shall be multiplied by the number of weeks each individual  
16 participating Class Member worked for Defendant in California during the Class Period to yield  
17 their Individual Payment Amount. Each Participating Settlement Class Member who does not opt  
18 out will receive an Individual Payment Amount equal to their individual weeks worked for  
19 Defendant in California during the Class Period multiplied by the Workweek Value. Stip. at ¶  
20 C(1)(d).

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

22 Pursuant to PAGA, the Parties have agreed that \$50,000 of the Gross Settlement Amount  
23 will be allocated to settle the claims brought under Labor Code § 2699 et seq. Pursuant to Labor  
24 Code § 2699(i), "civil penalties recovered by aggrieved employees shall be distributed as follows:  
25 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved  
26 employees." As such, 75 percent of the apportioned PAGA settlement amount – or \$37,500 – shall  
27 be payable to the LWDA. The remaining 25 percent, or \$12,500, shall be paid to Class Members  
28 pro-rata based on their Individual Payment Amount. Stip. at ¶ C(1)(e).

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

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

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

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

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

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

27     <sup>3</sup> 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 *Id.* at § 11.24.

2 Here, the Parties have reached such an agreement and have submitted the Stipulation  
3 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 14.

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

5 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary  
6 approval stage, request that the court provisionally approve certification of the class – conditioned  
7 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if  
8 found to be fair and reasonable.” *Wershba, supra*, 91 Cal.App.4th at 240. *Accord Dunk, supra*, 48  
9 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”  
10 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*  
11 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478<sup>4</sup> (“many courts have employed this practice in the  
12 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

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

17 <sup>4</sup> *Newberg on Class Actions*, at § 11.26.

18 As required by Labor Code § 2699(1)(2), concurrent with Plaintiffs’ submission of the  
19 Stipulation to the Court, their counsel is transmitting it, together with this Motion, to the LWDA.  
20 Gaines Decl. at ¶ 33.

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

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

27 \_\_\_\_\_  
28 <sup>4</sup> 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 Class meets all requirements for certification, as discussed below.

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

3 The proposed Settlement Class is ascertainable. The class definition, the size of the Class,  
4 and the means for identifying the members of the class determine whether the class is ascertainable.  
5 *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1274. In this case, the Class Members  
6 are identifiable from Defendant's employment and payroll records. Further, the Settlement Class  
7 is sufficiently numerous to warrant certification. According to Defendant's records, the Class  
8 comprises approximately 580 employees. Gaines Decl. ¶ 29.

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

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

18 c. **The Proposed Class Representatives' Claims Are Typical of the**  
19 **Class Members' Claims**

20 A class representative's claims are typical when they arise from the same event or course  
21 of conduct that gives rise to the claims of the class, and are based on the same legal theory.  
22 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. In this case, named Plaintiffs and proposed  
23 Class Representatives are former non-exempt employees who worked for Defendant in the State of  
24 California during the Class Period. They contend that Defendant failed to pay all wages, failed to  
25 provide meal and rest periods, failed to comply with itemized employee wage statement provisions,  
26 and failed to timely pay wages at the separation of employment, in violation of Labor Code §§ 201-  
27 203, 226(a), 226.3, 226.7, 510, 512, 1174, 1194, 2698, and 2699, among other Labor Code  
28 provisions. They have the same claims as those that the members of the Settlement Class would

1 reasonably be expected to bring based on the course of conduct alleged herein. Gaines Decl. ¶ 31.

2 Plaintiffs have also demonstrated that they will aggressively and competently assert the  
3 interests of the proposed Settlement Class; they have taken active roles in this litigation and have  
4 no apparent conflicts with other class members. Gaines Decl. ¶ 32; Short Decl. at ¶¶ 32-33.  
5 Furthermore, Plaintiffs have retained competent counsel, experienced in litigating class action  
6 claims in the employment context. See Gaines Decl. ¶¶ 2-5; Short Decl. at ¶¶ 2-9.

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

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

19 While the recommendations of counsel proposing the settlement are not conclusive, the  
20 Court can properly take them into account, particularly where, as here, such counsel have been  
21 involved in formal and informal discovery and negotiations for some period of time, appear to be  
22 competent, have experience with this type of litigation, and have exchanged substantial evidence  
23 with the opposing party. See *Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd.*  
24 *P'ships Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length  
25 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the  
26 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of  
27 counsel, who are most closely acquainted with the facts of the underlying litigation”); see Gaines  
28 Decl. ¶¶ 2-5, 12-27.

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, during a lengthy formal and informal discovery process and at a formal mediation, of their  
6 respective factual contentions, legal theories and defenses, resulting in extensive arm's-length  
7 negotiations taking place among the Parties. *See* Gaines Decl. ¶¶ 2-5, 12-27; Short Decl. at ¶¶ 11-  
8 17.

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

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

19 Plaintiffs' counsel created a comprehensive damage analysis using sampling information  
20 obtained through formal and informal discovery. This damage analysis reveals that the negotiated  
21 settlement falls within a realistic range of recovery on Class Members' claims. Gaines Decl. ¶ 16;  
22 Short Decl. at ¶ 17.

23 Plaintiffs allege that Defendant failed to pay overtime wages earned during the course of  
24 employment, when Plaintiffs and other Class Members worked off-the-clock, in violation of Labor  
25 Code §§ 510, 558 and 1194 and IWC Wage Order 5-2001. Plaintiffs argue that the supervisors  
26 were not only aware but expected Class Members to work after their regular shifts and through  
27 their meal periods to provide satisfactory service to clients and meet certain administrative  
28 reporting requirements. Despite 24/7 operating hours and a high number of individuals being

1 treated at McAlister, Plaintiffs allege that its facilities were understaffed, and it was expected that  
2 Plaintiffs continue to perform their job duties even after they punched out at the end of their shifts.  
3 The maximum potential value of this claim is \$4,306,500.00. Due to the difficulties expected in  
4 prevailing on the merits on this claim, including near impossibility to calculate the total number of  
5 off-the-clock hours worked by Plaintiffs and Class Members, together with inherent risks of class  
6 certification and proof, Plaintiffs were required to discount the value of this claim for purposes of  
7 settlement at this juncture. Gaines Decl. ¶ 17; Short Decl. at ¶ 21.

8 As a result of Defendant's allegedly illegal meal period policy and practices which Plaintiffs  
9 allege required that the putative Class Members stay on the premises to assist patients at all times  
10 and, Class Members were not provided with all meal periods to which they were entitled. Plaintiffs  
11 contend that when they were provided meal periods, the meal periods were oftentimes late, cut  
12 short or on-duty. Plaintiffs also argue that Defendant's meal period policy was facially unlawful  
13 because it does not provide a timing requirement for second meal periods – that they must be taken  
14 before the end of the tenth hour of work. Based on an analysis conducted by Plaintiffs' expert, the  
15 maximum potential value of this claim is \$424,908. Plaintiffs' expert analyzed a sampling of clock  
16 in and out records provided by Defendant. Of all the shifts analyzed, there was roughly a 14.8%  
17 meal period violation rate, which tended to demonstrate general compliance with California's meal  
18 period requirements and cut against class certification. Accordingly, Plaintiffs were therefore  
19 required to discount the value of this claim for purposes of settlement at this juncture. Gaines Decl.  
20 ¶ 18; Short Decl. at ¶ 2

21 Plaintiffs further contend that Defendant failed to offer or authorize uninterrupted ten-  
22 minute off-the-clock rest periods to Plaintiffs and Class Members for every four hours worked or  
23 major fraction thereof, but did not pay them premium wages in the amount of one hour's pay for  
24 these denied rest periods, in violation of Labor Code § 226.7 and IWC Wage Order 5-2001.  
25 Plaintiffs allege that Class Members were routinely unable, and not authorized, to take a 10-minute  
26 rest period for every four (4) hours of work or major fraction thereof due to their busy work  
27 schedules, but were not paid premium wages of one hour's pay for each missed rest period. Based  
28 on an analysis performed by Plaintiffs, coupled with their expert's review of Class Member time

1 and wage data, the potential value of this claim is \$ 717,75000. Due to the difficulties expected in  
2 prevailing on the merits on this claim, including the defenses proffered by Defendant (including  
3 waiver), together with the class certification risk inherent in rest period claims, Plaintiffs were  
4 required to discount the value of this claim for purposes of settlement at this juncture. Gaines Decl.  
5 ¶ 19; Short Decl. at ¶ 22.

6 Class Members also sought wage statement penalties pursuant to Labor Code § 226(e),  
7 waiting time penalties pursuant to Labor Code § 203 and PAGA penalties derivative of the  
8 underlying violations alleged. The value of these penalties – which are derivative, discretionary,  
9 and subject to defenses of their own – is \$3,784,500.00, a substantial amount which required a  
10 compromise to resolve based on risk of litigation. Plaintiffs believed it was unlikely that many of  
11 these penalties could be recovered because their value could eclipse the value of recovered  
12 underpaid wages (if any wages were recovered at all), because Plaintiffs' claims are novel, and  
13 because of Defendant's potential independent defenses to these penalties. These penalties are  
14 substantial for technical and derivative violations and were subject to multiple defenses, including  
15 good faith and lack of willfulness. Due to the difficulties expected in prevailing on the merits on  
16 these penalty claim, Plaintiffs were required to discount them for purposes of settlement at this  
17 juncture. Gaines Decl. ¶ 20; Short Decl. at ¶¶ 23-24.

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

25 Defendant also asserted that all of Plaintiffs' claims are subject to arbitration in accordance  
26 with the Binding Arbitration Agreement signed by both Plaintiffs and nearly all Class Members  
27 during their employment with Defendant and therefore, Plaintiffs are prohibited from pursuing  
28 class actions claims on behalf of all similarly-situated employees. If found enforceable, these

1 arbitration agreements would require all Class Members to pursue their claims individually in  
2 hundreds of separate arbitrations – an unlikely result. Put simply, many of the claims alleged in  
3 the Action and compromised by this Settlement would go unpursued without this resolution.  
4 Gaines Decl. ¶ 22; Short Decl. at ¶ 25.

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

9 Finally, Plaintiffs faced the risk that they would not obtain a maximum damage/penalty  
10 award on all (or any of) their claims. For example, Plaintiffs seek discretionary penalties pursuant  
11 to the PAGA. Even if Plaintiffs did prevail on these claims, it is possible that the Court would not  
12 impose all penalties pursuant to its discretionary power to reduce them. Gaines Decl. ¶ 24; Short  
13 Decl. at ¶ 31.

14 Defendant strongly contends that its policies and practices do not violate any laws. It  
15 contends that it properly provided for all meal and rest periods and fully compensated their  
16 employees for all time worked. It further contends that the wage statements it provides to their  
17 employees are fully compliant with California law. Gaines Decl. ¶ 26.

18 When the costs and risks of non-certification and loss on the merits are considered,  
19 Plaintiffs’ counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines  
20 Decl. ¶¶ 16-27; Short Decl. at ¶ 35.

21 The settlement for each Class Member is fair, reasonable and adequate, given the inherent  
22 risk of litigation, the risk relative to class certification, and the costs of pursuing such litigation.  
23 The settlement shall finally resolve all claims of the Class Members as alleged in the Action.  
24 Gaines Decl. ¶ 28. Short Decl. at ¶ 35.

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

27 Despite the asserted fairness of the settlement terms, any potential Class Member who  
28 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit

1 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member  
2 would be bound only by the PAGA portion of the Settlement but would otherwise retain any claim  
3 he or she may have against Defendant.

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

7 **E. The Proposed General Release Payments To Each Representative Plaintiff Is**  
8 **Reasonable, Justified, And Routinely Awarded.**

9 Service payments to representative plaintiffs in class action settlements are intended to  
10 recognize the representative's level of risk, time expended, and the efforts he or she undertook.  
11 *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785. "Courts routinely  
12 approve incentive awards to compensate named plaintiffs for the services they provide and the risks  
13 they incurred during the course of the class action litigation." See *Ingram v. The Coca-Cola Co.*  
14 (N.D. Ga. 2001) 200 F.R.D. 685, 694. See also Manual § 30.42 n. 763 (noting that such awards  
15 "may sometimes be warranted for time spent meeting with class members or responding to  
16 discovery.")

17 Here, the Parties agreed to pay each Plaintiff a General Release Payment in an amount not  
18 to exceed \$7,500 each because of their extensive contributions during the case, the valuable  
19 information they were able to provide both prior to and at mediation, and the risks that they  
20 incurred by serving as named representatives in a public class action lawsuit. Declarations detailing  
21 the extent of Plaintiffs Rose Smith's and Nadine Scott's contribution and accompanying number  
22 of hours worked for the benefit of the Class will be submitted in conjunction with the Motion for  
23 Final Approval. Short Decl. at ¶¶ 32-33.

24 In addition, Plaintiffs have agreed to a much broader general release and §1542 waiver  
25 which leaves them without recourse for known and unknown potential claims they may have against  
26 Defendant now or sometime in the future. This concession is significant and real. Considering the  
27 risks involved in prosecuting a case against their former employer, the work performed by the  
28 Plaintiffs during the litigation of this matter, and finally, Plaintiff's selfless desire to include all

1 Class Members in this recovery is to be commended and should be recognized. Therefore, the  
2 requested service award, totaling \$15,000 (\$7,500 for each Plaintiff) is fair and reasonable.

3 **F. The Requested Attorneys' Fees are Reasonable**

4 An award of attorney fees in class action litigation are tied to counsel's actual efforts to  
5 benefit the class. *Mark v. Spencer* (2008) 166 Cal.App.4th 219, 229. Hence, when class action  
6 litigation establishes a monetary fund for the benefit of class members, the preferred method of  
7 attributing attorneys' fees is as a percentage of the common fund created by the settlement. *Laffitte*  
8 *v. Robert Half Internat., Inc.* (2016)1 Cal.5th 480, 503. The fee award may then be "cross-checked"  
9 for reasonableness by reviewing counsel's lodestar. *Id.* at 506.

10 Plaintiffs' counsel will request attorney's fees of no more than one-third of the Gross  
11 Settlement Amount, and for reimbursement of actual litigation costs not to exceed \$15,000. The  
12 amount requested is reasonable if evaluated pursuant to the percentage of common fund or lodestar  
13 methodology and further details of thesis analysis will be provided to the court in conjunction with  
14 the filing of Plaintiffs' fee application. Short Decl. at ¶¶ 30-31.

15 **G. Plaintiffs Should Be Permitted to File Their First Amended Complaint**

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

21 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the  
22 First Amended Complaint for settlement purposes only. As part of its order preliminarily approving  
23 the settlement, Plaintiffs request that the Court approve their filing of the First Amended Complaint,  
24 and consent that Defendant not be required to file a responsive pleading thereto. Gaines Decl. ¶ 7,  
25 Exhibit B-3.

26 **V. CONCLUSION**

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

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

3           2.       Conditionally certifying, for settlement purposes only, the Settlement Class;

4           3.       Appointing Plaintiffs Nedine Scott and Rose Smith as Class Representatives;

5           4.       Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC and  
6 Brian R. Short and Dorota A. James of ShortLegal, APC as Class Counsel;

7           5.       Approving Phoenix Class Action Administration Solutions as Settlement  
8 Administrator;

9           6.       Preliminarily approving the allocation of \$50,000 from the Gross Settlement  
10 Amount to settle Plaintiffs' representative claims under the Private Attorney General Act (Lab.  
11 Code §§ 2698 et seq.), of which seventy-five percent (75%) will be paid to the Labor and Workforce  
12 Development Agency and twenty-five percent (25%) shall be paid to Class Members pro-rata based  
13 on their Individual Payment Amount who have not submitted a valid and timely Request for  
14 Exclusion Form as part of the Net Settlement Amount;

15          7.       Approving as to content and form the notice to the Settlement Class, and directing  
16 it to be disseminated by the Settlement Administrator;

17          8.       Permitting Plaintiffs to file their First Amended Complaint, attached to the  
18 Stipulation as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order  
19 granting this motion has been given, and consent that Defendant not be required to file a responsive  
20 pleading thereto; and,

21          9.       Setting the following schedule of settlement proceedings:

| <u><b>EVENT</b></u>                                                                                                                                                                                                                                                                   | <u><b>TIMING</b></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 in California during the Class Period ("Settlement Class Information") | 7 calendar days after entry of Court's Order granting preliminary approval of Settlement          |
| Last day for Settlement Administrator to mail Notice and Request for Exclusion form to Class Members                                                                                                                                                                                  | 14 calendar days after the Settlement Administrator's receipt of the Settlement Class Information |

| <u>EVENT</u>                                                                                                                                                                         | <u>TIMING</u>                                                                    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| 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,<br>at _____.m. (approximately 80 days<br>after entry of this Order) |

DATED: November 30, 2021

Respectfully submitted,

GAINES & GAINES,  
A Professional Law Corporation

By: 

DANIEL F. GAINES

ALEX P. KATOFISKY

Attorneys for Plaintiffs Nedine Scott and Rose Smith  
and Proposed Class Counsel