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8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**
11

12 DEREK DOWNEY, ADAM SARDONI,
individually and on behalf of all similarly
13 situated individuals, on behalf of the general
public, and all “aggrieved employees”
14 pursuant to Labor Code § 2698 *et seq.*

15 Plaintiffs,

16 v.

17 NATIONAL TECHNICAL SYSTEMS,
INC., a California corporation, and DOES 1
18 through 10, inclusive,

19 Defendants.
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Case No.: 22STCV00946

Assigned to the Hon. Stuart M. Rice, Dept. 1

CLASS ACTION

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

DATE: January 11, 2023

TIME: 10:30 a.m.

DEPT.: SSC-1

Action Filed: May 4, 2021

1 **PLEASE TAKE NOTICE THAT** on January 11, 2023 at 10:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department SSC-1 of the above-entitled Court, located at 312 N.
3 Spring Street, Los Angeles, California 90012, Plaintiffs Derek Downey and Adam Sardoni will and
4 hereby do move unopposed for an Order (1) preliminarily approving the proposed class action
5 settlement in the above-captioned case, (2) provisionally certifying the settlement class, (3)
6 provisionally approving the appointment of Plaintiffs Derek Downey and Adam Sardoni as Class
7 Representatives, (4) provisionally approving the appointment of Daniel F. Gaines, Esq. and Alex
8 P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (5) provisionally approving the
9 appointment of Phoenix Class Action Settlement Administration Solutions as settlement
10 administrator, (6) approving and directing distribution of notice to the settlement class, and (7)
11 setting a final fairness and approval hearing.

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

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

19 This Motion will be based on the Memorandum of Points and Authorities set forth herein,
20 the Joint Stipulation of Class Action Settlement and Release Between Plaintiffs, on Behalf of
21 Themselves and All Others Similarly Situated and Aggrieved, and Defendant, the Declaration of
22 Daniel F. Gaines, such evidence or oral argument as may be presented at the hearing, and on the
23 complete record and file herein.

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1 DATED: December 15, 2022

GAINES & GAINES, APLC

2
3 By: 

4 DANIEL F. GAINES

ALEX P. KATOFISKY

5 Attorneys for Plaintiffs Derek Downey and Adam Sardoni
6 and Proposed Class Counsel
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

4 Plaintiffs Derek Downey (“Downey”) and Adam Sardoni (“Sardoni”) (together,
5 “Plaintiffs”) and Defendants National Technical Systems, Inc., NTS Technical Systems, NTS
6 Engineering Services, Inc., Unitek Technical Services, Inc. and National Quality Assurance – USA,
7 Inc. (all together, “Defendants”) (collectively, the “Parties”) have reached a resolution of this class
8 action and hereby submit their settlement agreement to the Court for its preliminary approval.

9 On February 24, 2021 and March 9, 2021, Plaintiffs exhausted administrative remedies
10 pursuant to California Labor Code § 2699, *et seq.* by providing notice of their claims to the Labor
11 and Workforce Development Agency (“LWDA”) and Defendant National Technical Systems, Inc.
12 On April 15, 2022, the notice to the LWDA was supplemented to allege the same claims against
13 NTS Technical Systems, NTS Engineering Services, Inc., Unitek Technical Services, Inc. and
14 National Quality Assurance-USA, Inc, all of which are related companies. Declaration of Daniel
15 F. Gaines (“Gaines Decl.”) at ¶ 6.

16 On May 4, 2021, Plaintiffs filed a civil Complaint against Defendant originally in the Santa
17 Clara County Superior Court entitled *Derek Downey, Adam Sardoni, individually and on behalf of*
18 *all similarly situated individuals, on behalf of the general public, and all “aggrieved employees”*
19 *pursuant to Labor Code § 2698 et seq. v. National Technical Systems, Inc., a California*
20 *corporation, and Does 1 through 10, inclusive*, Case Number 21CV381341, alleging (1) failure to
21 pay all minimum and overtime wages (Labor Code §§ 510 and 1194); (2) failure to provide rest
22 periods or compensation in lieu thereof (Labor Code § 226.7; IWC Wage Order 4-2001); (3) failure
23 to provide meal periods or compensation in lieu thereof (Labor Code §§ 226.7, 512 and 1197; IWC
24 Wage Order 4-2001); (4) knowing and intentional failure to comply with itemized employee wage
25 statement provisions (Labor Code § 226(a), (e)); (5) failure to pay wages due at separation of
26 employment (Labor Code §§ 201-203, 221, 510 and 1194); and (6) violation of Business and
27 Professions Code § 17200. Plaintiff also sought civil penalties pursuant to the Private Attorneys
28 General Act (Labor Code § 2699(f)). Gaines Decl. at ¶ 7.

1 On January 10, 2022, Plaintiffs filed a notice of transfer of venue to the Superior Court of
2 California County of Los Angeles, where the case was designated Case No. 22STCV00946 (the
3 “Action”). Gaines Decl. at ¶ 8.

4 On September 6, 2022, Plaintiffs filed a First Amended Class and Representative Action
5 Complaint, naming all entities to which Plaintiffs exhausted PAGA’s administrative requirements
6 in their April 15, 2022 compliance letter as Defendants. Gaines Decl. at ¶ 9.

7 Defendants deny all material allegations set forth in the Action. Notwithstanding, in the
8 interest of avoiding further litigation, the Parties desire to fully and finally settle all actual or
9 potential claims by the putative Class Members. Gaines Decl. at ¶ 10.

10 **B. Investigation and Settlement Discussions**

11 Plaintiffs’ counsel in the Action diligently investigated the proposed putative Class
12 Members’ claims against Defendants, including any and all applicable defenses and the applicable
13 law. The investigation included, *inter alia*, the exchange of information pursuant to informal
14 discovery methods, review of numerous corporate policies and practices, and review and analysis
15 of voluminous time and payroll records. Gaines Decl. at ¶ 11.

16 On April 13, 2022, following nearly a year of litigation, the Parties participated in a
17 mediation before David A. Rotman, Esq. (the “Mediator”), a highly respected mediator of wage
18 and hour class actions. With the assistance of the Mediator, the Parties reached agreement on the
19 principal terms of a class action settlement that would fully resolve the Action. Gaines Decl. at ¶
20 12.

21 The settlement discussions before and during the mediation were conducted at arm’s length
22 and the settlement is the result of an informed and detailed analysis of Defendants’ alleged potential
23 liability in relation to the costs and risks associated with continued litigation. Gaines Decl. at ¶ 13.

24 Based on the data and documents produced pursuant to informal discovery, as well as Class
25 Counsel’s own independent investigation and evaluation, and the mediator’s efforts, Class Counsel
26 believe that the settlement with Defendants for the consideration and on the terms set forth in this
27 Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the Class
28 Members in light of all known facts and circumstances, including the risk of significant delay and

1 uncertainty associated with litigation, various defenses asserted by Defendants, the sharply
2 contested legal and factual issues involved, and numerous appellate issues. Gaines Decl. at ¶ 15.

3 The Settlement Agreement is made and entered into by and between Plaintiffs, individually
4 and on behalf of all others similarly situated and aggrieved, on the one hand, and Defendants, on
5 the other hand, and is subject to the terms and conditions hereof, and to the Court's approval. The
6 Parties expressly acknowledge that this Settlement Agreement is entered into solely for the purpose
7 of compromising significantly disputed claims and that nothing herein is an admission of any
8 liability or wrongdoing by Defendants. If, for any reason the Settlement Agreement is not
9 approved, it will be of no force or effect, and the Parties shall be returned to their original respective
10 positions.

11 Plaintiffs seek to represent a putative class of approximately 619 current or former hourly-
12 paid or non-exempt employees employed by Defendants at any time during the period between
13 May 4, 2017, through June 13, 2022. The Settlement Class does not include any person who
14 previously settled or released any of the claims covered by the Settlement, or any other person who
15 previously was paid or received awards through civil or administrative actions for the claims
16 covered by the Settlement. Gaines Decl. at ¶ 18.

17 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant
18 preliminary approval of the settlement agreement, (b) conditionally grant certification of the
19 proposed settlement class, (c) provisionally approve the appointment of Plaintiffs Derek Downey
20 and Adam Sardoni as Class Representatives, (d) provisionally approve the appointment of Daniel
21 F. Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel, (e)
22 approve appointment of the settlement administrator, (f) authorize the mailing of the proposed class
23 action notice packet; and (g) schedule a final fairness and approval hearing.

24 **II. LEGAL ANALYSIS**

25 **A. The Proposed Settlement Terms**

26 The Parties have agreed upon a settlement class: all persons employed in California by
27 National Technical Systems, Inc., NTS Technical Systems, NTS Engineering Services, Inc., Unitek
28 Technical Services, Inc., or National Quality Assurance-USA, Inc. as current or former hourly-

1 paid or non-exempt employees at any time during the period between May 4, 2017, through June
2 13, 2022. Settlement at ¶ 15.

3 The Parties stipulate to the conditional certification of the Settlement Class as defined herein
4 for settlement purposes only. Settlement at ¶ 22.

5 The Settlement Agreement provides that Defendants shall pay the total, non-reversionary
6 sum of \$885,000 to resolve the claims alleged in the Action on behalf of the Settlement Class (the
7 “Maximum Settlement Amount”). Settlement. at ¶ 24.

8 Class Members need not submit a claim form to receive their share of the Settlement. Class
9 Members who timely exclude themselves from the Settlement will not be part of the final
10 Settlement Class and not bound by the Settlement’s class release (although Aggrieved Employees
11 will be bound by the PAGA release, even if they opt out of the class settlement). Settlement at ¶
12 35.

13 The Settlement Agreement further provides that Plaintiffs’ counsel may request an award
14 of attorneys’ fees not to exceed \$295,000 (i.e., one-third of the Maximum Settlement Amount) and
15 seek reimbursement of litigation costs necessarily incurred in pursuing this Action, not to exceed
16 \$25,000. Settlement at ¶ 12. It also provides that Plaintiffs will seek, and Defendants will not
17 oppose, a service payment to each of the named plaintiffs, Derek Downey and Adam Sardoni, in
18 the amount of \$5,000 (for a total of \$10,000). Settlement at ¶ 18.

19 The Parties have agreed that Phoenix Class Action Settlement Administration Solutions
20 (“Phoenix”), an experienced and competent settlement administration company, will administer the
21 settlement. Phoenix’s credentials are discussed in the concurrently filed Declaration of Jodey
22 Lawrence. Up to \$12,000 has been allocated to compensate Phoenix for its work related to the
23 administration. Settlement at ¶ 38.

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

25 Pursuant to PAGA, the Parties have agreed that \$20,000 of the Maximum Settlement
26 Amount will be allocated to settle the claims brought under Labor Code § 2699 et. seq. Pursuant
27 to Labor Code § 2699(i), “civil penalties recovered by aggrieved employees shall be distributed as
28 follows: 75 percent to the Labor and Workforce Development Agency...and 25 percent to the

1 aggrieved employees.” As such, 75 percent of the apportioned PAGA settlement amount – or
2 \$15,000 – of the PAGA Settlement Amount will be paid to the California Labor and Workforce
3 Development Agency as the Labor and Workforce Development Agency Payment, and Twenty-
4 Five Percent (25%), or Five Thousand Dollars and Zero Cents (\$5,000.00), of the PAGA Settlement
5 Amount will be distributed proportionately among all Aggrieved Employees based on their
6 Compensable Workweeks during the PAGA Period. Settlement at ¶ 23.

7 As required by Labor Code § 2699(1)(2), concurrent with Plaintiffs’ submission of the
8 Settlement Agreement to the Court, they are transmitting it, together with this Motion, to the
9 LWDA. Gaines Decl. at ¶ 40.

10 C. Two-Step Approval Process

11 Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.
12 3.769; Fed. R. Civ. P. 23(e).¹ This is done in two steps: (1) an early (preliminary) review by the
13 trial court, and (2) a final review after notice has been distributed to the Class Members informing
14 them of the terms of the settlement and allowing them to exclude themselves from, participate in
15 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

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

27 Thus, the preliminary approval by the trial court is simply a conditional finding that the
28 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*
Computer (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a
preliminary hearing or conference concerning a tentative settlement proposal may vary. The court
may find that the settlement proposal contains some merit, is within the range of reasonableness

¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and 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 required for a settlement offer, or is presumptively valid subject only to any objections that may be
2 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
3 (4th ed. 2002).

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

6 When the parties to an action reach a monetary settlement, they will
7 usually prepare and execute a joint stipulation of settlement, which
8 is submitted to the court for preliminary approval. The stipulation
9 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.

10 *Id.* at § 11.24.

11 Here, the Parties have reached such an agreement and have submitted the Settlement
12 Agreement herewith which fully sets forth all terms of the agreement reached among the Parties.
13 *See* Gaines Decl., Exhibit B; Gaines Decl. ¶ 17.

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

15 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary
16 approval stage, request that the court provisionally approve certification of the class – conditioned
17 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if
18 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,
19 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”
20 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*
21 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478² (“many courts have employed this practice in the
22 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

23 The strength of the findings made by a judge at a preliminary hearing
24 or conference concerning a tentative settlement proposal . . . may be
25 set out in conditional orders granting tentative approval to the various
26 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.

27 4 *Newberg on Class Actions*, at §11.26.

28 ²In 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 1. **The Settlement Class Should Be Certified for Settlement Purposes**

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

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

9 The proposed settlement class is ascertainable. The class definition, the size of the class
10 and the means for identifying the members of the class determine whether the class is ascertainable.
11 *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members
12 are identifiable from Defendants' records. Further, the settlement class is sufficiently numerous to
13 warrant certification. According to Defendants' records, the Class is comprised of approximately
14 619 individuals. Gaines Decl. ¶ 36; Settlement at ¶ 15.

15 b. **Questions of Law or Fact Common to Members of the Settlement**
16 **Class Predominate**

17 The Class Members' claims all stem from a common source: all Class Members allege that
18 Defendants violated the same Labor Code and Wage Order provisions in connection with their
19 work for Defendants. The same Labor Code and Wage Order violations are alleged on behalf of
20 all persons encompassed in the settlement class, arising out of or which could be pled based on the
21 facts and the allegations set forth in the operative complaints in the Actions, including but not limited
22 to claims for meal period violations; rest period violations; failure to pay meal or rest period
23 premiums; failure to pay wages; "off-the-clock" work during meal periods; wage statement
24 violations; waiting time penalties; civil penalties, including penalties under PAGA, based on the
25 allegations set forth above; and violations of Business and Professions Code section 17200 based on
26 the allegations set forth above. Gaines Decl. ¶ 37.

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1 c. **The Proposed Class Representatives' Claims are Typical of the**
2 **Class Members' Claims**

3 A class representative's claims are typical when they arise from the same event or course
4 of conduct that gives rise to the claims of the class, and are based on the same legal theory.
5 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, the named Plaintiffs and
6 proposed Class Representatives Derek Downey and Adam Sardoni are former non-exempt
7 employees of Defendants whom, Plaintiffs allege, were not provided with proper uninterrupted
8 (off-the-clock and free of all duties) 30-minute meal periods for every shift they worked which
9 exceeded five hours in duration; were not provided with 10-minute rest breaks as required by
10 California law; were not provided with compliant itemized employee wage statements; and were
11 not timely paid all wages due at termination. Plaintiffs allege the same claims as those that the
12 members of the Settlement Class would reasonably be expected to bring based on the course of
13 conduct alleged herein. Gaines Decl. ¶ 38.

14 Plaintiffs have also demonstrated that they will aggressively and competently assert the
15 interests of the proposed Settlement Class; they have taken active roles in the litigation and have
16 no apparent conflicts with other class members. Gaines Decl. ¶ 39. Furthermore, Plaintiffs have
17 retained competent counsel, experienced in litigating class action claims in the employment
18 context. See Gaines Decl. ¶¶ 2-5.

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

21 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
22 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*
23 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re*
24 *Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their
25 judgment for that of the proponents, particularly where, as here, settlement has been reached with
26 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
27 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990)
28 752 F. Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored*

1 *Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln*
2 *Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

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

13 Here, the Parties’ counsel have a great deal of experience in class action litigation and
14 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted
15 an extensive investigation of the factual allegations involved in this case. The Parties have engaged
16 in a broad exchange of documents, statistics, records and other information. Each side has apprised
17 the other, informally and at a formal mediation, of their respective factual contentions, legal
18 theories and defenses, resulting in extensive arms-length negotiations taking place among the
19 Parties. *See* Gaines Decl. ¶ 2-5, 11-15.

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

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

1 *Kullar, supra*, 168 Cal.App.4th at 133.

2 Prior to settlement, Plaintiffs' counsel created a comprehensive damage analysis using
3 sampling information obtained through informal discovery. This damage analysis reveals that the
4 negotiated settlement falls within a realistic range of recovery on class members' claims. Gaines
5 Decl. ¶ 23.

6 Plaintiffs allege that Defendants never required Plaintiffs or Class Members to record their
7 meal breaks. Defendants also allegedly failed to pay premium wages to Plaintiffs and Class
8 Members who were denied meal periods, in violation of Labor Code §§ 226.7, 510, 512, and 1194
9 and IWC Wage Order 4-2001. Plaintiffs and Class Members contend that they were routinely
10 denied, and not authorized to take, a proper, timely, uninterrupted, 30-minute meal period for every
11 shift worked that exceeded five hours, or a second proper, timely, uninterrupted, 30-minute meal
12 period for every shift worked that exceeded ten hours, but were not paid premium wages of one
13 hour's pay for each missed first or second meal period. Plaintiffs allege that when Plaintiffs and
14 Class Members were provided with a meal period, they were late, cut short or they would be
15 required to work through them (off-the-clock and without compensation). Plaintiffs allege that
16 Defendants failed to keep proper records of meal periods, and therefore its violation rate is
17 theoretically 100% per time records, affecting more than 15,200 pay periods during the Class Period
18 and exposing Defendants to up to \$8,765,000 in theoretical damages. But Defendants maintained
19 numerous defenses to this claim: among them, they contend that they were exempt from the
20 obligation to record meal periods; that employees always took their meal periods pursuant to a
21 compliant written policy; that any employee who did not take a meal period voluntarily waived it;
22 that Defendants did not know or have any reasonable reason to know that any employee was
23 working through authorized meal periods; and, most importantly, that this claim could never be
24 certified because individualized issues and manageability concerns would preclude certification.
25 These were substantial risks, and the compromised settlement amount reflects their strength.
26 Gaines Decl. at ¶ 24.

27 Plaintiffs also contend that Defendants failed to provide Plaintiffs and Class Members with
28 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by

1 Labor Code § 226.7 and Wage Order 4-2001. Plaintiffs report that they and other Class Members
2 were routinely not authorized and unable to take an off-duty, 10-minute rest period for every four
3 (4) hours of work or major fraction thereof but were not paid premium wages of one hour's pay for
4 each missed rest period. Gaines Decl. at ¶ 25.

5 This claim, too, was subject to litigation risks: Defendants argued their complaint written
6 policy was rigorously enforced among its workforce, and because employees needn't record their
7 rest periods under California law, it would be unmanageable to determine which employees were
8 purportedly denied rest periods and when. It would require thousands of mini-trials to gauge
9 liability on, and damages for, this claim, which would easily defeat certification and make litigating
10 the PAGA claim unmanageable. Risks as to class certification and difficulties of proof easily justify
11 the compromised settlement amount here because it represents a fair compromise in light of the
12 litigation risks that lied ahead. Gaines Decl. at ¶ 26.

13 Plaintiffs sought up to \$1,360,000 for wage statement violations pursuant to Labor Code §
14 226(e), premised on "derivative" violations for failing to accurately report meal and rest period
15 premium wages earned and "non-derivative" violations for failing to list the accurate double time
16 rate, when such a rate was earned. Gaines Decl. at ¶ 27.

17 Defendants maintained multiple defenses to this claim. First, they contended that under the
18 law in effect at the time of settlement, wage statement penalties could not be recovered for
19 "derivative" meal and rest period violations (since settlement, the law has changed). They argued
20 that Plaintiffs would not prevail on their underlying meal and rest period claims at all, so there would
21 be minimal wage statement penalties, if any, awarded. They argued that employees were always
22 appropriately compensated and suffered no injury, such that a condition to recovery of penalties
23 under Labor Code § 226(e) was not satisfied. They argued that no class could be certified on this
24 claim. Based on the strength of Plaintiff's wage statement claims and Defendants' defenses to this
25 claim, the compromised reach in the Settlement is fair. Gaines Decl. at ¶ 28.

26 The PAGA claims alleged by Plaintiffs could be valued at approximately \$1,622,700, based
27 on 16,227 aggregate pay periods among all Aggrieved Employees at the rate of \$100 per violation
28 (and without stacking penalties). If penalties were stacked, their value could eclipse \$7,000,000.

1 However, any recovery on these claims is not certain either. PAGA claims are discretionary, such
2 that the Court could decline to award their full value. They are also derivative, so Plaintiffs must
3 prevail on their underlying Labor Code claims to prevail on these claims. Finally, the Court may
4 award far less than the maximum value on these penalty claims, particularly if they approach or
5 exceed the value of the underlying wage claims. Considering the numerous claims asserted by
6 Plaintiffs and the obstacles to prevailing on many of them, it is possible that they would not prevail
7 on one or more of them, such that their PAGA claims as to some or all of their claims would also
8 fail. The compromised settlement amount takes these risks into account. Gaines Decl. at ¶ 29.

9 Finally, Plaintiffs asserted a claim for waiting time penalties under Labor Code § 203 which
10 was valued at approximately \$2,000,000 for approximately 245 former employees. This claim also
11 faced substantial risk because of the good faith defense proffered by Defendants (particularly
12 because the penalties flow from the award of meal and rest period premium wages, if any, which
13 at the time of settlement was in a state of flux). Moreover, if the meal or rest claims could not be
14 certified, it is unlikely that this claim would be certified. The settlement's compromise as to the
15 waiting time penalty claim is fair and reasonable considering the risks of prevailing on this penalty
16 claim on a classwide basis. Gaines Decl. at ¶ 30.

17 A discount on the maximum value of Class members' claims was required (and warranted)
18 to resolve the matter at this stage of the litigation. Class certification is a substantial risk in any
19 class action case. Here, while Plaintiffs maintain that the requirements of class certification are
20 met, Defendants proffer various arguments why class treatment is not appropriate here, including
21 but not limited to that individualized inquires among class members predominate over common
22 ones. If Defendants were to defeat Plaintiffs' class certification motion, there would be no class
23 wide relief whatsoever, and most class members would likely not file individual claims. Gaines
24 Decl. at ¶ 31.

25 Defendants strongly contend that their policies and practices do not violate any laws. They
26 contend that they provided all required wages in a timely manner. Gaines Decl. at ¶ 32.

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

Decl. at ¶¶ 23-33.

The settlement for each participating Class Member is fair, reasonable and adequate, given the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines Decl. at ¶ 34.

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

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

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

III. CONCLUSION

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

1. Review the proposed Settlement Agreement setting forth the settlement terms.
2. Consider whether the proposed settlement preliminarily appears to be fair, reasonable and adequate, and whether the proposed settlement class preliminarily appear to meet the applicable certification criteria.
3. Appoint Derek Downey and Adam Sardoni as the Class Representatives.
4. Appoint Daniel F. Gaines, Esq. and Alex P. Katofsky, Esq. of Gaines & Gaines, APLC as Class Counsel.
5. Approve Phoenix Class Action Settlement Administration Solutions as Settlement Administrator with regard to handling the notice procedure as set forth more particularly in the Settlement Agreement.

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6. Enter an Order provisionally approving the proposed settlement class on a non-mandatory basis, approve forms to be distributed to the settlement class, direct notice to be given to the settlement class, and set the following schedule of settlement proceedings:

<u>EVENT</u>	<u>TIMING</u>
Last day for Defendants to provide to the Settlement Administrator a "Class List" in readable Microsoft Office Excel spreadsheet that will include Class Members' names, last-known addresses, last-known telephone numbers, social security numbers, and workweek data (i.e., the start and end dates of employment for each class member for the Settlement Administrator to use in calculating the workweeks) during the Class Period (the "Class List")	15 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Settlement Administrator to mail Notice to Class Members via U.S. Mail	28 calendar days after entry of Court's Order granting preliminary approval of Settlement
Last day for Class Members to submit a written Request for Exclusion to Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Members to submit an Objection to the Settlement Administrator	45 calendar days after the initial mailing of the Class Notice to Class Members
Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs	_____, 2023
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	_____, 2023
Final settlement approval hearing	_____, 2023, at _____. The Parties suggest the final approval hearing be held approximately 120 days after the preliminary approval order is signed.

1
2 DATED: December 15, 2022

GAINES & GAINES, APLC

3
4 By: 

DANIEL F. GAINES

ALEX P. KATOFSKY

Attorneys for Plaintiffs Derek Downey and Adam Sardoni
and Proposed Class Counsel