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NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTINA EISENACHER, on behalf of
herself and other aggrieved employees,
Plaintiff,

v.

VITAS HOSPICE SERVICES, L.L.C.; VITAS
HEALTHCARE CORPORATION OF
CALIFORNIA; VITAS HEALTHCARE
CORPORATION, and DOES 1–100,
Defendants.

Case No.: 3:20-cv-04948-RS

**NOTICE OF PLAINTIFF'S
UNOPPOSED MOTION AND MOTION
FOR APPROVAL OF SETTLEMENT
OF PLAINTIFF'S CLAIM FOR
PENALTIES UNDER CALIFORNIA
LABOR CODE SECTION 2699, ET SEQ.**

Hearing Date: April 22, 2021
[Stipulated Motion Shortening Time for
Hearing Date of March 25, 2021 Pending]

Hearing Time: 1:30 p.m.
Dept.: Courtroom 3
Action Filed: June 16, 2020

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 22, 2021, at 1:30 p.m., or March 25, 2021, at 1:30
p.m., pending stipulation for hearing on shortened time, or as soon thereafter as counsel may be

1 heard, Plaintiff KRISTINA EISENACHER, on behalf of herself and other aggrieved employees,
2 will and hereby does move for an order granting approval of her settlement with Defendants
3 VITAS Hospice Services, L.L.C., VITAS Healthcare Corporation, and VITAS Healthcare
4 Corporation of California (collectively “VITAS” or “Defendants”) regarding Plaintiff’s first
5 cause of action, her claim for civil penalties pursuant to the Private Attorneys General Act,
6 California Labor Code §§ 2699 et seq (“PAGA”). This settlement also resolves Plaintiff’s
7 individual claims and, therefore, this action.

8 This unopposed motion will be made and based upon: (1) this Notice of Motion and
9 Motion; (2) the Memorandum of Points and Authorities in support thereof; (3) the Declaration of
10 Jennie Lee Anderson and the attached exhibits, all of which are filed and served concurrently
11 herewith; as well as (4) the records, pleadings, and papers on file in this action, and upon such
12 other matters as may be presented at the time of hearing on this motion.

13
14 Dated: March 16, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Kristina Eisenacher (“Plaintiff” or “Eisenacher”) reached a settlement of both her individual claims and the California Private Attorneys General Act. Cal. Labor Code § 2699, *et seq.* (“PAGA”) claim asserted against Defendants VITAS Hospice Services, L.L.C., VITAS Healthcare Corporation, and VITAS Healthcare Corporation of California (collectively “VITAS” or “Defendants”). Cal. Lab. Code §§ 2699, *et seq.* In accordance with California Labor Code §§ 2699(1)(2); 2699.3(b)(4), Plaintiff now seeks this Court’s approval of the penalties sought as part of the parties’ settlement of Plaintiff’s PAGA Claim.

Under Labor Code section 2699 (1)(2), the trial court shall review and approve the settlement of any civil PAGA claims. The proposed settlement shall be submitted to the Labor and Workforce Development Agency (“LWDA”) at the same time that it is submitted to the court. *Id.* Further, under Labor Code section 2699.3(b)(4), the trial court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with section 6300) to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation. The provisions of the settlement relating to health and safety laws shall be submitted to the Division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the Division to comment on those settlement provisions, and the court shall grant the Division’s commentary the appropriate weight. *Id.*

A true and correct copy of the Settlement Agreement, which sets forth the terms for settlement of the PAGA claims, is attached as Exhibit 1 to the Declaration of Jennie Lee Anderson (“Anderson Decl.”), filed herewith. Capitalized terms have the same meaning as defined in the Settlement Agreement.

I. STATEMENT OF ISSUES TO BE DECIDED

The issues to be decided by this Court are whether the proposed settlement of Plaintiff’s PAGA claims meets the requirements of California Labor Code sections 2699(1)(2) and 2699.3(b)(4).

II. BACKGROUND AND PROCEDURAL POSTURE

This lawsuit arises out of Plaintiff's employment as a sales representative with VITAS, which provides hospice services to patients residing in their own homes, in-patient hospice units, assisted living facilities, skilled nursing facilities, and hospitals unaffiliated with VITAS. Plaintiff alleges that VITAS subjected her and other sales representatives to unsafe working conditions during the COVID-19 pandemic by requiring them to make in-person visits to hospitals and other facilities in violation of local and state shelter-in-place orders. Plaintiff further alleges that when she complained about the policies and the public health issues they presented, VITAS retaliated against her, first by putting her on unpaid leave and then refusing to send her necessary leads or resources to make sales safely from her home.

Plaintiff commenced this action by filing her Complaint in Alameda County Superior Court on June 16, 2020. The Complaint includes individual claims for (1) retaliation; (2) public nuisance; (3) violations of California's Unfair Competition Laws (UCL); (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. Plaintiff also asserted an action for civil code penalties under PAGA on behalf of herself and other aggrieved employees.

The lawsuit was filed after Plaintiff exhausted PAGA's administrative remedies, by providing written notice of the alleged violations to the Division of Occupational Safety and Health ("DOSH" or "Cal-OSHA") and the LWDA via online submission on April 29, 2020, and by certified mail to VITAS ("PAGA Notice"). Complaint ¶ 142 (Dkt. No. 1-1, Exhibit A). Plaintiff alleged violations of the California Labor Code and Cal-OSHA General Industry Safety Orders, including California Code of Regulations, title 8 section 3203, requiring all employers to have an Illness Injury Prevention Program ("IIPP") and section 5199, requiring that employers in specified health care, correctional and other specialized settings protect employees against Aerosol Transmissible Diseases ("ATD").¹

Under Labor Code section 6309, DOSH is required to investigate a complaint from an employee no later than three working days of an allegation of a serious violation, or fourteen

¹ The Complaint also alleges violations of sections 3380, requiring personal protective devices, and 5144, requiring respiratory protection, however, after further reviewing these standards and reviewing the Cal-OSHA violations issued to date, Plaintiff has determined that these general Safety Orders are likely inapplicable here.

1 calendar days after an allegation of a non-serious violation. If no investigation or inspection
2 occurs, the aggrieved employee may commence a private right of action under Labor Code
3 section 2699.3(c). Cal. Lab. Code § 2699.3(b)(2)(B). DOSH failed to complete an investigation
4 or otherwise respond to Plaintiff's PAGA Notice, and to date, DOSH has not expressed any intent
5 to investigate Plaintiff's claims. Complaint ¶ 146; Anderson Decl. ¶ 3. In addition, more than
6 thirty-three calendar days passed between the postmark date of Plaintiff's letter and the filing of
7 Plaintiff's Complaint, and Plaintiff did not receive any notice of cure from Defendants.
8 Complaint ¶ 147.

9 On July 23, 2020, Defendants removed the case to federal court. The parties exchanged
10 significant discovery under Northern District of California General Order No. 71 For
11 Employment Cases Alleging Adverse Action on or about August 21, 2020, and through
12 Plaintiff's informal requests. The discovery produced to date includes Plaintiff's entire personnel
13 file and documents relevant to VITAS's COVID-19 policies throughout California.

14 On December 7, 2020, the parties participated in private mediation with the Honorable
15 U.S. District Magistrate Judge Elizabeth D. Laporte (Retired). Following a full day of mediation
16 and several weeks of follow up with Judge LaPorte thereafter, the parties came to a settlement.

17 **III. TERMS OF THE PAGA SETTLEMENT**

18 **A. Monetary Terms**

19 The Settlement Agreement negotiated by the parties provides for a Gross Settlement
20 Amount in the amount of \$236,993.27, which includes (i) \$20,000 as the PAGA Gross Settlement
21 Amount; (ii) the Net Settlement amount of \$177,964.14 to Plaintiff for a release of all claims; and
22 (iii) \$39,029.13 to Plaintiff's attorneys for fees and costs, which includes fees to be paid to the
23 Settlement Administrator for the administration of PAGA claims. Anderson Declaration, Exhibit
24 1, "Settlement Agreement," ¶ C.1; Anderson Declaration ¶ 11.

25 **B. Non-Monetary COVID-19 Safety Terms.**

26 In addition, the Settlement Agreement includes a list of COVID-safe Policy Changes and
27 Enforcement, which Defendants have agreed to adopt or, if already in place, confirm enforcement
28 of until all applicable state and local COVID-19 orders are lifted. Such policies include (1)

1 continue to provide personal protective equipment commensurate with job responsibilities to all
2 employees any time they are required to visit a facility or work in the VITAS offices in any
3 capacity; (2) continue to provide intra-office safety protocols to reduce the risk of the spread of
4 COVID-19; (3) continue safety protocols for use on in-person sales visits to decrease the risk of
5 the spread of COVID-19; (4) continue to provide COVID-19 testing to employees who, while
6 carrying out their job duties, have come in contact with any individual who tests positive for
7 COVID-19; (5) continue to require employees to report positive COVID-19 tests to their
8 manager; (6) continue to perform contact tracing and disclosing to an employee when that
9 employee has come in contact with an individual who has tested positive for COVID-19 in the
10 course of his or her job duties; (7) continue to require that all employees follow facility policies
11 and will continue to create a culture that respects the facility's priority to protect their patients and
12 staff. Facility policies include policies that are designed to protect the safety of well-being of the
13 facility, its patients, and its employees; (8) VITAS has provided an additional two weeks of PTO
14 for all employees, including those who have contracted COVID-19; (9) continue to provide a
15 work-from-home process with reasonable accommodations for any sales representative who
16 presents a disability or medical issue to VITAS that impacts the sales representatives'
17 performance, unless there is an undue hardship; and (10) continue to allow virtual
18 communications, including phone calls, to count towards sales call quotas while COVID-19
19 public health orders are in place. *Id.* ¶ C(3), Exhibit A.

20 **C. Administrative Terms and Distribution of the PAGA Funds**

21 The PAGA Gross Settlement Amount of \$20,000.00 is to be distributed 75% to the State
22 of California and 25% to the PAGA Settlement Administrator for distribution to the Aggrieved
23 Employees. Settlement Agreement. ¶ C(1). No attorneys' fees or costs, including any fees to be
24 paid to the Settlement Administrator for administering the PAGA claims, are to be paid out of the
25 \$20,000 PAGA Settlement Amount. *Id.* The Administrator fees are anticipated to be
26 approximately \$5,500.00, and will not exceed \$10,000. Anderson Decl. ¶ 11.

27 The Effective Date of the settlement is the date the Court enters a Final Order approving
28 the terms of the PAGA Settlement Agreement. Settlement Agreement ¶ A(j). Within twenty (20)

1 calendar days of the Effective Date, Defendant will send to the Settlement Administer a list of
2 Aggrieved Employees. This information shall be treated as and remain confidential and shall be
3 used solely by the Settlement Administrator to manage the notice and payment process described
4 herein, shall not be disclosed to anyone other than the Settlement Administrator, except to
5 applicable taxing authorities, or pursuant to express written authorization of Defendant, the
6 individual in question, or by order of the Court. Settlement Agreement ¶ 4(e).

7 Within 30 days of the date of the Effective Date, Defendant shall wire the Settlement
8 Administrator, CPT Group, the PAGA Settlement Amount. Settlement Agreement ¶ 4(f);
9 A(j)(l)(m).

10 Within ten (10) days of receiving the PAGA Settlement Amount, the Settlement
11 Administrator shall mail the respective settlement checks to the Aggrieved Employees, Plaintiff's
12 Counsel and LWDA, as set for in the payment plan in the Settlement Agreement. Settlement
13 Agreement ¶ 4(g). The settlement checks mailed to the Aggrieved Employees will be
14 accompanied with a notice letter ("Notice") explaining the payment and the deadline to cash the
15 check. *Id.* The Notice to LWDA shall comply with any legal requirements and in compliance
16 with the Final Order. *Id.* A copy of the proposed Notice is attached as Exhibit 5 to the
17 Declaration of Jennie Lee Anderson. Anderson Decl. ¶ 12, Exhibit 5.

18 Aggrieved Employees shall have one hundred and eighty (180) calendar days after
19 mailing to cash their settlement checks. Settlement Agreement ¶ 4(h). If any Aggrieved
20 Employee's check is not cashed within that period, the check will be voided and a stop-payment
21 will be issued. The release nevertheless will be binding upon all Aggrieved Employees who do not
22 cash their checks within the 180-day period. *Id.* In the event that any settlement check is returned to
23 the Settlement Administrator within 180 days of mailing, the Settlement Administrator will, within
24 five (5) business days of receipt of the returned settlement check, perform a skip trace to locate the
25 individual, and notify Defendants' Counsel and Plaintiff's Counsel of the results. *Id.* If a new
26 address is located by these means, the Administrator will have ten (10) business days to issue the
27 check. *Id.* Any funds in the Settlement Administrator's account as a result of a failure to timely cash
28 a settlement check shall be paid to the California State Controller in the name of the Aggrieved

1 Employee who did not cash the check from which the Aggrieved Employee may claim the funds.² *Id.*

2 The “Aggrieved Employees” are defined as “all current and former sales representatives
3 who were employed by Defendants in California at any time during the period from March 12,
4 2020, through January 31, 2021.” Settlement Agreement ¶ A(c). Defendants represent that there
5 are a total of approximately 112 qualifying Aggrieved Employees. *Id.* Plaintiff recommends an
6 even distribution of the PAGA Settlement Amount between Aggrieved Employees, yielding
7 approximately \$44.64 per employee.

8 As to the Aggrieved Employees, the Settlement Agreement releases ***only claims for those***
9 ***civil penalties recoverable under PAGA*** and does not otherwise cover individual underlying
10 claims or causes of action that Aggrieved Employees may have under the law. Settlement
11 Agreement ¶ C(2). The Settlement Agreement also requires that LWDA and DOSH be served
12 with a copy of this motion and the Settlement Agreement through the online process as required
13 by Labor Code sections 2699(l) and 2699.3(b)(4). *Id.* ¶ C(4)(a).

14 As to Plaintiff Kristina Eisenacher, the Settlement Agreement releases for herself, her
15 agents, assigns, heirs, executors, and administrators hereby fully releases, acquits, and forever
16 discharges Releasees of and from any and all claims, liabilities, causes of action, damages, costs,
17 attorneys’ fees, expenses, expert witness fees and expenses, and compensation whatsoever, of
18 whatever kind or nature, in law, equity or otherwise, whether known or unknown, vested or
19 contingent, suspected or unsuspected, that she may now have or have ever had, which exist or
20 may exist on Plaintiff’s behalf against Releasees as of the Effective Date, including, but not
21 limited to, claims for wages, back pay, front pay, reinstatement, compensatory, liquidated, or
22 punitive damages, interest, penalties, or benefits. Settlement Agreement ¶ 7-9. Plaintiff further
23 agrees to waive her right to participate in any class, collective, or enforcement action. *Id.* ¶ 10.

24 **IV. THE PROPOSED SETTLEMENT OF PLAINTIFF’S PAGA CLAIM IS**
25 **WORTHY OF APPROVAL.**

26 “Neither the California legislature, nor the California Supreme Court, nor the California
27 Court of Appeal, nor the California Labor & Workforce Development Agency (‘LWDA’) has

28 ² Neither Defendants, Defense Counsel, Plaintiff’s Counsel nor Plaintiff will have any liability for
lost or stolen settlement checks, forged signatures on settlement checks, unauthorized negotiation
of settlement checks or failure to timely cash a settlement check within the 180-day period. *Id.*

provided any definitive answer” as to what the appropriate standard is for approval of a PAGA settlement. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1075 (2017). In the absence of any governing standard, federal courts evaluating PAGA settlements have approved PAGA settlements upon a showing that “(1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement is fair, reasonable, and adequate in view of PAGA’s public policy goals.” *See, e.g., Patel v. Nike Retail Services, Inc.*, 14-CV-04781-RS, 2019 WL 2029061, at *2 (N.D. Cal. May 8, 2019).³ Courts regularly approve settlement payments lower than the maximum PAGA penalties that may possibly accrue at trial. *See, e.g., Id.* (approving PAGA settlement totaling 22.8% of trial expert’s valuation); *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (2016) (citing Lab. Code § 2699(e)(2)) (approving PAGA settlement amount lower than maximum PAGA penalties that would accrue if plaintiffs were successful at trial).

A. Plaintiff Has Provided the Required Notice of Settlement to LWDA and DOSH.

As required by the terms of the Settlement Agreement, concurrent with this filing, Plaintiff submitted the instant motion and all accompanying documents, including the Settlement Agreement and the proposed order, to the LWDA’s website. This constitutes service to both LWDA and DOSH. Lab. Code §§ 2699(l)(4); 2699.3(b)(4). A proof of service will be filed accordingly. Anderson Decl. ¶ 6.

B. The Settlement Is Fair, Reasonable and Adequate, and Advances PAGA’s Public Policy Goals.

PAGA’s public policy goals include “benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring non-compliance.” *O’Connor v. Uber Tech. Inc.*, 201 F. Supp. 3d 1110, 1132-33 (N.D. Cal. 2016). The imposition of civil penalties has been considered to have the likely effect of

³ As part of this analysis, courts often consider the relevant factors from *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), as the *Hanlon* factors are designed to determine the fairness of a settlement and are useful in evaluating PAGA settlements. *Id.* The relevant factors include the (1) strength of a plaintiff’s case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceeding; (5) the presence of government litigation; and (6) the expertise and views of counsel. *Id.*; *see also Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008). The proposed Settlement Agreement satisfies *Hanlon* for the reasons set forth herein.

1 substantially deterring defendants and other California employers from committing similar
2 unlawful acts and protect workers from unlawful employment practices and working conditions.
3 *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014). As discussed below, when evaluating
4 the relative risks of further litigation against the significant benefits of the proposed Settlement
5 Agreement, which includes a \$20,000 PAGA payment, as well as significant COVID policy
6 changes, the proposed Settlement Agreement is fair and reasonable in light of PAGA's public
7 policy goals and therefore should be approved.

8 **1. Proceeding with Litigation Presents Significant Risk.**

9 Although Plaintiff believes in the strength of her case and PAGA claims, the case faces
10 significant challenges. Plaintiff would need to prove each of the underlying General Safety Order
11 violations as to each of the 112 Aggrieved Employees at trial. Defendants would likely argue that
12 doing so would be difficult or impossible because, according to Defendants, VITAS sales
13 representatives' duties varied from employee to employee, VITAS's policies also varied between
14 locations and managers, and many VITAS sales representatives did not experience the alleged
15 violations. *See Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011
16 WL 379413, at *3 (C.D. Cal. Jan. 31, 2011) ("Given the statutory language [of PAGA], a plaintiff
17 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of
18 the Labor Code by the defendant.").

19 The core of Plaintiff's allegations is that VITAS violated California Code of Regulations,
20 title 8 section 3203, requiring all employers to have an IIPP and the ATD standard in section
21 5199.⁴ In order to prevail on these claims, Plaintiff must demonstrate by a preponderance of
22 evidence that the employer violated an existing occupational safety and health standard, rule, or
23 order. *See Nolte Sheet Metal, Inc. v. Occupational Safety & Health Appeals Bd.*, 44 Cal. App. 5th
24 437, 446 (2000) (setting forth Cal-OSHA's burden under Occupational Safety and Health
25 Appeals Board precedent) and Labor Code section 2699.3(b)(2)(a)(ii) (setting forth that courts

26 ⁴ Plaintiff also maintains that Defendant violated Labor Code sections 6400-6404 and 6407,
27 however, Cal-OSHA has no authority to issue citations absent violation of a specified safety
28 order. *See In re Gray Line Tours Div. of Indus. Safety State of Calif.*, 1975 WL 23373. Cal-OSH
App. Bd., Docket No. 74-R5D1-598 (1975) (citing Cal. Lab. Code §§ 6308, 6317) (Where no
safety regulation addresses an existing hazard; the DOSH's recourse is to issue a special safety
order.).

1 reviewing PAGA claims for Cal-OSHA violations shall follow precedents of the Occupational
2 Safety and Health Appeals Board).⁵ However, Defendants contend that the alleged conduct does
3 not violate any section of the California Labor Code or any Cal-OSHA promulgated standard, and
4 that its IIPP plan was adequate to protect its employees.

5 Further, the novel corona virus, COVID-19, presents untested novel legal questions.
6 Under California Code of Regulations, title 8, section 3203, employers retain discretion on how to
7 effectively address the hazard of COVID-19 as it does not specify how employers are to protect
8 unsafe workplaces and does not prescribe specific steps that employers must take to protect
9 workers from COVID-19. While it is true that Cal-OSHA has issued COVID-19 citations under
10 this provision, to Plaintiff's knowledge, no court has evaluated when COVID-19 policies or lack
11 thereof violate these sections. Indeed, the Cal-OSHA Board cited this very issue in determining
12 to promulgate an Emergency Temporary Standard intended to prevent the spread of COVID-19 in
13 California workplaces. Cal. Code Regs. tit. 8, §§ 3205-3205.3; Request for Judicial Notice
14 ("RJN") Exhibit 1 ("Cal. Dept. of Indus. Relations, Finding of Emergency - Addendum #1, New
15 Sections 3205 through 3205.4, COVID-19 Prevention"), ¶¶ iv - iv. These unknowns present
16 significant risk to all parties.

17 As to the ATD standard in section 5199, VITAS will likely argue that although VITAS is
18 subject to section 5199, sales representatives have no "occupational exposure," and are therefore
19 no additional protective measures were required.

20 Whether a particular employee has occupational exposure depends on the tasks,
21 activities, and environment of the employee, and therefore, some employees of a
22 covered employer may have no occupational exposure. For example, occupational
23 exposure typically does not exist where a hospital employee works only in an office
24 environment separated from patient care facilities, or works only in other areas
25 separate from those where the risk of ATD transmission, whether from patients or
26 contaminated items, would be elevated without protective measures. It is the task
27 of employers covered by this standard to identify those employees who have
28 occupational exposure so that appropriate protective measures can be implemented
to protect them as required.

⁵ California Labor Code section 2699.3 is silent as to the standard of proof where Cal-OSHA has failed to perform an inspection or investigation as provided by section 6309 and Plaintiff was unable to find any relevant case law regarding the same.

1 Cal. Code Regs. tit. 8, § 5199. In the alternative, while Plaintiff contends otherwise, VITAS
2 could argue that because the sales representatives did not provide diagnosis, treatment, transport,
3 isolation, or management to persons with COVID-19, and as such was only required to establish a
4 limited set of written procedures instead of the Exposure Control Plan covered under the full
5 ATD standard. *Id.* at § 5199(c).

6 In summary, the risks and uncertainty facing the parties going forward are significant and
7 strongly favors approval of the proposed Settlement Agreement. *Patel*, 2019 WL 2029061, at *3
8 (citing *Browning v. Yahoo! Inc.*, Nos. 13-cv-3826-EMC, 15-cv-262-EMC, 2007 WL 4105971, at
9 *10 (N.D. Cal. Nov. 16, 2007). (“In general, legal uncertainty favors approval of a settlement.”).

10 **2. Continued Litigation Would Delay and Possibly Moot COVID-19 Policy Changes**
11 **That Are Urgent Due to the Threats of the Pandemic.**

12 The COVID-19 pandemic poses an ongoing and deadly threat to public health, especially
13 to workers who depend on their employers to protect them while at work. The SARS-CoV-2
14 virus, the novel coronavirus that causes COVID-19, spreads through droplets and aerosolized
15 particles, which may be transferred unwittingly by individuals who exhibit no symptoms. *See*
16 *South Bay United Pentecostal Church v. Newsom* (2020) 140 S. Ct. 1613, 1613 (Roberts, C.J.,
17 concurring). There is an acute risk of transmission in settings where prolonged contact with an
18 infected person occurs or where large numbers of people gather. The virus may have serious
19 long-term effects, including on individuals who do not initially experience significant symptoms.

20 Although three vaccines have now been developed and approved for use, (with several
21 others are at different stages) as of the date of this filing less than 10% of Californians have been
22 fully vaccinated.⁶ Consequently, safety and health measures like physical distancing remain the
23 primary recognized ways to slow the spread of the virus until vaccinations can be adequately
24 administered on the scale that is needed. *See id.*; *Gish v. Newsom*, No. EDCV20-755-JGB (KKx),
25 2020 WL 1979970, at *4 (C.D. Cal. Apr. 23, 2020), *appeal filed*, No. 20-55445 (9th Cir. Apr. 28,
26 2020). The proposed Settlement Agreement ensures that VITAS adopts or, if already in place,

27
28 ⁶ See, e.g., Los Angeles Times, “Tracking Coronavirus Vaccination in California”,
<https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/covid-19-vaccines-distribution/> (last visited Mar. 3, 2021).

1 confirms, a number of COVID-19 protections for VITAS' employees that are urgently needed.
2 Should the Settlement Agreement not be approved, the parties will be required to engage in
3 protracted litigation, resulting in a delay of the implementation of such policies.

4 **3. Continued Litigation Would Be Expensive and Complex, Presenting Additional**
5 **Risks.**

6 The complex nature of the PAGA claims threatens risky, expensive, and complex
7 discovery and trial that would also extend the lawsuit's duration. In addition, to prevail on her
8 claims at trial, Plaintiff would have to hire health and safety experts and experts on Cal-OSHA
9 violations to evaluate each particular Aggrieved Employees' situation. Additionally, Plaintiffs
10 and potential Aggrieved Employees face the risk of being bound by an adverse judgment that
11 awards no penalties on the many claimed violations, particularly if other employees are not found
12 have been aggrieved. These risks also weigh strongly in favor of settlement here.

13 **4. Multiple Factors Establish That the PAGA Settlement Amount Is Reasonable.**

14 There are several factors demonstrating that the amount allocated to civil penalties in the
15 proposed settlement is well within the range of reasonableness.

16 Plaintiff's LWDA Letter and Complaint allege that VITAS violated both general duty
17 clauses in the Labor Code (sections 6300–6304) and California Code of Regulations, title 8,
18 sections 3203, 3380, 5144, and 5199. However, because Cal-OSHA may only issue a citation
19 based on an employer's violation of a duly adopted standard, rule, or order, civil penalties against
20 VITAS may limited to violations of Cal-OSHA General Safety Standards sections 3203 and
21 5199, requiring employers to have an IIPP and protect employees from airborne infectious
22 diseases, respectively. *See In re Gray Line*, 1975 WL 23373 (citing Cal. Lab. Code
23 §§ 6308, 6317) (Where no safety regulation addresses an existing hazard; the DOSH's recourse is
24 to issue a special safety order.); *see also* Cal. Code Regs. tit. 8, §§ 3203, 5199; Section III.B.1,
25 *supra*.

26 Further, even if Plaintiff prevailed on each of these claims, the amount of recovery is far
27 from certain. When determining the amount of a civil penalty, both Cal-OSHA and the courts
28 exercise significant discretion. Cal. Lab. Code § 2699(e). Civil penalties for Cal-OSHA Order

1 violations are determined by category, with adjustments made for severity, extent, and likelihood.
2 *See, e.g.*, Cal. Code Regs. tit 8, § 336. When a single hazard is the subject matter of multiple
3 violations, each of which results in a civil penalty, Cal-OSHA may even depart from its normal
4 penalty procedures to mitigate the penalties' cumulative effect by reducing serious penalties **up to**
5 **90 percent** or general and regular violations **up to 100 percent**. Cal. Code Regs. tit 8, § 336(k).

6 Similarly, courts have the discretion to drastically reduce any potential penalty as unjust,
7 arbitrary and oppressive, or confiscatory. *Fleming v. Covidien, Inc.*, No. ED CV 10-01487 RGK
8 (OPx), 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (finding that the maximum PAGA
9 penalties “unjust” because the employees had suffered no injuries and reducing the penalties by
10 over 80%). As a result, courts routinely approve PAGA settlements totaling only a fraction of
11 their maximum total value. *McLeod v. Bank of Am., N.A.*, 2018 WL 5982863, at *4 (N.D. Cal.
12 Nov. 14, 2018) (approving PAGA settlement totaling 1.1% of total value); *Van Kempen v.*
13 *Matheson Tri-Gas, Inc.*, 15-cv-00660-HSG, 2017 WL 3670787, at *10 (N.D. Cal. Aug. 25, 2017)
14 (approving PAGA allocation of \$5,000 from a settlement fund of \$370,000, or 1.3% of total
15 value).

16 A review of penalties proposed by Cal-OSHA itself for other COVID-19-related
17 violations following complaint-initiated inspections is instructive and further supports the
18 proposed settlement here.

- 19 • Cal-OSHA determined that the Gateway Care & Rehabilitation Center skilled nursing
20 facility in Hayward exposed nurses and housekeeping workers to COVID-19 when it
21 failed to follow requirements for providing necessary personal protective equipment. The
22 proposed penalty was \$23,430.
- 23 • Cal-OSHA determined that Ridge Post-Acute skilled nursing facility in San Jose failed to
24 train health care workers deployed to the facility on COVID-19 despite exposure to
25 suspected and confirmed COVID-19 cases. The proposed penalty was \$15,400.
- 26 • Cal-OSHA determined that Canyon Springs Post-Acute skilled nursing facility in San
27 Jose failed to train health care workers deployed to the facility on COVID-19 despite
28 exposure to suspected and confirmed COVID-19 cases. The proposed penalty was \$13,500.
- Cal-OSHA determined that the Santa Clara Valley Medical Center on North Jackson
Avenue failed to provide clear communication to their health care workers who were
deployed to two skilled nursing facilities and exposed to suspect and confirmed cases of
COVID-19. The proposed penalty was \$7,650.

See RJN, Exhibit 2, (“Cal/OSHA Issues Citations to Health Care Facilities and Public Safety
Employers for COVID-19 Violations”). Indeed, Plaintiff’s proposed penalty of \$20,000 is well

1 within the range of penalties Cal-OSHA has proposed for COVID-19 violations by nursing care
2 facilities and health care providers found during complaint-initiated inspections. *Id.*

3 Lastly, besides monetary value, the Settlement Agreement requires VITAS to adopt or, if
4 already in place, confirm enforcement of COVID-19 safe policies until all applicable local and
5 local COVID-19 orders are lifted. Eliminating future violations and infections is an important
6 aspect of the settlement.

7 **5. The Experience and Views of Counsel Support Approval of the Settlement**
8 **Agreement.**

9 Plaintiff's counsel has extensive experience in employment, complex and class action
10 litigation. *See* Anderson Decl., ¶¶ 7-8, Exhibit 3-4. Counsel diligently investigated Plaintiff's
11 individual and PAGA claims before filing the Complaint and before settlement. Counsel
12 interviewed dozens of VITAS former and current employees who contacted counsel about the
13 lawsuit. Plaintiff gathered extensive evidence even before filing. In addition to the discovery
14 relating to Plaintiff, Defendants produced documents relevant to their COVID-19 policies
15 throughout California. *Id.* ¶¶ 4, 9. This discovery and extensive factual and legal research
16 allowed Plaintiff's counsel to evaluate the likelihood of success on the merits and the benefits of
17 the proposed Settlement Agreement. *Id.* ¶ 10.

18 Based on the foregoing, Plaintiff's counsel believes that the settlement is fair and
19 reasonable given the risks and delay of litigation, open questions of law, and the COVID-19
20 citations issued by Cal-OSHA, and the potential trial and appellate issues. Anderson Decl., ¶ 10.

21 **C. The Proposed Settlement Agreement Is at Least as Effective as the Protections or**
22 **Remedies Provided by State and Federal Law or Regulation for the Alleged**
23 **Violation.**

24 As discussed above, the civil penalty provided by the Settlement Agreement is
25 comparable to penalties Cal-OSHA has proposed for COVID-19 violations by nursing care
26 facilities and health care providers found during complaint-initiated inspections (ranging from
27 \$2,060–\$32,000) and penalties approved by courts. In addition, the Settlement Agreement
28 requires VITAS to adopt or, if already in place, confirm enforcement of COVID-19 safe policies
until all applicable local and local COVID-19 orders are lifted. *See* Settlement Agreement,

1 Exhibit A. These protections go beyond what is required by the relevant Cal-OSHA safety
2 standards. Moreover, unlike any citation imposed by Cal-OSHA the terms of Settlement
3 Agreement are immediately enforceable and not subject to appeal.

4 **D. The Remaining Settlement Terms Do Not Require Court Approval.**

5 Although PAGA requires that the Court approve the penalties sought as part of a proposed
6 settlement, California Labor Code section 2699(1) does not require the Court to approve any
7 other elements of the proposed settlement, including Plaintiff's individual settlement and related
8 attorneys' fees and costs. Similarly, because there are no class allegations, the approval
9 provisions applicable to class settlements under California Code Civil Procedure section 382 do
10 not apply. Thus, the Court only needs to approve the settlement of the civil penalties sought in
11 the PAGA claim, which, as demonstrated here, meets the applicable standards in all respects.
12 Nonetheless, as explained below, the amounts provided for the settlement of Plaintiff's individual
13 claims and attorneys' fees are reasonable.

14 **1. The Amount Allocated to Kristina Eisenacher For Her Individual Claims is**
15 **Appropriate.**

16 Apart from the \$20,000 allocated as the PAGA Gross Settlement Amount, the Settlement
17 Agreement provides for \$177,964.14 to be paid to Plaintiff for the release of her claims for her
18 individual causes of action, including retaliation under Labor Code sections 1102.5, and 6310, *et*
19 *seq.* Unlike Plaintiff's claims for PAGA penalties, there is a wide breadth of case law regarding
20 retaliation claims which established the elements of the cause of action and the right to damages
21 arising therefrom.

22 As a preliminary matter, Plaintiff's retaliation claims do not require proof that VITAS
23 **actually** violated any California Labor Code or Safety Order. Instead, Plaintiff may prevail on a
24 retaliation claim under Labor Code section 1102.5, by demonstrating that she was retaliated
25 against for disclosing information that she had **reasonable cause to believe** violated a state or
26 federal statute, or noncompliance with a local, state, or federal rule or regulation. Cal. Lab. Code
27 § 1102.5(b) (emphasis added). Thus, many of the issues addressed above regarding novelty do
28 not apply to Plaintiff's claims for retaliation.

1 In addition, the damages available for Plaintiff's retaliation claim are far higher than the
2 penalties available for Plaintiff's PAGA claims. Specifically, at trial, Plaintiff could be awarded
3 back pay (including prejudgment interest), years of front pay, and non-economic damages. See,
4 e.g., *Gardenhire v. Hous. Auth.*, 85 Cal. App. 4th 237, 240-241 (2000) (affirming damages in the
5 sum of \$1.3 million for emotional distress and \$125,000 for economic injuries); *Glenn-Davis v.*
6 *City of Oakland*, Case No. 02-2257 SI, 2008 WL 410239, at *4 (N.D. Cal. Feb. 12, 2008)
7 (awarding three years of front pay); Cal. Civ. Code § 3288.⁷

8 As alleged in the Complaint, VITAS began retaliating against Plaintiff when she requested
9 to work-from-home on March 20, 2020 by placing her on unpaid medical leave. Complaint ¶¶ 95
10 - 102 (Dkt. No. 1-1). Thereafter, although VITAS informed Ms. Eisenacher that she could work-
11 from-home temporarily, VITAS took measures to damage Ms. Eisenacher reputation, income,
12 and opportunity for advancement in her career by withholding valuable sales leads and
13 information necessary for her to perform her job and make sales calls remotely, including contact
14 information and training. *Id.* Additional facts were to be included in an amended complaint,
15 including the fact that the stress of the retaliation became so unbearable that Plaintiff's doctor
16 ordered her to be put on medical leave in May 2020. Anderson Decl. ¶ 13. Since that time,
17 Plaintiff has actively sought new employment that would not require her to make in-person visits
18 or otherwise violate state and local rules requiring her to shelter-in-place but has been unable to
19 obtain a new position. Under the Settlement Agreement, Plaintiff's employment with VITAS will
20 end and she will not be reinstated. Given that the unemployment rate in California remains high
21 because of the ongoing pandemic, it seems likely that Plaintiff will continue to face significant
22 difficulty in finding new employment. Thus, at trial, Plaintiff would have a right to back pay
23 beginning in March 2020, through the date of trial, plus any prejudgment interest, as well as front
24 pay, and non-economic damages.

25 **2. Plaintiff's Proposed Attorneys' Fees Are Appropriate.**

26 The Settlement Agreement provides for payment of attorneys' fees and costs in the
27 amount of \$39, 029.13. This amount represents approximately 18% of the total amount to be paid

28 ⁷ Punitive damages are also available under Labor Code section 1102.5. *Hennighan v. Insphere*
Ins. Sols, Inc., No. 13-cv-00638-JST, 2013 WL 1758934, at *5 (N.D. Cal. Apr. 24, 2013).

1 for Plaintiff's individual claims and is extremely reasonable given the extensive experience of
2 Plaintiff's counsel. Anderson Decl. ¶¶ 7-8, Exhibits 3-4. Moreover, Plaintiff is entitled to
3 attorneys' fees for her individual cause of action for retaliation. Labor Code § 2201.5(j);
4 California Code of Civil Procedure section 1021.4. Finally, Plaintiff is not requesting any
5 attorneys' fees from the PAGA Net Settlement amount.

6 **V. CONCLUSION**

7 Based on the above, Plaintiff respectfully requests that this Court approve the PAGA
8 settlement and the PAGA payment sought as part of the proposed settlement.

9
10 Date: March 16, 2021

ANDRUS ANDERSON LLP

11 By: /s/ Jennie Lee Anderson
12 Jennie Lee Anderson

13 *Attorneys for Plaintiff*
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