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by Superior Court of California, County of San Mateo
ON 2/18/2022
By /s/ Priscilla Tovar
Deputy Clerk

Attorneys for Plaintiff and Proposed Plaintiffs Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO**

JOANNA MAGPIONG, on behalf of herself
and all others similarly situated,

Plaintiff,

vs.

CARELINX, INC., and DOES 1-100,
inclusive,

Defendants.

Case No.: 21-CIV-03038

CLASS and REPRESENTATIVE ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT and
CONDITIONAL CERTIFICATION FOR
SETTLEMENT PURPOSES ONLY;**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION;**

**DECLARATION OF MATTHEW S.
DA VEGA IN SUPPORT OF MOTION;**

[PROPOSED] ORDER with COVER SHEET

Assigned For All Purposes to the Honorable
Marie S. Weiner (Dept. 2)

Date: March 29, 2022

Time: 2:00 p.m.

Location: Dept. 2 (Hon. Marie S. Weiner)

1 **TO THIS HONORABLE COURT, ALL INTERESTED PARTIES, and THEIR**
2 **ATTORNEYS OF RECORD PLEASE TAKE NOTICE** that on March 29, 2022 at 2:00 p.m.,
3 or as soon as the matter may be heard, in Department 2 of the above entitled Court located at 400
4 County Center, Redwood City, CA 94063, Plaintiff Joanna Magpiong (“Plaintiff”) pursuant to
5 California Code of Civil Procedure §382 and California Rules of Court, rule 3.769, *et seq.*, will
6 and does move this Court for an Order granting preliminary approval of the proposed class action
7 settlement on the terms and conditions set forth in the Joint Stipulation of Class Action
8 Settlement Agreement and Release (“Settlement Agreement”), a copy of which is attached as
9 **Exhibit 1: Settlement Agreement** to the Declaration of Matthew S. Da Vega (“Da Vega Decl.”).
10 Plaintiff further moves the Court for an Order:

- 11 1. Approving the Stipulation and Order Granting Plaintiff Leave to File a Second
12 Amended Complaint (simultaneously filed and served with this Motion), and
13 also attached to the Settlement Agreement as **Exhibit A: Second Amended**
14 **Complaint**, for settlement purposes only;
- 15 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
16 Order attached to the Settlement Agreement as **Exhibit B: Preliminary**
17 **Approval Order**;
- 18 3. Certifying the proposed Class for settlement purposes only;
- 19 4. Appointing Plaintiff as “Class Representative” for settlement purposes;
- 20 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class
21 Counsel for settlement purposes;
- 22 6. Approving the proposed Class Notice which is attached to the Settlement
23 Agreement as **Exhibit C: Notice of Class Action Settlement**;
- 24 7. Approving the method and manner for providing notice to the Class, as
25 well as procedure for opting out, and making objections, as set forth in the
26 Settlement Agreement;
- 27 8. Approving the schedule for sending of notices to the Class per the
28 Settlement Agreement;

1 9. Setting a date and time for Final Approval Hearing / Fairness Hearing as soon as
2 possible to consider Final Approval of the Settlement;

3 Plaintiff seeks, for settlement purposes only, class certification of the following class:

4 **The “Class” is defined as:**

5 “All current and former Nurses who have worked at least one Nursing Shift in
6 California through use of Defendant’s Nurse OnDemand platform application at
7 any time during the Class Period.”

8 “Class Period” refers to the period of time from June 3, 2017 through the date the
9 Court grants preliminary approval of the Settlement.”

10 This Motion will be made on the grounds that the Parties have reached a settlement,
11 subject to approval by this Court, which the Parties believe provides fair, just, and reasonable
12 compensation to the class of Nurses who Plaintiff alleges were misclassified as independent
13 contractors, were not paid the correct overtime rates for all overtime hours worked, were not paid
14 minimum wage, were not provided meal/rest breaks, were not furnished timely/accurate wage
15 statements, were not reimbursed necessary business expenses, and were not paid full wages upon
16 separation/termination, in violation of California Labor Codes, California Unfair Business Act
17 and the Private Attorney General Act (“PAGA”). Plaintiff desires to give notice of the proposed
18 settlement to the Class Members and hold a hearing as to whether the settlement should be finally
19 approved. The Parties have met and conferred regarding this Motion for the Preliminary
20 Approval of Class Settlement and request the Court approve it.

21 This Motion is based on the following Memorandum of Points and Authorities in Support
22 of Motion for Preliminary Approval of the Class Settlement, the Declaration of Matthew S.
23 Da Vega in Support of Motion, and all other records and papers on file in this action. Pursuant to
24 Labor Code § 2699(1)(2), and the instructions provided by the Department of Industrial Relations
25 on its web site, a PDF copy of this motion and the supporting papers will be sent/uploaded
26 electronically to LWDA’s website at the time it is filed and served.
27
28

1 Dated: February 18, 2022

DAVEGA | FISHER | MECHTENBERG LLP

2
3
4 By:



Matthew S. Da Vega
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On behalf of herself and similarly situated individuals, Plaintiff Joanna Magpiong (“Plaintiff” or “Class Representative”) respectfully moves for preliminary approval of a **\$1,700,000 (One Million Seven Hundred Thousand Dollars) settlement** of the class and PAGA claims asserted in this lawsuit against Defendant CareLinx, Inc. (“Defendant” or “CareLinx”)(or together with the Plaintiff, the “Parties”).

The Parties to the Lawsuit vigorously disagree on the merits of the case. Class certification, liability and damages are all sharply disputed. Nevertheless, after litigation, investigation, numerous interviews, exchange of extensive information, data, documents, and a mediation before a neutral, professional mediator skilled in California employment laws, the Parties reached an informed agreement to settle the class and PAGA claims pursuant to the Joint Stipulation of Class Action Settlement and Release (“Settlement Agreement”) (See Da Vega Decl., **Exhibit 1 - “Settlement Agreement”**).

The Parties’ investigations and interchange of information enabled them to conduct meaningful and prolonged negotiations, with a keen eye towards the strengths and weaknesses of their positions and the value of the claims. In particular, the Parties exchanged data (i.e. documents and spreadsheets of all alleged Class Members employment data during damages period) and Plaintiff completed expert analyses of the data (i.e. estimates of potential damages for various claims if proven), which informed their views of the case, and ultimately helped set the parameters for settlement talks. All negotiations were conducted at arm’s-length and were facilitated by a highly experienced class action and employment mediator, Michael Loeb (<https://www.jamsadr.com/loeb/>) on November 4, 2021.

At mediation the Parties agreed to basic terms of a potential resolution of claims codified in a Confidential Memorandum of Understanding (“MOU”) and eventually the Settlement Agreement. The Settlement represents a good value for the Class and provides an estimated average gross of approximately **\$587.13 (pre-tax) to each of the approximate 1700 Class Member**. The fact that the Parties were able to reach a favorable settlement without additional

1 years of risky and costly litigation presents substantial benefits to the Class Members and
2 promotes judicial economy. As detailed in these papers, the Parties believe the Settlement is the
3 best possible outcome of this matter, especially given the substantial risks and delays associated
4 with litigation.

5 Therefore, Pursuant to California Rules of Court, Rule § 3.769, Plaintiff now seeks, and
6 Defendant does not oppose, preliminary approval of the settlement. See Manual for Complex
7 Litigation (“MCL”) § 21.63 (4th ed. 2004). In order to effectuate the settlement and the
8 resolution of this action, Plaintiff respectfully moves the Court for an Order:

- 9 1. Approving the Stipulation and Order Granting Plaintiff Leave to File a Second
10 Amended Complaint simultaneously filed and served with this Motion, and also
11 attached to the Settlement Agreement as **Exhibit A: Second Amended**
12 **Complaint**, for settlement purposes only;
- 13 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
14 Order attached to the Settlement Agreement as **Exhibit B: Preliminary Approval**
15 **Order**;
- 16 3. Certifying the proposed Class for settlement purposes only;
- 17 4. Appointing Plaintiff as “Class Representative” for settlement purposes;
- 18 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class Counsel
19 for settlement purposes;
- 20 6. Approving the proposed Class notice attached to the Settlement Agreement, as
21 **Exhibit C: Notice of Class Action Settlement**;
- 22 7. Approve the method and manner for providing notice to the Class, as well as
23 procedure for opting out, and making objections, as set forth in the Settlement
24 Agreement;
- 25 8. Approve the schedule for sending of notices to the Class per the Settlement
26 Agreement;
- 27 9. Setting a date and time for the Final Approval Hearing/Fairness Hearing as soon as
28 possible to consider Final Approval of the Settlement.

II. BACKGROUND

Plaintiff and Class Members are current and former Nurses (including Certified Nursing Assistant (“CNA”), Medical Assistant, Licensed Vocational Nurse (“LVN”), Licensed Practical Nurse (“LPN”), Registered Nurse (“RN”), and/or Nurse Practitioner (“NP”)) who have worked at least one Nursing Shift in California at a third party skilled nursing facility through use of Defendant’s Nurse OnDemand platform application at any time during the Class Period (collectively “Class Members”). The Nurses are classified as independent contractors and paid on an hourly basis. Plaintiff alleges that Nurses were misclassified as independent contractors, worked overtime each week but were paid only their flat hourly rate plus a small shift differential (i.e. an addition \$1- \$3/hr. based on travel distance to work location), instead of the correct overtime or double-time rates of 1.5x or 2x their regular rates, were required to work through/during meal/rest periods, were not provided compliant wage statements, were not reimbursed necessary business expenses, and were not paid all wages upon separation/termination. Defendant denies Plaintiff’s allegations and maintains that with respect to Plaintiff and the Class, Defendant acted in accordance with applicable law.

III. PROCEDURAL HISTORY

June 3, 2021 (Original Complaint Filed and PAGA Notice Sent): Plaintiff sent PAGA notice and also filed her class action suit under California Code of Civil Procedure §382 to address Defendant’s alleged violations of California wage and hour laws. Plaintiff’s complaint alleged 7 causes of action, including: 1. Failure to Pay Overtime Wages, 2. Failure to Pay Minimum Wage, 3. Failure to Provide Meal Breaks, 4. Failure to Provide Rest Breaks, 5. Failure to Furnish Timely/Accurate Wage Statements, 6. Failure to Pay All Wages Due at Discharge in Timely Manner, and 7. Unlawful Business Practices. Plaintiff defined the class as: “All current and former California based Nurse employees who were misclassified as ‘Independent Contractors’ and worked for Defendant from June 3, 2017 until the entry of judgment.”

1 **August 10, 2021 (First Amended Complaint Filed):** Plaintiff filed and served her First
2 Amended Complaint (“FAC”) with the addition of an 8th cause of action for violations of the
3 PAGA.

4 **August 25, 2021 (Parties Agree to Early Mediation):** The Parties agreed to an early
5 mediation with experienced JAMS mediator Michael Loeb after Defendant agreed to the
6 production of Class related data for mediation/settlement purpose only.

7 **November 4, 2021 (Mediation Proceedings):** The Parties participated in an all day
8 mediation that ran late into the evening. At the mediation the Parties reached a tentative
9 settlement of the class and PAGA claims pending this Court’s approval. The Parties executed an
10 confidential MOU regarding settlement. The Parties then executed the long form settlement in the
11 form of a Joint Stipulation of Class Action Settlement and Release (see Exhibit 1: Settlement
12 Agreement).

13 **IV. CASE INVESTIGATION, DISCOVERY, NEGOTIATIONS and MEDIATION**

14 The Parties vigorously investigated and debated the claims asserted against Defendant.
15 Plaintiff’s Counsel began their investigation into the claims long before the case was filed.
16 Plaintiff’s Counsel interviewed and obtained discovery/documents from various current and
17 former Nurses regarding their experiences working for Defendant. (Da Vega Decl. ¶13.) After the
18 Lawsuit was initiated, Parties’ Counsel engaged in serving written discovery, informal discovery,
19 discussions and negotiations before reaching this Settlement. (*Id.* at ¶13.) Early in the litigation
20 process the Parties’ Counsel began having regular discussions regarding the claims, discovery,
21 production of data, and the possibility of mediation/settlement. (*Id.*)

22 **A. The Parties’ Dispute of the Merits of the Case.**

23 Throughout the litigation, Defendant has denied Plaintiff’s allegations, and further have
24 denied the case is appropriate for class certification. (Da Vega Decl. ¶14.) Further, in addition to
25 generally denying the allegations, Defendant has contended that the Nurses are not misclassified,
26 that Nurses were and are legally engaged as independent contractors, that Defendant paid Nurses
27 correctly for all hours worked, Nurses as independent contractors are not subject to non-exempt
28 meal and rest break requirements, but in any event, the Nurses regularly received compliant meal

1 and rest breaks and did not work through/during meal/rest breaks, and as properly classified
2 independent contractors were not subject to and/or did not incur reimbursement for business
3 expenses. Defendant also have contended that to the extent any work hours were not paid
4 correctly, which Defendant denies, those errors would have been in violation of Defendant's
5 policies, and made without Defendant's knowledge. On the other hand, Plaintiff alleges that all
6 Nurses, throughout the Class Period, were subject to the same policy and practice promulgated by
7 Defendant. Plaintiff alleges they were misclassified as independent contractors, were paid only
8 their flat regular rate for overtime hours plus small differential as opposed to the correct rate for
9 overtime hours (i.e. 1.5 x - 2x regular rate), that Nurses worked through meal/rest periods and
10 were not paid the one hour premium/regular rate for said violations, and not reimbursed for
11 necessary business related expenses (i.e. mileage for travel and use of cell phones for work). As
12 part of the investigation into the claims, Class Counsel interviewed current and former Nurses and
13 reviewed various documents and handbooks related to Nurses work for Defendant. (*Id.*) This
14 investigation was crucial to the Parties' dispute over both the merits of the case, as well as with
15 respect to the appropriate scope of the Class. (*Id.*)

16 **B. Document and Data Discovery and Expert Analysis**

17 Plaintiff and Defendant informally exchanged extensive documents and multiple data
18 points on the class (i.e. data for all class members of class period including job titles, wages rates,
19 shifts worked, length of shifts, shift dates, start/end dates, shift differential pay, etc.) which at the
20 time of filing includes approximately **1700 Class Members** (Da Vega Decl. ¶15.) Plaintiff
21 retained experts Desmond, Marcello & Amster - Valuation and Litigation Consultants
22 (www.dmavalue.com) ("Plaintiff's Expert"), to examine the data for mediation. (*Id.*) Based on
23 analysis of the data, Plaintiff made various assessments of the data, overtime hours/incorrect pay
24 rates, meal/rest breaks violations, misclassification penalties, unpaid business expense
25 reimbursements, estimated employer-side payroll tax, and calculated the potential damages. (*Id.*).
26 Further, Plaintiff's Counsel provided Defendant with Plaintiff's position as to a calculation of
27 damages at mediation. (*Id.*) Those expert calculations estimate Defendant's potential liability for
28 alleged:

- (1) Under-paid overtime wages at approximately \$623,000;
- (2) Meal Break Violations at approximately \$372,000;
- (3) Rest Break Violations at approximately \$372,000;
- (4) Misclassification Penalties at approximately \$8.5 million;
- (5) Waiting time Penalties at approximately \$8.8 million;
- (6) Wage Statement Violations at approximately \$1.2 million;
- (7) Minimum Wage Violations at approximately \$844,000,
- (8) Unreimbursed mileage at approximately \$985,000
- (9) Unreimbursed cell phone use at approximately \$210,000; and
- (10) PAGA Penalties at approximately \$2.5M.

The putative Nurse Class Members worked approximately 37,636 shifts. If you take the Estimated Net Settlement Amount of approximately \$998,120 divided by 37,636 shifts it equals \$26.52 per shift. Further, the minimum work days per Class Members was 1 shift, while the maximum was 231 shifts. The overall average was 22 shifts per Class Member, and the overall median was 8 days per Class Member (i.e., approximately half of the Class Members had 8 or fewer shifts.) (Da Vega Decl. ¶15.)

C. Mediation and Settlement

On November 4, 2021 the Parties engaged in a full day of mediation with the experienced employment and class action mediator Michael Loeb. (Da Vega Decl. ¶16.) After exchanging data, documents, and evidence the Parties met for a full-day mediation via Zoom video conference with Plaintiff's counsel in-person with Plaintiff. The mediation was attended by Plaintiff's Counsel and the class representative, Joanna Magpiong, Defense counsel, and Defendant's representative CEO. The Parties ultimately executed a confidential memorandum of understanding ("MOU") at the mediation, which included a term to settle the class claims for the Gross Settlement Amount of **\$1,700,000 (One Million Seven Hundred Thousand Dollars)**, subject to Court approval. (*Id.*) The Parties then later finalized the terms of the settlement in a long form Joint Stipulation of Class Action Settlement and Release. (*Id.*)

V. CLASS REPRESENTATIVE'S SERVICE TO THE CLASS

1 Plaintiff Joanna Magpiong was the driving force behind this class action. (Da Vega Decl.,
2 ¶ 17.) Plaintiff played a critical role in retaining Matthew Da Vega and Matthew Fisher of
3 Da Vega Fisher Mechtenberg LLP and providing information regarding her legal claims to make
4 them successful. (*Id.*) Plaintiff has experience as a Nurse and knew other putative class members
5 that in turn provided additional information in support of the legal claims. With their help
6 Plaintiff's counsel was able to gather additional evidence, and contact additional putative class
7 members. (*Id.*) Together, the Plaintiff worked dozens of hours to help Plaintiff's counsel,
8 sacrificing her personal time and reputation to make the case successful.

9 In fact Plaintiff's counsel spoke to other witnesses who were afraid to participate in
10 litigation for fear that it might result in damage to their careers. (Da Vega Decl., ¶ 18.) Plaintiff
11 and witnesses feared that by initiating or participating a class action lawsuit might risk their future
12 job opportunities. Despite this Plaintiff stepped up and worked diligently in support of the case.
13 (*Id.*) Plaintiff have had numerous meetings and telephone conversations with Class Counsel to aid
14 in the initial investigation, factual development, mediation, and resolution of this case. (*Id.*) She
15 also reached out to and communicated with other Nurses about their work for Defendant, and
16 encouraged by Plaintiff, other Nurses contacted Class Counsel to provide information about their
17 time at Defendant. (*Id.*) In sum, the Settlement could never have been achieved without Plaintiff
18 service on behalf of the Class. (*Id.*)

19 **VI. KEY TERMS OF THE SETTLEMENT**

20 The Settlement provides for a significant settlement payment to each Class Member. In
21 exchange, Class Members will release claims, which were asserted or could have been asserted in
22 the Lawsuit based on the facts alleged in support of the class and PAGA claims.

23 **A. Definition of the Class**

24 Under the Settlement Agreement, the "Class" is defined as follows:

25 The "Class":

26 "All current and former Nurses who have worked at least one Nursing Shift in California
27 through use of Defendant's Nurse OnDemand platform application at any time during the
28 Class Period." (Settlement Agreement §1.1)

1 “Class Period” refers to the period of time from June 3, 2017 through the date the Court
2 grants preliminary approval of the Settlement. As a practical matter, there were no Nursing
Shifts worked by any Class Member prior to January 1, 2020.” (Settlement Agreement
§1.7)

3 “Nurse” means a licensed healthcare professional who works as a Certified
4 Nursing Assistant (“CNA”), Medical Assistant, Licensed Vocational Nurse (“LVN”),
Licensed Practical Nurse (“LPN”), Registered Nurse (“RN”), and/or Nurse Practitioner
5 (“NP”). (Settlement Agreement §1.23)

6 “Settlement Class” is defined to mean those Class Members who have not opted out of the
Class Settlement by submitting a timely and valid Request for Exclusion

7 **B. \$1,700,000 Gross Settlement Amount Plus Additional Estimated Substitute**
8 **Amount of \$37,620**

9 The Settlement provides for Defendant to make a maximum payment of **\$1,700,000 (One**
10 **Million and Seven Hundred Thousand Dollars)** in settlement of all class and PAGA claims in
11 the case, including the Class Counsel Award, all Settlement Administration Costs, the PAGA
12 Penalty Amount, all settlement payments to Settlement Class Members, and the Class
13 Representative Enhancement Payment. (the “Gross Settlement Amount”) (Settlement Agreement
14 §§1.16. 2.1).

15 The Settlement Class Members will also receive an “Additional Estimated Substitute
16 Amount” of **\$37,620 (Thirty Seven Thousand Six Hundred Twenty Dollars)** which is the
17 amount estimated by Class Counsel to be an approximate equivalent of the amount of employer-
18 side payroll tax that could have been attributed to an employer based on the settlement payment
19 amounts anticipated to result from the Estimated Net Settlement Fund if the Class Members were
20 classified as employees and if such settlement payment amounts were allocated as being
21 comprised of one-third compensation and two-thirds penalties and interest. (Settlement Agreement
22 §1.17) (See Da Vega Decl., ¶22 - Explanation of Calculations).

23 In this Action, Plaintiff alleges that Class Members are misclassified, but Defendant
24 maintains that Class Members are properly classified and paid as independent contractors. As a
25 compromise to this dispute, the Parties negotiated and agreed that Defendant would pay this
26 Additional Estimated Substitute Amount, in addition to the Gross Settlement Amount. This
27 Additional Estimated Substitute Amount is intended as a settlement amount that will be paid out to
28 Settlement Class Members as part of their Individual Settlement Payment. This Additional

1 Estimated Substitute Amount will be included in the Net Settlement Fund and distributed to
2 Settlement Class Members pursuant to Section 7.1, but it shall not be taken into consideration for
3 any other purpose, including that it shall not be taken into consideration for purposes of
4 determining the Class Counsel Award, Class Representative Enhancement Payment, or PAGA
5 Penalty Amount. (Settlement Agreement §§1.17; 7.1)

6 The “Individual Settlement Amount Calculations” payment to the Class Members will be
7 based on the approximate number of Nursing Shifts each Settlement Class Member worked during
8 the Class Period. The Settlement Administrator will determine the total number of Nursing Shifts
9 worked by all Class Members during the Class Period and then divide that Net Settlement Fund
10 (which will include the addition of the “Additional Estimated Substitute Amount”) by the number
11 of Total Shifts to derive the “Shift Point Value”. Then for each Settlement Class Member the
12 Settlement Administrator shall multiply the number of their Nursing Shifts worked during the
13 Class Period by the Shift Point Value to determine each Settlement Class Members Individual
14 Settlement Amount and that amount shall be reported on an IRS Form 1099. (Settlement
15 Agreement § 7.1).

16 The portion of the Net Settlement Amount allocated to the Class shall be all-in and
17 settlement checks will be sent to all Settlement Class Members. Any settlement checks not
18 cashed after 180 days from the date of the class-wide distribution shall be void, and the Settlement
19 Administrator shall, as soon as practicable, forward the sums correlating to those checks and any
20 residual amounts returned to the Settlement Administrator to be paid out per guidelines in CCP
21 §384 to Cy Pres recipient the Legal Aid Society of San Mateo County (Settlement Agreement
22 §7.4).

23 **C. Released Claims**

24 *Released Claims:* Under the terms of the Settlement Agreement, upon Final Approval by
25 the Court, and subject to Defendant’s deposit of the Gross Settlement Amount and Additional
26 Estimated Substitute Amount with the Settlement Administrator, Plaintiff and each Settlement
27 Class Member shall be bound by the Settlement, and, at the same time, will have released the
28 Released Parties from the Released Claims. The “Released Claims” with respect to the “Released

Parties” (defined below) are any manner of action, cause of action, claim, demand, right, suit, obligation, debt, contract, agreement, promise, liability, or remedy of any nature whatsoever (including without limitation any damages, charges, penalties, losses, costs, expenses, and attorneys’ fees), whether in law or in equity, under contract, tort or any other subject area, or under any statute, rule, regulation, order, or law, whether federal, state, or local, on any grounds whatsoever, including without limitation any and all alleged violations of the California Labor Code, the California Code of Regulations, the California Business & Professions Code, and the Fair Labor Standards Act, that were pled or that could have been pled, and claims sought or that could have been sought, based on or arising out of the factual allegations in the Complaint, whether foreseen or unforeseen, fixed or contingent. (Settlement Agreement §1.31)

The “Released Parties” means CareLinx and any of its current and former directors, officers, members, administrators, agents, insurers, beneficiaries, trustees, employee benefit plans, representatives, partners, accountants, servants, employees, attorneys, parents, subsidiaries, affiliates, divisions, branches, units, shareholders, investors, contractors, successors, joint venturers, predecessors, related entities, and assigns, and all other individuals and entities acting by, through, under and/or on behalf of CareLinx. (Settlement Agreement §1.32) The Settlement Agreement also provides Defendant with a general release from named Plaintiff, including a Civil Code § 1542 waiver. (Settlement Agreement §2.6).

D. Attorneys’ Fees and Incurred Expenses

Under the terms of the Settlement Agreement, Class Counsel will move for reasonable attorney’s fees, not exceeding one-third, **\$561,000 (Five Hundred Sixty One Thousand)**, of the Gross Settlement Amount (\$1,700,000). (Settlement Agreement § 2.2). Class Counsel will also seek reimbursement of reasonable expenses incurred by Class Counsel in connection with the Lawsuit, not exceeding **\$20,000 (Twenty Thousand)**. (*Id.*) The Court need not rule on Class Counsel’s fees and expenses now; a formal application will be filed prior to and to be heard at the same date and time as the Final Approval Hearing. As will be explained in detail in the application, the requested fees and costs are eminently reasonable considering the amount of time and expenses incurred by Class Counsel in this case. In that application for fees and costs Class

1 Counsel will provide a lodestar cross check and itemization of costs so that the court can see the
2 requests are reasonable. (Da Vega Decl., ¶ 28.)

3 **E. PAGA Penalty Amount, LWDA Payment, and Settlement Administrator**

4 **\$170,000 (One Hundred and Seventy Thousand Dollars)** of the Gross Settlement Fund
5 is allocated to be paid for the resolution of potential PAGA claims (the “PAGA Penalty Amount”).
6 (Settlement Agreement §1.28). Pursuant to PAGA, 75% of that amount, **\$127,500 (One Hundred**
7 **Twenty Seven Thousand Five Hundred Dollars)**, is to be paid to the California Labor and
8 Workforce Development Agency (the “LWDA Payment”) and 25% to the Class Members,
9 **\$42,500 (Forty-Two Thousand Five Hundred Dollars)**, (the “PAGA Group Amount”).
10 (Settlement Agreement §§1.20, 1.27). Prior to the Final Approval/Fairness Hearing, Class Counsel
11 will apply to the Court for payment from the Gross Settlement Fund to compensate the Settlement
12 Administrator – CPT Group, Inc. - for fees and costs associated with the administration of the
13 settlement (not exceeding **\$21,000**)(the “Settlement Administration Costs”). (Settlement
14 Agreement §§ 1.2, 1.3). (Da Vega Decl., ¶ 29)

15 **F. Class Representative Enhancement Payment**

16 Pursuant to the terms of the Settlement, Class Counsel will seek an Enhancement Payment
17 of **\$10,000 (“Ten Thousand Dollars”)** for the Class Representative. (Settlement Agreement
18 §§1.8, 2.3). The Court need not rule on the Class Representative Enhancement Payment now; a
19 formal application will be filed prior to the Final Approval/Fairness Hearing. As will be explained
20 in detail in the application, the requested Enhancement Payment is reasonable and justified based
21 on the significant time, effort and risks the Class Representative incurred in bringing this case on
22 behalf of the Class, as well as the substantial benefits the resulting Settlement provides the Class.
23 The proposed Class Representative Enhancement Payment represents only .005% of the total
24 Gross Settlement Amount and will not significantly reduce the awards of the Class Members.
25 Public policy strongly supports service awards to plaintiffs in employment class actions, and they
26 are routinely granted by courts in this state and around the country. Such awards compensate
27 plaintiffs for the efforts and risks they have undertaken on behalf of the Class, without which no
28

1 settlement would be possible. And, they provide an incentive for other employees to bring cases
2 that vindicate the public interest in the lawful payment of wages. (Da Vega Decl., ¶30.)

3 **VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD**
4 **BE PRELIMINARILY APPROVED**

5 The law favors settlements, especially of class actions. See *Potter v. Pacific Coast Lumber*
6 *Co.* (1951) 37 Cal. 2d 592, 602; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943,
7 950. To ensure there is no “fraud, collusion or unfairness to the class,” class claims can only be
8 settled through Court review and approval. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,
9 1801. The trial court is required to determine whether the “settlement is fair, adequate and
10 reasonable,” and has “broad discretion” in making this assessment. *Id.* Nevertheless, “[d]ue regard
11 should be given to what is otherwise a private consensual agreement between the parties.” *Id.*

12 At this stage, the Court is making a preliminary assessment of whether the Settlement
13 appears to be fair, adequate, and reasonable and, thus, whether notice to the class of the settlement
14 terms and conditions and the scheduling of a final approval hearing is worthwhile. See Cal. Rules
15 of Court, rule 3.769; 4 NEWBERG ON CLASS ACTIONS § 13:13 (5th ed. 2014). (“The goal of
16 preliminary approval [of a class settlement] is for a court to determine whether notice of the
17 proposed settlement should be sent to the class, not to make a final determination of the
18 settlement’s fairness.”) “The general rule is that a court will grant preliminary approval where the
19 proposed settlement is neither illegal nor collusive and is within the range of possible of
20 approval.” 4 NEWBERG ON CLASS ACTIONS § 13:10 (5th ed. 2014). See also *Harris v. Vector*
21 *Mktg. Corp.* (N.D. Cal. Apr. 29, 2011) No. C-08-5198 EMC, 2011 WL 1627973, at *7 (“the Court
22 may grant preliminary approval of a settlement and direct notice to the class if the settlement (1)
23 appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious
24 deficiencies; (3) does not improperly grant preferential treatment to class representatives or
25 segments of the class; and (4) falls within the range of possible approval.”)

26 Following notice to the Class, the Court will make a final determination regarding the
27 fairness of Settlement. In making this evaluation, courts consider and balance a number of
28 factors, including:

1
2 [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration
3 of further litigation, the risk of maintaining class action status through trial, the
4 amount offered in settlement, the extent of discovery completed and the stage of
5 the proceedings, the experience and views of counsel, the presence of a
6 governmental participant, and the reaction of the class members to the proposed
7 settlement.

8 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–45 (quoting *Dunk v. Ford*
9 *Motor Co., supra*, 48 Cal.App.4th at 1801). Nevertheless, a presumption of fairness exists when:
10 (1) the parties reached a settlement through arm's-length bargaining; (2) the parties conducted
11 sufficient investigation and discovery to allow counsel and the Court to act intelligently; (3)
12 counsel are experienced in similar litigation; and, (4) the percentage of objectors is small. *Dunk,*
13 *supra*, 48 Cal.App.4th at 1802.

14 **A. The Settlement Is the Product of Non-Collusive, Arm's-length, and Well-**
15 **Informed Negotiations**

16 In reaching the Settlement Agreement, counsel on both sides relied on their respective
17 substantial litigation experience in similar employment class actions, and thorough analysis of the
18 legal and factual issues presented in this case. Information obtained through Class Member
19 interviews and informal discovery informed Plaintiff's assessment of the strengths and
20 weaknesses of the case and the benefits of the Settlement Agreement. The document and data
21 exchanges have allowed the Parties to closely evaluate the claims in this case, and the benefits of
22 the proposed Settlement Agreement. *See 7-Eleven Owners for Fair Franchising v. Southland*
23 *Corp.* (2000) 85 Cal.App.4th 1135, 1150 (“[I]n the context of class action settlements, formal
24 discovery is not a necessary ticket to the bargaining table where the parties had sufficient
25 information to make an informed decision about settlement.”) (quoting *Linney v. Cellular Alaska*
26 *P'ship* (9th Cir. 1998) 151 F.3d 1234, 1239).

27 The Parties initially engaged in a full day of mediation, which resulted in an agreement to
28 certain terms of resolution. Further, even after a deal was reached in the form of a confidential
MOU, the Parties continued to engage with each other in regards to the terms of the long form
Settlement Agreement. The fact that the Settlement “was the product of extensive and hard-

fought adversarial negotiations between the parties” and only reached with the assistance of an experience mediator is a strong indication that the settlement process was fair and non-collusive. See *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.

B. The Settlement Agreement Provides Reasonable Compensation for Class Members’ Damages in Light of Significant Litigation Risks

Class Members will share in an “Estimated Net Settlement Amount” of approximately **\$998,120 (Nine Hundred Ninety Eight Thousand One Hundred Twenty Dollars)** (\$1,700,000 Gross Settlement Amount) minus attorney fees [-\$561,000], estimated attorney costs [-\$20,000], estimated class administration costs [-\$21,000], service award [- \$10,000] and PAGA payments to the State of California [-\$127,500]), plus the \$37,620 in “Additional Estimated Substitute Amount” to be distributed to the Settlement Class Members as 1099 payments. This is a good recovery for the class of approximately 1700 Nurses making approx. \$26/hr., and who have been estimated to be under-paid \$623,000 in overtime and whose claims’ damages are driven largely by misclassification penalties. **The average Class Member will receive a pre-tax award of approximately \$587.13** (\$998,120 divided by 1700 Class Members = \$587.13).

The amount of the Settlement is reasonable given: (1) the difficulty of the claims, (2) the degree of risk and uncertainty involved in further litigation, (3) the amount of time that would pass before Plaintiff and the Class Members would see the fruits of any class verdict in their favor, (4) ability of Defendant to pay, and (5) the relative short period (since January 1, 2020) of the alleged practices and amount of alleged under-paid overtime wages. Defendant assert numerous legal and factual grounds for defending this action and, protracted litigation can lead to potential insolvency, and thus no recovery for any Class Member. Further, absent this Settlement, Defendant would have vehemently contested the propriety of class treatment both through motion practice regarding class certification and through any trial.

While Plaintiff remains confident that were this case to proceed in litigation, she would successfully move for class certification, defeat decertification, and prove her claims at trial, Plaintiff recognizes there are considerable risks, and that independent contractor and “off-the-clock” class actions are particularly challenging. See *Deaver v. Compass Bank* (N.D. Cal. Dec. 11,

1 2015) 2015 WL 8526982, at *7 (approving class settlement in part because of the “difficulties [in]
2 certifying the class and establish liability on the merits of Plaintiff’s [off-the-clock] claims”); *Cf.*
3 *Chu v. Wells Fargo Investments, LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, at *4 (ruling
4 that class certification risk weighed in favor of settlement approval, recognizing that “the outcome
5 of plaintiffs’ case was far from certain, particularly in light of several recent decertification orders
6 and denials of certification in similar wage and hour class actions.”)

7 Further, even if Plaintiff succeeded in proving at trial that Defendant should be liable for
8 Nurses being misclassified and working “off the clock”/under-paid their flat rate for overtime
9 hours, Plaintiff would still have the challenge of proving misclassification and the extent of hours
10 worked/under-paid. Given the nature of a misclassification case not all the information sought to
11 be analyzed by Class Counsel could be found in documented records. Instead, Plaintiff’s Expert
12 analyzed potentially under-paid overtime and penalties based on the estimates of the
13 testimony/declarations of Plaintiff and Class Members and assumptions from evidence provided
14 by Class Members and Defendant. Based on Class Counsel’s investigation and Plaintiff’s Expert’s
15 experience from other cases, Plaintiff believes her assumptions are reasonable. Nevertheless,
16 Plaintiff is very cognizant that Defendant would challenge the assumptions as aggressive. Indeed,
17 Defendant disputes that the evidence establishes a pattern and practice of misclassification and
18 under-paid overtime hours work. The Court could ultimately reject, either in whole or in part,
19 Plaintiff’s Nurse misclassification analysis and model for analyzing the existence of “off-the-
20 clock”/under-paid overtime work thus mooted her and class claims and damages potentially
21 leading to no recovery. *See Wren v. RGIS Inventory Specialists* (N.D. Cal. Apr. 1, 2011) 2011 WL
22 1230826, at *7 (risk associated with “challenges to their expert witnesses and damages
23 calculations” supported approval of settlement in off-the-clock class action); *In re Wells Fargo*
24 *Loan Processor Overtime Pay Litig.* (N.D. Cal. Aug. 2, 2011) 2011 WL 3352460, at *6
25 (recognizing that the potential difficulty in proving “off-the-clock” hours is a significant risk
26 which supports approval of class settlement).

27 Based on her current analysis, Plaintiff believes – and Defendant denies - that in the best-
28 case scenario, they would prove that the Class Members were misclassified and owed on average

1 a few hours of under-paid overtime wages each week (see Damage Analysis above). However,
2 “[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of
3 what might have been achieved had plaintiffs prevailed at trial.” *Wershba v. Apple Computer, Inc.*,
4 *supra*, 91 Cal.App.4th at p. 246.

5 A settlement need not obtain 100 percent of the damages sought in order to be fair
6 and reasonable. (See *Rebney v. Wells Fargo Bank, supra*, 220 Cal.App.3d at p.
7 1139 [settlements found to be fair and reasonable even though monetary relief
8 provided was “relatively paltry”]; *City of Detroit v. Grinnell Corp., supra*, 495
F.2d at p. 455 [settlement amounted to only “a fraction of the potential
recovery”].)

9 *Id.* at 250. See also *Officers for Justice v. Civil Serv., Commission* (9th Cir. 1982) 688 F.2d 615,
10 624, 628 (recognizing that “the very essence of a settlement is compromise, a yielding of
11 absolutes and an abandoning of highest hopes” and that “[i]t is well-settled law that a cash
12 settlement amounting to only a fraction of the potential recovery will not per se render the
13 settlement inadequate or unfair.”) (internal quotation omitted).

14 Considering the significant challenges faced by Plaintiff including Defendant’s legal and
15 factual defenses, there is a great risk the Class would do substantially worse in litigation than
16 under the Settlement or receive nothing at all. Further, absent a settlement, Class Members might
17 not receive any recovery at all or may not see any recovery until after years of litigation, including
18 appeals. See *Nat’l Rural Telecommunications Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221
19 F.R.D. 523, 526 (“In most situations, unless the settlement is clearly inadequate, its acceptance
20 and approval are preferable to lengthy and expensive litigation with uncertain results.”) (internal
21 quotation omitted).

22 On the other hand, the average Class Member Nurse will receive approximately five
23 hundred and eighty seven dollars and thirteen cents (\$587.13) under the Settlement. This is a good
24 recovery similar to many other wage and hour actions brought on behalf of hourly paid workers.
25 See e.g. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.* (E.D. Cal. June 9,
26 2015) 2015 WL 3622999, at *7, 10 (approval of wage settlement where the average non-
27 exempt/hourly class member was receiving \$531.67); *Gardner v. GC Servs., LP* (S.D. Cal. Apr. 2,
28 2012) 2012 WL 1119534, at *4 (average settlement award for the non-exempt/hourly employee

1 class was “around several hundred dollars” – “a good result for the class”); *Collins v. Cargill Meat*
2 *Solutions Corp.* (E.D. Cal. 2011) 274 F.R.D. 294, 302 (preliminary approval of wage settlement
3 where the average non-exempt/hourly class member was receiving \$685). In sum, the Settlement
4 provides meaningful, prompt relief for the disputed wage and hour violations and is well within
5 the range of reasonableness.

6 **C. The Class Settlement Payment Process is Fair and Reasonable**

7 All Class Members will be eligible to receive a share of the Estimated Net Settlement Fund
8 plus the Additional Estimated Substitute Amount based upon the number of Nursing Shifts s/he
9 worked as a Nurse during the Class Period. (See Settlement Agreement §§1.23, 1.24, 7.1). This
10 method of distribution is reasonably designed so that Settlement Class Members who worked
11 more shifts and thus, Plaintiff alleges, would have larger overtime and/or meal/rest break claims
12 will receive a larger share of the Settlement. Significantly, the proposed payment process ensures
13 that the maximum possible Estimated Net Settlement Fund plus Additional Estimated Substitute
14 Amount will actually be received by Settlement Class Members. As stated in the Class Notices,
15 the Settlement Class Members need not take any further action to receive a Settlement payment
16 other than cash the settlement checks they receive in the mail. Class Members who may be
17 hesitant to take affirmative action to claim monies from Defendant will not face the barrier of
18 taking affirmative action to recover their portion of the Settlement. If they do not opt-out of the
19 settlement they will simply receive a check in the mail that they can deposit/cash. Any settlement
20 checks not cashed after 180 days from the date of the class-wide distribution shall be void and the
21 sums correlating to those checks not cashed and any residual amounts shall be returned to the
22 Settlement Administrator and will be paid out per guidelines in CCP § 384. (Settlement
23 Agreement §7.4).

24 **D. The Settlement of Penalties Under the Labor Code Private Attorney General**
25 **Act of 2004 (PAGA) is Reasonable**

26 The settlement of the PAGA claim for **\$170,000** (10% of \$1,700,000 Gross Settlement
27 Amount) is within the range of reasonable PAGA settlement amounts. See, e.g. *Nelson v. Avon*
28 *Prod., Inc.* (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *2 (approving class settlement of \$1.8

1 Million with \$10,000 attributed to PAGA claim); *Taylor v. Shippers Transp. Express, Inc.* (C.D.
2 Cal. May 14, 2015) 2015 WL 12658458, at *19 (approving payment of \$50,000 for PAGA
3 penalties from a \$11 Million class settlement, finding that “[t]he proposed PAGA payment is
4 greater than awards deemed reasonable and approved in other cases,” and citing cases); *Franco v.*
5 *Ruiz Food Prod., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, at *14 (approving PAGA
6 payment of \$10,000 from a \$2.5 Million class settlement, finding the “amount comports with
7 settlement approval of PAGA awards in other cases,” and citing cases); *Cotter v. Lyft, Inc.* (N.D.
8 Cal. 2016) 193 F.Supp.3d 1030, 1037 [preliminarily approving class action settlement allocating a
9 PAGA set-aside worth a fraction of the PAGA claim’s potential value, where the defendant’s
10 obligations were “genuinely unclear” and there was no evidence the defendant acted deliberately
11 or negligently failed to learn about its obligations].) Pursuant to Labor Code § 2699(i), the
12 LWDA will receive 75% of this amount (**\$127,500**), and the remaining 25% (**\$42,500**) will be
13 shared by the Settlement Class Members/PAGA Group. (Settlement Agreement §§ 1.19, 1.20,
14 1.26, 1.27, 1.28).

15 **E. The Settlement’s Provision for Attorneys’ Fees, Expenses, and Costs is**
16 **Reasonable, Fair, and Appropriate Under the Circumstances**

17 In connection with final settlement approval/Fairness Hearing, Class Counsel will apply to
18 the Court for reasonable attorney’s fees and costs. The Settlement Agreement allows Counsel to
19 seek one-third of total Settlement fund (**\$561,000**) in attorney fees. Fee awards of 33% are
20 commonly awarded by courts. See, e.g. *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal. 5th 480, 503
21 (affirming fee award of one-third of the common fund in a wage and hour class action and
22 recognizing the following advantages in using the percentage method: “relative ease of
23 calculation, alignment of incentives between counsel and the class, a better approximation of
24 market conditions in a contingency case, and the encouragement it provides counsel to seek an
25 early settlement and avoid unnecessarily prolonging the litigation”) (internal quotation omitted);
26 *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 (“Empirical studies show that,
27 regardless whether the percentage method or the lodestar method is used, fee awards in class
28 actions average around one-third of the recovery.”) (internal quotation omitted); *Smith v. CRST*

1 *Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 2013 WL 163293, at *5 (recognizing the California
2 benchmark for fee awards in class actions as 33%).

3 The Court need not rule on Class Counsel's fees and costs now; a formal application will
4 be filed prior to the Final Approval Hearing. As will be explained in detail in the application,
5 including a lodestar cross-check, a fee award of one-third (33%) of the Settlement fund is
6 reasonable and well-justified in consideration of the risks Class Counsel has undertaken in
7 pursuing this case on a contingency basis and the good result achieved on behalf of the Class.
8 Class Counsel expended significant time and resources on this matter and will continue to do so
9 over the next approximate six months as they oversee the administration of the Settlement. Class
10 Counsel will further request reimbursement of their incurred, reasonable costs, not exceeding
11 \$20,000. See *Thieriot v. Celtic Inc. Co.* (N.D. Cal. Apr. 21, 2011) 2011 WL 1522385, *7 ("Class
12 counsel are entitled to reimbursement of reasonable out-of-pocket expenses.")

13 **F. Class Representative Enhancement Payments Are Reasonable and**
14 **Routinely Awarded**

15 Prior to the Final Approval Hearing/Fairness Hearing, Class Counsel will file a motion
16 seeking a reasonable Class Representative Enhancement Payment for the Class Representative.
17 The Court need not rule on this request now. At present, it is sufficient for the Court to determine
18 that the award provided for in the Settlement Agreement does not render the overall Settlement
19 inherently unfair and is not an obstacle to preliminary approval.

20 Courts routinely approve service ("incentive" or "enhancement") awards to compensate
21 class representatives for the services they provide and the risks they incur during class litigation.
22 See *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393 ("incentive
23 awards are fairly typical in class action cases . . . and are intended to compensate class
24 representatives for work done on behalf of the class, to make up for financial or reputational risk
25 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a
26 private attorney general.")

27 At the Final Approval Hearing/Fairness Hearing, Class Counsel will ask the Court to
28 approve an Enhancement Payment of **\$10,000 for the Class Representative**. Based on Class

1 Representative's significant time, effort and risks incurred in bringing this case on behalf of the
2 Class, as well as the substantial benefits the resulting Settlement provides the Class, the requested
3 service awards should ultimately be found to be reasonable. See, *e.g. Hasty v. Elec. Arts, Inc.* (San
4 Mateo Cty. Super. Ct., Sept. 22, 2006) No. CIV 444821 (approving an award of \$30,000 to the
5 class representative in a wage and hour class action); *Meewes v. ICI Dulux Paints* (Los Angeles
6 Cty. Super. Ct. Sept. 19, 2003) No. BC265880 (approving service awards of \$50,000, \$25,000 and
7 \$10,000 to the named plaintiffs); *In re High-Tech Employee Antitrust Litig.* (N.D. Cal. Sept. 2,
8 2015) No. 11-CV-02509-LHK, 2015 WL 5158730, at *17 (awarding service awards of \$80,000
9 and \$120,000).

10 The requested Class Representative Enhancement Payment is also reasonable in proportion
11 to the overall Settlement. The award represents only a small fraction of the total Settlement fund
12 and thus barely impacts the recovery of the Class Members. See *Singer v. Becton Dickinson & Co.*
13 (S.D. Cal. June 1, 2010) 2010 WL 2196104, at *9 (awarding \$25,000 to class representative from
14 \$1 Million wage and hour case settlement (2.5% of fund)); *Thieriot v. Celtic Inc. Co, supra* 2011
15 WL 1522385 at *8 (awarding \$25,000 service award to class representative from class settlement
16 of \$1.375 Million (1.8% of fund)).

17 In sum, the proposed Attorneys' fees, costs and Class Representative Enhancement
18 Payment are within the typical range of approval, and are justified given the facts of this case.
19 Regardless, both the attorneys' fees, costs and Enhancement Payment are subject to the Court's
20 approval and should be assessed at the final approval stage/Fairness Hearing after Class Counsel
21 formally applies for fees, costs and Class Representative Enhancement Payment and the Class
22 Members have an opportunity to respond.

23 **G. CPT Group Should Be Appointed as the Settlement Administrator**

24 Pursuant to the Settlement Agreement, the Parties seek to have CPT Group, Inc. appointed
25 as the Settlement Administrator. Amongst other things, the Settlement Administrator will be
26 responsible for: processing class data from Defendant; mailing Notices to Class Members;
27 handling returned Class Notices, using skip-tracing and last-known telephone numbers to obtain
28 current addresses for Class Members; creating and overseeing a Qualified Settlement Fund (QSF);

1 calculating the Class Settlement Payments (with the assistance and input of the Parties);
2 distributing the Individual Settlement Amount and PAGA Group Payments to Class/PAGA
3 Members; and tax reporting of Class Settlement Payments. CPT Group is a competent and
4 experienced settlement administration company. Plaintiff will apply to the Court for payment for
5 CPT's fees and costs, which it estimates at **\$21,000**. Based on the amount of work demanded of
6 the Settlement Administration, this sum is reasonable. See, e.g. *McNeal v. RCM Techs. USA Inc.*
7 (C.D. Cal. Mar. 16, 2017) 2017 WL 1807595, at *3 (preliminarily approving \$327,000 class
8 settlement where the Claims Administrator would receive fees not exceeding \$20,000).

9 **VIII. THE COURT SHOULD CONDITIONALLY CERTIFY A PROVISIONAL**
10 **SETTLEMENT CLASS**

11 When a negotiated class action settlement has been reached prior to certification—as
12 here—the Parties may agree that a defined class be conditionally (or provisionally) certified
13 for settlement purposes only. Cal. Rules of Court, Rule 3.769(d). In such circumstances, the
14 decision to certify a class is purely a procedural one and should be based on the allegations in
15 the Complaint and not on the perceived factual or legal merit of the class claims. *Linder v. Thrifty*
16 *Oil Co.*, 23 Cal.4th 429, 439-41 (2000). Therefore in a class action settlement context the
17 Parties are not required to stipulate to certification as contemplated by Cal. Rules of Court, Rule
18 3.764(e).

19 In support of conditional class certification, a party must show that (1) the class is
20 “ascertainable and sufficiently numerous;” (2) there are “predominant common questions of law
21 or fact;” (3) the class representatives have “claims or defenses typical of the class;” (4) the class
22 representatives can “adequately represent the class;” and (5) the benefits of a class action make it
23 “superior to the alternatives.” *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,
24 1021.

25 *Ascertainability and Numerosity:* For settlement purposes the Class Members are
26 identifiable from Defendant's records, and they total approximately 1700 individuals. For
27 purposes of administering this Settlement, the Class is ascertainable and sufficiently numerous as
28

1 to make joinder impracticable. *Citizens of Humanity, LLC v. Ramirez* (2021) 63 Cal.App.5th
2 117, 130–131.

3 *Common Legal and Factual Questions Predominate:* For settlement purposes, the
4 common questions include, without limitation: (i) whether Class Members were misclassified as
5 independent contractors; (ii) whether Class Members were paid for all hours worked and wages
6 to which they were entitled; (iii) whether Class Members were paid for all overtime hours
7 worked and wages to which they were entitled at the appropriate rate; (iv) whether Class
8 Members were denied duty-free meal/rest periods; (v) whether Class Members are entitled to
9 recover waiting time penalties under California law; (vi) whether Class Members received
10 reimbursement for necessary business expenses; and (vii) whether Class Members received
11 compliant wage statements. *See, e.g. Williams v. Superior Court* (2013) 221 Cal.App.4th 1353,
12 1369-1371 (overturning decertification of off-the-clock class and ruling the plaintiffs had
13 adequately shown that defendants had a company wide practice of having class members work
14 off-the-clock).

15 *Typicality of Claims:* “The test of typicality is whether other members have the same or
16 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
17 and whether other class members have been injured by the same course of conduct.” *Johnson v.*
18 *GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509. Like all Class Members, Plaintiff
19 was engaged as a Nurse and alleges that she and all other Nurses were subject to the same or
20 similar policies and practices of Defendant whereby they were allegedly misclassified as
21 independent contractors, not paid the correct rate for all overtime hours worked, not reimbursed
22 for business related expenses, and denied duty-free meal/rest breaks. Further, Plaintiff alleges
23 that as a result of these policies and practices she – like all Class Members – was misclassified,
24 was denied overtime pay at the correct rate, was required to work through/during meal/rest
25 periods and not provided premium pay, was not reimbursed for necessary business expenses, and
26 was not provided accurate and timely wage statements. *See Wershba v. Apple Computer, Inc.,*
27 *supra*, 91 Cal.App.4th at p. 239 (class representative typical as “all of the class members
28 [including the class representative] here suffered a common alleged wrong.”)

1 *Adequate Representation:* Plaintiff will adequately represent the Class. She has the same
2 interest in maintaining this action as any Class Member would have. Further, she has hired
3 counsel experienced in class actions and wage and hour law. *See McGhee v. Bank of America*
4 (1976) 60 Cal.App.3d 442, 450 (“Adequacy of representation depends on whether the plaintiff’s
5 attorney is qualified to conduct the proposed litigation and the plaintiff’s interests are not
6 antagonistic to the interests of the class.”)

7 *Superiority of Class Action:* Further, the maintenance of the Class results in “substantial
8 benefits” to the Parties, including the Class Members, and the Court. *Linder v. Thrifty Oil Co.*
9 (2000) 23 Cal. 4th 429, 435. It would be inefficient and a waste of the Court’s and Parties’
10 resources to require 1700 Class Members to separately litigate the same issues in different
11 lawsuits. *Capitol People First v. Dep’t of Developmental Servs.* (2007) 155 Cal.App.4th 676, 702
12 (“without class treatment there could be multiple actions that would burden the litigants and the
13 courts with cumulative and excessive expenses, discovery efforts and evidence.”) The class action
14 procedure is an ideal method for resolving the relatively modest individual claims of 1700 current
15 and former Nurses, many of whom would be deterred from bringing individual claims due to the
16 costs of litigation and concerns that bringing a lawsuit could adversely affect current or future
17 employment. *See Bibo v. Fed. Exp., Inc.* (N.D. Cal. Apr. 21, 2009) 2009 WL 1068880, at *9
18 (“Class treatment will increase class members’ access to redress because it unifies what may be a
19 series of small claims . . . Additionally, class treatment may relax any concerns that current
20 employees may have about retaliation if they were to bring a suit against FedEx, as unity of the
21 employee class would prevent retaliation.”)

22 Accordingly, the Class should be conditionally certified as a provisional settlement class.

23 **IX. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

24 A court is afforded broad discretion in determining appropriate notice to class members.
25 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973-74. The Class Notice should be provided
26 in a manner that “has a reasonable chance of reaching a substantial percentage of the class
27 members.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 251 (internal quotation
28 omitted). “In regard to the contents of the notice, the notice given to the class must fairly apprise

1 the class members of the terms of the proposed compromise and of the options open to dissenting
2 class members.” *Id.* (internal quotation omitted).

3 The proposed Class Notices is attached to the Settlement Agreement as **Exhibit C: Notice**
4 **of Class Action Settlement.** The Settlement Agreement is attached as Exhibit 1 to the Da Vega
5 Decl., which is filed in support of this motion.

6 A notice will be sent to Class Members. **The Notice Period / “Response Deadline” will**
7 **be 45 calendar days.** The Class Notice clearly and accurately describes (a) the case information
8 and the nature of the action; (b) the terms of Settlement Agreement; (c) the definition of the class;
9 (d) the formula for calculating the Net Settlement Fund (including the amounts sought for the
10 Class Counsel Award, Class Representative Enhancement Payment, Settlement Administration
11 Costs and the LWDA Payment) and Individual Settlement Amounts; (e) the individual Class
12 Member’s estimated number of Nursing Shifts worked through use of Defendant’s Nurse
13 OnDemand platform application during the Class Period and Gross Allocated Amount; (f) the
14 dates which comprise the Class Period, (g) instructions on how to submit a Shift Dispute, Request
15 for Exclusion, or Objection, and (h) the deadlines by which Shift Disputes, Requests for
16 Exclusion, or Objections to the Agreement must be submitted to the Settlement Administrator. It
17 also describes that Class Members who do not opt-out, will be bound by the Settlement
18 Agreement, including the release of claims and PAGA, if the Agreement is approved by the Court;
19 the process to appear at the Final Approval Hearing/Fairness Hearing to state objections; and that
20 a Class Member may retain separate counsel to appear on the Class Member’s behalf. *See* Cal.
21 Rules of Court, rule 3.766(d) & 3.769(f).

22 The proposed plan for distributing the Class Notice is also reasonable and satisfies the
23 notice requirements of California Rules of Court, Rules 3.766 & 3.769(f) and all other legal and
24 due process requirements. Individual notice will be mailed to Class Members, which is a
25 reasonable and practicable way of reaching all of the Class Members. 4 NEWBERG ON CLASS
26 ACTIONS § 8:15 (5th ed. 2014). The notices will have contact information for Class Counsel.
27 Defendant will provide the Settlement Administrator with a Class List containing each Class
28 Members: (1) full name; (2) last known mailing address; (3) last known telephone number; (4)

1 Social Security number; and (5) estimated number of Nursing Shifts worked through use of
2 Defendant's Nurse OnDemand platform during the Class Period to the extent any or all such
3 information is reasonably available to Defendant. (Settlement Agreement §1.6).

4 Prior to the mailing of the Class Notice, the Settlement Administrator will run the list of all
5 Class Members through the United States Postal Service's National Change of Address database
6 ("NCOA"). (Settlement Agreement §4.3). However, if Class Notices are returned because the
7 address of the recipient is no longer valid, the Settlement Administrator will perform skip traces to
8 locate Class Members. (Settlement Agreement §4.4). Further, as necessary, the Settlement
9 Administrator will use Class Members' last-known telephone numbers (and telephone numbers
10 updated through public and proprietary databases) to obtain Class Members' current addresses.
11 The proposed mailing and distribution of the Class Notice constitutes the best notice practicable.

12 **X. A FINAL APPROVAL / FAIRNESS HEARING SHOULD BE SCHEDULED**

13 The last step in the settlement approval process is a final approval hearing, at which the
14 Court may hear all evidence and argument necessary to evaluate the proposed Settlement. *See*
15 California Rules of Court, Rules 3.769(g). Plaintiff respectfully requests that the Court schedule
16 the Final Approval / Fairness Hearing and set deadlines for the submission of motion and
17 supporting papers.

18 **XI. CONCLUSION**

19 For the reasons set forth above and in the accompanying papers, Plaintiff respectfully
20 requests that the Court grant Plaintiff's Motion for Preliminary Approval of the Class Settlement.

21
22 **DATED:** February 18, 2022

DA VEGA | FISHER | MECHTENBERG LLP

23
24 

25 By: _____
26 Matthew S. Da Vega
27 Attorneys for Plaintiff and Class
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