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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY**

LORENA RAMIREZ, on behalf of herself
and all similarly aggrieved employees,

Plaintiff,

v.

COVENANT SURGICAL PARTNERS,
INC.; SALINAS ENDOSCOPY CENTER,
LLC; AND DOES 1 through 50, inclusive,

Defendants.

Case No.: 22CV000081

(Assigned to the Honorable Thomas W. Wills,
Dept. 15)

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: July 14, 2023

Time: 8:30 a.m.

Dept.: 15

Complaint Filed: January 10, 2022

Trial Date: None

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on July 14, 2023, at 8:30 a.m. before the Honorable Thomas W. Wills, judge presiding in Department 15 of the above-referenced Court, located at 1200 Aguajito Road, Monterey, California 93940, Plaintiffs Lorena Ramirez and Teresa Martinez (“Plaintiffs”) will and hereby do move the Court for the following relief with respect to the Joint Stipulation of Class and Representative Action Settlement (“Agreement” or “Settlement Agreement”) entered into by Plaintiffs and Defendants Covenant Surgical Partners, Inc. and Salinas Endoscopy Center, LLC (“Defendants”) (together with Plaintiffs, the “Parties”):

1. That the Court approve the Settlement Agreement referenced above;

2. That the Court conditionally certify the following Class for settlement purposes only: All non-exempt employees who are or previously were employed by Covenant Surgical Partners, Inc. and/or Salinas Endoscopy Center, LLC in California during the period of January 10, 2018 through February 1, 2023 (the “Class Period”).

3. That Plaintiffs Lorena Ramirez and Teresa Martinez be appointed as the Class Representatives, and B. James Fitzpatrick and Alison Baker of Fitzpatrick & Swanston, and Larry W. Lee, Kristen M. Agnew, and Nicholas Rosenthal of Diversity Law Group, P.C., be appointed as Class Counsel.

4. That the Court preliminary approve the Settlement Agreement and the total Gross Settlement Amount in the amount of One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000.00);

5. That the Court finds on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, the Service Payment to the Class Representatives, attorneys’ fees and costs, settlement administration costs, and the allocation of individual payments to Class Members, that could ultimately be given final approval by this Court.

6. That the Court approve the mailing of the proposed Notice of Proposed Class Action Settlement (“Class Notice”) to be sent to Class Members.

7. That the Court appoint CPT Group as the Settlement Administrator; and

1 8. That the Court schedule the matter for a final approval hearing.

2 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
3 provides for court approval of the settlement of a purported class action and allows the Court to
4 preliminarily certify a class for settlement purposes.

5 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
6 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
7 Class Members to participate in, opt out of, or object to the settlement. This Motion is based on
8 the Memorandum of Points and Authorities included herein, the Stipulation and the proposed
9 Class Notice, and the supporting Declarations of B. James Fitzpatrick, Alison Baker, Larry W.
10 Lee, Kristen M. Agnew, Nicholas Rosenthal, Plaintiff Lorena Ramirez and Plaintiff Teresa
11 Martinez, and upon the oral arguments of counsel (should there be any), and on the complete
12 records and file herein.

13
14 DATED: June 21, 2023

DIVERSITY LAW GROUP, P.C.

15
16 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiffs, the Class, and Aggrieved
Employees

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1
2 **I. INTRODUCTION**

3 After extensive investigation, discovery, mediation and negotiations, Plaintiffs Lorena
4 Ramirez and Teresa Martinez (“Plaintiffs”) (“Class Representatives” or “Plaintiffs”) and
5 Defendants Covenant Surgical Partners, Inc. and Salinas Endoscopy Center, LLC (“Defendants”) have
6 reached a class and PAGA action settlement, the terms of which are reflected in the Parties’
7 Joint Stipulation of Class and Representative Action Settlement (“Agreement” or “Settlement
8 Agreement”)¹. Plaintiffs now seek preliminary approval of the proposed settlement, which
9 includes a \$1,750,000.00 non-reversionary Gross Settlement Amount.

10 The following represents the key terms of the Settlement Agreement:

- 11 ▪ Gross Settlement Amount of \$1,750,000.00, which will be paid by Defendants
12 and distributed to the class on a **non-reversionary basis, such that no monies**
13 **will revert back to Defendant** (SA at § C-1);
14 ▪ Class size of 820 individuals (Agnew Decl. ¶ 12);²
15 ▪ Class Members do not need to submit claim forms to participate in the settlement
16 (SA at § C-15);
17 ▪ An Enhancement Payment of up to \$5,000 to each Class Representative (totaling
18 \$10,000.00), for their efforts in prosecuting this action on behalf of other Class
19 Members and in consideration for providing a general release of all claims
20 exclusive of Plaintiff Martinez retaliation and termination claim, including a
21
22
23

24 ¹ The Parties’ Joint Stipulation of Class Action Settlement is attached to the Declaration of
25 Kristen M. Agnew as **Exhibit B**.

26 ² Pursuant to Section A-4 of the Settlement Agreement, the “Class” consists of “all non-exempt
27 employees who are or previously were employed by Covenant Surgical Partners, Inc. and/or
28 Salinas Endoscopy Center, LLC in California during the period of January 10, 2018 through
February 1, 2023.”

waiver under Civil Code § 1542 (SA at § C-4)³;

- Class Counsel’s attorneys’ fees of up to 33.33% of the Gross Settlement Amount, or up to \$583,333.33 (SA at § C-3);
- Class Counsel’s litigation costs of up to \$25,000.00 (SA at § C-3);
- Settlement Administrator’s Costs of up to \$10,000.00 (SA at § C-5);
- Net Settlement Amount of approximately **\$1,071,666.67** (Agnew Decl. ¶ 16);
- Payment to the LWDA of \$37,500.00, representing seventy-five percent of the PAGA Payment of \$50,000.00 (SA at § C-6); and
- The remaining twenty-five percent of the PAGA Payment of \$50,000.00, or \$12,500.00, to be distributed to Aggrieved Employees⁴ on a *pro rata* basis, based on the number of pay periods worked during the PAGA Period (SA at § C-7)

As set forth more fully below, the Parties believe that the terms of the Settlement Agreement are fair, adequate, and reasonable, considering all known circumstances and the expenses and risks inherent in litigation. Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

A. The Allegations Set Forth in the PAGA Notice and the Operative First Amended Complaint.

On January 10, 2022, Plaintiff Lorena Ramirez (“Plaintiff Ramirez”) filed a written notice to the California Labor & Workforce Development Agency (“LWDA”) alleging that Defendants violated Labor Code sections 201, 201.3, 202, 203, 204, 207, 208, 209, 216, 218, 218.5, 218.6, 223, 225.5, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1199, 2800,

³ The Settlement Agreement allows for an Enhancement Payment of up to \$10,000 to each Class Representative (totaling \$20,000.00). However, the Class Representatives are each requesting a modest \$5,000 Enhancement Payment.

⁴ Pursuant Section A-2 of the Settlement Agreement, the “Aggrieved Employees” consists of all non-exempt employees who are or previously were employed by Covenant Surgical Partners, Inc. and/or Salinas Endoscopy Center, LLC in California during the period of January 10, 2021 through February 1, 2023.

1 and 2802, pursuant to Labor Code section 2699 (“PAGA Notice”). (Agnew Decl. ¶ 3.) On
2 January 10, 2022, Plaintiff Ramirez initiated this Action against Defendants in the Monterey
3 County Superior Court (the “Action”). (*Id.* at ¶ 4.)

4 On April 7, 2022, Plaintiff Ramirez filed the operative First Amended Complaint for
5 Damages, Penalties and for Injunctive Relief. (Agnew Decl. ¶ 5.) Plaintiff Ramirez amended the
6 complaint to name Teresa Martinez as an additional plaintiff and class representative. (*Id.*) As
7 pled in the First Amended Complaint, Plaintiffs’ class and PAGA claims are predicated on
8 multiple wage and hour violations experienced by Plaintiffs and the Class. (*Id.* at ¶ 6.) More
9 specifically, Plaintiffs allege that Defendants’ meal and rest periods policies are contrary to
10 Labor Code sections 226.7 and 512. (*Id.* at ¶¶ 23, 26.) Plaintiffs contend that, as a matter of
11 policy, employees were not provided with a meal period until *after* the sixth hour of work. (*Id.* at
12 ¶ 23.) Additionally, Plaintiffs contend that Defendants’ policy required employees to work at
13 least eight hours before taking a second rest period. (*Id.* at ¶ 23.) Even when provided meal and
14 rest periods, Plaintiffs allege that employees remained on-duty, and were required to respond to
15 work-related calls and complete other work during breaks. (*Id.* at ¶¶ 23, 26.)

16 Plaintiffs further contend that Defendants implemented four unlawful policies that
17 resulted in the underpayment of hourly and overtime wages to employees, in violation of Labor
18 Code sections 1194 and 1198. (Agnew Decl. ¶ 29.) Plaintiffs allege that Defendants rounded the
19 daily total hours worked by its employees. (*Id.*) Despite recording individual time entries to the
20 minute, for the purpose of paying wages, Defendants rounded the total hours worked each day to
21 the nearest 15 minutes. (*Id.*) As a separate violation, beginning in March 2020, Defendants
22 required that employees comply with health certification protocols prior to entering the
23 workplace, including temperature screening and a self-certification process. (*Id.* at ¶ 31.) This
24 occurred at the building entrance, prior to employees clocking in for work. (*Id.*) Additionally,
25 Plaintiffs allege that Defendants failed to incorporate non-discretionary bonus payment in the
26 regular rate of pay for purposes of paying overtime, meal/rest period premiums and sick pay. (*Id.*
27 at ¶ 34.)

28 Plaintiffs contend that Defendants failed to reimburse employees for work-related

1 expenses, in violation of Labor Code section 2802. (Agnew Decl. ¶ 37.) More specifically,
2 Plaintiffs allege that Defendants required employees to use their own cell phones for work-
3 related purposes, including communicating with Defendants’ doctors and staff during breaks and
4 completed Defendants’ health screening protocols. (*Id.*)

5 As a result of these alleged violations, Plaintiffs seek damages and derivative penalties
6 under Labor Code sections 203 and 226, California Business & Professions Code, and PAGA, as
7 well as attorneys’ fees and costs. (Agnew Declaration at ¶¶ 40, 42.)

8 **B. The Parties Engaged in Formal Written Discovery and Deposed Defendants’**
9 **PMK.**

10 On April 11, 2022, Plaintiffs propounded written discovery, including Special
11 Interrogatories (Set One) and Requests for Production of Documents (Set One). (Agnew Decl. ¶
12 7.) The discovery required Defendants to provide documents and information relevant to class
13 certification, including the number of members in the putative class, documents pertaining to
14 Defendants’ payroll policies and procedures, and time and payroll records of putative class
15 members. Defendants provided fulsome and substantive responses to the discovery requests. (*Id.*)

16 On December 6, 2022, Plaintiffs deposed Defendants’ designated person most
17 knowledgeable on topics related to Defendants’ meal/rest period policies, calculation of the
18 hours worked by putative class members, “rounding” policy, calculation of the regular rate of
19 compensation and cellphone reimbursement policy. (Agnew Decl. ¶ 8.)

20 **C. The Parties Participate in Private Mediation.**

21 In or around October 2022, the Parties agreed to participate in private mediation. (Agnew
22 Decl. ¶ 9.) Based on Defendants’ prior written discovery responses, Class Counsel was able to
23 determine the total number of Class Members and Aggrieved Employees, the number of meal
24 and rest period eligible shifts worked during the Class Period and PAGA Period, the number of
25 pay periods in which non-discretionary incentive pay was earned in the same workweek as
26 overtime and/or meal period premiums, the aggregate amount of time lost due to the alleged
27 rounding, the number of employees who separated employment, and the average rate of pay for
28 all employees. (*Id.*) With the assistance of an expert witnesses, Class Counsel conducted a full

1 damages analysis. (*Id.*)

2 On February 1, 2023, the Parties engaged in a full-day mediation with mediator Michael
3 J. Loeb, Esq. (Agnew Decl. ¶ 10.) As a result of the mediation, the Parties reached a tentative
4 settlement, which was memorialized in the Memorandum of Understanding. (*Id.* at ¶ 11.) The
5 Parties subsequently executed the Joint Stipulation of Class Action Settlement, a true and correct
6 copy of which is attached as **Exhibit B** to the Declaration of Kristen M. Agnew.

7 The Parties recognize the risk, expense, and delay in continuing litigation with the class
8 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. (Agnew Decl.
9 ¶ 53; Declaration of Alison Baker (“Baker Decl.”) at ¶ 3; Declaration of B. James Fitzpatrick
10 (“Fitzpatrick Decl.”) at ¶ 2; Declaration of Larry W. Lee (“Lee Decl.”) at ¶ 2; Declaration of
11 Nicholas Rosenthal (“Rosenthal Decl.”) at ¶ 2.) Accordingly, the Parties desire to settle,
12 compromise, and discharge all disputes and claims arising from or relating to the afore-
13 referenced claims.

14 **III. DISCUSSION**

15 **A. The Approval Process.**

16 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
17 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
18 review after notice has been distributed to the class members for their comment or objections.
19 The *Manual for Complex Litigation, Third* § 30.41 states:

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

(Fed. Jud. Ctr., 3rd ed. 1995).

Thus, the preliminary approval by the trial court is simply a conditional finding that the

1 settlement appears to be within the range of acceptable settlements. As Professor Newberg
2 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
3 concerning a tentative settlement proposal may vary. The court may find that the settlement
4 proposal contains some merit, is within the range of reasonableness required for a settlement
5 offer or is presumptively valid subject only to any objections that may be raised at a final
6 hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed.
7 2002).

8 The procedures for the parties’ submission of a proposed settlement for preliminary
9 approval by the court also are discussed in 4 *Newberg on Class Actions*:

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

15 *Id.* § 11.24.

16 Here, the Parties have reached such an agreement and have submitted to this Court in
17 connection with this Motion a copy of the Settlement Agreement fully setting forth the
18 agreement reached by the Parties. The Agreement sets forth all terms of the agreement reached
19 by the Parties as to settlement of the class and PAGA claims. Said terms in the Stipulation
20 include, among other things, the method for calculating the Class Members’ individual portions
21 of the settlement payment. (SA at § C-8.)

22 The parties also may, at the preliminary approval stage, request that the court
23 provisionally approve certification of the class for settlement purposes—conditional upon final
24 approval of the settlement. “[P]re-certification settlements are routinely approved if found to be
25 fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 240 (2001); *accord*
26 *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1803 (1996) (although the settlement was
27 reached before any “adversary certification,” the court was satisfied that it was “fair, adequate
28 and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many

1 courts have employed this practice in the name of judicial efficiency in order to facilitate
2 apparently beneficial settlement proposals”). As further explained by Professor Newberg:

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

11 4 *Newberg on Class Actions* § 11.26.

12 In addition to such terms as class identification, settlement amount, and payment
13 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
14 which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of
15 this settlement only. (SA at § C-53.)

16 **B. The Proposed Class Definition.**

17 The current settlement is being settled on behalf of the following Class: all non-exempt
18 employees who are or previously were employed by Covenant Surgical Partners, Inc. and/or
19 Salinas Endoscopy Center, LLC in California during the period of January 10, 2018, through
20 February 1, 2023. (SA at § A-4.) Defendants have represented that approximately 820
21 individuals comprise the Class. (Agnew Decl. ¶ 12.) With respect to PAGA, the settlement
22 covers the claims of the following Aggrieved Employees: all non-exempt employees who are or
23 previously were employed by Covenant Surgical Partners, Inc. and/or Salinas Endoscopy Center,
24 LLC in California during the period of January 10, 2021 through February 1, 2023. (SA at § A-
25 2.)

26 **C. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of 27 Litigation.**

28 **1. The Settlement Carries a Strong Presumption of Fairness.**

 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars
Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*

1 *re Chicken Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
2 judgment for that of the proponents, particularly where, as here, settlement has been reached
3 with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
4 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F.Supp.
5 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
6 *Antitrust Litig.*, 472 F.Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*
7 *& Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

8 While the recommendations of counsel proposing the settlement are not conclusive, the
9 Court can properly take them into account, particularly where, as here, they have been involved
10 in discovery and negotiations for some period of time, appear to be competent, have experience
11 with this type of litigation, and have exchanged substantial evidence from the opposing party.
12 *See Newberg on Class Actions, supra*, at § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at
13 p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however,
14 a strong initial presumption of fairness attaches to the proposed settlement...[citations] and
15 ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted
16 with the facts of the underlying litigation”).

17 Here, both Class Counsel and Defendants’ counsel have a great deal of experience in
18 wage and hour class action litigation. Class Counsel has been approved as class counsel in a
19 number of wage and hour class actions and have extensive litigation experience. (Agnew
20 Declaration at ¶¶ 54, 59; Baker Decl. ¶ 5; Fitzpatrick Decl. ¶ 5, 6; Lee Decl. at ¶¶ 5, 8; Rosenthal
21 Decl. ¶ 5.)

22 **2. The Class and PAGA Claims Are Contested.**

23 **a. Regular Rate Violations.**

24 Pursuant to California law, employers must include all non-discretionary items of pay,
25 including incentive pay and/or bonuses, into the regular rate of pay for purposes of paying
26 overtime, meal period penalties and sick pay. *See Marin v. Costco Wholesale Corp.*, 169 Cal. App.
27 4th 804, 807 (2008), as modified on denial of reh’g (Jan. 21, 2009) (“Where a bonus payment is
28 considered part of the regular rate at which an employee is employed, it must be include in

1 computing his regular hourly rate of pay and overtime compensation”); *Ferra v. Loews Hollywood*
2 *Hotel, LLC*, 11 Cal. 5th 858 (2021) (holding that meal period premium payments must be
3 calculated at the “regular rate of pay that included all non-discretionary remuneration”). Here,
4 Plaintiffs have identified 197 discrete “Club Card Membership bonus” payments made to Class
5 Members. (Agnew Decl. ¶ 34.) These annual payments range in price from \$30-\$60. (*Id.*) The
6 Parties sharply disagree as to whether the “Club Card Membership bonus” should be included in
7 the regular rate of pay. (*Id.* at ¶ 35.) Although Defendants’ handbook describes the payment as a
8 “bonus,” Defendants contend that the “Club Card Membership bonus” is not a non-discretionary
9 wage. (*Id.*) As argued by Defendants, the “Club Card Membership bonus” is a reimbursement to
10 employees who maintain a warehouse membership to Costco or Sam’s Club. (*Id.*) Furthermore,
11 with respect to the sick pay regular rate claim, Defendants have argued that Plaintiffs cannot
12 recover unpaid sick pay wages because there is no private right of action under the Healthy
13 Workplace Healthy Family Act. (*Id.*)

14 **b. Meal and Rest Period Violations.**

15 Plaintiffs assert claims for failure to provide meal periods and authorize and permit rest
16 periods. (Agnew Declaration at ¶¶ 23, 26.) Although Plaintiffs have argued that Defendants’
17 written policy was out of compliance with California law (*see* Section II-A, *supra*), Defendants
18 maintain that it complied with the law, had legal practices, and provided its employees duty-free
19 breaks. (*Id.* at ¶¶ 24, 27.) Defendants further argued that, even if Plaintiffs were able to establish
20 that some employees experienced a meal and/or rest period violation, such a claim would not be
21 manageable. (*Id.* at ¶¶ 24, 27.)

22 **c. Unpaid Time: Rounding Violation.**

23 Defendants contend that its rounding policy complies with California law. (Agnew Decl.
24 ¶ 29.) Based on Defendants’ time and pay records, Plaintiffs have identified 279 uncompensated
25 hours that resulted from Defendants’ rounding practice. (*Id.*) Defendants, however, maintain that
26 the cumulative effect of the rounding practice, resulted in the overpayment of wages to the Class.
27 (*Id.*)

28 **d. Unpaid Time: COVID Screenings.**

1 Defendants sharply dispute Plaintiffs’ allegation that Class Members were required to
2 submit to off-the-clock health certification protocols prior to entering the workplace. (Agnew
3 Decl. ¶ 32.) Consistent with its written policy that employees must record all time spent working,
4 Defendants contend that all certification procedures should have taken place after an employee
5 clocked-in for the day. (*Id.*) Furthermore, to the extent that an individual Class Member
6 submitted to a screening off-the-clock, Defendants provide all employees with a method to report
7 missed punches or any errors in the time records so that the time records may be corrected. (*Id.*)
8 Merits aside, Defendants further argue that the claim is not suitable for class certification. Citing
9 to *Brinker Rest. Corp. v. Superior Court* 53 Cal.4th 1004 (2012), Defendants argue that in order
10 to prevail at class certification, Plaintiffs must present evidence that Defendants “know[] or has
11 reason to know” that off-the-clock work occurred. Thus, according to Defendants, an
12 adjudication of the alleged off-the-clock claim would require individualized assessments as to
13 whether managers at its various facilities were aware that employees submitted to the protocol
14 prior to clocking in for the day. (Agnew Decl. ¶ 32.)

15 **e. Unpaid Business Expenses.**

16 Defendants contend that Class Members were not required to use a cell phone to perform
17 any part of their job duties. (Agnew Decl. ¶ 38.) Thus, as argued by Defendants, no portion of
18 the employees’ cell phone plans can accurately be characterized as a business expense. (*Id.*)
19 Plaintiffs, however, maintain that, in practice, Class Members were required to use their personal
20 cell phones to communicate during breaks and complete the off-the-clock COVID screenings.
21 (*Id.* at ¶ 37)

22 **f. Derivative Wage Statement Violation.**

23 Plaintiffs pursue a wage statement violation that is purely derivative in nature (Agnew
24 Decl. ¶ 40), and therefore vulnerable to a motion for summary judgment. *See Maldonado v.*
25 *Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a
26 violation under 226(a) where their wage statement cause of action was derived from an
27 underlying wage and hour violation for overtime). Additionally, Defendants maintain that any
28 alleged omission of information from the wage statements was not a “knowing and intentional

1 failure” by Defendants to comply with Labor Code section 226(a), and penalties are therefore
2 unwarranted. *See Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009)
3 //

4 **g. Derivative Waiting Time Penalties.**

5 Plaintiffs seek waiting time penalties based on Defendants’ alleged underpayment and/or
6 non-payment of wages, meal and rest period premiums and sick pay. (Agnew Decl. ¶ 42.) In
7 order to establish liability for waiting time penalties under Labor Code section 203, it is the
8 plaintiff’s burden to prove not only that there was a failure to pay final wages in a timely
9 manner, but also that the failure to pay wages in a timely manner was “willful.” Cal. Lab. Code §
10 203(a); *Granite Outlet, Inc. v. Hartford Cas. Ins. Co.*, 190 F. Supp. 3d 976, 986 (E.D. Cal. 2016)
11 (“The ‘willful’ factor...is a requisite element to impose penalties under Labor Code section
12 203”). As explained above, Defendants maintain that Plaintiffs cannot establish the predicate fact
13 that any earned wages were not paid at the time of termination. (Agnew Decl. ¶ 42.) Citing
14 *Naranjo v. Spectrum Security Services, Inc.*, Defendants contend that Plaintiffs cannot recover
15 section 203 penalties that are predicated on the non-payment of meal/rest periods. 88
16 Cal.App.5th 937, 949 (2023) (holding that an employer’s failure to include meal and rest period
17 premium pay on the wage statements was not “knowing and intentional” because it had a good
18 faith belief that it was not in violation of Labor Code section 226) (petition for review granted,
19 May 31, 2023). Defendants further contend, that to the extent that Plaintiffs overcome this
20 hurdle, Plaintiffs would need to prove that Defendants willfully delayed each final payment, and
21 this this is an inherently fact intensive inquiry, which is not susceptible to class-wide
22 adjudication. (Agnew Decl. ¶ 42.)

23 **3. The Recovery of Unpaid Wages and Statutory Penalties.**

24 Class Counsel retained Econ One to calculate the potential damages/penalties at issue.
25 (Agnew Declaration at ¶¶ 9, 22.) Based on the class data provided by Defendants, Class Counsel
26 estimated that Defendants would face potential liability of up to approximately \$15,187,189 in
27 unpaid wages and statutory penalties, if Plaintiffs succeeded at trial on all class claims. (*Id.* at ¶¶
28 22, 44.) The breakdown for the calculation of the class damages and penalties is set forth in

1 detail in the Agnew Declaration. (*Id.* at ¶¶ 22-44.)

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4 **4. The Recovery of Civil PAGA Penalties Is Uncertain.**

5 Due to the discretionary nature of PAGA penalties, PAGA civil penalties are difficult to
6 evaluate. Defendant has indicated that there were approximately 31,880 pay periods in which
7 Aggrieved Employees worked during the PAGA Period. (Agnew Decl. ¶ 45.) Assuming that
8 Plaintiffs were to prevail on the merits of the PAGA claim, applying the standard penalty of
9 \$100 per pay period (regardless of the number of violations) yields \$3,188,000 in potential
10 liability. (*Id.*) However, in the alternative, if the Court were to “stack” penalties, (ie, award
11 multiple PAGA penalties for different Labor Code violations in the same pay period), the
12 potential PAGA penalties could total as high as \$14,119,900. (*Id.* at ¶ 46.)

13 However, even assuming Plaintiffs ultimately prevail on their PAGA claims, the Court
14 has discretion to reduce any PAGA penalties. Pursuant to Labor Code section 2699(e)(2), the
15 Court can decline to award PAGA penalties where “if, based on the facts and circumstances of
16 the particular case, to do otherwise, would result in an award that is unjust, arbitrary and
17 oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v.*
18 *Starbucks Corp.*, 30 Cal.App.5th 504 (2018), while the plaintiff prevailed on his PAGA claim
19 upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
20 employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court
21 of Appeal found such a reduction to be proper. *Id.* at p. 539.

22 Although Plaintiffs believe in the merits of the alleged claims and maintains that there is
23 no reason for reducing PAGA penalties, Plaintiffs are aware that Defendants may raise defenses
24 to the claims and further with respect to the reduction of PAGA penalties and that it could be
25 persuasive to the Court. (*See* Agnew Decl. ¶ 49.) Thus, even if Plaintiffs were to successfully
26 prove their claims at trial, there is a possibility that the Court may only award a small percentage
27 of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was
28 premised with this risk in mind, associated with the possibility of the Court significantly

reducing Plaintiffs' PAGA penalties, along with other attendant risks, even if Plaintiffs were to prevail at trial. (*Id.* at ¶¶ 48-51.)

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5. The Settlement is Reasonable When Compared to the Value of the Underlying Labor Code Claim and Inherent Uncertainty of Litigation.

The settlement for each Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, the costs of pursuing such litigation, and the risks associated with the Court's discretion to reduce PAGA penalties. (Agnew Decl. ¶ 53; Baker Decl. ¶ 3; Fitzpatrick Decl. ¶ 2; Lee Decl. ¶ 2 Rosenthal Decl. ¶ 2.) Here, based on the amounts explained above, the total exposure for Plaintiffs' class and PAGA claims amount to \$29,307,089. (*See* Agnew Decl. ¶ 51.) However, this figure assumes that the Court would award \$14,119,900 in civil PAGA penalties, which presumes the award of multiple PAGA penalties for different Labor Code violations in the same pay period. (*Id.* at ¶¶ 46, 51.) However, if the Court applies a single \$100 PAGA penalty per pay period, the civil PAGA penalties total \$3,188,000 (*Id.* at ¶¶ 45, 51.) Considering this reduced penalty calculation, the realistic exposure on the class and PAGA claims totals \$18,375,189. (*Id.* at ¶ 51.) The Gross Settlement Amount here is \$1,750,000.00, and thus amounts to approximately 9.52% of the total estimated liability. (*Id.*)

Numerous courts have held that **gross** settlements approximating between only 8 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the settlement is fair and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D.

Cal. Mar. 20, 2015) (holding that class action settlement recovering between **8.5% and 25%** of the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable).

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Proposed Class Action Settlement (“Notice Packet”), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a Request for Exclusion (*i.e.*, opt-out) from the settlement. (*See* Notice Packet, attached as **Exhibit A** to the Settlement Agreement.) Moreover, as set forth in the Notice Packet, Class Members are advised of their right to object to any of the terms contained in the Stipulation and attend the final approval hearing.⁵ (*Id.*)

D. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive.

The Settlement Agreement provides for One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000.00) as the Gross Settlement Amount. (SA at § A-19.) The Net Settlement Amount, calculated after deduction of attorneys’ fees (up to \$583,333.33), litigation costs (up to \$25,000.00), the PAGA Payment (\$50,000.00), the Enhancement Payment to the Class Representatives (up to \$10,000.00), and Settlement Administration costs (up to \$10,000.00), is estimated to be approximately **\$1,071,666.67**. (Agnew Decl. at ¶¶ 16, 52.) Each Class Member

⁵ Class Members do not need to do anything should they wish to receive their share of the settlement funds. In other words, because this is not a claims-made settlement, Class Members will not be required to make a submission to participate in the settlement. This substantially decreases the amount of burden on each Class Member to receive their share of the settlement funds.

1 that does not opt-out of the settlement will be awarded a portion of the Net Settlement. Eighty
2 percent (80%) of the Net Settlement Amount shall be allocated to all Settlement Members. (SA
3 at § C-8.) Settlement Class Members will be entitled to receive a portion of this amount on a *pro*
4 *rata* basis, based upon the total number of pay periods each Participating Class Member worked
5 during the Class Period. (*Id.*) Twenty percent (20%) of the Net Settlement Amount shall be
6 allocated to Settlement Class Members who terminated employment with Defendants during the
7 Class Period. (*Id.*) Each Settlement Class Members who terminated employment with
8 Defendants during the Class Period shall receive the same dollar amount in distribution. (*Id.*)

9 Based thereon, on a raw average, each Class Member may potentially recover
10 approximately \$1,306.91. (Agnew Decl. ¶ 52.) The amount actually paid to each Class Member
11 may increase or decrease depending on the actual number of pay periods worked during the
12 Class Period and the number of opt-outs received. (*Id.*) To the extent that there are valid opt-
13 outs, the Settlement Administrator will proportionately increase the individual settlement
14 payments to each Settlement Class Member so that the amount distributed to Participating Class
15 Members equals 100% of the Net Settlement Amount. (*Id.*)

16 Additionally, twenty-five percent of the PAGA Payment, or \$12,500.00, will be
17 distributed to Aggrieved Employees who worked during the PAGA Period, on a *pro rata* basis,
18 based on the number of pay periods worked by each Aggrieved Employee during the PAGA
19 Period as compared to the total number of pay periods during the PAGA Period. (SA at § C-7.)

20 Finally, the terms of the Settlement provide that uncashed checks (upon the expiration
21 date) shall be distributed to Legal Aid at Work and California Rural Legal Assistance, Inc. as the
22 *cy pres* beneficiaries. (SA at § C-24.) Legal Aid at Work and California Rural Legal Assistance,
23 Inc. are non-profit organizations that provide free legal services and referral information to low-
24 income residents of California, in accordance with California Civil Procedure § 384. (Agnew
25 Decl. ¶ 21.) Neither Plaintiffs nor Class Counsel does not have an interest, financial or otherwise,
26 in Legal Aid at Work or California Rural Legal Assistance, Inc. (Agnew Decl. ¶ 21; Baker Decl.
27 ¶ 4; Fitzpatrick Decl. ¶ 4; Lee Decl. ¶ 4; Rosenthal Decl. ¶ 3; Declaration of Lorena Ramirez
28 (“Ramirez Decl.”) ¶ 8; and Declaration of Teresa Martinez (“Martinez Decl.”) ¶ 8.)

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E. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants.

None of the settlement funds will revert to Defendants. (SA at § C-1, C-7, C-8.)

F. Scope of the Release of Class Members' Claims

As a condition of participating in this Settlement, Class Members who do not opt out of the Settlement ("Settlement Class Members") will provide a limited release of the following claims against the Released Parties ("Released Class Claims"):

[A]ll claims, including penalties, interest, costs, and attorneys' fees related thereto, that were or could have been brought under the facts and allegations made in the operative First Amended Complaint for Damages, Penalties and for Injunctive Relief for violation of Labor Code sections 201, 202, 203, 204, 226.7, 510, 512, 558, 1194, 1198, 1199 and 2802.

(SA § A-27.) The Parties agreed to the class release is for the period of January 10, 2018 through May 2, 2023. (*Id.* at § C-33.)

Class Members, who are Aggrieved Employees, will also provide a limited release of the following PAGA claims ("Released PAGA Claims"):

[A]ll claims for penalties under the California Private Attorneys General Act, including interest, costs and attorneys' fees related thereto, predicated on the violation of Labor Code sections 201, 201.3, 202, 203, 204, 207, 208, 209, 216, 218, 218.5, 218.6, 223, 225.5, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1199, 2800 and 2802 that were alleged in the PAGA Notice and operative First Amended Complaint for Damages, Penalties and for Injunctive Relief.

(SA § A-28.) The Parties agreed to the PAGA release is for the period of January 10, 2021 through May 2, 2023. (*Id.* at § C-34.)

Given that the release is tailored to only claims pled in the operative Complaint and any claims arising from the facts alleged therein and nothing more, the release is appropriately

1 limited.

2 **G. Tax Treatment of Settlement Amounts.**

3 The Parties have agreed that all Individual Class Settlement Payments shall be allocated
4 as 75% penalties and interest, and 25% as wages, less withholdings and deductions, for which an
5 IRS Form W-2 shall issue. (SA § C-27.) Employer-side payroll taxes on the wage portion of the
6 Individual Class Settlement payment will be paid by Defendants separate an in addition to the
7 Gross Settlement Amount. (SA § C-1.) With respect to PAGA, all Individual PAGA Payments
8 shall be allocated as 100% as penalties. (SA § C-27.)

9 **H. Attorneys Fess and Litigation Costs.**

10 California state and federal courts have recognized that an appropriate method for
11 determining award of attorneys' fees is based on a percentage of the total value of benefits to Class
12 Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001);
13 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Vincent v. Hughes Air West, Inc.*, 557
14 F. 2d 759, 769 (9th Cir. 1997). Indeed, most recently, the California Supreme Court has also now
15 held that the award of attorneys' fees in common fund wage and hour class action settlements
16 should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503
17 (2016). The Parties have agreed to a payment of a maximum of 33.33% of the Gross Settlement
18 Amount (\$583,333.33) for payment of Class Counsel as attorneys' fees. (SA at § C-3.) Further,
19 the Parties have agreed to reimbursement of class counsel's litigation costs of up to \$25,000. (*Id.*)
20 Class Counsel have at their own risk, expended costs, for example, to file this instant action, service
21 of process, and payment of other litigation related costs. (Fitzpatrick Decl. ¶ 3; Lee Decl. ¶ 3.)
22 Based on the foregoing, the Court should preliminarily approve the attorney's fees and costs being
23 requested by the Parties.

24 **I. Proposed Enhancement Payments to the Class Representatives.**

25 Plaintiffs each request a service award in the amount of \$5,000 (totaling \$10,000.00).
26 (SA at § C-4.) Plaintiffs personally met with their respective counsel on various occasions to
27 discuss the case, provide documents and information, and review case documents, including the
28 PAGA Notice, Complaints and the Settlement Agreement. (Ramirez Decl. ¶ 9; and Martinez

Decl. ¶ 9.) Moreover, as part of their duties as the representatives, Plaintiffs provided invaluable information, evidence, and documents that resulted in this settlement. In addition to the invaluable services that Plaintiffs provided, they also took significant risks, both professionally and monetarily, in acting as the Class Representatives and seeking benefits on behalf of the class. (Ramirez Decl. ¶¶ 9, 11; Martinez Decl. ¶¶ 9, 11.) Because the claims alleged by Plaintiffs involved the payment of costs to the prevailing party, Plaintiffs could have possibly faced paying the fees and costs of Defendants, had Plaintiffs not prevailed in this action. (Ramirez Decl. ¶ 11; Martinez Decl. ¶ 11.) Furthermore, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiffs may face prejudice in the future from other potential employers. Plaintiffs took this risk upon themselves and the whole Class benefited. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a public lawsuit.

Moreover, in consideration for the Enhancement Payment, Plaintiffs also executed a general release of all claims including a waiver under California Civil Code § 1542, which other members of the Class did not have to do.⁶ (Ramirez Decl. ¶ 12; Martinez Decl. ¶ 12.)

J. Settlement Administration Fees

The Parties have agreed to an estimated payment of approximately \$10,000 to the Settlement Administrator, CPT Group, to send notices and to administer this settlement. (SA at § C-5.) The Parties believe that the administration fee is reasonable and should be approved. (Agnew Decl. ¶ 20.)

K. LWDA Has Been Provided Notice Of This Settlement.

Concurrent with the filing of this Motion, Plaintiffs provided notice of this Motion to the LWDA. (Agnew Decl. ¶ 61.)

IV. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS

⁶ However, the general release does not extend to any individual claim that Plaintiff Martinez may assert against Defendants for whistleblower retaliation and wrongful termination in violation of public policy. (SA at § C-32.)

1 Although Defendants disagree with Plaintiffs' contentions for purposes of settlement,
2 Defendants have agreed to certify the Class for settlement purposes only.

3 The Class that Plaintiffs seek to conditionally certify is ascertainable. "Class members are
4 'ascertainable' where they may be readily identified without unreasonable expense or time by
5 reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008). Here,
6 members of the Class are readily identifiable. Defendants have determined that there are
7 approximately 820 individuals that comprise the Class. (Agnew Decl. ¶ 12.) Furthermore, the Class
8 is sufficiently numerous. Courts generally find that numerosity is satisfied if the class includes
9 forty or more members. *See Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606 (N.D. Cal.
10 2014).

11 The commonality requirement is met when there are questions of law and fact common to
12 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
13 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
14 facts couple with disparate legal remedies within the class"). Plaintiffs allege, in part, that
15 Defendants, as a matter of its corporate policy, practice, or procedure violated the Labor Code by:
16 (1) failing to provide legally compliant meal periods and breaks, in violation of sections 226.7 and
17 512; (2) failing to pay hourly and overtime wages, in violation of Labor Code sections 1194 and
18 1198; (3) failing to provide compliant wage statements, in violation of Labor Code sections 226,
19 1174 and 1175; (4) failing to pay wages upon separation of employment, in violation of Labor
20 Code sections 201, 202 and 203; and (5) failing to reimburse business expenses, in violation of
21 Labor Code sections 2802. (Ramirez Decl. ¶¶ 4-7; Martinez Decl. ¶¶ 4-7.) In other words, Plaintiffs
22 were allegedly subjected to the same policy and practice as other Class Members. Thus, Plaintiffs'
23 claims are typical to those of class members.

24 The adequacy requirement is also met. "Adequacy of representation depends on whether
25 the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests
26 are not antagonistic to the interests of the class." *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442,
27 450 (1976). Here, Plaintiffs do not have any interests adverse to the class, nor have any such issues
28 been raised or presented. (Ramirez Decl. ¶ 8; Martinez Decl. ¶ 8.) Plaintiffs have taken all

1 necessary steps to represent the interests of the Class, including by remaining abreast of the status
2 of the case, providing information and documents to Class Counsel, and reviewing case
3 documents. (Ramirez Decl. ¶ 9; Martinez Decl. ¶ 9.) For such reasons, Plaintiffs assert that they
4 have adequately represented the class members and will continue to do so.

5 Further, as detailed in their declarations, Class Counsel are experienced and well-qualified
6 class action litigators who have litigated many wage and hour class actions and have each been
7 certified as class counsel in numerous other class actions, particularly wage and hour class actions.
8 (Agnew Decl. ¶ 54, 59; Baker Decl. ¶ 5; Fitzpatrick Decl. ¶ 5, 6; Lee Decl. ¶¶ 5, 8; Rosenthal Decl.
9 ¶ 5.) From the inception of the case, Class Counsel has solely represented the interest of the Class.
10 (Agnew Decl. ¶ 2; Baker Decl. ¶ 2; Fitzpatrick Decl. ¶ 2; Lee Decl. ¶ 9; Rosenthal Decl. ¶ 6.)

11 **V. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
12 **PRELIMINARY APPROVAL**

13 The settlement presented here is fair, adequate, and reasonable. The settlement will result
14 in substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
15 result of informed, extensive, and arm's-length negotiations conducted by counsel for the
16 respective Parties who are experienced in wage and hour class action litigation and facilitated by
17 an experienced and neutral mediator. For the foregoing reasons, Plaintiffs respectfully request
18 that the Court grant preliminary approval of the proposed Settlement, sign the proposed Order,
19 approve and authorize mailing of the proposed Notice Packet, and set a date for a final approval
20 hearing.

21
22 DATED: June 21, 2023

DIVERSITY LAW GROUP, P.C.

23
24 By: 

Larry W. Lee

Mai Tulyathan

Attorneys for Plaintiffs, the Class, and Aggrieved
26 Employees