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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

MELISSA HEBDON, on behalf of herself and all similarly aggrieved employees, Plaintiff, v. MISSION HEALTHCARE SERVICES, LLC; HEALTHY LIVING NETWORK RESOURCES, LLC; HEALTHY LIVING AT HOME - MONTEREY, LLC; and DOES 1 through 50, inclusive, Defendants.	Case No.: 22CV000226 **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: October 11, 2024 Time: 8:30 a.m. Dept.: 14

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 11, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Carrie M. Panetta, judge presiding, in Department 14 of the above referenced Court, located at 1200 Aguajito Road, Monterey, California 93940, Plaintiffs Melissa Hendon and Annette Lewis ("Plaintiffs") will and hereby move this Court for the following relief with respect to the Joint Stipulation of Class Action and Representative Action Settlement ("Agreement" or "Settlement Agreement") entered into by Plaintiffs and Defendants Mission Healthcare Services, LLC, Healthy Living Network Resources, LLC and Healthy Living at Home – Monterey, LLC (together, "Defendants") (Plaintiffs and Defendants shall collectively be referred to as the "Parties"):

1. That the Court approve the Agreement referenced above;

2. That the Court certify the following Class for settlement purposes: all current and former non-exempt, hourly W-2 employee by Defendants and other Healthy Living at Home Entities in California, at any time from June 23, 2021, to April 15, 2024 (the "Class");

3. That Plaintiffs Melissa Hebdon and Annette Lewis be appointed as the Class Representatives and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston; Larry W. Lee and Kristen M. Agnew of Diversity Law Group, P.C.; and Andrew H. Swartz of Swartz & Kennedy be appointed as Class Counsel;

4. That the Court preliminarily approve the Agreement and the Gross Settlement Amount in the amount of One Million Two Hundred Twenty-Five Thousand Dollars ($1,225,000.00);

5. That the Court finds on a preliminary basis that the Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Enhancement Payments to the Class Representatives, attorneys' fees and costs, settlement administration costs, and the allocation of 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" ("Notice Packet") to be sent to Class Members;

7. That the Court appoint Phoenix Settlement Administrators as the Settlement Administrator; and

8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

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

The basis for this Motion, filed without any opposition from Defendants, is that the proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of Class Members to participate in, opt-out of, or object to the settlement.

This Motion will be based on the attached Memorandum of Points and Authorities, the Settlement Agreement and the proposed Notice, and the supporting Declarations of B. James Fitzpatrick, Laura L. Franklin, Larry W. Lee, Kristen M. Agnew, Andrew H. Swartz and Plaintiff Melissa Hebdon, Plaintiff Annette Lewis and Jodey Lawrence of Phoenix Settlement Administrators, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

Dated: September 13, 2024

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.
SWARTZ & KENNEDY

By: ______________________________
B. James Fitzpatrick
Larry W. Lee
Kristen M. Agnew
Andrew H. Swartz

Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour class and representative PAGA action arising from Defendants' Mission Healthcare Services, LLC, Healthy Living Network Resources, LLC and Healthy Living at Home – Monterey, LLC (together, "Defendants") alleged violation of the California Labor Code. Prior to the settlement of this Action, Plaintiffs Melissa Hebdon and Annette Lewis ("Plaintiffs") and Defendants (jointly referred to as the "Parties") thoroughly investigated the facts relating to the claims alleged in the operative Complaint against Defendants. The Parties each propounded and responded to written discovery, and Defendants produced time and payroll records for Class Members. Thereafter, the Parties participated in three full days of private mediation and were ultimately able to reach the current settlement. Significantly, the entire Gross Settlement Amount is non-reversionary, such that no monies will revert to Defendants. The Parties believe that this amount is fair, adequate, and reasonable, especially given the risks and uncertainty of class certification and the merits of this case.

While Plaintiffs and their counsel are confident that they could prevail on class certification and on the merits of the claims at trial, they recognize the inherent risks in drawn-out litigation and the specific risk that Plaintiffs could fail to establish liability or that certification is appropriate. Based on their own independent investigation and evaluation, the Parties and their respective counsel are of the opinion that the settlement for the consideration and on the terms set forth in the Joint Stipulation of Class Action and PAGA Settlement (the "Agreement" or "Settlement Agreement")[1] is fair, reasonable, and adequate and is in the best interests of the Class and Defendants in light of 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.

[1] A true and correct copy of the Settlement Agreement is attached to the Declaration of Kristen Agnew as Exhibit 1.

II. PROCEDURAL HISTORY

A. The Hebdon PAGA Notice and Initial Complaint.

On September 28, 2021, Plaintiff Melissa Hebdon ("Plaintiff Hebdon") filed a written notice with the California Labor & Workforce Development Agency ("LWDA") alleging that Defendants Mission Healthcare Services, LLC, Healthy Living Network Resources, LLC and Healthy Living at Home – Monterey, LLC ("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, and 1199, and the applicable California Industrial Welfare Commission Wage Order, pursuant to Labor Code section 2699 ("Hebdon PAGA Notice"). *See* Declaration of Kristen M. Agnew ("Agnew Decl.") ¶ 3, Exhibit 2. Subsequently, on January 25, 2022, Plaintiff Hebdon initiated this Action in Monterey County Superior Court. *See id*. at ¶ 4. In the initial complaint, Plaintiff Hebdon asserted individual claims, as well as class and PAGA claims predicated on the Labor Code violations set forth in the Hebdon PAGA Notice. *See id*.

B. The Lewis PAGA Notice and First Amended Complaint.

On August 23, 2022, Plaintiff Anette Lewis ("Plaintiff Lewis") filed a written notice with the 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 and 1199, and the applicable California Industrial Welfare Commission Wage Order, pursuant to Labor Code section 2699 ("Lewis PAGA Notice"). *See* Agnew Decl. ¶ 5, Exhibit 3. On August 30, 2022, Plaintiffs filed the First Amended Complaint. *See id*. at ¶ 6. The First Amended Complaint adds Plaintiff Lewis as an additional named plaintiff, and includes class claims predicated on Defendants' alleged failure to provide meal/rest periods. *See id*.

C. The Operative Second Amended Complaint.

On November 8, 2023, Plaintiffs filed the operative Second Amended Complaint for Damages, Civil Penalties and for Injunctive Relief "Complaint"). *See* Agnew Decl. 7. As set forth in the Complaint, Plaintiffs allege that Defendants maintained a policy and practice of failing to: (1) provide meal periods and/or pay meal period premiums at the regular rate of pay [Labor Code §§ 226.7 and 1198]; (2) provide rest periods and/or pay rest period premiums at the regular rate of pay [Labor Code §§ 226.7 and 1198]; (3) pay hourly and overtime wages [Labor Code §§ 1194 and 1198]; (4) provide accurate itemized wage statements [Labor Code §§ 226, 1174 and 1175]; (5) pay wage upon termination [Labor Code §§ 201, 202 and 203]. *See id*. Plaintiffs also assert PAGA claims predicated on these alleged violations of the Labor Code. *See id*.

D. The Parties Engaged in Meaningful Discovery.

As detailed in the Agnew Declaration, the Parties propounded and responded to written discovery, and completed the *Belaire-West* opt-out process. *See* Agnew Decl. ¶¶ 9-13. Ultimately, Defendants produced thousands of pages of documents, which included Plaintiffs' personnel files, employee handbooks, and Excel spreadsheets with time and payroll records for the putative class. *See id*. at ¶ 11.

E. The Parties Participated in Three Rounds of Mediation.

On October 10, 2022, the Parties engaged in mediation with Mr. Serratore. *See* Agnew Decl. ¶¶ 14, 15. Although the Parties made progress towards settlement at the mediation, they did not reach a resolution of the Action. *See id*. Following the first mediation, the Parties continued to engage in informed settlement negotiations, which led to a second day of private mediation with Mr. Serratore. *See id*. at ¶¶ 16, 17.

On February 12, 2024, the Parties participated in a full-day mediation with Michael Mandel. *See* Agnew Decl. ¶ 20. After the exchange of further information and extended negotiations following mediation, the Parties reached the present class-wide settlement, memorialized by a written Memorandum of Understanding ("MOU") fully executed on June 11, 2024. *See id*.

The mediations and settlement discussions were conducted at arms' length. *See* Agnew Decl. 21. In advance of the mediations, Defendants provided data points regarding the size of the putative class and value of the claims, including, the number of California non-exempt employees, the number of shifts lasting 3.5 hours or more worked by California non-exempt employees, the number of shifts exceeding five hours worked by California non-exempt employees, the number of pay periods in which California non-exempt employees earned both overtime and non-discretionary incentive compensation, the number of pay periods in which California non-exempt employees earned both sick pay and non-discretionary incentive compensation, the number of wage statements issued to California non-exempt employees, and the average hourly rate of California non-exempt employees. *See id*. at ¶ 14. Class Counsel also engaged Econ One to analyze the extensive payroll data produced by Defendants. *See id*. at 19.

III. THE PROPOSED TERMS OF THE SETTLEMENT.

A. Class and PAGA Employee Definitions.

The proposed Class consists of the following group of employees: "all current and former non-exempt, hourly W-2 employees of Defendants and other Healthy Living at Home Entities in California, at any time from June 23, 2021 through April 15, 2024" (the "Class").[2] *See* SA § A-3. The Class Period is defined to mean the period from June 23, 2021 through the April 15, 2024. *See id*. at § A-7. Defendants have represented that there are approximately 2,537 individuals that comprise the Class. *See* Agnew Decl. ¶ 23.

The Settlement also encompasses "PAGA Employees," which is defined to mean "all persons who were formerly or are currently employed as non-exempt, hourly W-2 employee by Defendants and other Healthy Living at Home Entities in California at any time during the PAGA Period." *See* SA § A-24. The PAGA Period is the period from September 28, 2020 through April 15, 2024. *See id* at § A-25. Defendants have represented that there are approximately 2,671 individuals that comprise the PAGA Employees. *See* Agnew Decl. ¶ 24.

B. The Gross Settlement Amount.

One Million Two Hundred Twenty-Five Thousand Dollars ($1,225,000.00) as the Gross Settlement Amount. *See* SA § A-16. The Gross Settlement Amount was calculated with, and is

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[2] The Settlement defines "Healthy Living at Home Entities" to mean the following: California-based Home Health locations operated by Mission Healthcare Services or Healthy Living at Home, including the following: Healthy Living at Home – East Bay; Healthy Living at Home - Fresno; Healthy Living at Home - Modesto; Healthy Living at Home - Monterey; Healthy Living at Home - Palm Desert; Healthy Living at Home - Redding; Healthy Living At Home – San Diego and Healthy Living at Home - San Jose.

premised on, Defendants' representation that there are approximately 49,882 pay periods in which Class Members worked at least one shift during the Class Period. *See id*. at § D-2. Thus, the dollar value for each period being released by the Settlement is approximately $24.55.[3]

C. Allocation to PAGA Penalties.

The Settlement allocates One Hundred Fifty Thousand Dollars ($150,000.00) of the Gross Settlement Amount shall be allocated to PAGA penalties ("PAGA Allocation"). *See* SA § D-7. Seventy-Five percent of the PAGA Allocation, *i.e.* the sum of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00), to the LWDA. *See id.* The remaining twenty-five percent (25%), *i.e.*, the sum of Thirty-Seven Thousand Five Hundred Dollars ($37,500.00), shall be distributed to PAGA Employees ("Net PAGA Payment"). *See id*.

D. Individual Settlement Payments.

The balance of the Gross Settlement Amount remaining after deduction of the approved Enhancement Payments, Settlement Administration Costs, the PAGA Allocation, and Class Counsel Award, Attorneys' Fees and Costs, Settlement Administration Costs, Enhancement Payments, and the LWDA Payment constitutes the "Net Settlement Amount." *See* SA § A-20. Class Counsel estimates that the Net Settlement Amount will be at least $562,666.67. *See* Agnew Decl. ¶ 26.

The Net Settlement Amount will be available for distribution to Settlement Class Members (*i.e.*, Class Members who do not opt-out). *See* SA § A-20. The amount allocated to each Settlement Class Member will be based on the number of pay periods worked by the employee during the Class Period. *See id*. at § D-9. Based on the size of the Class, the number of pay periods at issue and the estimated amount of the Net Settlement Amount, Settlement Class Members will be entitled to recover, on average, up to $221.78. each. *See* Agnew Decl. ¶ 32. The amount any particular Class Member will be entitled to recover will be greater or lower than this average depending on the number of pay periods he or she worked, with some entitled to receive more, and others less. *Id.* This is fair, as it directly allocates greater recovery to

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[3]In the event the number of pay periods at issue exceeds 49,882 by more than ten percent (*i.e.*, 54,871) as determined by the Settlement Administrator, the Gross Settlement Amount shall increase proportionately for each pay period in excess of 54,871. *See* SA § D-2.

individual Class Members who have allegedly suffered greater harm. *Id.* All Individual Class Payments shall be allocated as ten percent (10%) to wages and ninety percent (90%) to penalties. *See* SA § D-10.[4]

Separately, PAGA Employees will be entitled to receive a portion of the Net PAGA Payment on a *pro rata* basis, based upon the total number of pay periods each Aggrieved Employee worked during the PAGA Period, regardless of whether the employee submits a timely and valid Request for Exclusion from the Settlement Agreement. *See* SA § D-8.[5] The Individual PAGA Settlement Amounts shall be allocated as 100% penalties. *See id*.

The funds represented by uncashed settlement checks will be paid out pursuant to California Code of Civil Procedure section 384 to California State Bar's Justice Gap Fund, the designated cy pres recipient. *See id.* at § D-15. Neither Plaintiffs nor Class Counsel maintains an interest in and/or relationship with California State Bar's Justice Gap Fund. *See* Agnew Decl. ¶ 33; Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.") ¶ 6; Declaration of Laura L. Franklin ("Franklin Decl.") ¶ 75; Declaration of Larry W. Lee ("Lee Decl.") ¶ 3; Declaration of Andrew H. Swartz ("Swartz Decl.") ¶ 6.

E. Attorneys' Fees and Reimbursement for Litigation Costs.

As part of the Settlement, Defendant does not object to Class Counsel's request for attorney's fees up to one-third of the Gross Settlement Amount, *i.e.*, the sum of Four Hundred Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($408,333.33), and costs in the amount of up to Sixty Thousand Dollars ($60,000.00), subject to the Court finally approving this Settlement. *See* SA §§ A-5, D-4. Any portion of the requested attorneys' fees and/or costs not approved by the Court shall be added to the Net Settlement Amount. *See*

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[4] Class Members do not need to do anything should they wish to receive their share of the settlement funds. This substantially decreases the amount of burden each Class Member must bear in order to receive his/her settlement share. If a Class Member does not wish to take part in this settlement and be bound by the release of the class claims, he/she must submit an exclusion request. Such obligations are thoroughly identified in the Notice Packet. *See* SA, Exhibit A.

[5] There is no right to opt-out of or object to the PAGA settlement under the Settlement Agreement. *See* SA § F-10. Any PAGA Employee who opts out of the Settlement Agreement for purpose of the proposed class action settlement will still be bound by the release of the PAGA claims and receive a portion of the Net PAGA Payment.

SA § D-4.

F. Enhancement Payments to the Class Representatives.

The Class Representatives request the payment of Enhancement Payments in the amount of $10,000 each ($20,000.00). *See* SA §§ A-14, D-5. This amount is intended to compensate Plaintiffs for their efforts and work in prosecuting this case, including meeting and communicating with Class Counsel and reviewing the pleadings and documents in this case, including the PAGA Notices, Complaints and the Settlement Agreement. 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. *See* SA § E-1.[6] Any portion of the Enhancement Payments that are not approved by the Court shall become part of the Net Settlement Amount. *See* SA § A-30.

G. Settlement Administration Costs.

Finally, the Settlement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. *See* SA § D-6. The Parties have agreed to utilize Phoenix Settlement Administrators to administer the settlement, with the administration costs estimated to be $24,000. *See id*. at §§ A-35, 36; Declaration of Jodey Lawrence ("Admin. Decl.") ¶ 8, Ex. B. Any portion of the Settlement Administration Costs not used or approved by the Court shall be added to the Net Settlement Amount,

H. Scope of the Class and PAGA Release.

Upon the payment of the Gross Settlement Amount, Plaintiffs and all Settlement Class Members will provide a release to the Released Parties. Settlement Class Members will release the following claims:

> [A] ny and all claims, rights, demands, liabilities, and causes of action of any kind, whether known or unknown, arising from the facts pleaded in the Second Amended Complaint for violation of common law, California law and/or federal law which was or could have been raised in the Second Amended Complaint based on the facts pleaded, including but not limited to claims based on the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq*.), California Labor Code sections 201, 202, 203, 204, 223, 225.5, 226, 226.7, 510, 512,

[6] Plaintiff Hebdon entered into a separate confidential settlement and general release of her individual claims for fraud, violation of the equal pay act, sex discrimination, retaliation and wrongful termination in violation of public policy. *See* Agnew Decl. ¶ 30.

> 1174, 1194, 1197, and 2802, and, California Code of Regulations, Title 8 Section 11000 *et seq.*, the applicable Industrial Welfare Commission (IWC) Wage Orders, and Business & Professions Code sections 17200 *et seq.*; that arose during the Class Perio.

See SA §§ A-29, E-2.

Additionally, upon the payment of the Gross Settlement Amount, Plaintiffs and all PAGA Employees will release the following claims:

> [A]ll claims for penalties under the California Private Attorneys General Act, including without limitation, interest, costs and attorneys' fees related thereto, predicated on Defendants' violation of Labor Code, including sections 201, 201.3, 202, 203, 204, 207, 208, 209, 216, 218, 218.5, 218.6, 223, 225.5, 226, 226.7, 227.3, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1199, and 2698 *et seq*. that accrued during the PAGA Period and were alleged by Plaintiffs in their LWDA Notice Letters and were or could have been alleged in the Second Amended Complaint..

See SA §§ A-30, E-3. As shown, the scope of the release is narrow and is limited to the claims that were, or that could have been, asserted in the operative Second Amended Complaint.

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLMENT

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008).

In order to approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness. *Kullar*, 168 Cal. App. 4th. at 133. The record need not contain an explicit statement of the maximum theoretical recovery. *Munoz v.*

BCI Coca-Cola Bottling Co. of Los Angeles, 186 Cal. App. 4th 399, 408-409 (2010).

As demonstrated in Sections II-D and II-E, the Settlement was reached through arm's length negotiations between experienced wage and hour attorneys. Agnew Decl. ¶¶ 14-21.

A. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation.

Although Plaintiffs and Class Counsel believe in the merits of the Action, they also recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. *See* Agnew Decl. ¶ 61-67; Fitzpatrick Decl. ¶ 2; Franklin Decl. ¶¶ 2, 3; Franklin Decl. ¶ 2; Lee Decl. ¶¶ 2, 5; Lee Decl. ¶ 2; Swartz Decl. ¶¶ 2, 3. Indeed, each of Plaintiffs' putative class claims faced unique challenges from Defendants.

Meal/Rest Period Claims. The meal and rest period claims are premised on the following alleged common practices and policies: (1) due to chronic understaffing and pressure from the corporate office to maximize client productivity (i.e., seeing the highest number of patients in the least amount of time), employees were frequently deprived of the opportunity to take timely, duty-free breaks; (2) Defendants required employees to leave their cell phones on and respond to calls during breaks; (3) Defendants did not pay rest period premiums for non-compliant rest periods; and (4) Defendants underpaid meal period premiums based on its policy of excluding non-discretionary incentive payments from the calculation of the regular rate. *See* Agnew Decl. ¶¶ 34, 35, 39.

Defendants maintain that they complied with the law, had lawful and compliant practices, and provided Class Members with duty-free meal/rest periods. *See* Agnew Decl. ¶ 36. In this respect, Defendants' written policies state that employees are "relieved of all duty" during their breaks and are "prohibited from working" during them. *See id*. The policy further directs employees to notify a manager or human resources of any work performed during a break. *See id*. Defendants also dispute the existence of a common policy that required Class Members to carry a cell phone during their breaks or otherwise interrupt their breaks to perform work related tasks. *See id*.

Defendants further argue that their only obligation was to make meal/rest periods available to employees – not to police them. *See* Agnew Decl. ¶ 37; *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) ("On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed"). As argued by Defendants, an adjudication of the alleged meal/rest period violations would require individualized assessments as to the circumstances of each missed, delayed or interrupted break. *See* Agnew Decl. ¶ 37. Defendants further argue that, even if Plaintiffs were able to establish that some employees experienced a rest period violation, such a claim would not be manageable. *See id*.

Regular Rate (Meal Period/Overtime) Claims. The Parties sharply disagree as to whether certain forms of compensation – namely, BNS, BONUS, COMM, INCPY, and OCCL – constitute nondiscretionary compensation that must be included in the regular rate of pay for the purposes of paying meal period premiums and overtime wages. *See* Agnew Decl. ¶¶ 41, 47.[7]

Off-the-Clock-Claim. Plaintiffs allege that Defendants failed to pay Class Members for all hours worked , including certain pre- and post-shift activities incidental to providing in-home medical care to Defendants' patients. *See* Agnew Decl. ¶ 44. Defendants argue that the off-the-clock claims are not suitable to be adjudicated on a classwide basis because their policies and training materials required accurate recording of time and prohibited off-the-clock work. *See id*. at ¶ 45. Defendants' written policies strictly prohibit non-exempt employees from working off the clock for any reason. *See id.* Citing to *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004 (2012) and its progeny, Defendants argue that their liability is contingent on proof that Defendants knew or should have known that off-the-clock work was occurring. In the absence of a uniform policy that requires off-the-clock work, Defendants argue that Plaintiffs will not be able to establish the requisite knowledge through common proof. *See* Agnew Decl. ¶ 45.

Derivative Wage Statement Claim. Plaintiffs allege a derivative wage statement violation based on the alleged underpayment and/or non-payment of wages to Class Members. *See* Agnew Decl. ¶ 49. As argued by Defendant, the derivative wage statement violation is vulnerable to a motion for summary judgment based on the weaknesses of the underlying

[7] The potential exposure on the meal period regular rate claim is nominal. EconOne identified 64 instances where it appears that meal periods were paid below the regular rate of pay, which resulted in the underpayment of $286 to twenty-two Class Members. *See* Agnew Decl. ¶ 41.

primary claims. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a) where their wage statement cause of action was derived from an underlying wage and hour violation for overtime). Additionally, Plaintiffs face the additional burden of demonstrating that any alleged omission of information from the wage statements was a "knowing and intentional failure" by Defendants to comply with Labor Code section 226(a). *See Harris v. Vector Mktg. Corp*., 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct was not "knowing and intentional"). Defendants a have argued that penalties under Section 226 are subject to a similar "good faith" defense. *See Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) ("Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional."). The California Supreme Court also recently approved a good faith defense to the imposition of Section 226 penalties, which further undermines the certainty of recovering these damages even if Plaintiffs prevailed on liability. *See Naranjo v. Spectrum Security Services, Inc*., 15 Cal.5th 1056, 1087 (2024) (employer's failure to include meal and rest period premium pay on the wage statements was not "knowing and intentional" because it had a good faith belief that it was not in violation of Labor Code section 226).

Derivative Waiting Time Penalties Claim. Plaintiffs seek waiting time penalties based on the alleged underpayment of wages, as set forth above. *See* Agnew Decl. ¶ 52. Defendant argued that the waiting time penalties are subject to a complete defense. *See id*. Defendants have argued that a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiffs and the Class Members considering what Defendants argued were compliant policies and procedures. If Defendants were successful in their good faith defense, the Court may not have awarded waiting time penalties at all, reducing the exposure of each defendant by several million. *Hill v. Walmart, Inc.*, 32 F.4th 811 (9th Cir. 2022) (upholding good faith defense because defendant reasonably believed wages were not due and owing at time of separation of employment); *Chavez v. Converse, Inc.,* 2020 WL 1233919, at *1 (N.D. Cal. 2020) (holding that an employer's failure to pay is not willful where there is uncertainty in the law or a "good faith mistaken belief that wages are not owed").

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B. The Settlement Effectuates PAGA's Objectives.

With respect to evaluating the reasonableness of the settlement of the PAGA claim, the Court's focus is not the amount that aggrieved employees will ultimately receive as a result of a settlement. Instead, "a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate *in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws*." *See Moniz v. Adecco USA, Inc*., 72 Cal.App.5th 56, 77 (2021) (emphasis added); *see also Kang v. Wells Fargo Bank, N.A*., 2021 WL 5826230, at *15 (N.D.Cal., 2021) (evaluating a PAGA settlement under the standard of whether the settlement terms "are fundamentally fair, reasonable, and adequate in view of PAGA's public policy goals"). Here, the Settlement vindicates the rights of PAGA Employees who have experienced alleged violations of the Labor Code. Additionally, the seven-figure Gross Settlement Amount acts as a deterrent to Defendant and other California employers. *O'Connor v. Uber Technologies, Inc*., 201 F.Supp.3d 1110, 1134 (N.D. Cal. 2016) ("If the settlement for the Rule 23 class is robust, the purposes of PAGA may be concurrently fulfilled. By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of the class members as employees but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA"). The Settlement is also consistent with the State's public policy favoring resolution of disputes. "California law favors the settlement of disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best positioned to understand their interests and resolve a dispute in a mutually beneficial manner without court intervention into the settlement." *Consumer Advocacy Group, Inc. v. Kintetsu*, 141 Cal. App. 4th 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal*., 3 Cal. 4th 273, 277- 278 (1992).

C. Potential Estimated Value of the Class and Representative PAGA Claims.

Based on the class data provided by Defendants, and analysis performed by EconOne, Plaintiffs estimate that Defendants could face potential maximum liability of up to approximately $9,550,972.93 for the class claims, if Plaintiffs were successful on all of his claims and obtained certification. Agnew Decl. ¶ 54.

Plaintiffs calculated Defendants' potential maximum exposure under the PAGA as approximately $6,308,600 (63,086 pay periods x $100 penalty). Agnew Decl. ¶ 55. This assumes complete victory at trial and that the Court would award the maximum penalty of $100 per pay period, which is far from certain as discussed above. Further, while the PAGA provides for a heightened penalty for a "subsequent violation," courts are hesitant to award the heightened penalty absent a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430 at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *see also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling).

Even assuming Plaintiffs ultimately prevailed on their PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code section 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id*. at 517. Upon review, the Court of Appeal found such a reduction to be proper. *Id*. at p. 539. Thus, even if Plaintiffs were to successfully prove their claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

Here, 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. *See* Agnew Decl. ¶60.[8] Here, based on the amounts explained above, the total exposure for the class and PAGA claims amount to $15,859,572.93. *See id*. at ¶ 59. The Gross Settlement is $1,225,000.00, and thus amounts to approximately 7.70% of Defendant's maximum exposure. *See id*. However, this figure assumes that the Court would award $6,308,600 in civil PAGA penalties (which in turn presumes that the Court would award $100 per pay period at issue). *See id.* In the alternative, if the Court uses *Carrington* as a benchmark and assesses PAGA penalties of approximately 10% of the total maximum, a more realistic estimate of the maximum PAGA penalties at issue is $630,860. *See id*. at ¶ 58. In this case, the Gross Settlement Amount is approximately 12% of the total estimated liability. *See id*. Numerous courts have held that **gross** settlements approximating between 8 and 25% of the defendant's potential exposure are fair and reasonable.[9]

D. The Court Should Preliminarily Approve the Proposed Enhancement Payment to the Class Representatives.

Plaintiffs each request an enhancement of Ten Thousand Dollars ($10,000.00). *See* SA

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[8] Despite the asserted fairness of the settlement terms, as set forth in the Notice of Settlement of Class and Representative Action ("Notice"), 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. Moreover, as set forth in the Notice, Class Members are advised of their right to object to any of the terms contained in the Stipulation and attend the final approval hearing.

[9] *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).

§§ A-14, D-5. Plaintiffs personally met with Class Counsel on various occasions to discuss the case, provide documents and information to Class Counsel, and review the Settlement Agreement. *See* Declaration of Melissa Hebdon ("Hebdon Decl.") ¶ 10; Declaration of Annette Lewis ("Lewis Decl.") ¶ 9. 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. *See* Hebdon Decl. ¶¶ 7, 8; Lewis Decl. ¶¶ 6, 7. Because the claims alleged by the Class Representatives involved the payment of costs to the prevailing party, Plaintiffs could have possibly faced paying the fees and costs of Defendant, had Plaintiffs not prevailed in this action. *See* Hebdon Decl. ¶ 8; Lewis Decl. ¶ 7.

Further, 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. *See* Hebdon Decl. ¶ 7; Lewis Decl. ¶ 6. Class Members did not have to file individual lawsuits and bear the risks of payment of fees and 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.

Notably, courts have routinely granted approval of representative enhancements for far greater amounts than the $10,000.00 sought by Plaintiffs in this case. *See*, *e.g.*, *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of $50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of $55,000, and three incentive awards of $35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a $50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) ($50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding $25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming $25,000 Incentive award to class representative in ERISA case). Here, Plaintiffs request a modest enhancement of $10,000 each, which is reasonable and consistent with case law.

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E. The Requested Attorneys' Fees and Litigation Costs Are Reasonable, Fair, and Appropriate.

California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement. *Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc*., 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

Under California law, the award of attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (Aug. 11, 2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created"). Under the percentage of the fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will set…The judge, in other words, is trying to mimic the market in legal services").

The results delivered by Class Counsel also support the requested percentage of the fund. Here, the Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount for payment to Class Counsel as attorneys' fees. The Parties have agreed to a payment of the foregoing attorney's fees and, thus, this payment should be presumed to be fair. Further, it is not uncommon for courts to award attorneys' fees as one-third or 33.3% of the settlement amount in wage and hour class action settlements. For example, in *McKinnon v. Best Buy Co., Inc*., (Alameda Superior Court Case No. RG03082294), the court awarded over $9 million as attorneys' fees, which was 33% of the maximum settlement amount of $26.9 million. At the time of final approval, Class Counsel will also provide the court with declarations and time records to show that a payment of one-third of the recovery is justified and fair even under the lodestar method.

Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs. Class Counsel have, at their own risk, expended costs, for example, to file this instant action, service of process, payment of mediation fees and other litigation related costs. Lee Decl. ¶ 4. Based on the foregoing, the court should preliminarily approve the attorney's fees and costs being requested by the Parties.

F. The Settlement Administrator's Fees are Reasonable.

The Parties request that Phoenix Settlement Administrators be appointed as the claims representative in this case. The Parties have agreed to an estimated payment of Ten Thousand Dollars ($24,000.00) to Phoenix to send notices and to administer this settlement. Phoenix is a well-recognized class action settlement administrator. Admin. Decl. ¶ 3, Ex. A.

V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS

A. The Class is Ascertainable and Sufficiently Numerous.

The Class that Plaintiffs seek to conditionally certify is ascertainable. "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008) (same). Defendant has determined that there are approximately 2,537 employees that comprise the Class. *See* Agnew Decl. ¶ 23. Thus, the Class is sufficiently numerous. *See Preston v. Porch.com, Inc.*, 2022 WL 1214710, at *3 (S.D. Cal., 2022) (a "presumption of numerosity created by twenty-five to thirty members"); *Rannis v. Recchia*, 380 Fed.Appx. 646, 650 (9th Cir. 2010) (district court "did not abuse its discretion in determining that the class of 20 satisfies the numerosity requirement").

B. There are Common Questions of Law and Plaintiffs' Claims are Typical of the Class.

The commonality requirement is met when there are questions of law and fact common to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class"). Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Industries, Inc*., 29 Cal. 3d 462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co*., 193 Cal. App. 3d 411, 421 (1987). Here, Plaintiffs allege, in part, that Defendant, as a matter of its corporate policy, practice, or procedure violated the Labor Code by: (1) failing to provide meal periods and/or pay meal period premiums at the regular rate of pay; (2) failing to provide rest periods and/or pay rest period premiums at the regular rate of pay; (3) failing to pay hourly and overtime wages; (4) failing to provide accurate itemized wage statements; (5) failing to pay wage upon termination; and (6) engaging in Unfair Business Practices in violation of the UCL. *See* Hebdon Decl. ¶¶ 3-5; Lewis Decl. ¶¶ 3, 4. In other words, Plaintiffs were allegedly subjected to the same policy and practice as other Class Members. Thus, Plaintiffs' claims are typical to those of Class Members.

C. Plaintiffs and Class Counsel Have Adequately Represented the Class.

The adequacy requirement is also met. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). Here, Plaintiffs do not have any interests adverse to the Class, nor have any such issues been raised or presented. *See* Hebdon Decl. ¶ 9; Lewis Decl. ¶ 8. Plaintiffs have taken all necessary steps to represent the interests of the Class, by providing information and documents. *See* Hebdon Decl. ¶ 10; Lewis Decl. ¶ 9. For such reasons, Plaintiffs have adequately represented the Class Members and will continue to do so.

Further, as detailed in their declarations, Class Counsel are experienced and well-qualified class action litigators who have litigated many wage and hour class actions and have each been certified as class counsel in numerous other class actions, particularly wage and hour class actions. Agnew Decl. ¶¶ 61-67; Fitzpatrick Decl. ¶ 4; Franklin Decl. ¶¶ 3, -4; Lee Decl. ¶¶

5-8; Swartz Decl. ¶ 4. From the inception of the case, Class Counsel have solely represented the interest of the Class. For example, Class Counsel expended significant time and resources propounding written discovery, exchanging informal discovery, drafting a mediation statement, and attending mediation. *See* Agnew Decl. ¶¶ 2-21. Finally, the mediation and settlement were also obtained for the benefit of the Class, not for the individual Plaintiffs.

VI. NOTICE TO THE LWDA

Concurrently with the filing of this motion, Plaintiffs submitted the Settlement Agreement and supporting documents to the LWDA. *See* Agnew Decl. ¶ 68, Exhibit 4.

VII. CONCLUSION

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective Parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Class Notice, and set a date for a final approval hearing.

Dated: September 13, 2024

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