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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BARBARA J. BOWLIN-BURDICK, an
individual on behalf of herself and all others
similarly situated,

Plaintiffs,

vs.

LIFE CARE CENTERS OF AMERICA, INC.,
a corporation; and DOES 1 through 10
inclusive,

Defendants.

Case No. BC657139

[Assigned for all purposes to the Honorable
Maren E. Nelson, Dept. SSC-17]

PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR CLASS
CERTIFICATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

[Filed concurrently with Compendium of
Evidence, including: Declarations of Paul
K. Haines and George Azadian and exhibits
attached thereto; Relevant excerpts from the
deposition transcripts of 14 individuals and
exhibits attached thereto; Declarations of
Plaintiffs and 9 putative class members;
Expert report of J. Michael DuMond, Ph.D.,
and exhibits attached thereto; and [Proposed]
Order]

Date: September 21, 2020
Time: 9:00 a.m.
Dept.: SSC-17

Complaint Filed: April 10, 2017
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SAC Filed: January 16, 2018
Trial Date: None set

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Attorneys for Plaintiffs

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on September 21, 2020, at 9:00 a.m. or as soon thereafter
3 as the matter may be heard in Department 17 of the above-entitled Court located at 312 N. Spring
4 St., Los Angeles, California 90012, Plaintiffs Lucy Chavez and Barbara Bowlin-Burdick
5 (“Plaintiffs”) will move the Court for an order that this action against Defendant Life Care
6 Centers of America, Inc. (“Life Care”) be maintained as a class action, and that the following
7 classes be certified as set forth in this Notice of Motion:

8 **Late First Meal Period Class:** All current and former non-exempt employees of Life
9 Care, who were employed in any of the following positions: Registered Nurse (“RN”), RN Unit
10 Nurse,¹ Licensed Vocational Nurse (“LVN”), LVN Unit Nurse, LVN Treatment Nurse,²
11 Certified Nursing Assistant (“CNA”), Nursing Aide, and/or Restorative Certified Nursing
12 Assistant (“RNA”), during the time period July 16, 2015³ through the present at any of Life
13 Care’s California locations.⁴

14 **On-Premises Rest Period Class:** All current and former non-exempt employees of Life
15 Care, who have worked at any of Life Care’s California locations at any time from May 2, 2016
16 through the present.

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18
19 ¹ Life Care’s RNs and RN Unit Nurses provide direct patient care. For purposes of this Motion, these two positions will be collectively referred to as “RNs.”

20 ² Life Care’s LVNs, LVN Treatment Nurses and LVN Unit Nurses provide direct patient care.
21 For purposes of this Motion, these three positions will be collectively referred to as “LVNs.”
22 Additionally, the non-exempt employee list produced by Life Care uses the title Licensed
23 Practical Nurse (“LPN”) instead of Licensed Vocational Nurse (“LVN”), but Life Care has
24 confirmed that all LPNs are required to hold LVN licenses and that the terms are interchangeable.
25 *See* Deposition of PMQ Pegah Sahebifard on February 21, 2020 (“PMQ Sahebifard Feb. 2020
Depo.”), 19:2-18 (confirming that the terms LPN and LVN are used interchangeably and that all
LPNs hold LVN licenses) and 6:6-8:15, Exh. 1 (confirming that she has been designated by Life
Care as the PMQ regarding job titles).

26 ³ A prior class action settlement in *Brooks et al v. Life Care Centers of America, Inc., et al*, Case
27 No. SACV-12-00659-CJC(RNBx), resolved Plaintiffs’ claims through July 15, 2015.

28 ⁴ “California locations” refers to Life Care’s six California locations referred to as: Bel Tooren,
La Habra, Mirada Hills, Rimrock, North Walk Villa, and Menifee.

1 **Wage Statement Class:** All current and former non-exempt employees of Life Care
2 who: (i) were paid at least one meal period premium payment that was denoted on their wage
3 statement as an hour of “regular” pay; and/or (2) are members of the Late First Meal Period class
4 and/or On-Premises Rest Period Class and who received at least one wage statement at any time
5 from April 10, 2016 through the present.

6 **Waiting Time Penalty Class:** All members of the Late First Meal Period Class and/or
7 On-Premises Rest Period Class who separated their employment from Life Care Centers of
8 America, Inc. at any time from July 16, 2015 through the present.

9 In addition to seeking an Order certifying the aforementioned four Classes, Plaintiffs also
10 move this Honorable Court to enter an Order appointing Plaintiffs Lucy Chavez and Barbara
11 Bowlin-Burdick as Class Representatives; and appointing Paul K. Haines, Tuvia Korobkin and
12 Stacey M. Shim of Haines Law Group, APC, and George S. Azadian and Ani Azadian of Azadian
13 Law Group, PC as Class Counsel.

14 This Motion is made pursuant to California Rule of Court 3.764 and California Code of
15 Civil Procedure Section 382, and is based upon the following grounds: The Classes are so
16 numerous as to make it impractical to join all class members; there are common questions of law
17 and fact as to the classes and these common questions predominate over any and all similar or
18 unique questions of law and fact affecting any individual class member; the claims of the named
19 Plaintiffs are typical of the claims of the members of the classes; the named Plaintiffs and their
20 counsel will fairly and adequately represent the interests of the classes; and the prosecution of
21 separate actions by the individual members of the classes would create the risk of inconsistent or
22 varying adjudications, which could establish incompatible standards of conduct, and would result
23 in duplicative and repetitive litigation burdensome to the court system and the parties. Life Care
24 has acted and refused to act on grounds generally applicable to the classes, thereby making relief
25 with respect to the classes proper. The class action procedure is superior to other available
26 methods and will fairly and efficiently adjudicate the controversy.

27 This Motion is based on this Notice of Motion; the attached Memorandum of Points and
28 Authorities; and the Compendium of Evidence, which includes:

- Declarations of attorneys Paul K. Haines and George Azadian exhibits thereto;
- Relevant excerpts and exhibits from the depositions of the named Plaintiffs (Lucy Chavez and Barbara Bowlin-Burdick);
- Relevant excerpts and exhibits from the depositions of Life Care's 7 PMQ witnesses (Rona Sanchez, Pegah Sahebifard, Rose Narcisse, Marcella Allard, Richard Lasota, Selina Stewart, and Kristina Kuizon)
- Relevant excerpts from the depositions of Plaintiff Chavez's direct supervisor, Yvonne Alumia, who holds the position of Director of Staff Development at Life Care's Menifee location;
- Relevant excerpts from the depositions of 4 putative class members (Dorothy Denise Parker, Joselin Perez Romero, Diana Joselyn Fuentes, and Gloria Gonzalez);
- Declarations of Plaintiffs Lucy Chavez and Barbara Bowlin-Burdick and 9 other putative class members (Rita Richardson, Sulema Torres, Celene Ybarra, Elizabeth Cornell, Abigail Chavez, Ashley Zamora, Tecielen Cruz, Carmen Magana, and Leticia Soto);
- Expert Report of Dr. J. Michael DuMond, Ph.D. and exhibits attached thereto;

Plaintiffs also ask that the Court consider the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time of hearing.

Dated: May 22, 2020

Respectfully Submitted,
HAINES LAW GROUP, APC

By:



Paul K. Haines
Attorneys for Plaintiffs

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Life Care Centers of America, Inc. (“Life Care”) owns and operates a network
4 of nursing homes that provides skilled short-term and long-term nursing care, Alzheimer’s care,
5 rehabilitation care, and other patient services. This putative class action concerns non-exempt
6 employees who have been employed at Life Care’s six California nursing home locations, referred
7 to as: Bel Tooren, La Habra, Mirada Hills, Rimrock, North Walk Villa, and Menifee.

8 This Motion for Class Certification presents three narrowly-tailored issues regarding Life
9 Care’s wage and hour policies and practices, which have resulted in: (1) routinely late meal
10 periods to nurses providing direct patient care (i.e., meal periods beginning after the sixth hour of
11 work has already commenced) (the “Late Meal Period Class”); (2) on-duty rest periods due to
12 Life Care failing to relinquish control over its non-exempt employees by expressly requiring them
13 to remain on-premises and expressly prohibiting them from doing things such as “smoking,
14 walking or driving to a convenience store, coffee shop” during rest periods (the “On-Premises
15 Rest Period Class”); and (3) direct wage statement violations that have resulted from listing the
16 incorrect number of “regular hours” worked in pay periods where Labor Code section 226.7 meal
17 period premium payments have been paid, as a result of listing these meal period premiums as
18 “regular” work hours on class members’ wage statements (the “Wage Statement Class”).

18 **II. BRIEF SUMMARY OF ISSUES**

19 All six of Life Care’s California locations operate 24 hours a day, 7 days a week, 365 days
20 per year, and each location may have the same patients staying for several weeks, months or even
21 years at a time. Because many of the patients staying at Life Care suffer from serious medical
22 issues such as Alzheimer’s disease and dementia, they routinely require assistance with basic life
23 tasks such as going to the bathroom, bathing, getting dressed and eating a meal. To assist these
24 individuals with their living needs, Life Care employs a number of nursing positions providing
25 direct patient care including: Certified Nursing Assistants (“CNA”), Licensed Vocational Nurses
26 (“LVN”), Registered Nurses (“RN”), Restorative Nursing Aides and Restorative Certified
27 Nursing Assistants (collectively “RNAs”) (in this Motion, CNAs, LVNs, RNs and RNAs are
28 collectively referred to as “nursing positions” or “nurses”).

1 In order to provide adequate patient care, and to comply with State staffing requirements,
2 Life Care's locations each have a combination of CNAs, LVNs, RNs and RNAs staffed on each
3 of three daily shifts. When CNAs, LVNs, RNs and RNAs arrive to work, they are assigned to
4 specific patient beds for their shift,⁵ and they are responsible for caring for the patients to which
5 they are assigned. In connection with assisting patients with their daily living activities, nurses
6 continuously monitor their assigned patients should any issues arise that require their assistance,
7 and in order to ensure that the patients are safe and cared for during the entirety of their shift.
8 Because CNAs, LVNs, RNs and RNAs are providing direct care, nurses cannot leave their
9 patients unattended while they are taking an off-duty 30-minute meal period (or even for a 10-
10 minute rest period) without having another nurse covering their assigned patients. This is
11 confirmed by Life Care's written meal and rest period policies, both of which expressly state:
12 "**resident care areas may not be left unattended during meal/rest periods.**" Every single one
13 of the 7 PMQ witnesses designated by Life Care, as well as every single one of the 11 nurses who
14 was deposed or has submitted a declaration in support of this Motion, has confirmed that before
15 a CNA, LVN, RN or RNA providing direct care can go off-duty for a meal period, she must first
16 be relieved by another nurse to ensure that her patients are being monitored.

17 Life Care acknowledges that meal periods are not scheduled for nurses at several of its
18 locations, but instead, are only discussed in pre-shift huddle meetings. Although Life Care claims
19 that some locations schedule meal periods, in discovery Life Care was only able to produce one
20 single example of a meal period schedule. Irrespective of whether or not meal periods are
21 scheduled for nurses, Life Care owes a duty to *actually provide* them with *timely* off-duty meal
22 periods under *Brinker*. However, throughout the putative class period, Life Care has failed to
23 maintain any process or system for actually providing timely relief for nurses on a regular basis,
24 so that they can take a meal period before the end of the fifth hour of work as the law requires.

25 Due to the nature of the work that nurses perform (e.g., bathing, dressing and feeding adults
26 with mental and physical illnesses and disorders), it is not reasonably practicable for nurses to
27 adhere to a scheduled meal period time without Life Care providing *timely* scheduled relief, which

28 ⁵ There are 59 beds at North Walk Villa and Rimrock, 86 beds at La Habra, 97 beds at Bel Tooren,
80 beds at Menifee, and 142 beds at Mirada Hills. Each patient room, which is numbered, contains
1, 2, or 3 beds lettered A, B, or C to which the nurses are assigned.

1 is often not provided by Life Care before the end of the fifth hour of work. In reality, meal periods
2 are often not provided to nurses until well after the sixth hour of work has already commenced, as
3 evidenced by their timekeeping records.⁶ Specifically, the timekeeping data produced to Plaintiffs
4 reveals that CNAs, LVNs, RNs and RNAs collectively worked 204,663 shifts over 6.0 hours and
5 failed to punch out for a meal period before the beginning of the sixth hour of work on 57,526 of
6 those shifts, or 28.1% of all shifts worked in excess of 6.0 hours. Despite there being 57,526 shifts
7 worked by CNAs, LVNs, RNs and RNAs where a meal period was not taken until after the sixth
8 hour of work had commenced, there are only at most 15 corresponding Section 226.7(c) meal
9 period premium payments made by Life Care for these untimely meal periods, which is a
10 minuscule fraction amounting to only 0.026% of these late meal periods.

11 The reason that virtually no Section 226.7 meal period premium payments have been made
12 for these 57,526 late meal periods is because Life Care does not have any process in place to audit
13 for late meal periods, although Life Care does have a daily process in place to audit for missed
14 meal periods. Because Life Care only audits nurses' timekeeping records for missed meal periods,
15 it is not surprising that that 92% of all Section 226.7 meal period premium payments made by
16 Life Care have been made in instances where an employee worked a shift over six hours without
17 receiving any meal period at all.

18 In sum, Life Care has habitually failed to provide nurses with timely meal periods, and
19 Life Care has also systematically failed to compensate these employees with one hour of pay for
20 these untimely meal periods as required by Section 226.7(c). These untimely meal periods have
21 occurred because Life Care has failed to provide timely relief for nurses providing direct patient
22 care, as confirmed by their timekeeping and payroll records, which reflect nearly sixty thousand
23 late meal periods with no corresponding Section 226.7 premium payments.

24 The second issue that Plaintiffs seek to certify is the On-Premises Rest Period Class. Life
25 Care's written rest period policy contains certain "Rest Period Rules," and three of these Rules

26 ⁶ During the deposition of PMQ witness Selina Stewart, it was confirmed that the job positions
27 identified in the Late First Meal Period Class all provide direct patient care, and therefore, would
28 have to be relieved by a licensed nurse for a meal period. *See* Deposition of Selina Stewart on
February 27, 2019 ("PMQ Stewart Feb. 2019 Depo."), 35:13-23, 40:4-11, 42:1-10, 43:23-44:14,
47:5-24, and 50:20-24, Exh. 4. In light of this fact, Dr. DuMond limited his late meal period
analysis to only these job positions. *See* DuMond Report at p. 5.

1 read as follows: “**Resident care areas may not be left unattended during rest periods,**”
2 “**Associates are not permitted to leave the facility premises during paid rest periods (i.e. to**
3 **run personal errands, smoke, walk or drive to a convenience store, coffee shop, fast food,**
4 **etc.),**” and “**Associates are subject to corrective action for...leaving the facility premises**
5 **during rest periods.**” Life Care’s PMQ witnesses have testified that this written rest period policy
6 containing these “Rest Period Rules” was distributed to all new employees at the time of hire, and
7 again was redistributed to employees during in-service trainings. The PMQ witnesses further
8 testified that it was the expectation that employees would familiarize themselves with Life Care’s
9 written rest period policy and follow the policy in practice. In *Augustus v. ABM Security Svcs.,*
10 *Inc.*, the California Supreme Court held that “[d]uring required rest periods, employers must
11 relieve their employees of all duties and relinquish any control over how employees spend their
12 break time,” just as employers must do during meal periods. 2 Cal.5th 257, 260 (2016). Despite
13 the unequivocal holding in *Augustus*, Life Care’s written rest period policy and practices expressly
14 require employees to remain on company premises during rest periods, and the policy is so specific
15 that it expressly prohibits employees from engaging in a number of personal activities, such as
16 “walking off premises” or “driving to a convenience store or coffee shop.” Deposition testimony
17 and declarations from putative class members confirm that it was their understanding that they
18 were required to follow Life Care’s written policy to remain on-premises and did so in practice.

19 The third and final issue that Plaintiffs seek to certify pertains to facially deficient wage
20 statements that have been issued to non-exempt employees. Specifically, in the timekeeping data
21 provided to Plaintiffs, Life Care paid its nurses a total of 498 meal period premiums pursuant to
22 Labor Code section 226.7(c). Notably, 92% of these meal period premiums were paid for missed
23 meal periods (i.e., shifts where the employee had worked over 6.0 hours without receiving any
24 meal period at all). On those occasions when Life Care paid a meal period premium payment
25 pursuant to Section 226.7, it reported the additional hour of pay as a “regular” hour of pay on the
26 employee’s wage statement, causing the number of regular working hours to be overstated. For
27 example, if an employee worked 38.12 “regular hours” during a pay period, but also received a
28 Section 226.7 meal period premium payment, then the employee’s wage statement would reflect
that the employee had worked 39.12 “regular hours.” This inaccurate reporting of hours when

meal period premium payments were paid has resulted in facially deficient wage statements, as the wage statements fail to accurately report the number of hours worked at each hourly rate in violation of Labor Code section 226(a).

III. FACTS SUPPORTING CLASS CERTIFICATION

A. Nurses Providing Direct Patient Care Were Routinely Provided With Late Meal Periods, Because Life Care Failed to Provide Timely Relief.

CNAs, LVNs, RNs and RNAs care for adult patients with varying degrees of mental and physical disabilities, such as Alzheimer’s disease and dementia.⁷ All six of Life Care’s California locations employ CNAs, LVNs, RNs and RNAs who provide direct patient care, meaning that these nurses are responsible for assisting patients with all aspects of daily living including but not limited to using the bathroom, bathing, dressing, eating and taking medications.⁸ Life Care acknowledges that meal periods are not scheduled at some locations, but instead, are only discussed during pre-shift huddle meetings.⁹ Although Life Care contends that other locations schedule meal periods,¹⁰ it has only produced a singular example of such a schedule and the meal

⁷ See Deposition of Diana Joselyn Fuentes (“Fuentes Depo.”), 74:13-23 (testifying that they had patients with dementia, combative patients, and patients that were a fall risk); Deposition of Joselin Perez Romero (“Romero Depo.”), 53:11-18 (testifying that at Bel Tooren they had patients suffering from dementia and short term patients there for rehabilitation); *see also* Cruz Decl., ¶ 2; Magana Decl., ¶ 2; Cornell Decl., ¶ 2; Soto Decl., ¶ 4; Zamora Decl., ¶ 3; Chavez Decl., ¶ 2; Ybarra Decl., ¶ 3

⁸ See Fuentes Depo., 26:17-27:7 (testifying that she had to help patients with activities of daily living including dressing, changing, and using the bathroom); Romero Depo., 17:1-10 (testifying that she helped clean and feed residents and assisted them with daily activities); Deposition of Dorothy Denise Parker (“Parker Depo.”), 12:16-22 (confirming that, among other things, she helped transfer, feed, and change residents); Deposition of Gloria Gonzalez (“Gonzalez Depo.”) 11:5-9 (testifying that her duties included, among other things, answering call lights and transferring patients); *see also* Magana Decl., ¶ 2; Cruz Decl., ¶ 4; Soto Decl., ¶ 3; Chavez Decl., ¶ 3; Cornell Decl., ¶ 2; Zamora Decl., ¶ 3; Ybarra Decl., ¶ 3

⁹ See Deposition of Marcella Allard (“PMQ Allard Depo.”), 33:23-35:8 (confirming that CNAs, LVNs, RNs and RNAs at Meniffee hold huddles to discuss what time employees will take their lunch breaks); Deposition of Rose Narcisse (“PMQ Narcisse Depo.”), 26:25-27:19 (confirming that nursing staff at Rimrock hold morning and evening huddles where they discuss when they’re taking their lunches so that they can cover each other); Deposition of Kristina Kuizon (“PMQ Kuizon Depo.”), 22:19-23:9 (confirming that nurses at Mirada Hills work amongst each other to coordinate when they will take their lunch breaks).

¹⁰ See PMQ Stewart Feb. 2019 Depo., 119:18-120:23 (testifying that La Habra and Mirada Hills schedules meal periods); Deposition of Pegah Sahebifard on November 14, 2019 (“PMQ

1 period times are pre-printed on the schedule.¹¹ But even at locations where meal periods are
2 “scheduled,” Life Care has no system in place for actually *providing* relief for nurses before the
3 end of the fifth hour of work on a consistent basis.

4 In practice, due to the nature of the work that nurses perform, it is often not possible to
5 adhere to any scheduled time to take a meal period. For example, if a nurse is in the middle of
6 giving a patient a bath, or is engaged with a patient who is getting physically violent, the nurse
7 would have to deal with those issues before going off-duty for 30 minutes.¹² In order to ensure
8 continual patient coverage, CNAs, LVNs, RNs and RNAs cannot take their meal periods until
9 another licensed nurse relieves them for their meal period. Every single one of the 7 PMQ
10 witnesses designated by Life Care, as well as every single one of the 11 nurses who was deposed
11 or has submitted a declaration in support of this Motion, has confirmed that before a nurse can go
12 off-duty for a 30 minute meal period, she must be first be relieved by another nurse to ensure her
13 patients are being monitored during the time she is taking her off-duty meal period.¹³ Life Care’s

14 Sahebifard Nov. 2019 Depo.”), 51:9-22, 55:8-56:7, 57:6-21 (confirming that Bel Tooren uses
15 written meal period schedules); Deposition of Selina Stewart of January 29, 2020 (“PMQ Stewart
16 Jan. 2020 Depo.”) 22:18-23:10 (testifying La Habra and North Walk Villa schedule meal periods).

17 ¹¹ Although Plaintiffs’ counsel requested all documents constituting meal period schedules
18 through a request for production, Defendant only produced a single meal period schedule. *See*
19 Haines Decl., ¶ 13, Exhs. 1, 2.

20 ¹² *See* Gonzalez Depo., 21:8-15 (stating that she had to make sure all her patients were in bed,
21 cleaned, with water, dressed, and with oral care before going on her lunch break); Romero Depo.,
22 27:15-28:4 (confirming that she had to finish showering patients before going on her lunch);
23 Fuentes Depo., 45:18-25 (testifying that the charge nurse told her to finish her rounds before
24 taking her lunch break) ; *see also* Magana Decl., ¶ 5; Cruz Decl., ¶ 5; Soto Decl., ¶ 5; Cornell
25 Decl., ¶¶ 5-6; Ybarra Decl., ¶ 6.

26 ¹³ *See* PMQ Stewart Feb. 2019 Depo., 37:24-38:7, 40:4-11, 42:1-10 (testifying that nurses at La
27 Habra and Mirada Hills are required to wait until relief coverage could be provided for their meal
28 period because they could not just walk off the floor for a meal period and leave their rooms
unattended); PMQ Stewart Jan. 2020 Depo., 41:4-17, 42:14-24 (testifying that nurses at La Habra
and North Walk Villa cannot just walk off the floor and must wait until coverage is provided
before they can take a meal period); PMQ Kuizon Depo., 18:18-19:19 (testifying that nurses at
Mirada Hills have to wait and ensure that there’s coverage before they clock out for meal periods
because patients cannot be left unattended); PMQ Sahebifard Nov. 2019 Depo., 69:9-25, 70:2-
71:9 (testifying that a nurse at Bel Tooren is required to cover for an nurse taking her meal period);
PMQ Narcisse Depo., 26:25-27:19 (testifying that the nursing staff at Rimrock cover for each
when taking their lunch breaks); PMQ Allard Depo., 46:19-47:12 (testifying that when nurses at

1 written meal period policy further confirms this truth, as the third of its “Meal Period Rules,”
2 states: “Meal periods are to be scheduled with your supervisor in advance **so that coverage can**
3 **be provided. Resident care areas may not be left unattended during meal periods.” See
4 Deposition of Richard Lasota (“PMQ Lasota Depo.”), 17:8-18:12, Exh. 3 (emphasis added).**

5 In addition to Life Care’s 7 PMQ witnesses, and Life Care’s written policies, Yvonne
6 Alumia, who has served as the Director of Staff Development at the Meniffee location for twenty
7 years,¹⁴ also confirmed that nurses were required to get coverage for their patients before taking
8 a meal period. See Alumia Depo., 55:9-22 (“...if a CNA is due to go on a break and nobody is
9 there to take care of their patient, they cannot leave, unless the nurse authorizes, ‘I’ll be the one
10 watching your patient.’”); *id.* at 54:13-55:8 (confirming that CNAs at Meniffee could not take a
11 meal period without going ensuring that someone was going to watch their patients).

12 Plaintiff Chavez, who worked as a CNA, as well as 11 other nurses who have been
13 deposed or submitted declarations in support of this Motion, uniformly confirm that they were
14 required to be relieved by another nurse before they could take a meal period. See evidence cited
15 in fn. 13. Due to the realities of providing direct patient care to adults with serious physical and
16 mental disorders, which necessitates that they be relieved by another licensed nurse before taking
17 a meal period, members of the Late First Meal Period Class were often not provided with a meal
18 period prior to the sixth hour of work commencing.¹⁵ The blame for these late meal periods falls

19 Meniffee take their meal periods, the Charge Nurse would provide another employee to monitor
20 patient rooms to ensure constant coverage at all times); Deposition of Yvonne Alumia (“Alumia
21 Depo.”), 54:13-55:8 (testifying that nurses at Meniffee could not leave without going to the Charge
22 Nurse to ensure that someone was going to watch their patients); *see also* Deposition of Lucy
23 Chavez (“Chavez Depo.”), 141:8-12, 142:24-143:12 (testifying that she could not take her meal
24 break whenever she wanted and could only take her meal break when someone relieved her);
25 Romero Depo., 24:9-12 (CNA at Bel Tooren facility from May 2016 to February 2017, testifying
26 that she had to make sure “someone was covering” her patients before taking her meal break);
27 Parker Depo., 24:21-26:2 (CNA at Rimrock facility since 2015, testifying that she could not take
28 her lunch without getting someone to relieve her); Fuentes Depo., 29:20-31:2 (CNA at North
Walk Villa testifying that she was required to ensure someone was watching over her patients
before she left for her meal period); *see also* Magana Decl., ¶ 5; Cruz Decl., ¶ 5; Soto Decl., ¶ 5;
Chavez Decl., ¶ 6; Ybarra Decl., ¶ 6; Cornell Decl., ¶ 6; Zamora Decl., ¶ 6.

¹⁴ See Alumia Depo., 13:6-14.

¹⁵ See Romero Depo., 25:3-26:20 (testifying that she almost always could not take her lunch break
when scheduled due to the workload); Gonzalez Depo., 16:18-18:6 (testifying that although she

1 squarely on the shoulders of Life Care. As the employer, it has an obligation to *provide* its nurses
2 with *timely* meal periods, yet it habitually failed to do so. This reality is confirmed by the
3 timekeeping data of CNAs, LVNs, RNs and RNAs. As set forth in the concurrently filed Report
4 of Dr. J. Michael DuMond (“DuMond Report”), the timekeeping data produced by Life Care
5 reflects that CNAs, LVNs, RNs and RNAs worked a total of 204,663 shifts of over 6.0 hours. Of
6 these 204,663 shifts, 57,526 shifts (or 28.1%) reflect a meal period being taken after the sixth
7 hour of work had already commenced. *See* DuMond Report at p. 5.

8 **B. Life Care Does Not Have an Adequate Process for Ensuring Section 226.7**
9 **Premiums are Paid When it Fails to Provide Timely Meal Periods.**

10 Each of Life Care’s six California locations employs an individual who reviews
11 employees’ timekeeping punches on a daily basis for the purpose of identifying any missed
12 punches in the employees’ timekeeping data.¹⁶ However, this person is only reviewing
13 timekeeping data for missed punches (i.e., to determine if an employee forgot to punch in or out
14 for the beginning or end of their shift, or for the beginning or end of a meal period). *See* fns. 16
15 & 17. Although Life Care has a process for reviewing timekeeping data for missed punches, Life
16 Care does not review timekeeping data for late meal periods (i.e., meal periods starting after the
17 sixth hour of work has commenced). Every single PMQ witness testified that Life Care only

18 _____
19 was scheduled to take her meal break at 7:00 p.m. or 7:30 p.m., she often took her first meal break
20 after 8:00 p.m. (i.e. more than 5 hours after her shift started at 3:00 p.m.); Fuentes Depo., 31:10-
21 17 (testifying that she was told by the charge nurse that she could not take her lunch break at the
22 scheduled time when they were on short on staff and backed up); *see also* Magana Decl., ¶ 5;
23 Cruz Decl., ¶ 5; Soto Decl., ¶ 5; Ybarra Decl., ¶ 6; Chavez Decl., ¶ 6.

24 ¹⁶ *See* PMQ Allard Depo., 57:19-58:3 (testifying that Sally Hicks the AP Payroll for Menifee
25 reviews employee timekeeping records daily for missed punches); PMQ Narcisse Depo., 22:23-
26 23:17, 26:20-22 (testifying that she, the staff developer, and the scheduler review punch records
27 at Rimrock daily for missed punches); PMQ Stewart Jan. 2020 Depo., 19:24-20:20, 35:9-23
28 (testifying that the AP Payroll person at La Habra and North Walk Villa reviews timekeeping
records daily and weekly for missed punches); PMQ Stewart Feb. 2019 Depo., 62:7-63:12
(testifying that AP of Payroll at La Habra and Mirada Hills reviews timekeeping records for
missed punches); PMQ Kuizon Depo., 7:9-19, 10:10-20 (testifying that as Executive Director, at
Mirada Hills she reviews timekeeping records for missed punches on a daily basis); PMQ Sanchez
Depo., 19:4-20:17 (testifying that as AP Payroll coordinator at Menifee she reviews timekeeping
records daily for missed punches); PMQ Sahebifard Nov. 2019 Depo., 90:1-6, 93:5-25 (testifying
that the payroll specialist and several other individuals at Bel Tooren review timekeeping records
for missed punches on a daily basis).

1 looks for missed punches when reviewing the daily timekeeping entries of its employees.¹⁷
2 Because Life Care does not review employee timekeeping entries for late meal periods, it has
3 turned a blind eye to the fact that it habitually provides late meal periods to nurses.

4 While Life Care may point to the fact that it has maintained a mechanism for paying
5 Section 226.7 meal period premiums, this is a red herring. For the CNAs, LVNs, RNs and RNAs
6 referenced in the DuMond Report, they collectively worked 57,526 shifts where they did not
7 punch out for a meal period until after the sixth hour of work had already commenced. *See*
8 DuMond Report at p. 5. Yet during this same time period, Life Care only made 498 meal period
9 premium payments, and of those 456 were for missed meal periods, meaning the employee
10 worked a shift over 6.0 hours without taking any meal period. At most, only 15 of the 498 Section
11 226.7 meal period premium payments in the data could have possibly been made for late meal
12 periods. *See* DuMond Report at p. 5. Simply put, Life Care has failed to consistently provide
13 CNAs, LVNs, RNs and RNAs providing direct patient care with timely meal periods, and it has
14 failed to maintain a mechanism for paying these employees Section 226.7 meal period premium
15 payments when it has failed to do so.

16 **C. Life Care Requires Employees to Remain On-Premises During Rest Periods,**
17 **Thereby Failing to Relinquish Control Over Employees During Rest Periods.**

18 From May 2016 to the present, Life Care’s written rest period policy has included several
19 “Rest Period Rules” prohibiting non-exempt employees from leaving the facilities for any purpose
20 during rest periods. These “Rest Period Rules” include the following Rules:

21 Rule No. 3. Rest Periods are to be scheduled with the associate’s supervisor in
22 advance **so that coverage can be provided. Resident care areas may not be**
23 **left unattended during rest periods.**

24 Rule No. 5. **Associates are not permitted to leave the facility premises**
25 **during paid rest periods (i.e. to run personal errands, smoke, walk or drive**

26 ¹⁷ *See* PMQ Allard Depo., 57:19-58:3 (AP Payroll is only looking for missed punches); PMQ
27 Narcisse Depo., 22:23-23:17 (Life Care is only reviewing punch records for missed punches);
28 PMQ Stewart Jan. 2020 Depo., 35:21-23 (Life Care is are not auditing timekeeping records for
anything other than missed punches; PMQ Stewart Feb. 2019 Depo., 63:22-24 (the AP Payroll
person is not looking for anything other than missed punches); PMQ Kuizon Depo., 7:9-19
(testifying she is only looking for missed punches when auditing the timekeeping records); PMQ
Sanchez Depo., 20:14-20:17 (testifying that she does not look for anything other missed punches
when auditing employees’ timekeeping records); PMQ Sahebifard Nov. 2019 Depo., 92:7-11
(testifying that employees’ timekeeping records are only being audited for missed punches).

1 to a convenience store, coffee shop, fast food, etc.)

2 Rule No. 6. Associates are subject to corrective action for...leaving the
3 facility premises during the rest period.

4 See PMQ Lasota Depo., 25:1-16, Exh. 4 (written rest period policy and confirming that it
5 accurately reflects Life Care's rest period policy) (emphasis added).

6 As reflected above, Life Care's written rest period policy explicitly and repeatedly states
7 that employees are not allowed to leave the premises during rest periods, and goes as far as to set
8 forth specific examples of what employees **cannot do** during their rest periods, such as walking
9 off premises, or driving to a coffee shop or convenience store.

10 Life Care's PMQ witnesses confirmed that it is their practice to follow the written rest
11 period policy at their locations.¹⁸ Life Care's PMQ witnesses have also confirmed it is Life Care's
12 policy to provide employees with a copy of the written rest period policy during the orientation
13 process after hire.¹⁹ Life Care also holds "in-seminar" meetings at multiple points throughout the
14 year, during which time it refreshes employees on its written rest period policies. Multiple PMQ
15 witnesses testified that they provide putative class members with the written rest period policy at
16 the in-seminar meetings in order for employees to refresh themselves on the written policy.²⁰ Life

17 ¹⁸ See PMQ Allard Depo., 16:17-21, Exh. 3 (testifying that Menifee expects employees to review
18 and follow guidelines in the written rest period policy); PMQ Narcisse Depo., 47:1-12, Exh. 7
19 (testifying that as part of its practices, Rimrock follows written policies); PMQ Stewart Jan. 2020
20 Depo., 32:8-16, 38:1-7, Exh. 10 (confirming that non-exempt employees are expected to follow
21 written policies); PMQ Kuizon Depo., 28:19-22, Exh. 5 (testifying that it is an expectation that
22 employees follow written policies); PMQ Sahebifard Nov. 2019 Depo., 78:6-10, Exh. 7
23 (testifying the Bel Tooren facility attempts to follow the written rest period policies).

24 ¹⁹ See PMQ Allard Depo., 15:4-16:16, Exh. 3 (testifying that it's a practice to collect the
25 employee's signature to the rest period policy at the time of orientation); PMQ Narcisse Depo.,
26 47:25-49:1, Exh. 7 (testifying that Life Care distributes and has employees sign to acknowledge
27 the rest period policy at the time of orientation); PMQ Stewart Jan. 2020 Depo., 36:23-37:3, Exh.
28 10 (testifying that as a practice, Life Care disseminates the written rest period policy to employees
29 at the time of hire).; PMQ Kuizon Depo., 28:2-15, Exh. 5 (testifying that as a practice, employees
30 sign and date the rest period during their orientation); PMQ Stewart Feb. 2019 Depo. 22:13-23:1,
31 Exh. 10 (testifying that the staff developer covers written meal and rest period policies with the
32 employees at the time of orientation).

33 ²⁰ See PMQ Allard Depo., 22:15-23:21, Exh. 3 (testifying that employees are asked at in-services
34 to review and follow written meal and rest period policies); PMQ Narcisse Depo., 50:12-51:4,
35 Exh. 7 (testifying that Life Care hands out written meal and rest period policies at in-services and
36 instruct employees to consult with written meal and rest period policies if they have questions);

Care's rest period practices do not deviate from its written policy as putative class members have testified that they were not allowed to leave company premises during their rest periods.²¹ During the relevant time period, Life Care has not paid a single rest period premium payment per Section 226.7. *See* PMQ Lasota Depo., 93:21-94:2.

Plaintiff contends that Life Care's policy of forbidding employees from leaving Life Care's premises during rest periods violates California law. *See Augustus, supra*, 2 Cal.5th at 260, 273 ("During required rest periods, employers must relieve their employees of all work duties and *relinquish any control over how employees spend their break time*," just as an employer must relinquish control over how employees spend their time during meal periods.") (emphasis added) (citing *Brinker Restaurant Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038-39 (2012) (discussing requirement to relinquish control over employees during meal periods)).

D. Life Care Has Issued Facially Defective Wage Statements Because It Does Not Have a Separate Paycode for Section 226.7 Meal Period Premium Payments, and Instead Denotes Them as "Regular" Hours on Employee Wage Statements.

When Life Care makes a Section 226.7 meal period premium payment, it notes that a payment should be made by making a notation for "Insufficient Break-REG" in the employee's timekeeping records, as reflected by the example timekeeping record below:

EV

11/25/2017	11:03:00 AM	8:00:00 PM	8.95
	EV	EV	
11/25/2017	12:00 AM	Insufficient Break-REG	1.00

When an employee has an "Insufficient Break-REG" notated in her timekeeping records,

PMQ Stewart Jan. 2020 Depo., 46:23-47:10, Exh. 10 (confirming that at one of the in-services, she handed out meal and rest break policies to review).

²¹ *See* Gonzalez Depo., 27:11-21, (testifying that she read the rest period policy stating that you could not go off-site during the 10-minute breaks) and 46:15-47:3 (testifying that she was told during orientation that they could not leave premises during rest periods.); Fuentes Depo., 48:7-49:15 (testifying that she was told during orientation by Norma, the director of development, that they could not leave facility for rest periods.); Parker Depo., 39:9-40:3 (testifying that employees were not allowed to leave facilities during rest periods because employees are still on company time and that she did not attempt to leave the facility during her rest periods.). Numerous other putative class members confirmed that they were not allowed to, and did not, leave Life Care's premises during rest periods. *See* Soto Decl., ¶ 6; Torres Decl., ¶ 3; Richardson Decl., ¶ 4; Cruz Decl., ¶ 6 Magana Decl., ¶ 7; Ybarra Decl., ¶ 7; Zamora Decl., ¶ 7.

Life Care will then pay a Section 226.7 meal period premium to the employee in that pay period.²² However, Life Care does not denote the meal period premium with a separate pay code on an employee's wage statement. Rather, Life Care increases the employee's reported "Regular" hours by the number of meal period premium hours paid, and this has been Life Care's policy during the entire putative class period, as Life Care's PMQ testified:

Q: ...in the event that there – an employee – there is an insufficient break on the employee's – inserted into the employee's timekeeping records, that employee would be paid an additional hour of pay for that pay period; is that correct?

A: Yes, yes.

Q: Okay. And do you know how that additional hour of pay appears on the employee's wage statement?

A: Yes.

Q: Okay. Can you tell me?

A: It appears on their regular hours.

See PMQ Lasota Depo., 84:4-14; 90:11-17.

By way of example, during the pay period January 29 to February 11, 2017, Plaintiff Chavez's wage statement lists **59.32** "Regular" hours worked for the pay period. *See* Haines Decl., ¶ 17 & Exh. 5 (Ms. Chavez's wage statement with the end date of February 11, 2017). However, a review of Ms. Chavez's timekeeping records for the pay period reflect that she actually worked **58.32** regular hours during that pay period. *See* Haines Decl., ¶ 18 & Exh. 6 (Ms. Chavez's time records from that pay period, with "Regular" hours highlighted). The "Regular" hours reported on Ms. Chavez's wage statement are exactly 1.0 hour higher than her actual regular hours worked, because she was paid one meal period premium that was reflected on her wage statement as 1.0 additional "Regular" hour worked. Mr. Lasota confirmed that this has been Life Care's practice of paying Section 226.7 meal period premium payments during the entire relevant time period. *See* PMQ Lasota Depo., 90:11-90:17.

IV. LEGAL ANALYSIS

A. Standard for Class Certification

Code of Civil Procedure section 382 authorizes class certification "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it

²² *See* PMQ Lasota Depo., 83:16-84:9 (confirming that employees were paid an additional hour of pay when payroll inserted an "insufficient break" notation into employee timekeeping records).

1 is impracticable to bring them all before the Court.” *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004)
2 34 Cal.4th 319, 326 (“*Sav-On*”). The class must be ascertainable and class members must share
3 a well-defined community of interest. *Id.* The “community of interest” standard recognizes that
4 there will be variation in the claims of individual class members, and holds that minor variations
5 among class members will not defeat class certification, and is established where: (1) common
6 questions of law or fact predominate; (2) the claims of the class representatives are typical of the
7 class; and (3) the class representatives can adequately represent the class. *Id.* As discussed below,
8 all of these elements are met in this case.

9 **1. The Classes are Numerous and Ascertainable**

10 Dr. Dumond has identified at least 1,054 putative class members in the Late Meal Period
11 Class, and at least 175 putative class members in the Wage Statement Class. *See* DuMond Report
12 at pp. 6, 8. Life Care has identified at least 1,800 individuals who are members of the On-Premises
13 Rest Period Class. *See* Haines Decl., ¶ 16. A class is “ascertainable” where the members “may
14 be readily identified without unreasonable expense or time by reference to official records.” *Lee*
15 *v. Dynamex, Inc.*, 166 Cal.App.4th 1325, 1334 (2008). The Classes are readily identifiable by
16 reference to Life Care’s employment records as noted above.

17 **2. Common Questions of Fact and Law Predominate**

18 A class action may be maintained if there is “an ascertainable class and a well-defined
19 community of interest among the class members.” *Washington Mutual Bank v. Sup. Ct.*, 24 Cal.
20 4th 906, 913 (2001). As part of the community of interest requirement, the party seeking
21 certification must show that issues of law or fact common to the class predominate. *See Duran*
22 *v. U.S. Bank Nat’l Assn.*, 59 Cal.4th 1, 28 (2014). The trial court must “examine the plaintiff’s
23 theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and
24 decide whether individual or common issues predominate.” *Brinker, supra*, 53 Cal.4th at 1025.
25 In assessing commonality, courts consider “pattern and practice evidence, statistical evidence,
26 sampling evidence, expert testimony, and other indicators of a defendant’s centralized practices
27 in order to evaluate whether common behavior towards similarly situated plaintiffs makes class
28 certification appropriate.” *Sav-On, supra*, 34 Cal.4th at 333 (footnote omitted).

1 **a. Common Issues Predominate: Late First Meal Period Class**

2 The Late First Meal Period Class should be certified for several reasons. First, under
3 *Brinker* an employer is responsible for providing its employees with timely meal periods, which
4 in the case of CNAs, LVNs, RNs and RNAs, means providing those employees with relief
5 coverage before the end of the fifth hour of work so that their patients will be covered when it is
6 time for their meal period to begin. However, Life Care’s requirement that members of the Late
7 Meal Period Class be relieved for meal periods, combined with the realities of their job duties in
8 caring for patients with varying degrees of severe mental and physical disorders, and Life Care’s
9 failure to provide timely relief, resulted in late meal periods on over 28% of shifts worked by
10 these class members. *See* DuMond Report at p. 5. The fact that members of the Late Meal Period
11 Class received timely meal periods approximately 71.9% of the time is not a basis to defeat
12 certification, especially where Life Care failed to adequately investigate and pay meal period
13 premium payments for 99.98% of these late meal periods. *See e.g., Alberts v. Aurora Behavioral*
14 *Health Care*, 241 Cal.App.4th 388, 410 (2015) (“...plaintiffs have identified several mutually
15 reinforcing policies that sharply circumscribed the employees' freedom of action: (1) the
16 Hospital's policy of chronic understaffing; (2) the Hospital's policy of making patient safety the
17 ‘number one priority’; and (3) the Hospital's policy of having ‘zero tolerance’ for staff who take
18 a break without first being relieved...The Hospital's policies, as understood through the prism of
19 plaintiffs' theory, effectively and unfairly leverage a reasonable nurse’s ethical obligations,
20 making missed break mandatory, not voluntary. A reasonable/ethical nurse under such
21 circumstances would not risk the life or health of his/her patient suffering from a psychiatric
22 disorder in order to take a mandated meal or rest break.”). Like *Alberts*, were Life Care to suggest
23 that over 57,526 late meal periods were the result of anything other than a widespread failure on
24 its part to provide timely coverage for its nurses so that they could take timely meal periods, defies
25 the evidence, common sense and logic. Although Life Care may argue that it maintained a process
26 by which an employee could receive a payment for a late meal period, as presumably happened
27 on up to 15 out of 57,526 late meal periods, this process is simply inadequate and fails to address
28 99.98% of the shifts where a meal period commenced after the sixth hour of work.

1 **b. Common Issues Predominate: On-Premises Rest Period Class**

2 Life Care fails to relinquish control over its employees during rest periods by explicitly
3 requiring them to remain on company premises and expressly prohibiting them from engaging in
4 several types of personal activities. Life Care’s written rest period policy repeatedly states that
5 employees are not permitted to go off premises for rest periods, and lists the following “Rest
6 Period Rules”: (3) “Associates are not permitted to leave the facility premises during paid rest
7 periods (i.e. to run personal errands, smoke, walk or drive to a convenience store, coffee shop,
8 fast food, etc.)”; (5) “Resident care areas may not be left unattended during rest periods”; and (6)
9 “Associates are subject to corrective action for...leaving the facility premises during the rest
10 period.” *See* PMQ Lasota Depo., 25:1-16, Exh. 4 (See “Rest Period Rules” 3, 5 and 6)

11 The above “Rest Period Rules” that are contained in Life Care’s written Rest Period Policy
12 are conveyed to members of the On-Premises Rest Period Class both at the time of hire when they
13 are provided with a copy of Life Care’s written rest period policy, and again throughout their
14 employment during in-service meetings that are usually held multiple times annually. *See*
15 evidence cited in support of fn. 20. In addition to Life Care’s uniform written policy, putative
16 class members have testified in depositions and confirmed in declarations that they were not
17 allowed to, and did not, leave the premises during rest periods. *See* evidence cited in fn. 21.

18 Whether it is lawful for Life Care to require the members of the On-Premises Rest Period
19 Class to remain on premises during rest periods is a common issue that can be adjudicated for all
20 class members. *See e.g., Augustus, supra*, 2 Cal.5th 257 (addressing summary judgment ruling in
21 context of certified on-duty rest period class); *Hall v. Rite Aid Corp.*, 226 Cal.App.4th 278, 289
22 (2014) (collecting cases and noting that, following *Brinker*, appellate courts have held that “when
23 a court is considering the issue of class certification and is assessing whether common issues
24 predominate over individual issues, the court must ‘focus on the policy itself’ and address whether
25 the plaintiff’s *theory* as to the illegality of the policy can be resolved on a classwide basis.”).

26 **c. Commons Issues Predominate: Wage Statement Class**

27 Plaintiffs’ theory of liability pertains to Life Care reporting Section 226.7 meal period
28 premium payments as additional “regular” hours worked on the employee’s wage statement.

1 Where the proposed class is based on alleged defects in the format of wage statements that are
2 prepared and distributed to employees in a uniform manner, common issues predominate. In
3 *Jaimez v. Daiohs USA, Inc.*, the California Court of Appeal reversed the trial court’s denial of
4 class certification of a wage statement class, and directed the trial court to certify the wage
5 statement class, which was also based on alleged defects on the face of the wage statements,
6 including the defendant’s failure to accurately list all hours worked. 181 Cal.App.4th 1286, 1306
7 (2010). The Court expressly rejected the defendant’s argument that individual issues would
8 predominate with respect to the element of “actual injury,” stating “[t]he fact that individualized
9 proof of damages may ultimately be necessary does not mean, however, that Jaimez’s theory of
10 recovery is not amenable to class treatment. A common legal issue predominates the claim, and
11 it makes no sense to resolve it in a piecemeal fashion.” *Id.* at 1307.

12 **d. Common Issues Predominate: Waiting Time Claim**

13 Plaintiffs’ Waiting Time Penalty Class is completely derivative of their claims for failure
14 to make meal and rest period premium payments under Section 226.7. California courts have
15 repeatedly held that certification of derivative claims is tied to certification of the underlying
16 claims. *See, e.g., Bradley v. Networkers Int’l, LLC*, 211 Cal.App.4th at 1134, 1136 (holding trial
17 court erred in denying certification of derivative waiting time class to the extent it was “based on
18 plaintiffs’ overtime and/or meal and rest break claims.”).

19 **3. Plaintiffs’ Claims are Typical of the Proposed Classes**

20 Typicality is satisfied where class members have similar injuries and where the action is
21 based on conduct that is not unique to the named plaintiff(s). *See, e.g., Classen v. Weller*, 145 Cal.
22 App.3d 27, 46-47 (1983). Like other putative class members, (1) Plaintiff Chavez was a nurse
23 providing direct patient care, and was required to be relieved for meal periods pursuant to Life
24 Care’s policies and thus often was provided late first meal periods; (2) Plaintiffs were required to
25 stay on-premises during their rest periods per Life Care’s written policy and practices; and (3)
26 Plaintiff Chavez had meal period premium payments reported on her wage statements as
27 additional “regular” hours worked. *See Chavez Decl.*, ¶¶ 3, 5; *Bowlin-Burdick Decl.*, ¶ 4; *Haines*
28 *Decl.*, ¶¶ 17-18.

1 **4. Plaintiffs and Plaintiffs’ Counsel are Adequate Representatives**

2 The adequacy requirement examines conflicts of interest between named parties and the
3 class they seek to represent. *Capitol People First v. State Dept. of Develop. Svcs.*, 155
4 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the class as
5 there are no conflicts and Plaintiffs’ claims are in line with those of the classes. Chavez Decl., ¶
6 8; Bowlin-Burdick Decl., ¶ 6. Proposed Class Counsel also has extensive experience in wage and
7 hour class action litigation, having certified numerous cases on contested certification motions in
8 both state and federal courts. *See* Haines Decl., ¶¶ 7, 9-10.

9 **V. PLAINTIFFS’ TRIAL PLAN UNDER DURAN**

10 “In wage and hour cases where a party seeks class certification based on allegations that
11 the employer consistently imposed a uniform policy or de facto practice on class members, the
12 party must still demonstrate that the illegal effects of this conduct can be proven efficiently and
13 manageably within a class setting.” *Duran, supra*, 59 Cal.4th 1, 29 (2014). Based on *Duran*, trial
14 courts have required this showing of manageability at the class certification stage. As addressed
15 below and in the DuMond Report, the claims of each of the classes that Plaintiffs seek to certify
16 are manageable and can be tried on common evidence.

17 **A. Trial Plan: Late First Meal Period Class**

18 The law requires that Life Care provide its employees with timely meal periods, i.e., meals
19 commencing before the sixth hour of work begins. Because the onus to provide legally compliant
20 meal periods falls on the employer under *Brinker*, it necessarily follows that Life Care has an
21 obligation to ensure that there is a relief system in place to actually provide its employees with
22 timely meals. However, the robust evidence developed in this case makes clear that there is not
23 a consistent process in place for providing timely meal periods to nurses who are providing direct
24 patient care. Nor does Life Care maintain a practical mechanism for ensuring that these nurses
25 are compensated for late meal periods as required by Section 226.7.

26 Following class certification, Plaintiffs intend to try this claim based on Life Care’s
27 uniform written policies and documents such as timekeeping and payroll records, the corporate
28 testimony of Life Care’s PMQ witnesses, the testimony of a random selection of members of the
Late Meal Period Class, as well as the testimony of Plaintiffs’ retained experts, including but not

1 limited to Dr. DuMond. As to Life Care's written policies and the testimony of Life Care's PMQ
2 witnesses, both uniformly have confirmed that before a nurse can take a meal period, it is
3 incumbent that the first nurse be relieved. Obtaining this testimony at trial will simply require
4 Plaintiffs to confirm what these witnesses and documents have already confirmed in this matter
5 at the pre-certification stage.

6 In addressing the testimony of class members, it is not yet known, nor could it be known,
7 exactly how many class members need to be deposed/testify post-certification in order to establish
8 Life Care's liability and resulting damages with an acceptable confidence interval. As noted in
9 the DuMond Report at pp. 8-9, the number of class members that would need to be deposed
10 essentially turns on a 4-step process. In the first step, the parties would come to an agreement as
11 to an acceptable confidence interval ("Z") and margin of error ("E"), such as 5%. In the second
12 step, each employee in the putative class(es) would be assigned a random number, and then the
13 class list would be sorted based on this random number. An initial pilot study of the first 25 class
14 members on the sorted class list(s) would be chosen. These employees would be deposed and
15 asked for "Yes" or "No" responses to the applicable questions, which could be jointly drafted by
16 the parties in a neutral manner (should Life Care wish to participate in the process) that go to the
17 core issue of liability (e.g., whether the class member were not provided with timely meal periods
18 due to Life Care's failure to provide adequate relief) and damages. Based on these responses, a
19 preliminary estimate of the underlying variation would be obtained (i.e., "p" in the sample size
20 equation). In the third step, after having obtained values of "Z", "E" and a preliminary estimate
21 of "p", the required sample size to meet those criteria could be calculated using the sample size
22 equation. As set forth in the DuMond Report, the required sample size would be calculated as
23 follows: Required Sample Size = $(Z^2 * p * (1-p)) / E^2 * FPC$ (where "FPC" means finite population
24 correction). After the required sample size has been obtained, additional depositions would be
25 taken for other randomly selected class members, and at periodic predetermined intervals, the
26 estimate of "p" would be updated in order to validate that the originally calculated required sample
27 size is still sufficient to obtain an estimate within the acceptable margin of error. Once the required
28 sample size is obtained, those randomly selected witnesses can then be called to trial for the
purpose of establishing liability and damages. DuMond Report pp. 8-9

1 As both the U.S. Supreme Court and California courts have held, the use of statistical
2 sampling to establish both liability and damages is appropriate in wage and hour class actions. In
3 *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1046-48 (2016), the U.S. Supreme Court expressly
4 rejected “the broad proposition that a representative sample is an impermissible means of
5 establishing classwide liability” and approved the use of statistical sampling of employees to
6 establish liability and damages in a collective action. The California Supreme Court, in *Duran*,
7 while finding that the sampling method employed by the trial court in that case was deficient,
8 nevertheless recognized that where common issues exist, “it may be possible to manage individual
9 issues through the use of surveys and statistical sampling” so long as “some glue” binds class
10 members together and the sample is “sufficiently representative” of the rest of the class. *Duran*,
11 *supra*, 59 Cal.4th at 31, 38; *see also Alberts, supra*, 241 Cal. App. 4th at 411 (“California courts
12 routinely consider pattern and practice evidence, statistical evidence, sampling evidence, expert
13 testimony, and other indicators of a defendant's centralized practices in order to evaluate whether
14 common behavior towards similarly situated plaintiffs makes class certification appropriate”).

15 **B. Trial Plan: On-Premises Rest Period Claim**

16 Life Care’s “on-premises” rest period policy is much like the “on-call” rest period policy
17 that was certified in *Augustus*, the landmark case that held it is unlawful for employers to maintain
18 an “on-call” rest period policy by requiring employees to keep their pagers and radio phones on
19 during rest periods. Just as that claim could be manageably litigated in *Augustus* so can Plaintiffs’
20 on-premises rest period theory, because like *Augustus*, the claim turns on the employer’s common
21 and uniform policy. The only difference is in that in *Augustus* the common issue to be adjudicated
22 was the legality of the “on-call” rest period policy, whereas in this case, the common issue to be
23 adjudicated is the legality of Life Care’s on-premises rest period policy that expressly prohibits
24 employees from leaving the premises during rest periods.

25 There is no question that on occasion, the class members in *Augustus* were provided with
26 rest periods that did not require them to respond to their radio or pager, but nevertheless, the fact
27 that this may have occurred from time-to-time is not enough to defeat certification where the
28 employer maintains an unlawful policy and enforces that policy. As discussed in *Alberts*,
“plaintiffs do not claim they were universally denied all breaks, nor must they do so to warrant

1 certification. *Brinker, supra*, 53 Cal.4th 1004, does not require class proponents to establish the
2 universal application of an allegedly illegal policy; rather, a class proponent need only show a
3 ‘consistent[]’ application of the policy.”). *Alberts, supra*, 241 Cal.App.4th at 409; *see also*
4 *Bradley, supra*, 211 Cal.App.4th 1129, 1150-53 (where theory of liability was employer’s
5 uniform policy violated labor laws by not authorizing employees to take meal and rest breaks,
6 class certification is proper and fact some employees in fact took meal and rest breaks is a damage
7 question that “will rarely if ever stand as a bar to certification.”).

8 As discussed above with respect to the Late Meal Period Class, the uniform written
9 policies and corporate testimony of Life Care’s PMQ witnesses would be procured at trial. With
10 respect to the testimony of class members to establish liability and damages, the same process
11 would be followed as discussed with the Late Meal Period Class, although as noted in the
12 DuMond Report at fn. 13, this process should be repeated separately for each of these classes.


13 **C. Trial Plan: Wage Statement Claim – Summary Adjudication**

14 Should the Court grant certification of Plaintiffs’ Wage Statement Class, Plaintiffs will
15 then move forward with limited additional discovery, including obtaining the remaining
16 timekeeping and payroll records since Life Care’s last production. Once that discovery has been
17 obtained, Plaintiffs will be able to move for summary judgment, as the only question that will
18 remain is the legal question of whether Life Care’s wage statements comply with Labor Code
19 section 226(a). Should that question be adjudicated in the negative, the statutory penalties under
20 Labor Code § 226(e) will be easily calculable based simply on the number of deficient wage
21 statements received by each class member during the relevant time period. *See* Labor Code §
22 226(e) (providing for statutory penalties of \$50 per employee per initial violation and \$100 per
employee per subsequent violation, up to \$4,000 per employee); *see also* DuMond Report at p. 6.

23 **VI. CONCLUSION**

24 For the foregoing reasons, Plaintiffs request that the Court certify the proposed Classes
25 set forth in the Notice of Motion.

26 Dated: May 22, 2020

27 Respectfully submitted,
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