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County of Los Angeles
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David W. Slayton,
Executive Officer/Clerk of Court,
By G. Carini, Deputy Clerk

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

14 LAUREN FLETCHER HERNANDEZ,
15 individually, and on behalf of all others
16 similarly situated,

17 *Plaintiff,*

18 v.

19 FACEY MEDICAL FOUNDATION, a
20 corporation; FACEY MEDICAL GROUP, a
21 corporation; and DOES 1 through 10, inclusive,

22 *Defendants.*

Case No.: 20STCV41624

CLASS ACTION

[Assigned to: Hon. Carolyn B. Kuhl, Dept. 12]

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

[Filed concurrently with: Declaration of Justin F. Marquez; Declaration of Lauren Fletcher Hernandez; Declaration of Amanda Rivera; Declaration of Ilbret Pourmanafy; and [Proposed] Order]

PRELIMINARY APPROVAL HEARING

Date: September 27, 2023

Time: 11:00 a.m.

Dept: 12

1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on September 27, 2023 at 11:00 a.m., in Department 12 of
3 the Los Angeles County Superior Court, 312 North Spring Street, Los Angeles, California 90012,
4 pursuant to California Code of Civil Procedure § 382 and California Rules of Court, Rule 3.769,
5 *et seq.*, Plaintiffs LAUREN FLETCHER HERNANDEZ, AMANDA RIVERA, and ILBRET
6 POURMANAFY (collectively, “Plaintiffs”) will and hereby do move the Court for an Order
7 granting preliminary approval of the proposed class action settlement between Plaintiff and
8 Defendant FACEY MEDICAL FOUNDATION. Plaintiffs further move the Court for an Order:

- 9 1. Granting preliminary approval of the Class Action and PAGA Settlement Agreement
10 and Class Notice;
- 11 2. Certifying a Class for settlement purposes;
- 12 3. Approving the Notice and the plan for distribution of the Notice;
- 13 4. Appointing Plaintiffs LAUREN FLETCHER HERNANDEZ, AMANDA RIVERA,
14 and ILBRET POURMANAFY as Class Representatives for settlement purposes;
- 15 5. Appointing Plaintiff’s Counsel, Justin F. Marquez, Benjamin H. Haber, and Daniel J.
16 Kramer of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
- 17 6. Appointing Apex Class Action as the Settlement Administrator; and
- 18 7. Scheduling a Final Approval Hearing.

19 The Motion will be based upon this Notice, the attached Memorandum of Points and
20 Authorities, the Declaration of Lauren Fletcher Hernandez, the declaration of Amanda Rivera, the
21 declaration of Ilbret Pourmanafy, and the Declaration of Justin F. Marquez, filed concurrently
22 herewith, the records and files in this Action, and any other further evidence or argument that the
23 Court may properly receive at or before the hearing.

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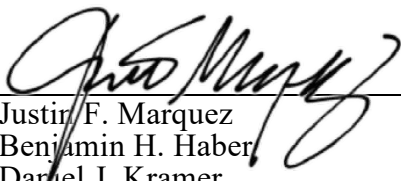
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Dated: August 4, 2023

Respectfully submitted,
WILSHIRE LAW FIRM

By: 
Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiff

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18 Empirical Study”, 53 *UCLA L. Rev.* 1303 (2006)15

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Lauren Fletcher Hernandez, Amanda Rivera, and Ilbret Pourmanafy (collectively,
4 “Plaintiffs”)¹ seek preliminary approval of a proposed \$750,000.00 non-reversionary, wage and hour
5 class action settlement with Defendant Facey Medical Foundation (“Defendant,” and together with
6 Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to
7 approximately 1,492 class members. And, as set forth more fully below, the proposed Settlement
8 satisfies all the criteria for settlement approval under California law. The Settlement was reached
9 after extensive investigation, informal discovery, and negotiations. The negotiations were at arms-
10 length and were facilitated by an experienced class action mediator, David Phillips, Esq., over the
11 course of a full day of mediation and a mediator’s proposal that followed. After extensive
12 negotiations and discussions regarding the strengths and weaknesses of Plaintiffs’ claims and
13 Defendant’s defenses, the Parties reached a settlement.

14 Accordingly, Plaintiffs request that the Court preliminarily approve the proposed Settlement,
15 certify the proposed settlement class for settlement purposes only, approve the proposed notice, and
16 set a final approval hearing.

17 **II. SUMMARY OF THE LITIGATION AND SETTLEMENT**

18 **A. Plaintiffs’ Claims**

19 This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab.
20 Code §§ 2699, *et seq.*) representative action. Plaintiffs and the putative class members worked
21 in California as hourly-paid or non-exempt employees for Defendant during the class period.
22 Defendant is a medical group that provides medical services to patients throughout Southern
23 California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary
24 Approval of Class Action Settlement (Declaration of Justin F. Marquez [“Marquez Decl.”], ¶
25 2.)

26 Plaintiffs allege that Defendant’s payroll, timekeeping, and wage and hour practices
27 _____

28 ¹ Plaintiff Hernandez has concurrently filed a Joint Stipulation to File a Second Amended Complaint to add Plaintiffs Amanda Rivera and Ilbret Pourmanafy to the action.

1 resulted in Labor Code violations. Plaintiffs allege that Defendant failed to pay for all hours
2 worked and failed to provide employees with legally compliant meal and rest periods. Based
3 on these allegations, Plaintiffs assert claims against Defendant for failure to pay minimum and
4 straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to
5 authorize and permit rest periods, failure to timely pay all final wages at termination, failure to
6 provide accurate itemized wage statements, failure to reimburse business expenses, unfair
7 business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

8 On October 30, 2020, Plaintiff Hernandez filed a putative wage and hour class action
9 complaint against Defendant for: (1) failure to pay minimum and straight time wages (Labor
10 Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194
11 and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to
12 authorize and permit rest periods (Labor Code §§ 226.7); (5) failure to timely pay final wages
13 at termination (Labor Code §§ 201-203); (6) failure to provide accurate itemized wage
14 statements (Labor Code § 226); (7) failure to indemnify employees for expenditures (Labor
15 Code § 2802); and (7) unfair business practices (Business and Professions Code 17200, *et seq.*)
16 (*Id.* at ¶ 4.) On November 19, 2020, Plaintiff Hernandez also sent a notice to Defendant and
17 the California Labor & Workforce Development Agency (“LWDA”) alleging similar wage and
18 hour violations pursuant to the PAGA. (*Id.*, **Ex. 1** [Plaintiff’s Notice of Labor Code Violations
19 and PAGA Penalties].) Plaintiff Hernandez also paid the \$75.00 filing fee on November 19,
20 2020 (Marquez Decl., ¶ 4.)

21 On May 7, 2021, Plaintiff filed a First Amended Class & Representative Action
22 Complaint, which added a claim for civil penalties under the PAGA and modified the starting
23 date for the class period to January 16, 2019 in light of a prior wage-and-hour class action
24 settlement involving Providence Little Company of Mary Foundation, which provided releases
25 for hourly-paid, non-exempt employees of Facey through January 15, 2019 (*Id.* at ¶ 5.) On
26 April 7, 2021, Plaintiff Hernandez dismissed Defendant Facey Medical Group from this action.
27 (*Id.* at ¶ 6.)

28 On August 25, 2022, Plaintiff Hernandez filed a motion for class certification. (Marquez

1 Decl., ¶ 7.)

2 Plaintiff Hernandez will concurrently file a Joint Stipulation to File the Second Amended
3 Complaint adding Plaintiff Rivera and Plaintiff Pourmanafy as plaintiffs and class
4 representatives to the current action. (Marquez Decl., ¶ 8.)

5 **B. Discovery and Investigation**

6 Following the initial Status Conference, Plaintiff propounded formal written discovery.
7 After Plaintiff filed the motion for class certification, the Parties agreed to stay briefing and
8 hearing of the motion for class certification in exchange for participating in private mediation
9 and engaging in informal discovery. In advance of mediation, Defendant produced a sample of
10 timekeeping and pay records for the class members, which included time records and
11 corresponding pay records for approximately 25% of the proposed class. Defendant also
12 provided documents of its wage and hour policies and practices during the class period and
13 information regarding the total number of current and former employees. (Marquez Decl., ¶ 9.)

14 After reviewing documents regarding Defendant's wage and hour policies and analyzing
15 Defendant's timekeeping and payroll records with the assistance of a retained expert, Class
16 Counsel was able to evaluate the probability of class certification, success on the merits, and
17 Defendant's maximum monetary exposure for all claims. (Marquez Decl., ¶ 10.) Class Counsel
18 also investigated the applicable law regarding the claims and defenses asserted in the litigation.
19 Class Counsel reviewed these records and prepared a damage analysis prior to mediation.

20 **C. Settlement Negotiations**

21 On January 9, 2023, the Parties participated in private mediation with experienced class
22 action mediator David Phillips, Esq. (Marquez Decl., ¶ 11.) The mediation was conducted via
23 Zoom. (*Id.*) The settlement negotiations were at arm's length and, although conducted in a
24 professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing to
25 explore the potential for a settlement of the dispute, but each side was also prepared to litigate
26 their position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive
27 negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and
28 Defendant's defenses, the mediator issued a mediator's proposal that the Parties ultimately

1 accepted approximately one week later. (*Id.* at ¶ 12.) The Parties subsequently negotiated and
2 drafted a long-form agreement, the material terms of which are encompassed within the
3 Settlement Agreement. (*Id.* at ¶ 12, **Ex. 2** [Stipulation and Settlement of Class Action and
4 Private Attorneys General Act Representative Claims and Class Notice].)

5 Class Counsel has conducted a thorough investigation into the facts of this case. Based
6 on the foregoing discovery and their own independent investigation and evaluation, Class
7 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
8 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
9 of significant delay, the defenses that could be asserted by Defendant both to certification and
10 on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 19.)

11 Indeed, the \$750,000.00 Settlement represents **52.5% of the realistic maximum**
12 **recovery of \$1,427,605.32.** (Marquez Decl., ¶ 29.) Although Class Counsel estimated that
13 Defendant’s maximum potential liability for all claims was approximately \$22,231,602, when
14 the risk of prevailing at certification and trial are factored into the equation, Class Counsel
15 believes that Defendant’s realistic exposure was approximately \$1,427,605.32, meaning the
16 Settlement achieves a significant recovery. (*Id.* at ¶¶ 20-29.) Considering the risk and
17 uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class.
18 (*Id.* at ¶ 33.) This result is also significant considering that the class period was significantly
19 limited due to a prior class action settlement. (*Id.*) Indeed, because of the proposed Settlement,
20 class members will receive timely, guaranteed relief that they likely would not have been to
21 achieve on their own, and will avoid the risk of an unfavorable judgment.

22 **D. Key Terms of the Proposed Settlement**

23 The Settlement’s key terms include:

24 1. Class Definition: For settlement purposes only, the Parties agree to the certification
25 of a class pursuant to California Code of Civil Procedure § 382 defined as: all persons employed
26 by Defendant in California as hourly, non-exempt employees during the Class Period. (Settlement,
27 § 1.5.)

28 ///

1 2. Class Period: “[T]he period from January 16, 2019 to end on the date of Preliminary
2 Approval, or April 10, 2023, whichever occurs first” (Settlement, § 4.)

3 3. Participating Class Members: “[a] member of the Class, as either a Participating
4 Class Member or Non-Participating Class Member (including a Non-Participating Class Member
5 who qualifies as an Aggrieved Employee).” (Settlement, § 1.9.)

6 4. Aggrieved Employee: means “a person employed in California by Defendant as
7 hourly non-exempt employees during the PAGA Period.” (Settlement, § 1.4.)

8 5. PAGA Period: means “the period from October 30, 2019 to Preliminary Approval,
9 or April 10, 2023, whichever occurs first.” (Settlement, § 1.30.) Every class member is not also
10 an Aggrieved Employee.

11 6. Gross Settlement Amount: This amount is \$750,000.00 and will be used to pay
12 Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class
13 Counsel Fees, Class Counsel Expenses, Class Representative Service Payment and the
14 Administrator’s Expenses. (Settlement, § 1.21.) Defendant shall fully fund the Gross Settlement
15 Amount, plus all employer-side taxes, no later than 14 days after the Effective Date as described
16 in the Settlement Agreement. (Settlement, § 4.3.)

17 7. Uncashed Checks: For any Participating Class Member whose Individual Class
18 Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date,
19 the Administrator shall transmit the funds represented by such checks to the California Controller’s
20 Unclaimed Property Fund in the name of the Class Member thereby leaving no “unpaid residue”
21 subject to the requirements of California Code of Civil Procedure Section 384, subd. (b)
22 (Settlement, § 4.4.3.)

23 8. Release by Participating Class Members: “All Participating Class Members, on
24 behalf of themselves and their respective former and present representatives, agents, attorneys,
25 heirs, administrators, successors, and assigns, release Released Parties from all claims asserted in
26 the Action, arising from or related to the facts and claims alleged in the Action, or that could have
27 been raised in the Action based on the facts and claims alleged, as amended. The Class Released
28 Claims include all claims for unpaid wages, including, failure to pay minimum wages, straight time

1 compensation, overtime compensation, double-time compensation, and interest; the calculation of
2 the regular rate of pay; missed meal period and rest-period premiums, including failure to pay
3 premiums at the regular rate of compensation; reimbursement for all necessary business expenses;
4 payment for all hours worked, including off-the-clock work; wage statements; deductions; failure
5 to keep accurate records; unfair business practices; penalties, including, but not limited to, civil
6 penalties, statutory penalties, recordkeeping penalties, wage statement penalties, minimum-wage
7 penalties, and waiting-time penalties; and attorneys' fees and costs; all claims related to the
8 Released Claims which are asserted in the Complaint or which could have been asserted based on
9 the factual allegations pled in the Complaint arising under: the California Labor Code (including,
10 but not limited to, sections 201, 202, 203, 204, 218.5, 226, 226.3, 226.7, 510, 512, 558, 558.1,
11 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, and 2802), the Wage Order 5-2001 of the
12 California Industrial Welfare Commission; the PAGA; California Business and Professions Code
13 section 17200 based on the foregoing, *et seq.* Except as set forth in Section 5.1 of this Agreement,
14 Participating Class Members do not release any other claims, including claims for vested benefits,
15 wrongful termination, violation of the Fair Employment and Housing Act, unemployment
16 insurance, disability, social security, workers' compensation, or claims based on facts occurring
17 outside the Class Period." (Settlement, § 5.2.)

18 9. Release by Aggrieved Employees: "all claims for PAGA penalties that were alleged,
19 or reasonably could have been alleged, based on the facts stated in the Operative Complaint, the
20 PAGA Notice and ascertained in the course of the Action, including, e.g., (a) any and all claims
21 unpaid wages, including, failure to pay minimum wages, straight time compensation, overtime
22 compensation, double-time compensation, and interest; the calculation of the regular rate of pay;
23 missed meal period and rest-period premiums, including failure to pay premiums at the regular rate
24 of compensation; reimbursement for all necessary business expenses; payment for all hours
25 worked, including off-the-clock work; wage statements; deductions; failure to keep accurate
26 records; unfair business practices; penalties, including, but not limited to, civil penalties, statutory
27 penalties, recordkeeping penalties, wage statement penalties, minimum-wage penalties, and
28 waiting-time penalties; and attorneys' fees and costs." (Settlement, § 5.3.)

1 10. PAGA Allocation: The settlement includes \$25,000.00 allocated to Plaintiff’s
2 claims under PAGA, with 75% of which (\$18,750.00) being paid to the LWDA and 25%
3 (\$6,250.00) being paid to the Aggrieved Employees. (Settlement, § 1.33.) Class Counsel
4 submitted the proposed settlement to the LWDA before filing this Motion for Preliminary
5 Approval. (Marquez Decl., ¶ 14.)

6 11. Net Settlement Fund/Amount: “means the Gross Settlement Amount, less the
7 following payments in the amounts approved by the Court: Individual PAGA Payments, the
8 LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment,
9 Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The
10 remainder is to be paid to Participating Class Members as Individual Class Payments.”
11 (Settlement, § 1.27.)

12 12. Distribution Formula: The Individual Class Payment will be calculated by (a)
13 dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating
14 Class Members during the Class Period and (b) multiplying the result by each Participating Class
15 Member’s Workweeks. (Settlement, § 3.2.4.)

16 13. Tax Allocation: “33% of each Participating Class Member’s Individual Class
17 Payment will be allocated to settlement of wage claims (the “Wage Portion”). The Wage Portions
18 are subject to tax withholding and will be reported on an IRS W-2 Form. The remaining 67% of
19 each Participating Class Member’s Individual Class Payment will be allocated to settlement of
20 claims for interest and penalties (the “Non-Wage Portion”). The Non-Wage Portions are not
21 subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class
22 Members assume full responsibility and liability for any employee taxes owed on their Individual
23 Class Payment.” (Settlement, § 3.2.4.1.)

24 14. Class Representative Service Award: Subject to Court approval, Plaintiff Hernandez
25 shall be paid a service award not to exceed \$12,500.00, and Plaintiff Rivera and Plaintiff
26 Pourmanafy shall be paid a service award not to exceed \$5,000 each. (Settlement, § 3.2.1.) This
27 amount is for Plaintiffs’ time and effort in bringing and presenting the action, and in exchange for
28 a general release of all claims, known or unknown, pursuant to California Civil Code Section 1542.

1 (Settlement, §§ 3.2.1, 5.1.) If the Court approves a lesser enhancement, the Administrator will
2 retain the remainder in the Net Settlement Amount. (Settlement, § 3.2.1.)

3 15. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
4 a fee application of up to 33 1/3% of the Gross Settlement Amount or \$250,000.00, plus out-of-
5 pocket costs not to exceed \$50,000.00. (Settlement, § 3.2.1.)

6 16. Court Approved Notice of Class Action Settlement and Hearing Date for Final Court
7 Approval: The Notice sets forth, in plain terms, a statement of the case, the terms of the Settlement
8 Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and
9 an explanation of how the settlement allocations are calculated. (Settlement, Ex. A, Class Notice.)
10 Class Members will be notified by first-class mail of the settlement. (Settlement, § 7.4.2.) Apex
11 Class Action, the proposed Settlement Administrator, will undertake its best efforts to ensure that
12 the Notice is provided to the current addresses of class members. (*Id.*; Marquez Decl., ¶ 15, **Ex. 4**
13 [Settlement Administrator Bid].)

14 **III. DISCUSSION**

15 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
16 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
17 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super.*
18 *Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached
19 through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to
20 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
21 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

22 In considering whether a settlement is reasonable, the trial court should consider relevant
23 factors, which may include the strength of plaintiff's case, the risk, expense, complexity and likely
24 duration of further litigation, the risk of maintaining class action status through trial, the amount
25 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
26 experience and views of counsel, the presence of a governmental participant, and the reaction of
27 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
28 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself

1 that the class settlement is within the “ballpark” of reasonableness. (*Id.* at p. 133.) The record
2 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*
3 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not
4 require “an explicit statement of the maximum amount the plaintiff class could recover if it
5 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy
6 and the realistic range of outcomes of the litigation.”].)

7 As discussed below, Class Counsel has provided information exceeding the threshold
8 required to provide this Court with materials and information necessary to determine that the
9 proposed settlement is fair, adequate, and reasonable.

10 **A. The Settlement Is Fair, Reasonable, Adequate, and the Product of**
11 **Investigation, Litigation, and Negotiation**

12 **1. The Settlement Is the Product of Discovery, Investigation, and Informed**
13 **and Non-Collusive Arm’s-Length Negotiations**

14 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
15 evidence to the contrary is offered; thus, there is a presumption here that the negotiations were
16 conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.)
17 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super.*
18 *Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
19 fact that a plaintiff might have received more if the case had been fully litigated is no reason not
20 to approve the settlement.”].)

21 The Settlement was reached following extensive negotiations following one day of
22 mediation with experienced employment mediator, David Phillips, Esq. (Marquez Decl., ¶ 11.)
23 The settlement negotiations were at arm’s length and, although conducted in a professional manner,
24 were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a
25 settlement of the dispute, but each side was also prepared to litigate their or its position through
26 trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and
27 discussions regarding the strengths and weaknesses of Plaintiffs’ claims and Defendant’s defenses,
28 the Parties reached an agreement pursuant to a mediator’s proposal. (*Id.* at ¶ 9.)

1 Prior to reaching this settlement, Class Counsel conducted extensive informal discovery
2 concerning the claims set forth in the Litigation, such as a sample of class member timekeeping
3 and payroll records, Defendant’s policies and procedures concerning the payment of wages, the
4 provision of meal and rest breaks, providing all wages at separation, and the issuance of wage
5 statements, as well as information regarding the number of putative class members and the mix of
6 current versus former employees, the wage rates in effect, and the amount of meal and rest period
7 premium wages paid to class members. (Marquez Decl., ¶¶ 9-10.) In conjunction with their factual
8 investigation, Class Counsel investigated the applicable law regarding the claims and defenses
9 asserted in the litigation. (*Id.*) Thus, Plaintiff and her counsel were able to act intelligently and
10 effectively in negotiating the proposed Settlement.

11 Class Counsel also has considerable experience and has demonstrated competence with
12 litigating wage and hour class actions. (Marquez Decl., ¶¶ 44-54.) Again, this supports the
13 position that the terms of the Settlement are premised on objective evidence that has been
14 considered and weighed in light of the risks, expenses, and time consumption to both sides of
15 continued litigation of this action.

16 **2. The Settlement Is Fair and Reasonable in Light of the Parties’**
17 **Respective Legal Positions**

18 A settlement is not judged against what might plaintiff recover had he prevailed at trial, nor
19 does the settlement have to provide 100% of the damages sought to be fair and reasonable.
20 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is inherent
21 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
22 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
23 to a class settlement because the public interest may indeed be served by a voluntary settlement in
24 which each side gives ground in the interest of avoiding litigation.”].)

25 This settlement avoids the risks and the accompanying expense of further litigation.
26 (Marquez Decl., ¶ 31.) While Plaintiff is confident in the merits of her claims, a legitimate
27 controversy exists as to each cause of action. (*Id.* at ¶ 30.) Plaintiff also recognizes that proving
28 the amount of wages due to each class member would be an expensive, time-consuming, and

1 uncertain proposition. (*Id.*)

2 The proposed settlement of \$750,000.00 therefore represents a substantial recovery when
3 compared to Plaintiff’s reasonably forecasted recovery. (Marquez Decl., ¶¶ 20-33.) Because of
4 the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the
5 risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties
6 involved in achieving class certification, the burdens of proof necessary to establish liability, the
7 probability of appeal of a favorable judgment, it is clear that the settlement amount of \$750,000.00
8 is within the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*)
9 ***Indeed, each Settlement Class Member is eligible to receive an average net benefit of***
10 ***approximately \$260.56.*** (*Id.* at ¶ 32.)

11 **3. Class Counsel Has Extensive Experience in Class Action Litigation**

12 The settlement negotiations were conducted by highly capable and experienced counsel.
13 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
14 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 44-
15 54.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,
16 they support the proposed Settlement as being in the best interests of the class.

17 **B. The Proposed Class Notice of Settlement Should Be Approved**

18 The proposed Notice, in the form attached to the Settlement Agreement, should be approved
19 for dissemination to the class. The Notice informs the class of the terms of the settlement and of
20 their rights to be excluded from the settlement. And if there are class members who wish to object
21 to this proposed class action settlement, they will have the opportunity to file their objections and
22 be heard at the Final Approval Hearing. Accordingly, the proposed Notice meets all the
23 requirements of Rule 3.769(f) of the California Rules of Court.

24 **C. The Proposed Attorneys’ Fees and Costs Are Reasonable**

25 Under the Settlement, subject to the Court’s approval, Defendant agrees to pay Class
26 Counsel reasonable attorneys’ fees in amount up to 33 1/3% of the Gross Settlement Amount or
27 \$250,000.00, and up to \$50,000.00 in costs. These amounts are disclosed to all class members in
28 the proposed Notice and are reasonable.

1 **1. Class Counsel Request an Award of Fees Based on the “Common Fund”**
2 **Method**

3 California courts have long awarded attorneys’ fees as a percentage of the benefit created
4 by counsel in creating a common fund. The California Supreme Court held that “when a number
5 of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs
6 for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs
7 may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34,
8 quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

9 Class Counsel seek an award of attorneys’ fees on the “percentage of recovery/ common
10 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
11 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,
12 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
13 Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
14 from which others derive benefits may require those passive beneficiaries to bear a fair share of
15 the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
16 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
17 has been applied “consistently in California when an action brought by one party creates a fund in
18 which other persons are entitled to share.” (*Id.* at p. 110.)

19 The California Supreme Court affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th
20 480 that, “when class action litigation establishes a monetary fund for the benefit of the class
21 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
22 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
23 fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages of the percentage
24 method—including relative ease of calculation, alignment of incentives between counsel and the
25 class, a better approximation of market conditions in a contingency case, and the encouragement
26 it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—
27 convince us the percentage method is a valuable tool that should not be denied our trial courts.”
28 (*Id.* [internal citations omitted].)

1 **2. The Requested Fee Award Is in Line with Typical Cases**

2 According to a leading treatise on class actions, “[n]o general rule can be articulated on
3 what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on
4 a reasonable fee award from a common fund in order to assure that the fees do not consume a
5 disproportionate part of the recovery obtained for the class, although somewhat larger percentages
6 are not unprecedented.” (See Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 14.03.)
7 Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty
8 to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; see also
9 *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most
10 cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10
11 million].)

12 Here, Plaintiffs request attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
13 is in line with the prevailing guidelines established in California case law and academic literature,
14 and is consistent with awards in California. (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
15 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
16 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)
17 Accordingly, Plaintiff respectfully requests that the Court approve the attorneys’ fees as negotiated
18 by the Parties and requested herein.

19 **3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code**

20 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
21 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
22 section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were
23 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
24 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
25 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
26 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
27 Counsel. (Marquez Decl., ¶¶ 42-43.) Class Counsel undertook this matter solely on a contingent
28 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the

1 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
2 ahead of all other concerns.

3 **4. The Experience, Reputation and Ability of Class Counsel Support the**
4 **Requested Fee Award**

5 As demonstrated by their past experience in pursuing class actions on behalf of consumers
6 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
7 Decl., ¶¶ 44-54.) Class Counsel has been involved as lead counsel or co-counsel in several class
8 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
9 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee
10 award is supported here.

11 Class Counsel’s experience in wage and hour class actions was integral in evaluating the
12 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
13 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
14 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
15 action litigation. Based on these and other factors, Class Counsel has frequently received fee
16 awards of this percentage from the gross recovery for the class. Therefore, the requested fee award
17 is reasonable and fair.

18 **D. The Service Awards to Named Plaintiffs Are Reasonable**

19 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
20 compensate them for the expense or risk they have incurred in conferring a benefit on other
21 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
22 of class action settlement agreements containing enhancements for the class representatives, which
23 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
24 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
25 2009) 563 F.3d 948, 958-59.)

26 Service awards are particularly important to plaintiffs in wage and hour cases because they
27 promote the important public policies underlying the wage and hour laws. This strong policy is
28 codified in California Labor Code Section 90.5, which provides, “it is the policy of this state to

1 vigorously enforce minimum labor standards in order to ensure employees are not required or
2 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
3 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
4 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
5 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
6 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
7 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

8 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
9 a service award in the amount of \$12,500.00 to Plaintiff Hernandez and service awards of \$5,000
10 each to Plaintiff Rivera and Plaintiff Pourmanafy. This amount is also in exchange for Plaintiffs’
11 general release of all claims against Defendant. Class Counsel represent that Plaintiffs devoted a
12 great deal of time and work for this case, including communicating with counsel on a frequent
13 basis, preparing for and appearing for deposition, preparing for mediation, and reviewing case-
14 related documents. (Marquez Decl., ¶¶ 34-38.) This amount is reasonable particularly in light of
15 the substantial benefits Plaintiffs generated for all class members. (*Id.*) Indeed, in *Karl Adams,*
16 *III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F.
17 Marquez helped negotiate a \$2.5 million class action settlement for 339 class members, and the
18 court approved a \$25,000 class representative incentive award for each named plaintiff. (Marquez
19 Decl., ¶ 38.)

20 When compared with the amounts awarded in typical class action cases, the amount
21 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
22 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
23 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
24 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
25 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
26 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
27 while named plaintiffs in other employment class actions received an average award of \$12,121
28 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards

1 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
2 compensating them for the high costs of their service to the class, including risks of stigmatization
3 or retaliation on the job.” (*Id.* at p. 1308.)

4 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

5 **A. Legal Standard**

6 The proposed Settlement Class is well suited for class certification. All of the claims derive
7 from a core set of alleged violations of California’s wage and hour laws and regulations. For the
8 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
9 prerequisites for certification under California Code of Civil Procedure § 382. Section 382
10 provides: “when the question is one of a common or general interest, of many persons, or when
11 the parties are numerous, and it is impracticable to bring them all before the court, one or more
12 may sue or defend for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to
13 Section 382: “(1) There must be an ascertainable class; and (2) there must be a well-defined
14 community of interest in the questions of law and fact involved affecting the parties to be
15 represented.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 [internal citations omitted].) To
16 clarify these requirements, the California Supreme Court has looked to Federal Rule of Civil
17 Procedure 23 to explain that the community-of-interest requirement itself embodies three factors:
18 “(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical
19 of the class; and (3) class representatives who can adequately represent the class.” (*Richmond v.*
20 *Dart Indus., Inc.* (1981) 29 Cal.3d 462, 470.)

21 California law and policy favor the fullest and most flexible use of the class action device.
22 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
23 means to prevent a failure of justice in our judicial system” particularly where the rights of
24 consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434.) Any doubt as to
25 the appropriateness of class treatment should be resolved in favor of certification. (*Richmond,*
26 *supra*, 29 Cal.3d at pp. 473-75.)

27 ///

28 ///

1 **B. Plaintiffs Maintain That the Criteria for Class Certification Are Satisfied for**
2 **Settlement Purposes.**

3 **1. The Classes Are Ascertainable and Numerous**

4 The proposed class that Plaintiffs seek to represent is easily ascertainable, and includes
5 approximately 1,492 current and former employees of Defendant.

6 Plaintiffs maintain that there is an easily ascertainable class, defined by objective and
7 precise criteria. Because class members are identified using specific criteria in the regular business
8 records of Defendant, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life Ins. Co.*
9 (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the
10 subject of the lawsuit is sufficient to make the class ascertainable].)

11 “The requirement of Code of Civil Procedure Section 382 that there be ‘many’ parties to a
12 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
13 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
14 may be maintained as a class action even where the parties are numerous and it is in fact practicable
15 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
16 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
17 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
18 574; *see also Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
19 Plaintiffs contend that numerosity is plainly satisfied.

20 **2. There are Many Common Issues of Law and Fact Which Predominate**

21 The Court should grant conditional class certification for settlement purposes here on the
22 grounds that questions of law and fact common to all class predominate over any individual
23 questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant
24 adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
25 Cal.App.3d 605.)

26 Here, the employment practices at issue are: whether Defendant had legally compliant
27 policies and practices to provide employees with meal periods; whether Defendant had legally
28 compliant policies and practices authorizing and permitting their employees to take rest periods;

1 whether Defendant had legally compliant policies and practices for all hours worked, including
2 overtime wages; whether final payment of wages was untimely and excluded unpaid wages,
3 including meal and rest period premium wages; and whether the wage statements were
4 consequently non-compliant. Plaintiffs contend that the factual and legal issues are the same for
5 all of the identified class members, including Plaintiffs. Further, all class members suffered from,
6 and seek redress for, the same alleged injuries.

7 **3. Plaintiffs' Claims Are Typical of the Claims of the Class**

8 The typicality requirement does not focus on the individual characteristics or circumstances
9 of the representative plaintiff compared to those of the remainder of the class, but rather upon the
10 typicality of the proposed representative's claims as they relate to the defendant's conduct and
11 activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 [“[t]he only requirements are that
12 common questions of law and fact predominate and that the class representative be similarly
13 situated” vis-à-vis the class.]) A representative plaintiff's claims are typical of the class if they
14 arise from the same event, practice or course of conduct, and if the claims rest on the same legal
15 theories. (*Id.*) That is precisely the case here. Plaintiffs are former employees of Defendant; as
16 such, they allege that they were subject to the same policies and practices as other similarly situated
17 employees.

18 **4. Plaintiffs and Their Counsel Meet the Adequacy Requirement**

19 The adequacy of representation requirements is met by fulfilling two conditions: first, a
20 named plaintiff must be represented by counsel qualified to conduct the pending litigation; second,
21 a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of*
22 *America* (1976) 60 Cal.App.3d 442, 451.)

23 All of these requirements are met here for settlement purposes. Plaintiffs retained counsel
24 with extensive experience in prosecuting complex class actions, including similar class actions that
25 previously settled. (Marquez Decl., ¶¶ 44-54.) Class Counsel unquestionably is “qualified,
26 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148
27 Cal.App.3d 862, 875.) In addition, Plaintiffs have no conflicts, and Plaintiff have, with counsel,
28 litigated this case and diligently reviewed the settlement terms, showing their dedication.

1 Plaintiffs’ willingness to serve as a representative demonstrates their serious commitment to
2 bringing about the best results possible for the class and subclass. (*McGhee, supra*, 60 Cal.App.3d
3 at p. 451.)

4 **5. A Class Action is Superior to a Multiplicity of Litigation**

5 Finally, in making its class certification decision, the Court must determine that a class
6 action would be superior to alternative means for the fair and efficient adjudication of the litigation.
7 By consolidating many potential individual actions into a single proceeding, this Court’s use of the
8 class action device enables it to manage this litigation in a manner that serves the economics of
9 time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-
10 situated employees with small but nevertheless meritorious claims for damages would, as a
11 practical matter, have no means of redress because of the time, effort and expense required to
12 prosecute individual actions. (*Gentry, supra*, 42 Cal.4th at p. 443, 457-62; *Leyva v. Medline Ind.*
13 (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns
14 are essentially non-existent.

15 **V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND**

16 **A. The Proposed Notice Plan Satisfies Due Process**

17 Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court,
18 Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an
19 appropriate notice program. (*Cartt v. Super. Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
20 statutory or due process requirement that all class members receive actual notice, but in this matter,
21 the class members will receive direct mailed notice. As the Court of Appeals has explained, “[t]he
22 notice given should have a reasonable chance of reaching a substantial percentage of the Class
23 Members” (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
24 direct mailing, the best possible form of notice.

25 **B. The Notice is Accurate and Informative**

26 The proposed Notice should be approved. It will be disseminated through direct U.S. first
27 class mail to the last known address for each Class Member. It informs the Class Members of the
28 terms of the settlement and their right to be excluded from the Settlement. And if there are Class

1 Members who wish to object to this proposed class action settlement, they will have the
2 opportunity to file their objections and be heard at the Final Approval Hearing.

3 The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg,
4 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
5 terms and conditions of the settlement agreement, in an informative and coherent manner. It
6 makes clear that the settlement agreement does not constitute an admission of liability by the
7 Defendant, who deny all liability, and it recognizes that this Court has not ruled on the merits
8 of the action. It also states that the final settlement approval decision has yet to be made. The
9 Notice thus complies with the standards of fairness, completeness, and neutrality required of a
10 combined settlement-certification class notice.

11 **VI. CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary
13 approval of the proposed settlement and set a Final Approval Hearing in January 2024 or as soon
14 as is practicable for the Court's calendar.

15 Respectfully submitted,

16 Dated: August 4, 2023

WILSHIRE LAW FIRM

17
18 By:  _____

Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

19
20 *Attorneys for Plaintiff*

PROOF OF SERVICE

Hernandez v. Facey Medical Foundation, et al.
20STCV41624

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ashley Narinyans, am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is 3055 Wilshire Blvd., 12th Fl., Los Angeles, California 90010. My electronic service address is anarinyans@wilshirelawfirm.com.

On August 4, 2023, I served the foregoing **PLAINTIFFS’ NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:


Derek R. Havel
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Matthew A. Tobias
mtobias@sheppardmullin.com
Tyler J. Johnson
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Telephone: 213.620.1780
Facsimile: 213.620.1398

Attorneys for Defendant
Facey Medical Foundation

- (X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.
- (X) **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service **CASEANYWHERE**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this **August 4, 2023**, at Los Angeles, California.



Ashley Narinyans