IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NICHOLE WALKINSHAW, TYSHA BRYANT, APRIL ENDICOTT, HEATHER NABITY, MEGHAN MARTIN, ALANDREA ELLWANGER, TROY STAUFFER, and all other similarly situated former or current employees of Defendant, Plaintiffs, vs. COMMONSPIRIT HEALTH f/k/a CATHOLIC HEALTH INITIATIVES, CHI NEBRASKA d/b/a CHI HEALTH, and SAINT ELIZABETH REGIONAL MEDICAL CENTER, Defendant.	)	Case No. 4:19-cv-03012-BCB-SMB

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF SETTLMENT

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I. INTRODUCTION

Plaintiffs Nichole Walkinshaw, Tysha Bryant, April Endicott, Heather Nabity, Meghan Martin, Alandrea Ellwanger, and Troy Stauffer respectfully submit this Brief in support of their Motion for Class Certification and Preliminary Approval of the proposed Settlement with Defendants pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

This collective and class action alleges various violations by Defendants of the Fair Labor Standards Act ("FLSA") and Nebraska law. Pursuant to the Settlement, Defendants have collectively agreed that they will pay $800,000.00 into a Class Settlement Fund to be allocated to the FLSA opt-ins and the Class (collectively "the Settlement Class"). In exchange, the Settlement Class will dismiss with prejudice its claims asserted in the Second Amended Complaint against Defendants. The Settlement Class will also release Defendants from any claims arising out of the same factual predicate as those in the Second Amended Complaint. Given the uncertainty of establishing both liability and damages, the Settlement represents an excellent result for the Settlement Class and the Court should preliminarily approve it.

II. HISTORY AND STATUS OF THE CASE

A. The Factual Background of the Allegations

Plaintiffs are former and current hourly nurses in the Radiology Department at Defendant Saint Elizabeth Regional Medical Center ("St. Elizabeth") in Lincoln, Nebraska, between February 6, 2015 and the present. Doc. # 115 ("SAC") ¶¶ 11-17; Doc. # 122 ("CHI Answ.") ¶¶ 11-17. Defendant CHI Health ("CHI") operates hospitals and healthcare facilities including St. Elizabeth throughout Nebraska and southwest Iowa. SAC ¶¶ 2, 19-20; Doc. #122 ¶¶ 2. Defendant CommonSpirit Health is a corporation formed in January 2019 through the

merger of Dignity Health and Catholic Health Initiatives and has since been CHI's corporate parent. SAC ¶¶ 2, 9a; Doc. # 183 ("CommonSpirit Answ.") ¶¶ 2, 9a.

Since at least February 2015, Defendants have designated certain shifts of hourly nurse employees in various departments as "on-call" shifts ("On-Call Shifts"). SAC ¶ 37; CHI Answ. ¶ 37; CommonSpirit Answ. ¶ 37. Pursuant to Defendants' written on-call policies ("On-Call Policies"), while on an On-Call Shift, nurses are required, for example, to be available and reachable by phone and able to report to their CHI location within 30 minutes of being called to work. SAC ¶¶ 37, 42, 46; CHI Answ. ¶¶ 37, 42, 46; CommonSpirit Answ. ¶ 37. Since at least February 2015, Defendants have paid nurses $2.00–$4.00 per hour for On-Call Shifts. SAC ¶¶ 39, 52; CHI Answ. ¶¶ 39, 52. During that period, Defendants' written On-Call Policies provided with respect to some of Defendants' locations in Nebraska: "Work relating to the principal activities of a position that can be taken care of with a phone call or access to work from home will receive one and one-half times the regular base rate in 15-minute increments" ("the General Remote On-Call Work Pay Provision"). SAC ¶¶ 44, 151, 165; *see* Doc. # 117-6 at 3 of 4.

The Complaint alleges that Defendants had "a practice requiring nurses," including Plaintiffs, "to perform work while they are 'on call'" relating to the principal activities of their position without actually reporting to the hospital ("Remote On-Call Work"). SAC ¶¶ 3, 4. The Remote On-Call Work involved, for example, telephone calls and text messages with doctors and other facility personnel related to patient care. *Id*. ¶¶ 4, 38. The Complaint alleges that at least before October 2018, Defendants did not compensate these nurses for Remote On-Call Work beyond the On-Call Shift rate of $2.00–$2.50 per hour. *Id*. ¶¶ 5, 39.

B. The Claims and Relief Requested

The Second Amended Complaint alleges one count under the FLSA on behalf of a collective and six counts under Nebraska law on behalf of the Class and the Subclasses:

FLSA Claim

- **Count I** alleges that Defendants violated the FLSA by failing to record and include Remote On-Call Work time to compute nurses' overtime, and pay them overtime for Remote On-Call Work. *Id*. ¶¶ 127–37.

Nebraska Claims

- **Count II** alleges on behalf of the Class that Defendants violated the Nebraska Wage and Hour Act ("NWHA"), Neb. Rev. Stat. § 48-1203, by failing to pay minimum wages for Remote On-Call Work, as well as the Nebraska Wage Payment and Collection Act ("NWPCA"), Neb. Rev. Stat. § 48-1230, by failing to pay such wages within 30 days of regular paydays. *Id*. ¶¶ 138–46.
- **Count III** alleges on behalf of the 2017 Subclass that Defendants violated the NWPCA by failing to pay nurses within 30 days of regular paydays at time and a half their regular rates in 15-minute increments pursuant to the General Remote On-Call Work Pay Provision, from June 2017 through September 2018. *Id*. ¶¶ 147–57.
- **Count IV** alleges on behalf of the 2017 Subclass that Defendants breached their contractual obligations under the General Remote On-Call Work Pay Provision. *Id*. ¶¶ 158–66.
- **Count V** alleges on behalf of the 2016 Subclass that Defendants violated the NWPCA by failing to pay nurses within 30 days of regular paydays from March

2016 to May 2017 pursuant to a slightly different iteration of the General Remote On-Call Work Pay Provision that required Defendants to pay employees for a minimum of 15 minutes or actual time worked, whichever is greater, at time and a half their regular rates, for Remote On-Call Work ("the 2016 Remote On-Call Work Pay Provision"). *Id*. ¶¶ 167–76.

- **Count VI** alleges on behalf of the 2016 Subclass that that Defendants breached their contractual obligations under the 2016 Remote On-Call Work Pay Provision. *Id*. ¶¶ 177–83.
- **Count VII** alleges on behalf of the 2016 and 2017 Subclasses that Defendants were unjustly enriched as a result of their failure to pay wages for Remote On-Call Work performed and/or their retention of the value of the service performed. *Id*. ¶¶ 184–94.

The Complaint seeks, among other relief, declarations that Defendants violated the FLSA, the NWHA, and the NWPCA and breached their contractual obligations and recovery of back wages, liquidated damages, civil penalties, and attorneys' fees and costs. SAC at 73–74.

C. Procedural Background

Since this case was filed, the Parties and their counsel vigorously litigated the case.

Motions to Dismiss

Plaintiffs filed their initial Complaint on February 6, 2019 and an Amended Complaint on June 24, 2019. Doc. ## 1, 25. All Defendants moved to dismiss the latter under Rule 12(b)(6), and CommonSpirit moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2). Doc. ## 44, 46. The Court denied both motions in their entirety on December 20, 2019. Doc. # 60. After Plaintiffs filed the Second Amended Complaint to add Counts V–VII (Doc. ## 110, 115),

CommonSpirit moved to dismiss under Rule 12(b)(2). Doc. # 120. The Court denied that motion on December 17, 2020. Doc. # 179.

FLSA Conditional Certification

On July 20, 2020, Plaintiffs moved for conditional certification under the FLSA of a collective consisting of hourly nurses at fifteen locations (with twelve in Nebraska and three in Iowa) who were subject to Defendants' on-call policy. Doc. # 98. The Court granted conditional certification and approved a notice to inform collective members of the opportunity to join the case on December 17, 2020. Doc. # 179. By February 1, 2021, notice was issued to approximately 754 potential collective members. Doc. ## 188, 199. After Plaintiffs' counsel raised a concern to Defendants' counsel in May 2021 that some nurses did not appear to be included in the list of potential Collective members, Defendants produced a supplemental collective list including an additional 1,804 individuals. After a supplemental notice was sent to them on October 15, 2021 (Doc. # 278), there are 215 FLSA opt-ins ("FLSA Opt-Ins") including the seven Named Plaintiffs. Cheng Decl. ¶ 6.

Discovery

In discovery, Plaintiffs served more than 60 requests for production of documents and 30 interrogatories on each Defendant. *Id*. ¶¶ 2-3. Plaintiffs defended the depositions of the seven Plaintiffs. *Id*. ¶ 5. Plaintiffs' counsel took the depositions of CHI's Senior Vice President and Chief Human Resources Officer, Aaron Austin, and two former St. Elizabeth department directors, Jesse Thomas and Michael Hopkins. *Id*. Defendants collectively produced more than 54,000 pages of documents including Defendants' timekeeping and on-call policies and timekeeping and payroll data for the FLSA Opt-Ins and Class Members. *Id*. ¶ 4. Plaintiffs' counsel submitted numerous position statements and participated in numerous conferences with

Magistrate Judge Bazis, regarding various discovery disputes over, for example, the adequacy of Defendants' FLSA collective list and discovery responses and data and document production and the scope of discovery on FLSA Opt-Ins' claims. Doc. ## 172, 175, 176, 186, 190, 191, 192, 216, 221, 222, 239, 240, 242, 243.

Stay of Litigation, Mediation, and Settlement Conference

In June 2021, the parties agreed to explore the possibility of mediation. Doc. # 267 at 3. At the parties' joint request, the Court stayed this litigation since August 10, 2021. *Id*. at 4; Doc. ## 268, 296, 301, 304, 309. In September 2021, the parties selected private mediator Jill Sperber. Doc. # 279 at 2. The parties, including Plaintiffs Walkinshaw, Bryant, Endicott, Nabity, Martin, and Ellwanger, participated in a video mediation with Ms. Sperber on December 8, 2021, but no resolution was reached. Doc. # 295 at 1. Between December 2021 and February 2022, Ms. Sperber continued to facilitate settlement discussions by telephone and email. Doc. # 303 at 2. In February 2022, the parties agreed to mediation before a Magistrate Judge. *Id*. On April 11, 2022, the parties participated in an in-person settlement conference with Magistrate Judge Zwart. After a full day of mediation, the parties reached an agreement in principle. Doc. # 306; Doc. # 308 at 1; Cheng Decl. ¶ 8. The parties entered into the formal Settlement Agreement on September 27, 2022. *Id*.

III. THE TERMS OF THE SETTLEMENT

The Settlement Agreement ("Agmt") provides for a payment of $800,000.00 ("the Class Settlement Fund"), inclusive of settlement administration expenses and any service awards to Class Representatives. Agmt. §§ IV.1 & V.4. Defendants will fund the Class Settlement Fund within 30 days of the date that the Court enters an order granting preliminary approval of the Settlement. *Id*. § IV.1. Any amount from the Class Settlement Fund paid to the FLSA Opt-Ins

and the Class (collectively "the Settlement Class") will be treated 100% as wages for income and payroll tax purposes. *Id.* § V.7. Defendants will be responsible for the employer's share of payroll taxes on the gross settlement payment (other than any service award) to each employee. *Id.*

In exchange, Plaintiffs and the Settlement Class will dismiss and release their claims in the Second Amended Complaint and those claims arising from the same factual predicate through April 11, 2022 for the Class and end date of the Subclasses. *Id.* § XV.1. Defendants will make a separate payment of $750,000.00 to resolve any claims for attorneys' fees and litigation expenses, subject to the approval of the Court. *Id.* § IV.2.

IV. THE PLAN OF ALLOCATION

Pursuant to Plaintiffs' proposed Plan of Allocation, the "Net Settlement Amount"—i.e., the remaining Class Settlement Fund after deduction of expenses for settlement administration and any court-approved service awards to Class Representatives—will be divided among the Settlement Class Members. Under the proposed Plan, the amount that a Settlement Class Member will receive is affected by whether the Class Member (1) is also an FLSA Opt-In, (2) submits a Claim Form, and/or (3) is a member of the 2017 or 2016 Subclass. A Class Member who is not an FLSA Opt-In and does not submit a Claim Form will be eligible to receive a minimum payment of either (i) $25.00 if Defendants' records show that the Class Member had an on-call shift on or before October 31, 2018, or (ii) $15.00 if the records show that the Class Member only had an on-call shift after October 31, 2018. Cheng Decl. Ex. 5A ¶ 3. To cash their minimum payment checks, Class Members will be required to verify by endorsement that they meet the Rule 23 Class definition and performed uncompensated Remote On-Call Work during the Class Period. *Id.* ¶ 4.

The Net Settlement Amount less the minimum payments to Class Members who do not submit a Claim Form ("the Remaining Net Settlement Amount") will be allocated among the FLSA Opt-Ins and Class Members who submit a Claim Form (collectively "Authorized Claimants") pro rata—based on the Authorized Claimant's "Weighted Adjusted On-Call Shift Hours" as a fraction of all the Weighted Adjusted On-Call Shift Hours attributed to all Authorized Claimants. *Id*. ¶ 6.

Each Authorized Claimant's number of Weighted Adjusted On-Call Shift Hours and allocation will be calculated through the following process:

Step 1: Calculation of an Authorized Claimant's Adjusted On-Call Shift Hours

An Authorized Claimant's Adjusted On-Call Shift Hours will be the sum of his or her (a) pre-November 2018 On-Call Shift hours; and (b) post-October 2018 On-Call Shift hours valued at 20%. This reduction is based on discovery reflecting that Defendants began compensating significantly more nurses for Remote On-Call Work starting around November 2018.

Step 2: Weighting of Adjusted On-Call Shift Hours Depending on Class Status

An Authorized Claimant's Adjusted On-Call shift hours will be weighted based on the following categories (which consider the number of claims asserted on behalf of that Class Member and assessment by Plaintiffs' counsel of the relative strength and value of the respective claims):

If the Class Member is	Weighted Value of Adjusted On-Call Shift Hours
An FLSA Opt-In, a Rule 23 Class Member AND a Rule 23 Subclass Member	100% (Full Value) of Adjusted Hours
A Rule 23 Class Member and a Subclass Member, BUT NOT an FLSA Opt-in	80% of Adjusted Hours
An FLSA Opt-in AND a Rule 23 Class Member BUT NOT a Rule 23 Subclass Member	50% of Adjusted Hours

An FLSA Opt-In BUT NOT a Rule 23 Class Member	30% of Adjusted Hours
A Rule 23 Class Member BUT NOT an FLSA Opt-in or Rule 23 Subclass Member	30% of Adjusted Hours

Id. ¶ 6.a. & 6.b.

Step 3: Calculation of Each Authorized Claimant's Pro Rate Share

Each Authorized Claimant's pro rata share of the Remaining Net Settlement Amount will be based on each Authorized Claimant's Weighted Adjusted On-Call Shift Hours compared to the total Weighted Adjusted On-Call Shift Hours of all Authorized Claimants. *Id*. ¶ 6.c. Based on the size of the Class and the Class Settlement Fund, under the proposed Plan of Allocation, any Authorized Claimant is expected to receive more than the minimum payment.

V. THE SETTLEMENT CLASSES SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Certification of a class requires meeting the four prerequisites of Rule 23(a) and at least one of part of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997). A district court does not have discretion to deny class certification to claims meeting the requirements of Rule 23. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co*., 559 U.S. 393, 398 (2010) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action"). The requirements of Rule 23 apply equally to a class certified for purposes of settlement. *Amchem*, 521 U.S. at 620. For settlement purposes, Plaintiffs seek certification of the Class and Subclasses pursuant to Rule 23(a) and Rule 23(b)(3). The Class and Subclasses meet all the requirements for class certification.

A. The Rule 23 Class and Subclasses Meet the Requirements of Rule 23(a)

Rule 23(a) requires a class satisfy four criteria: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims and defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. Rule 23(a). Here, the Class and Subclasses satisfy all these requirements.

1. The Class and Subclasses Are so Numerous that Joinder is Impracticable

Rule 23(a)(1) requires that the class be so numerous that joinder is impracticable. Fed. R. Civ. P. 23(a)(1). This element "requires only [i]mpracticability, not impossibility." *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 870 (8th Cir. 1978); *Klug v. Watts Regulator Co.*, No. 8:15CV61, 2016 WL 7156478, at *4 (D. Neb. Dec. 7, 2016) (stating same). The difficulty inherent in joining "as few as 40 class members should raise a presumption that joinder is impracticable." *Briles v. Tiburon Fin., LLC*, No. 8:15CV241, 2016 WL 4094866, at *2 (D. Neb. Aug. 1, 2016). "Plaintiffs are not required to 'specify an exact number or to prove the identity of each class member, rather, 'the plaintiffs must only show a reasonable estimate of the number of class members'" *Postawko v. Mo. Dep't of Corrections*, No. 2:16-CV-04219, 2017 WL 3185155, at *6 (W.D. Mo. July 26, 2017).

Here, Defendants' data identifies 4,092 nurses who were employed at the locations of the Class and assigned an On-Call Shift during the class period of February 6, 2015 to April 11, 2022. Based on Defendants' information and interrogatory responses, there were over 1,700 nurses at the locations of the 2017 Subclass who were assigned an On-Call Shift between June 1, 2017 and September 30, 2018, and over 2,000 nurses at the locations of the 2016 Subclass who were assigned an On-Call Shift between March 2016 and May 31, 2017. As the Class and Subclasses each consist of more than a thousand individuals, they each exceed the threshold of 40 and satisfy Rule 23(a)(1).

2. There Are Common Questions of Law and Fact

"[A] single [common] question" will satisfy Rule 23(a)(2). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Commonality exists if plaintiffs' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Id*. at 350. "Rule 23 is satisfied when the legal question 'linking the class members is substantially related to the resolution of the litigation.'" *Custom Hair Designs by Sandy, LLC v. C. Payment Co., LLC*, 8:17CV310, 2020 WL 639613, at *5 (D. Neb. Feb. 11, 2020). The "rule does not require that every question of law or fact be common to every member of the class." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982). Commonality is met "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Id.*; *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 872 (8th Cir. 1978) (finding class certification for settlement purposes appropriate where there is a "common nucleus of operative facts . . . [e]ven if certain factual disparities exist[] within the class"). "The commonality requirement imposes a very light burden on Plaintiff seeking to certify a class and is easily satisfied." *Custom Hair Designs by Sandy, LLC*, 2020 WL 639613, at *5.

Counts II through VII each raise common questions of law and fact that are capable of common answers, including: (a) whether Defendants violated Neb. Rev. Stat. § 48-1203 by failing to pay minimum wage to the Class for Remote On-Call Work (Count II); (b) whether Defendants violated Neb. Rev. Stat. §§ 48-1229 and 48-1230 by refusing to timely pay wages at the agreed-upon rate under Defendants' written policies to the Subclasses for Remote On-Call Work (Counts III & V); (c) whether Defendants breached the terms of their employment contract with the Subclasses by failing to pay wages for Remote On-Call Work (Counts IV & VI); and (d)

whether Defendants were unjustly enriched as a result of their failure to pay the Subclasses in accordance with their written policies and the Subclasses' receipt of lower compensation for Remote On-Call Work (Count VII). SAC ¶ 30; *see Cruz v. TMI Hosp., Inc.*, 14-CV-1128 (SRN/FLN), 2015 WL 6671334, at *9 (D. Minn. Oct. 30, 2015) (finding commonality in off-the-clock case involving claims for breach of contract and under state wage-and-hour statutes). Thus, commonality is satisfied.

3. Plaintiffs' Claims Are Typical of the Class and Subclasses

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is generally satisfied when the class representatives' claims "are based on the same legal or remedial theory." *Paxton*, 688 F.2d at 561–62. "Factual variations in the individual claims" do not preclude class certification "if the claim arises from the same event or course of conduct as the class claims and gives rise to the same legal or remedial theory." *Custom Hair Designs by Sandy, LLC*, 2020 WL 639613, at *6. Nor do "differences in the claimed damages or the availability of certain defenses" destroy typicality. *Klug*, 2016 WL 7156478, at *4. "The interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they share common objectives and legal factual positions." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999). "The burden to establish typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Briles*, 2016 WL 4094866, at *3.

As to Count II, Plaintiffs and Class Members all worked in same category of positions—i.e., medical nurses—and were subject to uniform requirements for On-Call Shifts. SAC ¶¶ 37, 42, 46. The Complaint alleges that Defendants paid Plaintiffs and the Class $2.00-$4.00 per hour for Remote On-Call Work and failed to pay them a minimum wage for such work under the

NWHA. *Id*. ¶¶ 138-46. Counts III, IV, and VII allege that Defendants failed to compensate Plaintiffs and the 2017 Subclass for Remote On-Call Work in accordance with the same General Remote On-Call Work Pay Provision. *Id*. ¶¶ 147-66, 184-89. Counts V, VI, and VII allege that Defendants failed to compensate Plaintiffs and members of the 2016 Subclass for Remote On-Call Work in accordance with the same 2016 Remote On-Call Work Pay Provision. *Id*. ¶¶ 167-89. As such, Plaintiffs' claims arise from the same course of conduct—namely Defendants' alleged failure to pay minimum wage for Remote On-Call Work to the Class and pay wages in accordance with their own written policies to the Subclasses. *See Abarca v. Werner Enters., Inc*., No. 8:14CV319, 2018 WL 1136061, at *10 (D. Neb. Feb. 28, 2018) (finding typicality where plaintiffs held "the same position as all class members," had "the same duties" under employer's policy, and were paid under same compensation model). Thus, Plaintiffs' claims are typical of the claims of the Class and Subclasses.

4. Plaintiffs And Their Counsel Will Fairly And Adequately Represent the Class and Subclasses

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The focus of the adequacy requirement is "whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63; *Briles*, 2016 WL 4094866, at *4 (stating same).

Here, Plaintiffs share common interests and seek the same relief as all other Class Members—to receive compensation paid at Nebraska's minimum wage rates for Remote On-Call Work. SAC ¶ 32. Plaintiffs share common interests and seek the same relief as all other Subclass Members—to receive compensation consistent with Defendants' written compensation policies for Remote On-Call Work. *Id*. ¶¶ 33-34. Plaintiffs have actively participated in this

litigation, including by providing documents and information to their counsel, assisting in the investigation of the claims, and participating in discovery and settlement conferences. Cheng Decl. ¶¶ 7-8.

Rule 23(g) sets forth the factors to evaluate adequacy of Class Counsel. Fed. R. Civ. P. 23(g)(1)(A). Proposed Class Counsel meet those factors. R. Joseph Barton of Block & Leviton LLP in this case has litigated employment and employee benefits class action cases for over 20 years. Barton Decl. ¶ 4. Mr. Barton has been appointed Lead or Co-Lead Class Counsel in numerous employment and employee benefit class actions. *Id.* ¶¶ 5-6. Jason Rathod of Migliaccio & Rathod LLP has served as class counsel in numerous wage-and-hour class and collective actions. Rathod Decl. ¶¶ 2-6. Vince Powers of Powers Law has substantial litigation and trial experience and has successfully litigated employment law and other civil cases including in Nebraska for over 25 years. Powers Decl. ¶¶ 1-2. Thus, Plaintiffs and Plaintiffs' counsel satisfy Rule 23(a)(4).

B. The Rule 23 Class and Subclasses Meet the Requirements of Rule 23(b)(3)

Certification under Rule 23(b)(3) is appropriate if (1) common questions "predominate over any questions affecting only individual members," and (2) class resolution is "superior to other available methods for the fair and efficient adjudication" of the claims. Fed. R. Civ. P. 23(b)(3). "The requirements of 'predominance of common issues' and 'superiority' are stated in Rule 23(b)(3) in the conjunctive; both must be present for an action to be maintained under that provision." *Klug*, 2016 WL 7156478, at *5.

1. Common Issues of Law and Fact Predominate

Rule 23(b)(3) does not require that questions common to the class that predominate will be answered, on the merits, in favor of the class. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,

568 U.S. 455, 459 (2013). Instead, the requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (quoting *Amchem*, 521 U.S. at 623). "[T]he court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Id.* "It is not necessary to illustrate that all questions of fact or law are common." *Briles*, 2016 WL 4094866, at *4. "When there are issues common to the class that predominate, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, *such as damages* or some affirmative defenses peculiar to some individual class members.'" *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 833 (8th Cir. 2016) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 422, 453 (2016)). If there are common issues of liability and individual class members' damages can be determined "'in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification.'" *Cullan and Cullan LLC v. M-Qube, Inc.*, No. 8:13CV172, 2016 WL 5394684, at *5 (D. Neb. Sept. 27, 2016) (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)).

Here, common issues predominate over questions affecting individual Class and Subclass Members: questions of law and fact relating to Defendants' uniform requirements for On-Call Shifts, written policies governing pay for On-Call Shifts and pay for Remote On-Call Work, as well as whether Defendants' alleged failure to pay a minimum wage and adhere to the Remote On-Call Work Pay Provisions violated the NWHA, NWPCA, and Nebraska common law. Variation over Class Members' damages does not defeat predominance. *See Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 556-57 (W.D. Mo. 2017) (finding "common issues relating to

Defendants' adoption, implementation, and enforcement" of their own payment policy predominated while recognizing the nature of the action necessitated some individual inquiry into class members' harm); *Tyson Foods*, 577 U.S. at 453.

2. A Class Action Is Superior to Other Methods of Adjudication

Superiority merely measures whether "a class action is superior to other available methods for the fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) identifies the following factors to consider: (A) class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing of a class action. Fed. R. Civ. P. 23(b)(3). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Klug*, 2016 WL 7156478, at *6.

Here, most Class Members have modest damages and their damages pale in comparison to the significant cost of litigating these claims. *See Tigges v. AM Pizza, Inc.*, No. 16 Civ. 10136, 2016 WL 4076829, at *10 (D. Mass. July 29, 2016) (holding "[t]he aggregation of the many delivery drivers' small individual claims, where each delivery charge claimed is only a couple of dollars, is superior to individual adjudication"); *Briles*, 2016 WL 4094866, at *5 (finding the alternative of having 225 individual actions "would be a waste of resources, and likely few or no individual actions would be pursued."). Plaintiffs' counsel are not aware of any other pending or anticipated litigation against Defendants on the same issues. Concentrating the litigation in this particular forum is desirable as most of the Class are located in Nebraska who work or worked at

one of Defendants' Nebraska locations. Finally, there are no manageability issues for settlement classes. *Amchem*, 521 U.S. at 620.

VI. THE PROPOSED SETTLEMENT OF THE STATE LAW CLAIMS MERITS PRELIMINARY APPROVAL

A "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic*, 200 F.3d at 1148; *Bassett v. Credit Mgt. Servs., Inc*., No. 8:17CV69, 2019 WL 4262019, at *2 (D. Neb. Aug. 6, 2019) (citing Petrovic). Rule 23(e) provides that a class action cannot be settled without court approval. Fed. R. Civ. P. 23(e). Approval under Rule 23(e) involves "a two-step process": "First, the Court must determine whether the proposed settlement terms fall within the range of reasonableness such that preliminary approval is warranted. Second, after notice is given to the class, the Court must evaluate whether final approval is warranted." *Briles*, 2016 WL 4094866, at *1.

The request for preliminary approval only requires an "initial evaluation" of the fairness of the proposed settlement. *Manual for Complex Litigation* § 21.632 (4th ed. 2004); *Cullan and Cullan LLC*, 2016 WL 5394684, at *6 (citing same section of *Manual for Complex Litigation* § 21.632). The purpose of preliminary approval is to determine "whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a fairness hearing." William B. Rubenstein, et al., *Newberg on Class Actions* § 13:10 (5th ed. 2013). Thus, courts generally undertake a limited review of the proposed settlement. *Id*. "At the preliminary approval stage, the court's focus is on whether a proposed settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Cullan and Cullan LLC*, 2016 WL 5394684, at *6. The court considers "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement."

Briles, 2016 WL 4094866, at *5. A court may also consider "procedural fairness to ensure the settlement is 'not the product of fraud or collusion,'" the "experience and opinion of counsel on both sides," "whether a settlement resulted from arm's length negotiations, and whether a skilled mediator was involved," and "the settlement's timing, including whether discovery proceeded to the point where all parties were fully aware of the merits." *Powers v. Credit Mgt. Servs., Inc.*, No. 8:11CV436, 2016 WL 3983250, at *2 (D. Neb. July 25, 2016). Here, the proposed Settlement readily satisfies the requirements for preliminary approval.

A. The Terms of the Settlement, Weighed Against the Merits of Plaintiffs' Case, Favor Preliminary Approval

In considering a class action settlement, a court must consider the challenges that plaintiffs would face in prevailing on their claims. *Ramsey v. Sprint Commc'ns Co., L.P.*, No. 11-cv-3211, 2012 WL 6018154, at *3 (D. Neb. Dec. 3, 2012). But in doing so, "the Court does not try the case." *Id*. (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)). The "very object of compromise 'is to avoid the determination of sharply contested and dubious issues'" and in weighing the strength of Plaintiffs' case against the benefits provided by the proposed settlement, the court "cannot be expected to balance the scales with the nicety of an apothecary." *White v. Nat'l Football League*, 822 F.Supp. 1389, 1417 (D. Minn. 1993); *Ramsey*, 2012 WL 6018154, at *3 ("[T]he very purpose of a compromise is to avoid the delay and expense of a trial"). The court must not substitute its "own judgment as to optimal settlement terms for the judgments of the litigants and their counsel." *Petrovic*, 200 F.3d at 1148-49.

While Plaintiffs achieved some success earlier in the litigation in defeating Defendants' motions to dismiss and obtaining conditional certification of Claim I and believe that they could ultimately establish liability, Defendants have vigorously litigated this case. Defendants have argued that they did not violate the FLSA or Nebraska law after October 2018 as to the Named

Plaintiffs (when Defendants purportedly started paying them for Remote On-Call Work), that the majority of nurses outside Plaintiffs' department did not perform or only performed minimal Remote On-Call Work, and that any violation of the law was not willful. *E.g.*, Doc. # 116 at 13 of 36; CHI Answ. at 93, 96 of 100.

When an "employer's records are inaccurate or inadequate," the employee is relieved from "proving the precise extent of uncompensated work." *Carmody v. Kan. City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946)). However, the employee is still required to show "work performed for which the employee was not compensated" and provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* Remote On-Call Work was performed remotely and off the clock and primarily consisted of phone calls of minutes and text messaging. Most Class Members likely do not have written records or sufficient recollection of "the amount and extent" of such work. Defendants' data suggests that they compensated considerably more nurses for such work starting November 2018—which, if proven to be the case, would reduce Defendants' liability and the Settlement Class's recovery significantly after November 2018. If the case did not settle, Defendants would likely argue that differences among departments and other purportedly "individualized" inquiries preclude Rule 23 class certification and the FLSA collective should be decertified. Thus, potential risks exist for Plaintiffs at class certification and FLSA decertification and as to both liability and damages at trial.

Pursuant to the terms of the Settlement Agreement, Defendants agree to settle the underlying claims of the Settlement Class for $800,000.00. "As courts routinely recognize, 'a settlement is a product of compromise and the fact that a settlement provides only a portion of the potential recovery does not make such settlement unfair, unreasonable or inadequate.'" *Keil*

v. Lopez, 862 F.3d 685, 696 (8th Cir. 2017). As this is an off-the-clock case concerning work performed remotely when the employees were on call, there are no timekeeping records for On-Call Work performed by the vast majority of the Class Members. Nonetheless, there exist some records of Remote On-Call Work hours reported for some nurses in Defendants' timekeeping data. Assuming those records are representative of the amount of the Remote On-Call Work hours performed by all Class Members, (a) based on the average number of Remote On-Call Work hours reported by these nurses in the pre-November 2018 portion of the Class Period (before Defendants appear to have changed their practices thereafter), and (b) assuming that such average is representative of the amount of Remote On-Call Work performed by the entire Settlement Class and (c) assuming that *every* member of the Settlement Class performed uncompensated Remote On-Call Work during the Class Period, the maximum amount of wages owed to the Settlement Class would be approximately $1.7 million. Cheng Decl. ¶ 9. Based on those assumptions, the Class Settlement Fund represents approximately 47% of such estimated maximum back wages. Agmt. § IV.1. This certainly consists of more than a fraction of the potential recovery and provides substantial value given the attendant risks of litigation. *See, Singleton v. First Student Mgt. LLC*, CIV.A. 13-1744, 2014 WL 3865853, at *7 (D.N.J. Aug. 6, 2014) (finding proposed settlement to be within range of reasonableness where "the proposed settlement amount is about 40% of the Plaintiffs' estimate" of potential outcome for the class); *Acevedo v. Workfit Med. LLC*, 187 F.Supp.3d 370, 381 (W.D.N.Y. 2016) (finding in wage-and-hour class action that the "$2.1 million settlement is reasonable where the potential recovery is $9.1 million" or approximately 23% of potential recovery). The terms of the Settlement, weighted against the merits of Plaintiffs' claims, favor preliminary approval.

B. The Complexity and Expense of Further Litigating the Matter to Judgment Favors Settlement

By reaching a favorable settlement, Plaintiffs avoid significant expense and delay and ensure recovery for the Settlement Class. "Class actions, in general, 'place an enormous burden of costs and expense upon parties.'" *Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015). This case is no exception, with over 210 FLSA Opt-Ins and over 4,000 Class Members and claims under both federal and state law.

Plaintiffs have litigated this case for over three years. Further litigation would be complex, expensive and lengthy. Absent settlement, there would be further formal written discovery and depositions on both Rule 23 class certification and merits issues, discovery by Defendants on the FLSA Opt-Ins' claims, class certification briefing, expert discovery, and summary judgment motions. A trial would be lengthy and complex and add enormous cost to the litigation. Any judgment would likely be appealed, further extending the litigation. The Settlement makes monetary relief available to the Settlement Class in a prompt and efficient manner. *Cullan and Cullan LLC*, 2016 WL 5394684, at *7 (granting preliminary approval where "the settlements can deliver a real and substantial remedy without the risk and delay inherent in prosecuting this matter through trial and appeal"). The complexity and expense of further litigation favors preliminary approval.

C. The Settlement Is the Result of Informed, Non-Collusive, and Arm's Length Negotiations that Were Conducted by Experienced Counsel After Substantial Discovery

Rule 23(e) requires the court "merely to ensure that [a class action settlement] agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). "There is usually a presumption of fairness when a proposed class

settlement, which was negotiated at arm's length by counsel for the class, is presented for approval." *In re Zurn Pex Plumbing Prods. Liab. Litig*., No. 08-MDL-1958, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012). Here, settlement negotiations occurred after eighteen months of discovery in which Defendants produced over 54,000 pages of documents including timekeeping and on-call policies and timekeeping and payroll records for the Settlement Class and provided answers to interrogatories about departments that reported Remote On-Call Work, and Plaintiffs took and defended ten depositions. Cheng Decl. ¶ 5. Plaintiffs' counsel conducted investigation with and obtained information from Plaintiffs and other FLSA Opt-Ins regarding On-Call Shifts and Remote On-Call Work. *Id*. ¶ 9.

The parties participated in two full-day mediation sessions, first with a private mediator and then in-person with Magistrate Judge Zwart. Doc. # 295 at 1; Doc. # 303 at 2; Doc. # 308 at 1. Through the discovery conducted, Plaintiffs entered the settlement discussions with a thorough understanding of Defendants' arguments and the strengths of Plaintiffs' claims. *See Klug*, 2016 WL 7156478, at *7 (finding settlement agreements were results of arm's length negotiations "involving a skilled mediator" that took place after "[d]iscovery has progressed to a sufficient point"). Plaintiffs' counsel's extensive experience in employment class actions including wage-and-hour lawsuits enabled them to adequately assess the risks of proceeding to trial and the benefits of the Settlement. *See In re Zurn Pex Plumbing Prods. Liab. Litig*., 2012 WL 5055810, at *6 (granting preliminary approval where "[t]he Settlement followed thorough investigation and discovery and is the product of arm's-length negotiation between experienced, capable counsel, assisted by an experienced and capable magistrate judge and two private mediators"). Plaintiffs' counsel negotiated fees separately from and after negotiations of the Class Settlement Fund for the Settlement Class's underlying claims. Agmt. at 3. Thus, the proposed Settlement is

the result of informed, non-collusive, and arm's length negotiations that were conducted by experienced counsel after substantial discovery.

D. The Amount of Opposition to the Settlement and Defendants' Financial Condition Favor Preliminary Approval

Plaintiffs' counsel are not aware of any Class Members who intend to oppose the Settlement. After notice issues and Class Members have an opportunity to participate, object, or opt out, the Court will be in a better position to assess the extent of the support from Class Members. *See Cooper v. Integrity Home Care, Inc*., 4:16-CV-1293, 2018 WL 3468372, at *4 (W.D. Mo. July 18, 2018) ("A further inquiry into this element may be conducted after assessing the class members' response to the notice."). There is no indication that consideration of Defendants' financial condition would have resulted in a higher settlement amount. *See George v. Uponor Corp*., CIV. 12-249, 2015 WL 5255280, at *7 (D. Minn. Sept. 9, 2015).

E. There Are No Obvious Deficiencies

The proposed Settlement was reached only after substantive discovery and protracted, arm's length negotiations between the parties. *Supra* V.A.4 & VI.C. Plaintiffs' counsel weighed the terms of the Settlement against the merits of Plaintiffs' claims and considered the advantages and disadvantages of further litigation. *Supra* VI.A. The Class Settlement Fund represents a substantial monetary settlement to the Settlement Class Members, especially given the attendants risks of litigation. *Id.*; *see Cullan and Cullan LLC*, 2016 WL 5394684, at *6 (stating that in determining whether there are "glaring substantive or procedural deficiencies," courts consider "the terms of the settlement as compared to the merits of the plaintiff's case; the complexity, expense, and likely duration of litigating the matter to judgment; the defendant's financial condition; and the amount of opposition to the settlement, if any"). The proposed Settlement has no obvious deficiencies.

Accordingly, the proposed Settlement merits preliminary approval.

VII. THE FLSA COLLECTIVE SHOULD BE FINALLY CERTIFIED FOR SETTLEMENT PURPOSES

Some district courts in the Eighth Circuit have held that "a final certification finding is required when the parties propose to settle an FLSA collective action." *Adams v. City of Kansas City, Missouri*, No. 19-CV-00093, 2022 WL 949815, at *2 (W.D. Mo. Mar. 29, 2022) (citing cases). "At the conditional certification stage, courts apply a lenient standard." *Sporven v. Safe Haven Sec. Servs., Inc.*, No. 8:20CV3032, 2021 WL 3172021, at *1 (D. Neb. July 27, 2021). At the second stage, "'the court makes a factual determination as to whether the members of the conditionally certified class are similarly situated and makes the associated legal determination as to whether the members may proceed as a formal class.'" *Id*. "During this second stage analysis, a court reviews several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Morales v. Greater Omaha Packing Co., Inc.*, No. 8:08-cv-161, 2011 WL 2881408, at *6 (D. Neb. Apr. 5, 2011). "The plaintiffs need not show the class members are identically situated." *Id*. at *7.

Here, there is significant evidence that members of the FLSA Collective are similarly situated. They were all employed by Defendants in the same category of position and were assigned On-Call Shifts while in that position. Doc. # 179 at 9. Pursuant to Defendants' written policies, these nurses were subject to the same restrictions and requirements including that while on call, they be available for work and able to respond to calls at any time and report to work at their facilities within 30 minutes. Doc. # 100-3 at 1-3; Doc. # 100-2 at 1-4. Defendants uniformly paid nurses $2.00 to $4.00 per hour for On-Call Shifts. Doc. # 100-3 at 1-3; Doc. # 100-2 at 1. Defendants' standardized job descriptions for nurse positions required working On-Call Shifts

and overtime as essential to performance of nurses' job duties and activities. Doc. ## 100-5 through 100-15 at 3. While on-call, nurses can and do perform in certain situations Remote On-Call Work related to their job duties "that can be taken care of with a phone call or access to work from home." Doc. # 100-3 at 2; Doc. # 100-4 at 2. "The differences among employees (i.e., types of equipment and amount of time spent) do not diminish these predominant relevant similarities." *Morales*, 2011 WL 2881408, at *7. Common factual and employment settings weigh in favor of maintaining certification of the FLSA Collective.

Defendants did not assert any defense that applies uniquely to the Plaintiffs. CHI Answ. at 92-99; CommonSpirit Answ. at 91-98. Fairness and procedural considerations "analyze whether allowing an FLSA claim to proceed as a collective action reduces the burden on plaintiffs through the pooling of resources, and efficiently resolves common issues of law and fact that arise from the same illegal conduct." *Mazanti v. Bordelon*, No. 4:20-CV-00049, 2022 WL 1585436, at *3 (E.D. Ark. Feb. 16, 2022). Here, the Named Plaintiff's FLSA claims and the FLSA Opt-Ins' claims both involve claims that arise from working for the same employers and in the same type of positions, performing similar job duties, and being subject to the same policies of Defendants governing On-Call Shifts. *Id*. (denying motion to decertify). As with respect to Rule 23 class certification, Plaintiffs are adequate representatives of past and current employees of Defendants who performed compensable Remote On-Call Work but were not properly compensated for it. *Supra* IV.A.4. Because most of the members of the Collective have at most modest amounts of damages, "[i]f affected employees are not permitted to proceed as a class, the monetary value of their claims may not be large enough to enable each employee to proceed with their claims individually." *Cope v. Let's Eat Out, Inc*., 354 F.Supp.3d 976, 990

(W.D. Mo. 2019) (denying motion to decertify collective). Thus, fairness and procedural considerations weigh in favor of maintaining certification of the FLSA Collective.

According, final certification of the FLSA Collective for settlement purposes is appropriate.

VIII. THE PROPOSED SETTLEMENT OF THE FLSA CLAIMS MERITS COURT APPROVAL

A settlement of an FLSA claim in a private cause of action requires court approval. *Sporven v. Safe Haven Sec. Servs., Inc.*, No. 8:20CV3032, 2021 WL 3172021, at *2 (D. Neb. July 27, 2021) (citing *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 (11th Cir. 1982)). "The standard for court approval is straightforward: a district court should approve a fair and reasonable settlement if it was reached as a result of contested litigation to resolve a bona fide dispute under the FLSA." *Id*. "If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement in order to promote the policy of encouraging settlement of litigation." *Grove v. Meltech, Inc*., No. 8:20CV193, 2022 WL 119180, at *2 (D. Neb. Jan. 12, 2022). Here, the proposed Settlement readily satisfies these requirements.

A. Bona Fide Disputes Exist Between the Parties Over the FLSA Claims

"FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Ark.-Best Freight Sys., Inc*., 450 U.S. 728, 740 (1981). A settlement of an FLSA claim is permitted only if there is a dispute that the plaintiff is owed wages. *Webb v. S. Aluminum Mfg. Acq., Inc*., No. 1:19-CV-1059, 2022 WL 801559, at *2 (W.D. Ark. Mar. 15, 2022); *Grove*, 2022 WL 119180, at *2. A bona fide wage dispute exists when an employee and an employer disagree "with respect to coverage or amount due under the [FLSA]." *Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 703 (1945); *Adams v. City of Kansas City, Missouri*, No. 19-

CV-00093, 2022 WL 949815, at *3 (W.D. Mo. Mar. 29, 2022) (citing *Brooklyn Savs. Bank*). "The threshold for establishing whether a bona fide dispute exists between the parties is a low one met where the parties are in disagreement about the wages to be paid and liability of the issues." *Netzel v. W. Shore Grp., Inc.*, No. 16-CV-2552, 2017 WL 1906955, at *4 (D. Minn. May 8, 2017).

The FLSA claims under Count I allege that Defendants violated the FLSA by failing to include Remote On-Call Work time to compute nurses' overtime pay and failing to compensate them at time and a half their regular hourly rates for such work and Defendants failed to maintain records of Remote On-Call Work time and their violations of FLSA were willful. SAC ¶¶ 127-37; *id*. ¶¶ 56-59, 123. Defendants' Answers deny that they have violated the FLSA or owe Plaintiffs and the Collective any wages or damages. CHI Answ. ¶¶ 127-37; CommonSpirit Answ. ¶¶ 127-37. Defendants have contended that the Named Plaintiffs' department was "an anomaly." Doc. # 116 at 5 of 36. Defendants asserted an affirmative defense that the FLSA claims are barred by "the *de minimis* doctrine." CHI Answ. ¶¶ 127-37 at 96; CommonSpirit Answ. at 95; *see Grove*, 2022 WL 119180, at *3 (finding a bona fide dispute where "the defendants deny any wrongdoing and maintain they complied at all times with the FLSA"); *Netzel*, 2017 WL 1906955, at *4 (finding a bona fide dispute where "Defendant denies both that it has violated the FLSA and that it owes Plaintiffs any wages or damages"). Bona fide disputes exist between Plaintiffs and the Collective and Defendants over the FLSA claims.

B. The Settlement Is Fair and Reasonable

"Typically, courts rely on the adversarial nature of a litigated FLSA case resulting in an arms' length settlement as indicia of fairness." *Grove*, 2022 WL 119180, at *2. Courts should consider "the unique ability of class and defense counsel to assess the potential risks and rewards

of litigation." *Id*. A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Id*. There are considerable risks for Plaintiffs at class certification and FLSA decertification and as to both liability and damages at trial. *Supra* VI.A. The Class Settlement Fund represents substantial value given the attendants risks of litigation. *Id*. The Settlement makes monetary relief available to the Settlement Class in a prompt and efficient manner. *Supra* VI.B. The Settlement was reached in arm's length negotiations by experienced counsel through a private mediation and magistrate judge after substantial discovery. *Supra* VI.C & D. "Courts have held that negotiations involving counsel and a mediator, like the present case, raise a presumption of reasonableness." *Netzel*, 2017 WL 1906955, at *6; *Grove*, 2022 WL 119180, at *3. As such, the proposed Settlement is fair and reasonable.

IX. THE NOTICE AND PLAN OF NOTICE SHOULD BE APPROVED

Once the parties obtain preliminary approval of a class settlement, Rule 23(e) requires the Court to direct notice "in a reasonable manner to all class members who would be bound" by the proposed settlement. A proper notice should state: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B); *see* Manual for Complex Litigation, *supra*, § 21.312. L.R. 23.1(b) requires that the notice state that all documents sent by any class members to the Court, including any request for exclusion from the class and objection to a proposed settlement, will be electronically filed with the Court and will be available for public view. A notice of a class action settlement is adequate

if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Petrovic*, 200 F.3d at 1153; *Cullan and Cullan LLC*, 2016 WL 5394684, at *7 (quoting *Petrovic*). Here, the proposed notice to the Settlement Class provides information on all of the subjects required under Rule 23(c) and L.R. 23.1(b) and informs Class Members about their rights under the Settlement and their right to be heard at the final fairness hearing. *See* Cheng Decl. Ex. 5B ("the Notice").

Rule 23(e) affords the district court some discretion as to the manner of the notice. Fed. R. Civ. P. 23(e)(1). It is well-established that notice sent by first class mail to each member of the class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974); *Peters v. Nat'l R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) ("It is beyond dispute that notice by first class mail ordinarily satisfies rule 23(c)(2)'s requirement that class members receive 'the best notice practicable under the circumstances.'"). In recent years, courts have also approved notice by email. *See, e.g*., *Cullan and Cullan LLC*, 2016 WL 5394684, at *7 (approving notice plan including email notice); *Becker v. Wells Fargo & Co*., No. 0:20-cv-2016, 2022 WL 1210948, at *2 (D. Minn. Apr. 25, 2022) (approving "the method of giving direct notice to Settlement Class members by email and, if no email address is available, by U.S. mail"). Here, the proposed Notice will be provided to each Settlement Class Member by email to the extent that email is known and available or if email is not known or not available, by mailing via first class U.S. Mail. Agmt. § III.3. Defendants have previously provided the names and contact information of the FLSA Opt-Ins and Class Members and have agreed to provide, among others, their current employment employee status and Social Security numbers. *Id.* § III.6. Publication notice is not necessary

because Defendants' data identifies the names and contact information of all Settlement Class Members. Thus, the proposed procedures satisfy due process, meet the requirements of Rule 23, and should be approved.

Courts "often appoint a claims administrator or special master" to handle the administration of a class action settlement. *Manual for Complex Litigation*, *supra* § 21.661. In this case, the settlement administrator's responsibilities will include, among others, mailing the Notice to Settlement Class Members, reviewing claim forms, calculating and paying the net settlement amount allocated to each Settlement Class Member by check, and setting up and maintaining a settlement website consistent with Plaintiffs' counsel's instructions or the court-approved Plan of Allocation. Agmt. § VII.2. Plaintiffs' counsel sought bids for class notice and administration services from seven service providers, of which four submitted bids. Cheng Decl. ¶ 10. Following review of the bids and discussion with the respondents to ensure an "apples-to-apples" comparison of services, Plaintiffs' counsel proposes that the Court appoint CPT Group as Settlement Administrator. *See id*. and Ex. 5D.

X. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

The proposed Plan of Allocation is reasonable and should be preliminarily approved. "'A district court's principal obligation in approving a plan of allocation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.'" *In re Resideo Techs., Inc., Secs. Litig*., No.19-CV-2863, 2022 WL 872909, at *4 (D. Minn. Mar. 24, 2022) (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011)). "A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel.'" *Yarrington v. Solvay Pharm*., Inc., No. 09-CV-2261, 2010 WL 11453553, at *10 (D. Minn. Mar. 16, 2010) (quoting *In re Charter Commc'ns, Inc., Sec. Litig*., No. 4:02-CV-

1186, 2005 WL 4045741, at *10 (E.D. Mo. June 30, 2005)); *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 163 (S.D.N.Y.2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."). "[I]t is appropriate for interclass allocations to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims . . . ." *In re Charter Commc'ns, Inc., Sec. Litig*., 2005 WL 4045741, at *10; *In re Centurylink Sales Practices and Secs. Litig*., No. CV 18-296, 2021 WL 3080960, at *7 (D. Minn. July 21, 2021) (same). "A reasonable plan of allocation 'need not necessarily treat all class members equally'" but may be based on "'the extent of class members' injuries" and "the relative strength and values of different categories of claims.'" *Hill v. State St. Corp*., No. CIV.A. 09-12146, 2015 WL 127728, at *11 (D. Mass. Jan. 8, 2015) (citations omitted). "In determining whether a Plan of Allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel." *In re Schering-Plough Corp. Enhance ERISA Litig*., No. 08-1432, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012).

A plan of allocation that "fairly treats class members by awarding a pro rata share to every Authorized Claimant, but also sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims" is fair, reasonable, and appropriate. *In re MicroStrategy, Inc. Sec. Litig*., 148 F.Supp.2d 654, 669 (E.D. Va. 2001) (significantly discounting recovery for certain class members with particularly weak claims and providing premiums to other class members with stronger claims); *see In re Charter Commc'n, Inc., Secs. Litig*., 2005 WL 4045741, at *10 (approving plan of allocation that "takes into account differences in likelihood of recovery for different portions of the Class Period"); *In re Lithium Ion Batteries Antitrust Litig*., No. 13MD02420, 2020 WL 7264559, at *12 (N.D. Cal. Dec. 10, 2020) (approving "[t]he proposed 90/10 allocation" based on relative strengths and

values of various claims). Courts have found it "perfectly appropriate to require Class members to submit certain information [as such a claim form] proving that they are entitled to collect the relief awarded in this case." *Milliron v. T-Mobile USA, Inc.*, No. CIV.A. 08-4149, 2009 WL 3345762, at *6 (D.N.J. Sept. 10, 2009); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 593 (N.D. Ill. 2011) ("there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment"); *see Keith v. Back Yard Burgers of Neb., Inc.*, No. 8:11-CV-00135, 2014 WL 4781914, at *6 (D. Neb. Sept. 23, 2014) (approving settlement where only class members who submitted valid claim form would be entitled to benefits under settlement); *Powers v. Credit Mgt. Servs., Inc.*, No. 8:11CV436, 2016 WL 3983250, at *3 (D. Neb. July 25, 2016) (same). "A settlement's fairness is judged by the opportunity created for the class members, not by how many submit claims." *Hall v. Bank of Am., N.A.*, No. 1:12-CV-22700, 2014 WL 7184039, at *7 (S.D. Fla. Dec. 17, 2014) (approving use of claim form). It is common for settlements to require "class members to submit valid claims, even though some class members may fail to do so, going uncompensated for releasing their claims." *Robinson v. Paramount Eq. Mortg., LLC*, No. 2:14CV02359, 2017 WL 117941, at *8 (E.D. Cal. Jan. 10, 2017).

Courts have also approved settlement distribution in FLSA collective and Rule 23 class action settlements in which class members who did not submit a claim form received a minimum payment. *E.g., Thompson v. Seagle Pizza, Inc.*, No. 3:20-CV-16, 2022 WL 1431084, at *2 (W.D. Ky. May 5, 2022) (granting final approval of settlement in which class members who did not submit a timely claim form would receive a minimum payment of $25); *Thompson v. Seagle Pizza, Inc.*, No. 3:20-CV-16, 2021 WL 7084148, at *3 (W.D. Ky. June 1, 2021) (preliminarily approving settlement in which class members who did not submit a valid claim form would

receive "a minimum payment of $25"); *see Marroquin Alas v. Champlain Valley Specialty of N.Y., Inc*., No. 5:15-cv-00441, 2016 WL 3406111, at *3 n.1 (N.D.N.Y. June 17, 2016) (granting final approval of settlement in which "[t]he minimum payment to Class Members is $7.64"). Under the proposed Plan, Class Members who do not submit a claim form will receive a minimum payment of $25 if they performed an On-Call Shift on or before October 31, 2018 or a minimum payment of $15.00. Cheng Decl. Ex. 5A ¶ 3. This distinction takes into account information reflecting Defendants began compensating significantly more nurses for Remote On-Call Work starting around November 2018.

The Plan of Allocation calculates each Authorized Claimant's share of the Remaining Net Settlement Amount based on the proportional share of the Claimant's Weighted Adjusted On-Call Shift Hours compared to the Weighted Adjusted On-Call Shift Hours of all Authorized Claimants. These adjustments and weightings are made based on whether the Claimant has timely consented to join the FLSA overtime claim (i.e., Count I), and whether the Claimant has claims pursuant to a Remote On-Call Work Pay Provision of Defendant (i.e., Counts III, IV, V, VI, and/or VII) or only has a Nebraska minimum wage claim (i.e., Count II). For calculating each Authorized Claimant's Adjusted On-Call Shift Hours, the Plan of Allocation adjusts his or her post-October 2018 On-Call Shift hours by valuing or weighting them at 80% less to take into account the post-October 2018 changes in Defendants' practices based on discovery. *Id*. ¶ 6.a.

The Plan of Allocation weights each Class Member's Adjusted On-Call Shift Hours based on the claims the Authorized Claimant has and the relative values, strengths, and weaknesses of the different categories of the claims. Authorized Claimants who are an FLSA Opt-In and a member of both the Rule 23 Class and one of the Rule 23 Subclasses have every

claim alleged in the Complaint. As such, their Adjusted On-Call Shift Hours are weighted at 100% or its full value. *Id.* ¶ 6.b(1).

As Counts III-VII seek back wages pursuant to Defendants' written policies that Remote On-Call Work would be compensated at time-and-a half the employee's regular hourly rate in 15-minute increments and regardless of how many hours the employee worked each week, Rule 23 Subclass Members have significantly higher value claims than Class Members outside the Subclasses who only have a Nebraska minimum wage claim. The Rule 23 Class members (who are not Subclass members) face more risks in attaining class certification and would likely receive less than the Subclasses. Although FLSA Opt-Ins have an FLSA overtime claim, at least some of the FLSA Opt-Ins appear to have regularly worked less than forty regular hours a week and as such would likely have difficulty showing that they were not paid overtime for Remote On-Call Work or are entitled to recovery. The Court has already conditionally certified the FLSA collective. Taking all of these strengths and weaknesses into consideration, the proposed Plan of Allocation weights the Adjusted On-Call Shift Hours of the rest of the Class Members at the following percentages:

(a) 80% for Class Members with at least one Nebraska claim under Counts III through VII and a Nebraska minimum wage claim but not an FLSA claim (i.e., Rule 23 Class Members who are a Subclass Member but not an FLSA Opt-Ins);

(b) 50% for Class Members with an FLSA claim and a Nebraska minimum wage claim but not a claim under Counts III through VII (i.e., FLSA Opt-Ins who are a Rule 23 Class Member but not a Subclass Member);

(c) 30% for Class Members with only an FLSA claim (i.e., FLSA Opt-Ins who are not a Rule 23 Class Member) or with only a Nebraska minimum wage claim (i.e.,

Rule 23 Class Members who are not an FLSA Opt-In or a Subclass Member). *Id*. ¶ 6.b(2)-(5). As it properly accounts for the risks, strengths, and weakness of the various categories of claims and the subgroups within the Settlement Class, the proposed Plan of Allocation should be preliminarily approved.

XI. THE COURT SHOULD ESTABLISH DATES FOR EFFECTUATING FINAL APPROVAL OF THE SETTLEMENT

In order to effect notice, fix a date for the final approval hearing, and provide a deadline for exclusion from the Settlement, submission of objections and claim forms, Plaintiffs request that the Court establish the dates set forth in Plaintiffs' Motion. Plaintiffs address the deadline for exclusions, objections, and claim forms specifically.

"Courts have consistently held that 30 to 60 days between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement." *Greco v. Ginn Dev. Co., LLC*, 635 Fed. Appx. 628, 634 (11th Cir. 2015) (unpublished) (quoting 2 McLaughlin on Class Actions § 6:18 (11th ed.)); *see Charron v. Pinnacle Grp. N.Y. LLC*, 874 F.Supp.2d 179, 193 (S.D.N.Y. 2012) (citing cases), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). Like other Circuits to consider the issue, the Eighth Circuit upheld notice one month before the settlement hearing. *White v. Nat'l Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding that notice mailed "approximately one month prior to the first settlement hearing" was adequate notice); *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 940, 946–47 (10th Cir. 2005) (approving a 32–day opt-out period). Here, Plaintiffs propose a 45-day period.

There is no need to set the deadline to file claims before the final approval hearing.

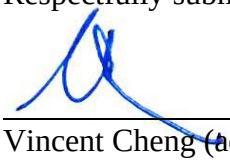
"District courts often grant final approval of class actions settlements before the final claims deadline." *Hall v. Bank of Am.*, N.A., No. 1:12-CV-22700, 2014 WL 7184039, at *7 (S.D. Fla. Dec. 17, 2014). The claims rate is not relevant to whether the proposed settlement is fair or the appropriateness of class counsel's fees. *Casey v. Citibank, N.A.*, No. 12–cv–00820, 2014 WL 4120599, at *2 (N.D.N.Y. Aug. 21, 2014) (finding number of claims is irrelevant to "whether the proposed settlement agreement is fair, reasonable, and adequate"); *Shames v. Hertz Corp.*, No. 07–cv–2174, 2012 WL 5392159, at *10 (S.D. Cal. Nov. 5, 2012) (finding no reason to "wait until the claims are in, and it is determined how much was actually paid to the class before determining [fees for [class counsel"); *Perez v. Asurion Corp.*, 501 F.Supp.2d 1360, 1383 (S.D. Fla. 2007) (court need not wait for final claims data to approve). Here, Plaintiffs propose a 120-day deadline from the issuance of notice to allow sufficient for Class Members to submit claim forms.

XII. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification and Preliminary Approval of Settlement should be granted.

Dated: September 27, 2022

Respectfully submitted,



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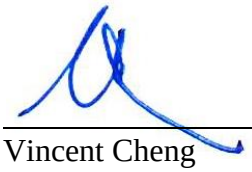
CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d)(3), I hereby certify that this brief complies with the word count limitation provided under the rule and further certify that the word count function was applied to include all text, including the caption, headings, footnotes, and quotations. This document was prepared using Microsoft Word and contains 12,953 words.



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CERTIFICATE OF SERVICE

I, Ming Siegel, hereby certify that on September 27, 2022, a true and correct copy of the above and foregoing **PLAINTIFF'S BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF SETTLMENT** was electronically filed with the Clerk of the Court by using the CM/ECF system, which sends notice to the following counsel of record:

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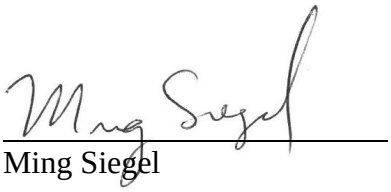

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