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7

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

10  
11 ANN MARIE COSTA, et al.,

12 Plaintiffs,

13 vs.

14 VITAS HEALTHCARE CORPORATION  
OF CALIFORNIA,

15 Defendant.  
16  
17

CASE NO. BC313552

Honorable James C. Chalfant  
Department 13

**CLASS ACTION**

**NOTICE OF MOTION AND MOTION  
FOR PRELIMINARY APPROVAL OF  
SETTLEMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES;  
DECLARATION OF MIKE ARIAS IN  
SUPPORT THEREOF**

[Filed Concurrently with:  
(1) Appendix of Federal Authorities;  
(2) Class Action Settlement Agreement and  
Stipulation; and  
(3) [Proposed] Order]

Date: April 12, 2006  
Time: 8:30 a.m.  
Dept: 13

Date Action Filed: April 8, 2004  
Trial Date: Vacated

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on April 12<sup>th</sup>, 2006 at 8:30 a.m. or as soon thereafter  
3 as the matter may be heard in Department 13 of the above referenced Court, Plaintiffs Ann  
4 Marie Costa, Deborah Gill, Anna Jimenez and Gracetta Wilson ("Plaintiffs"), on behalf of  
5 themselves and the Class, shall move this Court, pursuant to Rule 1859(c) of the CAL. R.  
6 COURT, for an order:

- 7 (1) Granting Preliminary Approval to the Proposed Class Action  
8 Settlement in this action (the "Settlement");  
9 (2) Confirming the Class Representatives  
10 (3) Confirming Arias, Ozzello & Gignac, LLP as class counsel  
11 (4) Appointing Desmond, Marcello & Amster, certified public  
12 accountants as the Claims Administrator;  
13 (5) Establishing a schedule for the provision of Notice of the  
14 Settlement to the members of the Settlement Class; and  
15 (6) For the Setting of a Final Approval Hearing.

16 This Motion is based on this Notice, the Memorandum of Points and Authorities  
17 filed in support thereof, the Settlement Agreement filed concurrently herewith, the  
18 pleadings and records on file in this action, of which the Court is requested to take judicial  
19 notice pursuant to CAL. EVIDENCE CODE §§ 452 and 453, and such oral argument as may be  
20 permitted at the hearing on the Motion.

21 Dated: April 17, 2006

ARIAS, OZZELLO & GIGNAC, LLP

22  
23  
24 By: 

25 MIKE ARIAS, ESQ.  
26 MARK A. OZZELLO, ESQ.  
27 MIKAEL H. STAHL, ESQ.  
28 LOUIS PACELLA, ESQ.  
Attorneys for Class Plaintiff

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 By this Motion, plaintiffs Ann Marie Costa, Deborah Gill, Anna Jimenez and  
5 Gracetta Wilson (“Plaintiffs”), on behalf of themselves and the Class, seek an order of this  
6 Court:

- 7 (1) Granting Preliminary Approval to the Proposed Class Action  
8 Settlement in this action (the “Settlement”);  
9 (2) Confirming the Class Representatives  
10 (3) Confirming Arias, Ozzello & Gignac, LLP as class counsel  
11 (4) Appointing Desmond, Marcello & Amster, certified public  
12 accountants as the Claims Administrator;  
13 (5) Establishing a schedule for the provision of Notice of the  
14 Settlement to the members of the Settlement Class; and  
15 (6) For the Setting of a Final Approval Hearing.

16 The motion by Plaintiffs is made pursuant to Rule 1859(c) of the CALIFORNIA RULES  
17 OF COURT. For the reasons set forth below, the Court should grant Plaintiffs’ motion and  
18 enter an order in the form proposed.

19  
20 II.

21 FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

22 A. Factual Summary of the Issues Involved

23 Vitas Healthcare Corporation of California, (“Vitas”) provides end-of-life medical  
24 services, commonly known as “hospice” care, to terminally ill patients. To provide this  
25 patient care, Vitas distributes the patient-related job duties among “teams,” which are  
26 comprised of “team members.” These teams consist of persons of specific disciplines that  
27 include Nurses, Social Workers, and Home Health Aides.<sup>1</sup>

28 \_\_\_\_\_  
<sup>1</sup> Other team members such as Chaplains, Patient Care Administrators and Physicians are

1           **1. The Voicemail System**

2           To keep in contact with all of its team members on a daily basis, Vitas has  
 3 established an elaborate voice mail system that provides detailed information on every  
 4 patient in the Vitas program. Plaintiffs contend that, prior to beginning their shift for the  
 5 day, Nurses, Social Workers and Home Health Aides are required to call and check this  
 6 voice-mail system to obtain patient updates, and to adjust their schedules. It is the  
 7 contention of Plaintiffs that these voice mails are lengthy, with some messages lasting for a  
 8 minimum of thirty (30) minutes, and Plaintiffs allege that Vitas does not compensate its  
 9 Nurses, Social Workers and Home Health Aides for the time they spend listening to them.

10           **2. The VRU System**

11           Plaintiffs also claim that after completing their daily shifts, Nurses, Social Workers  
 12 and Home Health Aides are required to report all activities they performed that day to Vitas  
 13 through a telephonically controlled, computerized database known as the "VRU" system.  
 14 To access the VRU system team members must place a telephone call from their home  
 15 phones, and proceed to use their telephone keypad to dial in the corresponding activity  
 16 code for every activity performed and patient visited throughout the day. Plaintiffs allege  
 17 that Nurses, Social Workers and Home Health Aides typically spend about thirty (30)  
 18 minutes per weekday on the entire VRU requirement, for which they are not compensated.

19           **3. The Meal Periods**

20           To keep track of meal periods taken, Vitas has established a specific code for team  
 21 members to enter into the VRU system to indicate when they took their meal breaks.  
 22 Plaintiffs assert that the VRU database shows that Nurses, Social Workers and Home  
 23 Health Aides consistently did not report their meal periods to Vitas.

24           Vitas vigorously denies all allegations advanced by Plaintiffs.

25           **B. Procedural Summary of the Litigation**

26           **1. The Complaints**

27           On April 8, 2004, Plaintiffs filed a Complaint against Vitas in the Superior Court of  
 28 not a part of this litigation.

1 California for the County of Los Angeles, Case No. BC 313552, seeking to represent a  
2 class consisting of:

3 All current and former Nurses, Social Workers and Home Health  
4 Aides employed by Vitas who worked more than eight (8) hours in  
5 any given day during the period April 8, 2000 to the present and who  
6 were not paid overtime compensation pursuant to California Labor  
7 Code requirements.

8 On May 14, 2004, prior to serving the Complaint of the Defendant, Plaintiffs filed a  
9 First Amended Complaint to add a cause of action on behalf of the class for failure to  
10 provide meal and rest breaks in violation of the CALIFORNIA LABOR CODE and the  
11 applicable INDUSTRIAL WELFARE COMMISSION WAGE ORDER.

12 Finally, on April 12, 2005, Plaintiffs filed the operative Second Amended Complaint  
13 ("SAC"), purely to correct a clerical error involving the proposed class period. The  
14 operative SAC states causes of action for:

- 15 (1) Failure to provide Overtime compensation in violation of CAL. LAB. CODE §§  
16 1194 and 1198;
- 17 (2) Failure to provide meal periods in violation of CAL. LAB. CODE section  
18 226.7; and,
- 19 (3) Unlawful business practices in violation of CAL. BUS. & PROF. CODE §§  
20 17200, *et seq*; and,

21 The underlying class action alleges that Vitas unlawfully failed to compensate its  
22 Nurses, Social Workers and Home Health Aides for all of the hours which they worked.  
23 The alleged uncompensated time included that spent "off-the-clock" listening to voice  
24 mails prior to beginning their shifts; inputting data into the VRU system after their shifts  
25 had ended; and time spent driving to the first appointment and from the last; time spent  
26 working a nine (9) hour shift. Plaintiffs also alleged that Vitas failed to provide meal and  
27 rest periods in accordance with the applicable California Industrial Welfare Commission  
28 ("IWC") Wage Order. Plaintiffs seek recovery of alleged unpaid overtime wages and  
penalties pursuant to the CALIFORNIA LABOR CODE, the applicable IWC WAGE ORDER, and  
CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200.

1           2.     Discovery

2           Prior to the filing of the Complaint, Arias, Ozzello & Gignac, LLP ("AOG"),  
3     conducted extensive investigations as to the validity and extent of Plaintiffs claims. This  
4     investigation included extensive witness interviews of both current and former Nurses,  
5     Social Workers and Home Health Aides, as well as an inquiry with the California Labor  
6     Commissioner as to the existence of any previous claims of this nature against Vitas.

7           During the two-year period subsequent to the filing of the Complaint, the Parties  
8     engaged in extensive written discovery. The written discovery propounded by Plaintiffs  
9     alone involved eight (8) sets of Special Interrogatories, four (4) sets of Requests for  
10    Admissions, four (4) sets of Form Interrogatories and nine (9) sets of Requests for  
11    Production yielding over 10,000 pages of paper and electronic documents.

12          The Parties also noticed, and took, a multitude of depositions. Each of the named  
13    Plaintiffs provided deposition testimony to the Defendant, while counsel for Plaintiffs  
14    deposed an array of Vitas employees. The Plaintiffs also took multiple depositions of the  
15    Defendant's Person(s) Most Knowledgeable as to the payment and policies related to  
16    overtime, meal breaks, rest breaks, VRU and voicemail systems and computer and  
17    technological structure.

18          In a further effort to analyze and substantiate Plaintiffs' contentions, subpoenas  
19    were issued to obtain records from the California Department of Labor Standards  
20    Enforcement to determine whether Vitas was subject to any prior citations for wage and  
21    hour violations.

22          Plaintiffs also, via subpoena, obtained telephone records from AT&T relating to  
23    calls placed to the VITAS toll free number used for its voicemail and VRU systems. This  
24    documentation allowed Plaintiffs', with some degree of certainty, to determine what time  
25    of day its Nurses, Social Workers and Home Health Aides placed their telephone calls to  
26    accomplish these tasks.

27          Plaintiffs additionally subpoenaed the results of survey of Vitas' employees  
28    conducted by the AON corporation, a third party company hired by Vitas to research

1 employee satisfaction, to see if any common complaints existed throughout the  
2 organization.

3 **3. Forensic Accountants**

4 Plaintiffs retained the services of forensic accountants to analyze the payroll  
5 information, digital VRU entry data provided by Vitas, and telephone records obtained  
6 from AT&T, for the purposes of calculating damages for each member of the proposed  
7 Class. The results of this expert analysis were shared with Vitas, and were instrumental to  
8 the mediation process and resulting settlement.

9 **4. Mediation Efforts**

10 As a result of the extensive discovery and analysis conducted by Plaintiffs, the  
11 parties mutually agreed to attempt to settle this matter and turned to former California  
12 Appellate Court Justice, John F. Trotter (Ret.) of JAMS for guidance as a neutral. Justice  
13 Trotter (Ret.) formally oversaw three separate formal mediation sessions conducted at the  
14 JAMS offices in Orange County and Los Angeles. Justice Trotter (Ret.) also remained  
15 actively involved in communicating with counsel for the parties through numerous  
16 telephone conversations, furthering the settlement process with each.

17 **5. Plaintiffs' Motion for Class Certification**

18 On November 29, 2005, Class Plaintiffs filed their motion for Class Certification,  
19 followed by the Opposition of Defendant and subsequent Reply of Class Plaintiffs. On  
20 January 9, 2006 the Court heard oral argument on the Motion for Class Certification and  
21 took the matter under submission. As a result of the oral argument on the Motion for Class  
22 Certification, the parties renewed their settlement discussions and requested that the Court  
23 delay any ruling on the Motion for Class Certification.

24 **6. Settlement**

25 On January 17, 2006, the parties attended a third mediation session with Judge  
26 Trotter (Ret.), at which a Settlement was reached. On February 17, 2006 the Board of  
27 Directors of Defendant formally ratified the Settlement.

28 Plaintiffs now seek the Preliminary Approval of this Court for this Settlement.

III.

DEFINITION OF THE SETTLEMENT CLASS

For purposes of the Settlement, the Parties have agreed to define a Settlement Class which consists of the following Sub-Classes:

**Overtime Sub-Class:** All persons who were employed by Defendant as Nurses, Social Workers, or Home Health Aides in California at any time from April 8, 2000, to the date of Preliminary Approval, and who worked more than eight hours in any given workday and/or over 40 hours in any given workweek without being paid compensation for all overtime hours worked.

**Meal Period Sub-Class:** All persons who were employed by Defendant as Nurses, Social Workers, or Home Health Aides in California at any time from April 8, 2000, to the date of Preliminary Approval, and who worked one or more five-hour increments of time and did not report a meal period in the VRU system for each such increment.

The Settlement disposes of all causes of action advanced by the Settlement Class<sup>2</sup>, or which could have been brought against Vitas during the Class Period of April 8, 2000 through the date of Preliminary Approval.

IV.

RECOMMENDATION OF CLASS COUNSEL

Class Counsel has conducted substantial pretrial investigation; legal research into the issues in contention; discovery involving the depositions of numerous parties and non-parties, and the production of nearly ten thousand documents. Class Counsel has analyzed the facts, as well as the law, relevant to the merits of the claims asserted in this action. Based upon the investigation, discovery and analysis, Class Counsel has determined that a settlement on the terms and conditions explained herein and embodied in the Settlement Agreement is in the best interests of the members of the Settlement Class.

The Settlement was reached after extensive arm's-length negotiations between Class counsel and counsel for VITAS, assisted in part by Justice John F. Trotter (Ret.) of JAMS. Class Counsel recommend the Settlement based upon their determination that the

<sup>2</sup> The Class is currently estimated to be comprised of approximately 2,500 individuals.

1 Settlement will confer substantial benefits on the members of the Settlement Class. In  
2 determining to recommend the Settlement, Class Counsel have considered, among other  
3 things:

- 4 (1) The benefits that the members of the Settlement Class will receive under the  
5 Settlement;
- 6 (2) The attendant risks of continued litigation of this action;
- 7 (3) The uncertainties relating to the proof of the claims alleged in this action;  
8 and,
- 9 (4) The Settlement is fair, reasonable and adequate, and in the best interests of  
10 the members of the Settlement Class under the circumstances.

11  
12 **V.**

13 **DEFENDANT'S POSITION ON SETTLEMENT**

14 Defendant VITAS continues to deny all wrongdoing of any kind whatsoever and  
15 denies any liability to Plaintiffs or the members of the Settlement Class. Defendant Vitas  
16 however, considers it desirable to settle this action on the terms set forth in the Settlement  
17 Agreement to avoid further expense, to enable VITAS to pursue its business endeavors  
18 unhindered by further litigation. The Settlement brings a finality to the potential exposure  
19 for the payment of damages to the Settlement Class, and concludes all controversies  
20 surrounding the merits of the claims asserted in this action.

21  
22 **VI.**

23 **BENFITS TO THE SETTLEMENT CLASS UNDER THE SETTLEMENT**

24 The Settlement provides for the creation of a common fund (the "Settlement Fund")  
25 in the amount of Fifteen Million Dollars and zero cents (\$15,000,000.00)<sup>3</sup>. (The Settlement  
26 Agreement is attached hereto as Exhibit "A".)

27  
28 <sup>3</sup> This amount does not include attorneys' fees and costs, class representatives'  
enhancements, and the cost of claims administration which shall all be paid from funds  
Separate and Apart from the Settlement Fund.

1 The Settlement Fund shall be deposited into an interest bearing account, to be  
2 opened by the Parties, within five (5) business days after the entry of an Order granting  
3 Preliminary Approval to the Settlement.

4 As the resulting Settlement is the product of serious, informed, and arms-length  
5 negotiations and contains no deficiencies, it is worthy of Preliminary Approval by this  
6 Court under the operative standards of CAL. R. COURT, RULE 1859 and applicable state  
7 law. Three separate and formal mediation sessions were conducted with the supervision  
8 and assistance of Justice Trotter (Ret.) on August 11, 2005, October 13, 2005, and January  
9 17, 2006. The Settlement is fair, adequate, and reasonable and provides relief consistent  
10 with the claims asserted as explained in detail in Section X herein. Accordingly,  
11 Preliminary Approval of the Settlement is appropriate at this time.

12  
13 **VII.**

14 **GENERAL TERMS AND CONDITIONS OF THE SETTLEMENT**

15 The terms and conditions of the settlement provide or require that:

- 16 1. The Subclasses are as defined in Part III of this Motion.
- 17 2. The Class Representatives are Ann Marie Costa, Deborah Gill, Anna Jimenez  
18 and Gracetta Wilson.
- 19 3. The Settling Plaintiffs are the Class Representatives.
- 20 4. Class Counsel is Arias, Ozzello & Gignac, LLP.
- 21 5. The Class Action Claims Administrator is Desmond, Marcello & Amster,  
22 certified public accountants.

23 6. The total amount of the Settlement Fund is Fifteen Million Dollars and zero  
24 cents (\$15,000,000.00), which shall be allocated as follows:<sup>4</sup>

- 25 a. Seven Million Five Hundred Thousand Dollars (\$7,500,000) to the  
26 Overtime Sub-Class; and,

27  
28 <sup>4</sup> Detailed allocations of wages, interest and penalties are set forth in Part 6 of the Settlement Agreement, attached hereto as Exhibit "A."

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b. Seven Million Five Hundred Thousand Dollars (\$7,500,000) to the Meal Period Sub-Class.

7. Any Settlement Class Member who objects to any aspect of the Settlement may appear and be heard at the Final Approval Hearing. Any such person must submit a written notice of objection to the Court and Class Counsel prior to the Final Approval Hearing.

VIII.

**OTHER SIGNIFICANT TERMS OF THE SETTLEMENT**

The other significant terms of the Settlement are as follows:

**A. Mutual General Releases Of All Claims, Known And Unknown**

If the Settlement is granted final approval by the Court, all members of the Settlement Class will release and forever discharge the Released Parties (as defined in the Settlement Agreement) from any and all claims, rights, demands, suits, actions or causes of action, losses, costs, obligations, liabilities, expenses, debts and duties of every kind or nature, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, at law or in equity, arising out of their employment with the Released Parties in connection with the claims asserted in this action. This release will bind all members of the Settlement Class regardless, except those who file a timely Request for Exclusion with this Court. In connection with the release and discharge of the Released Parties, each member of the Settlement Class who has not filed a timely Request for Exclusion with this Court shall be deemed to have expressly waived all rights under CALIFORNIA CIVIL CODE section 1542.

Reciprocally, upon final approval of the Settlement, the Released Parties will release all members of the Settlement Class from any and all claims, rights, demands, suits, actions or causes of action, losses, costs, obligations, liabilities, expenses, debts and duties of every kind or nature, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, at law or in equity, arising out of their employment with the Release Parties.

1 The Released Parties likewise shall be deemed to have expressly waived all rights under  
 2 CALIFORNIA CIVIL CODE section 1542.

3 **B. Dismissal Of This Action**

4 As part of the Final Judgment, this action will be dismissed with prejudice.  
 5

6 **IX.**

7 **STEPS TO BE UNDERTAKEN FOLLOWING PRELIMINARY APPROVAL**

8 Following Preliminary Approval of the Settlement, Class Counsel shall undertake  
 9 the following steps as part of the Final Approval process:

10 **A. Notice Of The Settlement**

11 Class Counsel propose that Notice of the Settlement be provided to the Settlement  
 12 Class by first-class United States mail as follows:

13 1. Mail Notice. Desmond Marcello & Amster ("DM&A"), the Class  
 14 Action Claims Administrator proposed for appointment as the Settlement Administrator,  
 15 shall mail the Settlement Notice, in the form attached as Exhibit "B" to the Preliminary  
 16 Approval Order, by first class United States mail, postage prepaid, to the last known  
 17 address of every member of the Settlement Class. VITAS shall provide DM&A with a list  
 18 of the names and last known addresses for each member of the Settlement Class within five  
 19 (5) days of the order granting Preliminary Approval. Within ten (10) business days of  
 20 receipt of the mailing address information, the Claims Administrator shall mail the Notice  
 21 via first-class regular U.S. Mail to all identified Class Members of the Overtime Sub-Class  
 22 and Meal Period Sub-Class, respectively. Prior to mailing the Notice, the Claims  
 23 Administrator shall utilize the services of National Change of Address (NCOA) to correct  
 24 any addresses as necessary. For any Notice returned for the first time with a new address  
 25 provided by the postal service, the Claims Administrator shall utilize the new address and  
 26 mail the Notice a second time.

27 2. Skip Tracing. For any notice returned for the first time by the postal  
 28 service without a new address provided by the postal service, the Claims Administrator

1 shall skip trace to obtain a current address for the Class Member in question and shall mail  
 2 the Notice a second time within five (5) days of receiving the notice of invalid address.  
 3 The Claims Administrator shall thereafter have no further obligation to seek a current  
 4 address.

5 3. Private Investigator. For those Class Members who cannot be located  
 6 through the process described above, if any, any Settlement Payments allocated to such  
 7 Class Members shall be applied toward the cost of a private investigator in a final effort to  
 8 locate such Class Members.

9 Class Counsel believe that the Notice Plan set forth above provides the best notice  
 10 practicable under the circumstances, constitutes due and sufficient notice to the members of  
 11 the Settlement Class of the terms of the Settlement Agreement, and otherwise satisfies the  
 12 requirements of California law.

13 **B. Motion For Final Settlement Approval**

14 Class Counsel shall file a Motion for Final Approval of the Settlement. The date,  
 15 time and location of the hearing on the motion shall be set forth in the Settlement Notice as  
 16 required by Rule 1856 of the CALIFORNIA RULES OF COURT.

17 **C. Application For Award Of Attorneys' Fees**

18 At the time of Final Approval, Class Counsel shall make an application to the Court  
 19 to be awarded attorneys' fees. Any award of attorney's fees granted by the Court shall be  
 20 payable separate and apart from the Settlement Fund, thereby not affecting the amount any  
 21 member of any Sub-Class shall receive. This intended application is set forth in the  
 22 Settlement Notice.

23 **D. Application For Reimbursement Of Litigation Expenses**

24 At the time of Final Approval, Class Counsel shall make an application to the Court  
 25 to be awarded reimbursement of costs for litigation expenses. Any award of reimbursement  
 26 of costs granted by the Court shall be in excess of the Settlement Fund and shall not affect  
 27 the amount of the Settlement Fund, or the amount a member of any Sub-Class will receive.  
 28 Any amount awarded by the Court for reimbursement of costs will not be deducted from

1 the Settlement Fund, but rather shall be paid separately by Vitas. This intended application  
 2 is set forth in the Settlement Notice.

4 X.

5 THE CLASS ACTION SETTLEMENT APPROVAL PROCEDURE

6 No action brought on behalf of a Class may be settled, compromised, or dismissed  
 7 without the approval of the Court. The procedures for submission of a proposed settlement  
 8 for preliminary approval are discussed at *Newberg on Class Actions* § 11.24-11.26:

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

13 There are three steps to the Court’s settlement approval process:

- 14 (1) Preliminary approval of the proposed settlement at an informal hearing;
- 15 (2) Dissemination of notice of the settlement to all affected class members; and,
- 16 (3) A “formal fairness hearing,” or final settlement approval hearing, at which  
 17 class members may be heard regarding the settlement, and at which evidence  
 18 and argument concerning the fairness, adequacy, and reasonableness of the  
 19 settlement is presented.

20 This three-step settlement approval process is prescribed by the *Manual for Complex*  
 21 *Litigation, Third* (Federal Judicial Center 1995) §30.41, is widely followed in the federal  
 22 circuits, and has also been adopted by California courts.<sup>5</sup>

23 Specifically, the *Manual for Complex Litigation Second* provides at § 30.41 (2002):

24 “Approval of Class action settlements involves a two step process. First,  
 25 counsel submits the proposed terms of the settlement and the court makes a  
 26 preliminary fairness evaluation.... If the preliminary evaluation of the  
 27 proposed settlement does not disclose grounds to doubt its fairness or other  
 28 obvious deficiencies, such as unduly preferential treatment of Class

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<sup>5</sup> See *Manual for Complex Litigation, Third* § 30.41 (2003); see also, *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1599-1602 [outlining the Class Action settlement approval process].

1 representatives or of segments of the Class, or excessive compensation for  
2 attorneys, and appears to fall within the range of possible approval, the court  
3 should direct that notice under Rule 23 (e) be given to the Class members of  
4 a formal fairness hearing, at which arguments and evidence may be presented  
5 in support of and in opposition to the settlement. For economy, courts have  
6 in appropriate cases permitted the notice under Rule 23 (c)(2) to be combined  
7 with the Rule 23(e) notice.”

8 Under this standard, a trial court’s preliminary approval of a Class Action settlement is  
9 simply a conditional finding that on its face, the compromise appears to be within a range  
10 of acceptable agreements. As *Newberg, supra*, comments:

11 “The strength of the findings made by a judge at a preliminary hearing or  
12 conference concerning a tentative settlement proposal may vary. The court  
13 may find that the settlement proposal contains some merit, is within the  
14 range of reasonableness required for a settlement offer, or is presumptively  
15 valid subject only to any objections that may be raised at a final hearing.”

16 This Court will also ultimately determine the reasonableness of any attorneys’ fees  
17 or repayment of costs advanced by Class Counsel. These matters are solely within the  
18 discretion of the Court, who must issue its determination after reviewing the appropriate  
19 applications made by Class Counsel. The Court must also factor in objections raised by  
20 Class members (the criteria for approval of final settlement are set forth at NEWBERG  
21 commencing at § 11.41).

22 Class Representative and Class Counsel request that this Court take the initial step  
23 of granting Preliminary Approval of this Settlement.

24 **A. Preliminary Approval is Appropriate Where The Proposed Settlement Is**  
25 **Within The Range of Possible Final Approval**

26 Settlements, in general, are highly favored by the courts. *Stambaugh v. Superior*  
27 *Court* (1976) 62 Cal.App.3d 231, 236. In evaluating a class action settlement, this Court  
28 has broad powers to determine whether a proposed settlement is fair and reasonable under  
the circumstances of the case. *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438;  
*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 [“In general,  
questions whether a settlement was fair and reasonable, whether notice to the class was  
adequate ... are matters addressed to the trial court’s broad discretion.”]

1 In reaching its ultimate determination as to the fairness, adequacy and  
2 reasonableness of a proposed class action settlement, the Court may consider a variety of  
3 factors, including: the strength of the plaintiffs' case; the risk, expense complexity and  
4 likely duration of further litigation; the risk of maintaining the case as a class action  
5 through trial; the amount offered in settlement; the extent of discovery completed and the  
6 stage of the proceedings; the experience and views expressed by Class Counsel; and the  
7 reaction of the class members to the proposed settlement. *7-Eleven Owners For Fair*  
8 *Franchising v. The Southland Corporation* (2000) 85 Cal.App.4th 1135, 1146; *Dunk v.*  
9 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Wershba*, 91 Cal.App.4th at 245.  
10 However, this "list of factors is not exhaustive and should be tailored to each case". *Dunk*,  
11 48 Cal.App.4th at 1801. In this regard, the trial court is "free to engage in a balancing and  
12 weighing of factors depending on the circumstances of each case". *Wershba*, 91  
13 Cal.App.4th at 245.

14 Ultimately, before granting final approval to a proposed settlement, the Court must  
15 carefully scrutinize the proposed settlement "with the purpose of protecting the rights of the  
16 absent class members who will be bound by the settlement". *Wershba*, 91 Cal.App.4th at  
17 245. At that time, the Court must "reach a reasoned judgment that the agreement is not the  
18 product of fraud or overreaching by, or collusion between, the negotiating parties, and that  
19 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned". *Id.*,  
20 quoting *Officers for Justice v. Civil Service Com'n, etc.*, 688 F. 2d 615, 625 (9th Cir. 1982).

21 For purposes of granting preliminary approval, however, this Court need only find  
22 that the proposed settlement falls within the range of possible final approval. *See, Holden*  
23 *v. Burlington Northern, Inc.*, 665 F.Supp. 1398, 1402 (D. Minn. 1987); *In re Montgomery*  
24 *County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 313 (D. Md. 1979). As noted by  
25 the court in *In re Traffic Executive Asso.--Eastern Railroads*, 627 F.2d 631, 634 (2d Cir.  
26 1980), approving the dissemination of notice "is at most a determination that there is what  
27 might be termed 'probable cause' to submit the proposal to class members and hold a full-  
28 scale hearing as to its fairness."

1 B. The Settlement Is Within The Range Of Possible Final Approval Under The  
2 Factors Set Forth In 7-Eleven, Wershba, and Dunk

3 Evaluating the Settlement in this action under the factors set forth in *7-Eleven*,  
4 *Wershba*, and *Dunk* for final approval, it is clear that the Settlement warrants this Court's  
5 preliminary approval.

6 *First*, although Plaintiffs believe that their claims in this action are meritorious,  
7 there is no guarantee of success when those claims are subject to adjudication in a jury  
8 trial. Vitas categorically disputes Plaintiffs' claims, asserts that Plaintiffs were paid for all  
9 time worked and took all meal and rest periods, claims to be able to produce past and  
10 present employees at trial who will testify that they did not work overtime and took all  
11 meal and rest periods, and maintains that this action never should have been filed in the  
12 first place. Moreover, even a successful result at the time of trial can be a fleeting victory  
13 when faced with the prospect of a long and almost certain appeal of any jury verdict in  
14 favor of the Class.

15 *Second*, the case has been very time consuming and expensive for the parties, who  
16 have been litigating for a period of over two years. In the absence of a settlement, the  
17 parties were poised to receive the Court's ruling on Class Certification, the risks of which  
18 stood to drastically alter the landscape of the case for both sides. Certification  
19 notwithstanding, the Parties were set to commence a lengthy and expensive trial, involving  
20 a multitude of witnesses, and experts which, as with all trials, entailed the risk of a loss in  
21 which case, the Class would receive no compensation at all.

22 *Third*, a well-defined community of interests exists among the Nurses, Social  
23 Workers and Home Health Aides of Vitas. The arguments both for and against certification  
24 were thoroughly briefed and argued by both Plaintiffs' and Vitas, and although the  
25 Plaintiffs' believed that the risk of this Court not certifying at least one Sub-Class was  
26 minimal, there is no guarantee as to how the Court would rule on the Motion for Class  
27  
28

1 Certification.<sup>6</sup> Further, the Court would remain free to decertify the Class at anytime  
2 during trial. Obviously, if the Court were to decertify the Class during trial, the impact on  
3 the Class would be catastrophic.

4 *Fourth*, the amount obtained under the Settlement is substantial, especially when  
5 compared to the maximum values of Plaintiffs claims after a successful trial on the merits.  
6 With respect to the Overtime Sub-Class, assuming that the Class could fully prove to a jury  
7 that each employee worked 30 minutes of unpaid overtime per day, the maximum amount it  
8 could have received in a successful trial would be \$14,407,227 in unpaid wages and  
9 interest. Under this Settlement, \$7,500,000 is allocated to the Overtime Sub-Class  
10 representing a recovery of approximately 52% of the maximum successful trial value of  
11 these claims. With respect to the Meal Period Sub-Class, again assuming that the Class  
12 could convince a jury to find entirely for its side, the maximum amount that could be  
13 recovered for meal periods not provided is \$10,577,115.76. Under this Settlement,  
14 \$7,500,000 is allocated to the Meal Period Sub-Class, representing a recovery of  
15 approximately 71% of the maximum successful trial value of these claims.<sup>7</sup> Examining the  
16 actual recovery, some Class members will receive a gross amount of as much as \$63,479.65  
17 as a result of this Settlement.<sup>8</sup> Such a recovery is almost unprecedented in the world of  
18 wage and hour litigation, where many a class member has been forced to accept minutes for  
19 every overtime hour that they have worked. When considered in light of the inherent risks  
20 of a full trial on the merits, and subsequent appeals, the Settlement is certainly very  
21 favorable to the Class.

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22  
23 <sup>6</sup> The Parties submitted all briefs on the issue of Certification, and the Court heard oral  
24 argument on January 9, 2006. At the request of the Parties, the Court stayed its order on  
Certification so that negotiations could continue, the ultimate result of which was  
Settlement.

25 <sup>7</sup> An added negotiated benefit to the Class is the agreement of the Parties to allow for a  
26 recovery of denied meal periods over a four-year period. At present, there are conflicting  
27 Appellate opinions as to whether these claims should be subject to a four or one year statute  
period, and the California Supreme Court has recently granted review to the matter.

28 <sup>8</sup> The amounts of recovery will widely vary depending upon the length of time a Class  
Member was employed at Vitas, with the minimum amount being as low as \$3.63 for a very  
short term employee to as high as \$63,479.65.

1 *Fifth*, the discovery that was conducted in this action, as set forth on pages four and  
 2 five herein, was extensive. It included both merits-based discovery and expert discovery.  
 3 Plainly, the discovery conducted, was sufficient for the parties to make an informed  
 4 decision on the issue of settlement.

5 *Sixth*, Class Counsel, who possess substantial experience in the field of class  
 6 actions, and employment litigation, recommend the Settlement.<sup>9</sup> Where, as here, the  
 7 counsel recommending the proposed settlement for approval are competent and  
 8 experienced, significant weight may be given to their opinion. *Kirkorian v. Borelli*, 695  
 9 F.Supp. 446, 451 (N.D. Cal. 1988). *See, also, Warren v. Tampa*, 693 F.Supp. 1051, 1060  
 10 (M.D. Fla. 1988) (“[T]he Court is affording great weight to the recommendations of  
 11 counsel for the parties, given their considerable experience in this type of litigation”) *aff’d.*,  
 12 893 F.2d 347 (11th Cir. 1989); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 n.14 (4th Cir.  
 13 1975), *cert. denied*, 424 U.S. 967 (1976); *In re Minolta Camera Products Antitrust*  
 14 *Litigation*, 668 F.Supp. 456, 459 (D. Md. 1987); *Blank v. Talley Industries, Inc.*, 64 F.R.D.  
 15 125, 132 (S.D.N.Y. 1975).

16 **C. The Settlement Is Presumptively Fair**

17 Under California law, a “presumption of fairness” exists where:

- 18 (1) The settlement is reached through arm’s-length bargaining;
- 19 (2) Investigation and discovery are sufficient to allow counsel and the  
 20 Court to act intelligently;
- 21 (3) Counsel is experienced in similar litigation; and,
- 22 (4) The percentage of objectors is small.

23 *7-Eleven Owners For Fair Franchising*, 85 Cal.App.4th at 1146; *Dunk*, 48  
 24 Cal.App.4th at 1802.

25 Three of the four prerequisites for presumptive fairness are present in this case: (1)  
 26 the Settlement is the result of arm’s-length bargaining by the parties and their counsel with  
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28 <sup>9</sup> Class Counsel has immense experience in Class Action litigation, litigating, settling and  
 trying over 150 matters. (*See, Declaration of Mike Arias ¶ 4*)

1 the help of an accomplished and well respected neutral; (2) the parties have conducted  
2 extensive discovery as described herein; and (3) Plaintiffs have been represented by  
3 counsel with many years of experience in litigating class actions who have negotiated  
4 numerous other class settlements that have been approved by courts throughout California  
5 and the United States. Of course, the fourth prerequisite cannot be satisfied until the time  
6 of the final approval hearing.

7 **D. The Proposed Settlement Fulfills All Criteria For Preliminary Settlement**  
8 **Approval**

9 As stated *supra*, the Preliminary Approval stage is merely an “initial assessment” of  
10 the fairness of the proposed Agreement, which the Court must declare after reviewing the  
11 settlement documents provided by the parties.

12 The purpose of this preliminary evaluation is not a comprehensive review of all  
13 aspects of the agreement, but rather to determine whether the proposed Settlement is within  
14 a range of possible approval, thereby making notice to the Class and the scheduling of a  
15 Fairness Hearing worthwhile.<sup>10</sup> Whether the Settlement is within the range of possible  
16 approval involves only an initial examination by the Court, which must determine whether  
17 the proposed Settlement appears “reasonable on its face.”<sup>11</sup> Notably, California courts  
18 favor class action settlement.<sup>12</sup>

19 In reviewing a class action settlement for preliminary approval, the court has broad  
20 powers to determine whether a proposed settlement is fair under the circumstances of the  
21 case.<sup>13</sup> To grant Preliminary Approval of any class action settlement, the court need find  
22 only that the settlement falls within the range of possible final approval.<sup>14</sup>

23  
24 <sup>10</sup> See, *Newberg on Class Actions*, Settlement of Class Actions, § 11.25; see also, *Liebman*  
*v. J.W. Petersen Coal & Oil Co.* (N.D. Ill. 1973) 73 F.R.D. 531.

25 <sup>11</sup> See, *Magana v. Platzer Shipyard, Inc.*, (S.D. Tex. 1977) 74 F.R.D. 61, 79.

26 <sup>12</sup> See, *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.

27 <sup>13</sup> See, *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.

28 <sup>14</sup> See, *2 Newberg on Class Actions*, Settlement of Class Actions, § 11.25; see also, *Holden*  
*v. Burlington Northern, Inc.*, (D. Minn. 1987) 665 F.Supp. 1398, 1402; *In re Montgomery*

1 As this Court is aware from the hearing on Class Certification, the claims against  
2 VITAS were subject to extensive scrutiny and debate. VITAS has been represented by  
3 extremely competent counsel, who has vigorously defended its client. As such, the  
4 settlement is reasonable in light of:

- 5 (1) the guaranteed continued vigorous representation by counsel,
- 6 (2) the risks associated with issues of Class Certification;
- 7 (3) the various defenses to liability;
- 8 (4) the overall difficulties and risks of litigation in prosecuting an action  
9 of this nature; and
- 10 (5) the risks associated with any appeals taken by any party.

11 In short, the Settlement has no deficiencies that would require this Court to reject  
12 the proposed settlement. Further, the Court should grant preliminary approval of a Class  
13 action settlement "if the preliminary evaluation of the proposed settlement does not  
14 disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly  
15 preferential treatment of Class Representatives or of segments of the Class, or excessive  
16 compensation for attorneys and appears to fall within the range of possible approval..."<sup>15</sup>

17 Preliminary Approval and certification for settlement purposes fulfills all the due  
18 process criteria where, as here, the Settlement is evaluated by an informed court, and  
19 where, as here, the court utilizes a settlement approval process which includes notice to the  
20 Class and an opportunity to be heard.

21 **E. Class Settlement Notice**

22 The proposed Notice meets the standards of applicable law.<sup>16</sup> The method and the

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23 *County Real Estate Antitrust Litigation* (D. Md. 1979) 83 F.R.D. 305, 313.

24  
25 <sup>15</sup> See, *Manual for Complex Litigation, Third*, § 30.41 (2002); see also, *In re Shell Oil*  
26 *Refinery*, 155 F.R.D. 552, 555 (E.D. La 1993) (holding that at the preliminary approval stage,  
27 the Court's only task is to determine whether 'the proposed settlement appears to be the  
28 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does  
not improperly grant preliminary preferential treatment to Class representatives or  
segments of the Class, and falls within the range of possible [judicial] approval.')

<sup>16</sup> The Notice is attached as Exhibit "B".

1 content of the Notice to the Settlement Class should be designed to fairly appraise it of all  
2 terms of the proposed Settlement and the options available to each member.<sup>17</sup> An  
3 appropriate notice is one that has a reasonable chance of reaching a substantial percentage  
4 of the Settlement Class.<sup>18</sup>

5 The proposed Notice identifies the settling Class Representatives and Defendant, as  
6 well as a description of the lawsuit and its claims, the Settlement Sub-Classes, the  
7 Settlement Fund, the proposed plan of allocation and the maximum amount of attorneys'  
8 fees that Class Counsel may receive. Furthermore, the proposed Notice contains  
9 information on objecting to the settlement, requesting an exclusion from the Settlement  
10 Class, as well as the schedule for the Final Approval Hearing. In short, the proposed  
11 Notice describes the proposed Settlement with enough specificity to allow class members to  
12 receive sufficient information to decide whether they should accept the benefits offered or  
13 object to the Settlement.

14 FEDERAL RULES OF CIVIL PROCEDURE RULE 23(c)(2) requires that all members of  
15 the Class that can be identified shall receive notice of the proposed settlement.

16 Additionally, CALIFORNIA RULES OF COURT, RULE 1859(f) requires that:

17 "If the court has certified the action as a Class action, notice of the final  
18 approval hearing must be given to the Class members in the manner specified  
19 by the court. The Notice must contain an explanation of the proposed  
20 settlement and procedures for Class members to follow in filing written  
objections to it and in arranging to appear at the settlement hearing and state  
any objections to the proposed settlement."

21 The proposed Noticed attached as Exhibit "B" meets all requirements for notices of  
22 Class Action settlement.

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27 <sup>17</sup> See, *Philadelphia Housing Authority v. American Radiators & Standard Sanitary Corp.*  
323 F.Supp. 364, 378 (E.D. Pa. 1970).

28 <sup>18</sup> See, *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.

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XI.

CONCLUSION

Based upon the foregoing, Class Plaintiffs respectfully request that this Court grant Preliminary Approval of the proposed Settlement between the Class and VITAS by entering an Order preliminarily approving the settlement.

Dated: April 17, 2006

ARIAS, OZZELLO & GIGNAC, LLP

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