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6 Attorneys for Defendant
ODYSSEY HEALTHCARE OPERATING A, L.P.

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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LESLIE OLIVARES, as an individual
and on behalf of all others similarly
situated, and as a private attorney
general,

Plaintiff,

v.

ODYSSEY HEALTHCARE
OPERATING A, L.P., a Delaware
limited partnership; and DOES 1
through 50, inclusive,

Defendants.

Case No. '20CV2381 GPC DEB

**DEFENDANT ODYSSEY
HEALTHCARE OPERATING A,
L.P.'S NOTICE OF REMOVAL**

[28 U.S.C. §§ 1332, 1441, 1446]

Complaint Filed: 10/28/2020
Trial Date: Not set

21 **TO THE CLERK OF THE U. S. DISTRICT COURT FOR THE SOUTHERN**
22 **DISTRICT OF CALIFORNIA, PLAINTIFF AND HER ATTORNEYS OF**
23 **RECORD:**

24 PLEASE TAKE NOTICE that Defendant Odyssey Healthcare Operating A,
25 L.P. (“Defendant”) removes the above-entitled action to this Court from the Superior
26 Court of the State of California, County of San Diego pursuant to 28 U.S.C. § 1441.
27 Defendant invokes this Court’s original jurisdiction under 28 U.S.C. § 1332(d) (the
28 Class Action Fairness Act). Defendant submits this Notice of Removal without

1 waiving any defenses to the claims asserted by Plaintiff Leslie Olivares (“Plaintiff”)
2 and without conceding that Plaintiff has pled claims upon which relief can be
3 granted. This removal is based on the following grounds:

4 **PROCEDURAL BACKGROUND**

5 1. On October 28, 2020, Plaintiff Leslie Olivares filed a class action
6 Complaint in the Superior Court of the State of California, County of San Diego,
7 titled *Oliveras v. Odyssey Healthcare Operating A, L.P.*, Case No. 37-2020-
8 00039092-CU-OE-CTL. Odyssey was served with the Complaint on November 5,
9 2020. (Declaration of Keith Jewell (“Jewell Decl.”), ¶ 3.) A true and correct copy
10 of the Complaint is attached to this Notice of Removal as **Exhibit A**. (Declaration
11 of Shannon Nakabayashi (“Nakabayashi Decl.”), ¶ 3, Exh. A (Complaint).)

12 2. On December 3, 2020, Defendant filed an Answer to the Complaint in
13 the Superior Court of the State of California, County of San Diego. A true and
14 correct copy of Defendant’s Answer is attached to this Notice of Removal as **Exhibit**
15 **B**. (Nakabayashi Decl, ¶ 4, Exh. B (Answer).) Exhibits A and B constitute all the
16 pleadings that have been filed or served in this action as of the date of the filing of
17 this Notice of Removal. (*Id.*, ¶ 5.)

18 **REMOVAL IS TIMELY**

19 3. Plaintiff served Defendant with the Complaint on November 5, 2020.
20 (Jewell Decl., ¶ 3.) This Notice of Removal is timely under 28 U.S.C. §§ 1446(b)
21 and 1453. *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 354 (1999). No
22 previous Notice of Removal has been filed or made with this Court for the relief
23 sought herein.

24 **NOTICE**

25 4. Defendant will promptly serve this Notice of Removal on all parties
26 and promptly file a copy of this Notice of Removal with the Clerk of the Superior
27 Court, County of San Diego, as required by 28 U.S.C. § 1446(d).

PLAINTIFF'S ALLEGATIONS

1
2 5. Plaintiff is a former non-exempt employee of Defendant and “regularly
3 worked more than eight hours in a workday and 40 hours in a workweek.” (Exh. A
4 (Complaint), ¶ 9.) Plaintiff regularly earned non-discretionary remuneration in
5 addition to her base hourly wages, including on-call pay. (*Id.*)

6 6. Plaintiff alleges that Defendant “routinely fail[s] to pay sick pay at the
7 regular rate of pay and routinely fail[s] to pay all overtime at one-and-one-half times
8 (and double-time wages at two times) the regular rate of pay.” (Exh. A, ¶ 3.)
9 “Specifically, Plaintiff and other non-exempt employees earn non-discretionary
10 remuneration in addition to their base hourly wages that Defendant’s fail to consider
11 when calculating Plaintiff and other non-exempt employees’ regular rates of pay.”
12 (*Id.*)

13 7. Plaintiff claims that this miscalculation of the regular rate of pay
14 resulted in unpaid sick pay and unpaid overtime. (Exh. A, ¶ 3.) She further claims
15 that Defendant unlawfully paid only straight time for double overtime worked:
16 “Moreover, based on Defendant’s wage statements, Defendants do not even pay two
17 times a miscalculated regular rate of pay for double-time wages and **instead pay**
18 **straight-time wages only for double-time work.**” (*Id.*) (Emphasis added.) As a
19 result, Plaintiff seeks unpaid wages on behalf of herself and other similarly situated
20 individuals. (*Id.*, ¶¶ 3, 25-30, 31-35, Prayer for Relief ¶¶ 4, 5.)

21 8. Plaintiff claims that these unpaid wages were “neither timely paid
22 during employment nor timely paid upon termination” in violation of California
23 Labor Code §§ 201-204. (Exh. A, ¶¶ 3, 34.) As a result, she requests recovery of
24 waiting time penalties under California Labor Code § 203. (Exh. A, ¶ 34, Prayer for
25 Relief ¶¶ 4, 5.)

26 9. Plaintiff also claims that Defendant violated California Labor Code §
27 226(a) by failing to provide her and similarly situated individuals itemized wage
28 statements that accurately showed hourly rates, gross wages earned, and net wages

1 earned, including sick pay, overtime, and double-time wages. (Exh. A, ¶¶ 36-39.)
2 Accordingly, she requests penalties, attorneys' fees, and costs of suit pursuant to
3 California Labor Code § 226. (*Id.*, ¶ 39, Prayer for Relief ¶ 6.)

4 10. Plaintiff defines and seeks certification of multiple subclasses that
5 include "all current and former non-exempt employees of Defendant in the State of
6 California" from May 2, 2016 to the present (i) who were paid sick pay in
7 workweeks in which they earned on-call pay or other non-discretionary
8 remuneration in addition to their base hourly ("Sick Pay Class"); (ii) who were paid
9 overtime or double-time wages in workweeks in which they earned on-call pay or
10 other non-discretionary remuneration in addition to their base hourly wages
11 ("Overtime Class"); and (iii) who were paid double overtime wages ("Double-Time
12 Class"). Plaintiff also seeks certification of all current and former non-exempt
13 employees of Defendant in the State of California from May 2, 2019 to the present,
14 "who were paid sick pay, overtime, or double-time wages in workweeks in which
15 they earned on-call pay or other non-discretionary remuneration in addition to their
16 hourly wages ("Wage Statement Class)." (Exh. A, ¶ 15.) These subclasses are
17 herein collectively referred to as the "**Putative Class**."

18 11. Based on the foregoing, Plaintiff asserts five causes of action: (1)
19 failure to pay sick pay on behalf of herself and the Sick Pay Class; (2) failure to pay
20 overtime and double overtime on behalf of herself and the Overtime Class and
21 Double-Time Class; (3) failure to provide accurate, itemized wage statements on
22 behalf of herself and the Wage Statement Class; (4) violation of California's Unfair
23 Competition Law under California Business and Professions Code § 17200, *et seq.*
24 (the "**UCL Claim**") on behalf of herself and the Putative Class; and (5) a
25 representative action for the foregoing wage-and-hour violations under the Private
26 Attorneys General Act of 2004 (the "**PAGA Claim**"). (Exh. A.)

27 12. In her Complaint, Plaintiff seeks damages, restitution, penalties, and
28 other relief pursuant to the California Business and Professions Code § 17200, *et*

1 *seq.* and the California Labor Code, including but not limited to, waiting time
2 penalties under California Labor Code § 203. (Exh. A, ¶¶ 24, 30, 34-35, 39, 43, 48,
3 Prayer for Relief, ¶¶ 1-10.)

4 **THIS COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION**
5 **UNDER CAFA**

6 13. Plaintiff brings this action as a putative class action. Removal based
7 upon the Class Action Fairness Act (“CAFA”) is proper pursuant to 28 U.S.C. §§
8 1332(d), 1441, 1446, and 1453 because (1) the aggregate number of putative class
9 members in all proposed classes is 100 or greater; (2) diversity of citizenship exists
10 between at least one putative class member and the named defendant in this matter;
11 and (3) the amount placed in controversy by the Complaint exceeds, in the aggregate,
12 \$5,000,000, exclusive of interests and costs. 28 U.S.C. §§ 1332(d)(2).
13 1332(d)(5)(B), 1453; *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied*
14 *Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087,
15 1089–90, 1090 n.2 (9th Cir. 2010). Although Defendant denies Plaintiff’s factual
16 allegations and denies that Plaintiff or the classes, she purports to represent are
17 entitled to the relief requested, all requirements for jurisdiction under CAFA have
18 been met in this case.

19 **There Are At Least 100 Putative Class Members in All Proposed Classes**

20 14. To remove under CAFA, the aggregate number of putative class
21 members in all proposed classes must be greater than 100. 28 U.S.C. §§
22 1332(d)(5)(B); *United Steel*, 602 F.3d at 1090, n.2.

23 15. There are approximately 376 former and current non-exempt
24 employees who worked for Defendant in California from May 6, 2016 to August 1,
25 2020, who earned non-discretionary remuneration, including on-call pay. (Jewell
26 Decl., ¶ 6.) These employees are part of the Putative Class that Plaintiff seeks to
27 certify. Accordingly, there are at least 100 putative class members in all of the
28 proposed classes alleged in this action.

1 Defendant Odyssey Healthcare Operating A, L.P.

2 19. For minimum diversity purposes, CAFA provides that an
3 unincorporated association is a citizen of the state where it has its principal place of
4 business and under whose laws it is organized. 28 U.S.C. §§ 1332(d)(10). *See*
5 *Lafountain v. Meridian Senior Living*, No. CV 15-03297-RGK (PJWx), 2015 U.S.
6 Dist. LEXIS 84134, at *5 n.2 (C.D. Cal. Jun. 29, 2015); *Ferrell v. Express Check*
7 *Advance of S.C. LLC*, 591 F.3d 698, 705 (4th Cir. 2010) (under CAFA, an LLC is a
8 citizen of the State under whose laws it is organized and the State where it has its
9 principal place of business); *Marroquin v. Wells Fargo, LLC*, No. 11-CV-163-L-
10 BLM, 2011 U.S. Dist. LEXIS 10510, 2011 WL 476540 (S.D. Cal. Feb. 3, 2011)
11 (applying *Ferrell* to find that minimum diversity existed).

12 20. Defendant Odyssey Healthcare Operating A, L.P. is a limited
13 partnership organized under the laws of Delaware and with its principal place of
14 business and headquarters in Atlanta, Georgia. (Jewell Decl., ¶ 4.) Therefore,
15 Defendant is a citizen of Delaware and Georgia.

16 21. Accordingly, at least one member of the putative class is a citizen of a
17 state different from the named defendant; Plaintiff is a citizen of California and
18 Defendant is a citizen of Delaware and Georgia for purposes of determining
19 diversity. As a result, diversity jurisdiction exists under CAFA. 28 U.S.C. §
20 1332(d)(2)(A).

21 **The Amount in Controversy Exceeds \$5,000,000**

22 22. Pursuant to CAFA, the claims of the individual members in a class
23 action are aggregated to determine if the amount in controversy exceeds \$5,000,000,
24 exclusive of interest and costs. 28 U.S.C. § 1332(d)(6). Plaintiff may not avoid
25 removal to federal court under CAFA's \$5,000,000 amount in controversy
26 requirement by expressly alleging or subsequently stipulating that damages fall
27 below that sum. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1347
28 (2013). Because Plaintiff has not expressly pled a specific amount of damages, a

1 removing party need only show that it is more likely than not that the amount in
2 controversy exceeds \$5,000,000. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116
3 F.3d 373, 376 (9th Cir. 1997).

4 23. Defendant’s burden to establish the amount in controversy is the
5 preponderance of the evidence standard. *Dart Cherokee Basin Operating Company,*
6 *LLC v. Owens*, 135 S. Ct. 547 (2014). *See also Jordan v. Nationstar Mortg., LLC*,
7 781 F.3d 1178, 1183 (9th Cir. 2015) (citing *Dart Cherokee* for the proposition that
8 there is no anti-removal presumption against CAFA cases). A removing party
9 seeking to invoke CAFA jurisdiction “need include only a plausible allegation that
10 the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee*, 135
11 S. Ct. at 554. “If a federal court is uncertain about whether ‘all matters in
12 controversy’ in a purported class action ‘do not in the aggregate exceed the sum or
13 value of \$5,000,000,’ the court should err in favor of exercising jurisdiction over the
14 case.” Senate Judiciary Report, S. REP. 109–14, at 42 (2005) (citation omitted).

15 24. A removing defendant is “not required to comb through its records to
16 identify and calculate the exact frequency of violations.” *Oda v. Gucci America,*
17 *Inc.*, Case No. 2:14-cv-7468-SVW (JPRx), 2015 U.S. Dist. LEXIS 1672, at *12
18 (C.D. Cal. Jan. 7, 2015); *see Sanchez v. Russell Sigler, Inc.*, Case No. CV 15-01350-
19 AB (PLAx), 2015 U.S. Dist. U.S. LEXIS 55667, at *5 (C.D. Cal. Apr. 28, 2015).
20 (“[A] removing defendant is not obligated to research, state and prove the plaintiff’s
21 claims for damages.”) (citation omitted). *See also LaCross v. Knight Transport.*
22 *Inc.*, 775 F.3d 1200, 1203 (9th Cir. 2015) (rejecting plaintiff’s argument for remand
23 based on the contention that the class may not be able to prove all amounts claimed:
24 “Plaintiffs are conflating the amount in controversy with the amount of damages
25 ultimately recoverable”); *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 n.1
26 (9th Cir. 2015) (in alleging the amount in controversy, defendants “are not
27 stipulating to damages suffered, but only estimating the damages in controversy”).
28 The ultimate inquiry is what amount is put “in controversy” by plaintiff’s Complaint,

1 not what a defendant will actually owe. *LaCross*, 775 F.3d at 1202 (explaining that
2 courts are directed “to first look to the complaint in determining the amount in
3 controversy”) (citation omitted).

4 25. Under *Dart Cherokee*, a removing defendant is not required to submit
5 evidence in support of its removal allegations. *Roa v. TS Staffing Servs., Inc.*, Case
6 No. 2:14-cv-08424-ODW (MRW), 2015 U.S. Dist. LEXIS 7442, at *4–5 (C.D. Cal.
7 Jan. 22, 2015). However, as detailed below, Defendant has both plausibly alleged
8 and established by a preponderance of the evidence that the amount in controversy
9 exceeds \$5,000,000 and the Court has jurisdiction pursuant to CAFA.

10 26. Although Defendant denies Plaintiff’s factual allegations and denies
11 that Plaintiff or the classes she seeks to represent are entitled to any relief, Plaintiff’s
12 allegations have more likely than not put into controversy an amount that exceeds
13 the \$5,000,000 threshold when aggregating the claims of the putative class members
14 as set forth in 28 U.S.C. § 1332(d)(6).

15 Plaintiff’s Claim for Unpaid Wages Puts **\$2,435,937.30** in Controversy

16 27. Plaintiff claims that Defendant’s alleged miscalculation of the regular
17 rate of pay resulted in unpaid sick pay and unpaid overtime. (Exh. A, ¶ 3.) However,
18 she also claims that Defendant unlawfully paid only straight time for double
19 overtime worked: “Moreover, based on Defendant’s wage statements, Defendants
20 do not even pay two times a miscalculated regular rate of pay for double-time wages
21 and instead pay straight-time wages only for double-time work.” (*Id.*) As a result,
22 Plaintiff seeks unpaid wages on behalf of herself and other similarly situated
23 individuals. (*Id.*, ¶ 3, 31-34, Prayer for Relief ¶¶ 4, 5.)

24 28. There are approximately 376 former and current non-exempt
25 employees who worked for Defendant and who earned non-discretionary pay, such
26 as on-call pay, from May 2, 2016 to August 1, 2020. (Jewell Decl., ¶ 6.) Their
27 average hourly rate is \$43.45 per hour based on a payroll analysis of a sample size
28 of these employees’ wage records from July 15, 2018 to August 1, 2020 –

1 approximately half of the class period that Plaintiff seeks to certify in the Complaint.
2 (*Id.*, ¶ 7.)

3 29. Based on their start dates and current employment status, these 376
4 former and current non-exempt employees who worked for Defendant and who
5 earned non-discretionary pay, such as on-call pay, worked approximately a total of
6 56,063 workweeks from May 2, 2016 to August 1, 2020. Assuming that the 376
7 putative class members each were conservatively entitled to one hour of pay per
8 week (as a result of Defendant allegedly paying them their regular hourly rate instead
9 of double time for all double overtime hours worked (Exh. A, ¶¶ 3, 33)) at the
10 average hourly rate of \$43.45 per hour rate, the amount in controversy would be
11 **\$2,435,937.30** (\$43.45 per hour x 1 hour per week x 56,063 workweeks).

12 30. The amount in controversy for unpaid wages is likely to be greater than
13 **\$2,435,937.30** because these calculations do not include unpaid sick pay and unpaid
14 overtime caused by Plaintiff's alleged miscalculation of the regular rate of pay. (*Id.*,
15 *Id.*, ¶¶ 3, 25-30, 31-35, Prayer for Relief ¶¶ 4, 5.) Furthermore, this data does not
16 consider any putative class members who worked were hired after August 1, 2020.

17 Plaintiff's Claim for Wage Statement Penalties Puts **\$1,581,000.00** in Controversy

18 31. Plaintiff also claims that Defendant violated California Labor Code §
19 226(a) by failing to provide her and similarly situated individuals itemized wage
20 statements that accurately showed hourly rates, gross wages earned, and net wages
21 earned, including sick pay, overtime, and double-time wages. (Exh. A, ¶¶ 36-39.)
22 Accordingly, she requests penalties, attorneys' fees, and costs of suit pursuant to
23 California Labor Code § 226. (*Id.*, ¶ 39, Prayer for Relief ¶ 6.)

24 32. Labor Code section 226 provides that an employee can recover the
25 greater of all actual damages or \$50 for the initial violation and \$100 per pay period
26 for each subsequent violation, up to a maximum penalty of \$4,000, plus reasonable
27 attorneys' fees, if an employer knowingly and intentionally fails to provide an
28 accurate itemized wage statement. Cal. Lab. Code § 226(e). Plaintiff's Complaint

1 seeks these penalties for each wage statement for each member of the Wage
2 Statement Class. Thus, according to Plaintiff's Complaint, she seeks \$50 for the
3 first alleged violation, plus \$100 for each subsequent violation for every pay period
4 during the relevant period where she and all putative class members allegedly did
5 not receive an accurate wage statement, subject to a maximum penalty of \$4,000 per
6 employee. The statute of limitations for penalties based on inaccurate wage
7 statements is one year from the filing of the complaint. Cal. Code Civ. Proc. § 340.

8 33. There are approximately 255 non-exempt employees who worked for
9 Defendant in California and who earned non-discretionary pay, such as on-call pay,
10 from May 2, 2019 to August 1, 2020. (Jewell Decl., ¶ 6.) Defendant paid its
11 employees bi-weekly. (*Id.*, ¶ 8.) There are approximately 42 pay periods from May
12 2, 2019 to the present. Assuming, as Plaintiff's Complaint alleges, a wage statement
13 violation for each employee, each pay period, Plaintiff's claim for wage statement
14 penalties alone places **\$1,581,000.00** in wage statement penalties in controversy
15 ([255 employees x \$50 per initial violation x 42 initial pay periods] + [255
16 employees x \$100 per subsequent violation * 41 subsequent pay periods]).

17 Plaintiff's Claim for Waiting Time Penalties Puts **\$2,752,992** In Controversy

18 34. Plaintiff claims that these unpaid wages were "neither timely paid
19 during employment nor timely paid upon termination" in violation of California
20 Labor Code §§ 201-204. (Exh. A, ¶¶ 3, 34.) As a result, she requests recovery of
21 waiting time penalties under California Labor Code § 203. (Exh. A, ¶ 34, Prayer for
22 Relief ¶¶ 4, 5.)

23 35. An employer who willfully fails to timely pay wages to an employee
24 who is discharged or quits, must pay, as a penalty, the "the wages of the employee .
25 . . from the due date thereof. . . until paid or until an action therefor is commenced;
26 but the wages shall not continue for more than 30 days." Cal. Lab. Code § 203. The
27 statute of limitations for waiting time penalties is three years. Cal. Lab. Code §
28 203(b); *Pineda v. Bank of Am., N.A.*, 50 Cal. 4th 1389, 1395, 1398 (2010).

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SUPPLEMENTAL JURISDICTION

40. Plaintiff alleges that Defendant engaged in unfair business practices in violation of California Business & Professions Code §§ 17200 *et seq.* as a result of the conduct alleged above and seeks full restitution of all money withheld, converted or acquired by Defendant. (Exh. A, ¶¶ 40-43.) Pursuant to California Labor Code §§ 2698 *et seq.*, she also seeks recovery of all applicable civil penalties for Defendant’s Labor Code violations against all aggrieved employees from May 2, 2019 to the present. (*Id.*, ¶¶ 44-48.)

41. To the extent any of Plaintiff’s claims are not removable under CAFA, this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a), because they are part of the same common nucleus of operative facts over which this Court has original jurisdiction.

VENUE

42. “[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). As stated above, Plaintiff brought this action in California Superior Court, County of San Diego. Thus, venue properly lies in the United States District Court for the Southern District of California. 28 U.S.C. § 1441(a).

CONCLUSION

43. Based on the foregoing, Defendant requests that this action be removed to this Court. If any question arises as to the propriety of removal of this action, Defendant respectfully requests the opportunity to present a brief and oral argument in support of its argument that removal is proper. *Dart Cherokee*, 135 S. Ct. at 554

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1 (“[N]o antiremoval presumption attends cases invoking CAFA, which Congress
2 enacted to facility adjudication of certain class actions in federal court.”)
3

4 Dated: December 7, 2020

JACKSON LEWIS P.C.

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By: s/ Shannon B. Nakabayashi
Attorneys for Defendant

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E-mail: Shannon.Nakabayashi@jacksonlewis.com

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

LESLIE OLIVARES, as an individual and on behalf of all others similarly situated, and as a private attorney general

(b) County of Residence of First Listed Plaintiff Riverside County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Larry W. Lee / Simon L. Yang Tel: (213) 488-6555
Diversity Law Group, P.C.
515 South Figueroa Street, Suite 1250, Los Angeles, CA 90071

DEFENDANTS

ODYSSEY HEALTHCARE OPERATING A, L.P., a Delaware limited partnership; and DOES 1 through 50, inclusive

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

'20CV2381 GPC DEB

Attorneys (If Known)
Shannon B. Nakabayashi / Hardev S. Chhokar Tel: (415) 394-9400
Jackson Lewis P.C.
50 California Street, 9th Floor, San Francisco, CA 94111

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input checked="" type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act
	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
		<input checked="" type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Sections 1332 and 1441(a), Class Action Fairness Act (CAFA)

Brief description of cause:
Wage and hour claims under the California Labor Code and Business and Professions Code section 17200, et seq.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Dale Drozd DOCKET NUMBER 1:19-cv-01624-DAD-JLT

DATE 11/07/2020 SIGNATURE OF ATTORNEY OF RECORD s/ Shannon B. Nakabayashi

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

EXHIBIT A

TABLE OF CONTENTS

EXHIBIT A - SUMMONS.....Page 1
EXHIBIT A - COMPLAINT.....Page 2
EXHIBIT B - ANSWER.....Page 15

SUM-100

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
10/28/2020 at 10:41:05 AM
Clerk of the Superior Court
By Elizabeth Reyes, Deputy Clerk

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

ODYSSEY HEALTHCARE OPERATING A, L.P., a Delaware limited partnership; and DOES 1 through 50, inclusive,

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

LESLIE OLIVARES, as an individual and on behalf of all others similarly situated, and as a private attorney general,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una corte o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Superior Court of California, County of San Diego
330 W. Broadway, San Diego, CA 92101

CASE NUMBER:
(Número del Caso):

37-2020-00039092-CU-DE-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Larry W. Lee (SBN 228175)/Diversity Law Group, 515 S. Figueroa St. #1250, LA, CA 90071, 213-488-6555

DATE: 10/29/2020
(Fecha)

Clerk, by
(Secretario)

E. Reyes
E. Reyes

, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
- 2. as the person sued under the fictitious name of (specify):

- 3. on behalf of (specify): *Odyssey Healthcare Operating A, L.P.*
under: CCP 416.10 (corporation) CCP 416.60 (minor) *9 Delaware*
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee) *limited*
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person) *partnership*
 other (specify):

- 4. by personal delivery on (date):

1 **DIVERSITY LAW GROUP, P.C.**
Larry W. Lee (State Bar No. 228175)
2 lwlee@diversitylaw.com
Simon L. Yang (State Bar No. 260286)
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6 **POLARIS LAW GROUP LLP**
William L. Marder (State Bar No. 170131)
7 501 San Benito Street, Suite 200
Hollister, California 95023
8 Telephone: (831) 531-4214
Facsimile (831) 634-0333

9 Attorneys for Plaintiff, the Class, and Aggrieved Employees
10

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN DIEGO**

13 **LESLIE OLIVARES**, as an individual and on
behalf of all others similarly situated, and as a
14 private attorney general,

15 Plaintiff,

16 vs.

17 **ODYSSEY HEALTHCARE OPERATING A,**
L.P., a Delaware limited partnership; and **DOES 1**
18 through 50, inclusive,

19 Defendants.
20
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ELECTRONICALLY FILED

Superior Court of California,
County of San Diego

10/28/2020 at 10:41:05 AM

Clerk of the Superior Court
By Elizabeth Reyes, Deputy Clerk

Case No.: 37-2020-00039092-CU-0E-CTL

**CLASS AND REPRESENTATIVE ACTION
COMPLAINT:**

- (1) Unpaid Sick Pay (Lab. Code §§ 201-204, 246)
- (2) Unpaid Overtime (Lab. Code §§ 510, 1198)
- (3) Inaccurate Itemized Wage Statements (Lab. Code § 226(a))
- (4) Unfair or Unlawful Business Practices (Bus. & Prof. Code §§ 17200 et seq.)
- (5) Violations of the California Labor Code (Lab. Code §§ 2698 et seq.)

DEMAND OVER \$25,000.00

1 On behalf of herself and other similarly situated current and former employees of Defendants,
2 and as a proxy for the State of California, Plaintiff, Leslie Olivares, submits this Class and
3 Representative Action Complaint against Odyssey Healthcare Operating A, L.P., and Does 1 through
4 50 (collectively, "Defendants").

5 **INTRODUCTION**

6 1. This class and representative action challenges systemic illegal employment practices
7 resulting in violations of the California Labor Code against individuals who worked for Defendants.
8 The Complaint seeks damages, restitution, penalties, and other relief for Defendants' violations of
9 Labor Code sections 201-202, 204, 226, 246, 510, and 1198, and seeks penalties, damages, and other
10 relief pursuant to, among other provisions, Labor Code sections 203, 210, 218, 218.5, 218.6, 248.5,
11 558, 1194, and 2698 et seq., and the Unfair Competition Law, codified at Business and Professions
12 Code sections 17200 *et seq.* (the "UCL").¹

13 2. Plaintiff is informed and believes that Defendants have jointly and severally acted
14 intentionally and with deliberate indifference and conscious disregard to the rights of employees by
15 failing to pay sick pay at the regular rate of pay, failing to pay overtime wages at one and one-half
16 times (or double-time wages at two times) the regular rate of pay, and failing to provide accurate
17 itemized wage statements.

18 3. Defendants routinely fail to pay sick pay at the regular rate of pay and routinely fail to
19 pay all overtime at one-and-one-half times (and double-time wages at two times) the regular rate of
20 pay. Specifically, Plaintiff and other non-exempt employees earn non-discretionary remuneration in
21 addition to their base hourly wages that Defendants fail to consider when calculating their regular rates of
22 pay. For example, Defendants fail to consider "on-call" pay when calculating Plaintiff and other non-
23 exempt employees' regular rates of pay. Rather than pay sick pay at the regular rate of pay, Defendants
24 underpay sick pay to Plaintiff and other non-exempt employees at their base rates of pay. Likewise,
25 because Defendants fail to consider all non-discretionary compensation, including on-call pay, when
26 calculating Plaintiff and other non-exempt employees' regular rates of pay, Defendants underpay overtime
27 and double-time wages to Plaintiff and other non-exempt employees. Moreover, based on Defendants'
28

¹ Except as otherwise noted, all "Section" references are to the Labor Code.

1 wage statements, Defendants do not even pay two times a miscalculated regular rate of pay for double-
2 time wages and instead pay straight-time wages only for double-time work. Defendants thus routinely
3 fail to timely pay Plaintiff and other non-exempt employees all due sick pay, overtime, and double-time
4 wages, which are neither timely paid during employment nor timely paid upon termination of
5 employment.

6 4. As a result of the above practices and Defendants' miscalculation of the regular rate of
7 pay, Defendants also routinely fail to provide itemized wage statements that show accurate hourly rates
8 of pay, gross wages earned, and net wages earned. Independent of Defendants' miscalculation of the
9 regular rate of pay, Defendants also routinely issue wage statements that show that the double-time rate
10 as the base hourly rate of pay. Finally, Defendants also routinely fail to provide wage statements that
11 accurately itemize or show the total hours worked by Plaintiff and other non-exempt employees. Even
12 when the hours shown on the wage statements are added up, the sum does not equal the total hours
13 worked.

14 5. Plaintiff is informed and believes that Defendants have engaged in, among other things,
15 a system of willful violations of the Labor Code by creating and maintaining policies, practices, and
16 customs that knowingly deny its employees the above stated rights and benefits.

17 6. The policies, practices, and customs of Defendants resulted in unjust enrichment of
18 Defendants and an unfair business advantage over businesses that routinely adhere to the strictures of
19 the Labor Code.

20 **JURISDICTION AND VENUE**

21 7. The Complaint seeks relief exceeding \$25,000.00. The Court has jurisdiction of
22 Defendants' violations of Sections 201-202, 204, 226, 246, 510, and 1198, and the UCL.

23 8. Venue is proper as Defendants employed Plaintiff in San Diego, California.

24 **PARTIES**

25 9. In or about May of 2013, Plaintiff began working for Defendants as a nurse and has
26 worked in California for Defendants for 30 or more days within a year. Until she quit working for
27 Defendants in 2020, Plaintiff was paid on an hourly basis as a non-exempt employee who regularly
28 worked more than eight hours in a workday and 40 hours in a workweek. Plaintiff regularly earned non-

1 discretionary remuneration in addition to her base hourly wages, including on-call pay, that Defendants
2 failed to consider when calculating her regular rate of pay. Defendants, however, paid Plaintiff sick pay at
3 her base hourly rate of pay. Likewise, Defendants did not consider such earnings when calculating
4 Plaintiff's regular rate of pay for purposes of paying overtime and double-time wages to Plaintiff.
5 According to the wage statements Defendants provided to Plaintiff, she was not even paid two times a
6 miscalculated regular rate of pay for her double-time hours and instead pay straight-time wages only for
7 double-time work. Plaintiff was provided wage statements that failed to itemize and show accurate
8 hourly rates of pay, gross wages earned, net wages earned, and total hours worked. Plaintiff thus is a
9 victim of the policies, practices, and customs of Defendants complained of in this action in ways that
10 have deprived her of the rights guaranteed by the Labor Code and the UCL.

11 10. Plaintiff is informed and believes that Odyssey Healthcare Operating A, L.P. was and is
12 a Delaware limited partnership and that at all times herein mentioned it and Does 1 through 50, were
13 and are business entities, individuals, or partnerships that were and are licensed to do business and
14 actually doing business in the State of California. Based upon all the facts and circumstances incident
15 to Defendants' business, Defendants are subject to Sections 201-202, 204, 226, 246, 510, and 1198.

16 11. Plaintiff does not know the true names or capacities of the defendants sued herein as
17 Does 1 through 50, whether individual, partner, or corporate, and for that reason, said defendants are
18 sued under such fictitious names. Plaintiff prays for leave to amend this Complaint when the true
19 names and capacities are known. Plaintiff is informed and believes that each of said fictitious
20 defendants was responsible in some way for the matters alleged herein and proximately caused the
21 illegal employment practices, wrongs, and injuries complained of herein.

22 12. At all times herein mentioned, each of said Defendants participated in the doing of the
23 acts alleged herein. Defendants, and each of them, were the agents, servants, or employees of each of
24 the other Defendants, as well as the agents of all Defendants, and were acting within the course and
25 scope of said agency and employment.

26 13. Plaintiff is informed and believes that at all times material hereto, each of said
27 Defendants was the agent, employee, alter ego, or joint venturer of, or was working in concert with,
28 each of the other Defendants and was acting within the course and scope of such agency, employment,

1 joint venture, or concerted activity. To the extent said acts, conduct, or omissions were perpetrated by
2 certain Defendants, each of the remaining Defendants confirmed and ratified said acts, conduct, or
3 omissions of the acting Defendants.

4 14. Plaintiff is informed and believes that at all times material hereto each of the Defendants
5 (i) aided and abetted the acts and omissions of each of the other Defendants in proximately causing the
6 alleged harms, or (ii) were members of, engaged in, and acting within the course and scope of, and in
7 pursuance of, a joint venture, partnership, or common enterprise.

8 **CLASS ACTION ALLEGATIONS**

9 15. **Definition:** Pursuant to Code of Civil Procedure section 382. Plaintiff seeks class
10 certification of the following classes and sub-classes: (i) all current and former non-exempt employees
11 of Defendants in the State of California since May 2, 2016, who were paid sick pay in workweeks in
12 which they earned on-call pay or other non-discretionary remuneration in addition to their base hourly (the
13 “Sick Pay Class”); (ii) all current and former non-exempt employees of Defendants in the State of
14 California since May 2, 2016, who were paid overtime or double-time wages in workweeks in which
15 they earned on-call pay or other non-discretionary remuneration in addition to their base hourly wages (the
16 “Overtime Class”); (iii) all current and former non-exempt employees of Defendants in the State of
17 California since May 2, 2016, who were paid double-time wages (the “Overtime Sub-Class/Double-
18 Time Class”); (iv) all current and former non-exempt employees of Defendants in the State of
19 California since May 2, 2019, who were paid sick pay, overtime, or double-time wages in workweeks
20 in which they earned on-call pay or other non-discretionary remuneration in addition to their base hourly
21 wages (the “Wage Statement Class”); and (v) all current and former non-exempt employees of
22 Defendants in the State of California since May 2, 2019, who were paid double-time wages (the “Wage
23 Statement Sub-Class”). The Sick Pay Class, Overtime Class and Sub-Class, and Wage Statement Class
24 and Sub-Class are collectively referred to as the “Class.”

25 16. **Numerosity and Ascertainability:** The members of the Class are so numerous that
26 joinder of all members would be impractical, if not impossible. The identities of the members of the
27 Class are readily ascertainable by review of Defendants’ records, including payroll records. Plaintiff is
28

1 informed and believes that Defendants violated Sections 201-202, 204, 226, 246, 510, and 1198, and
2 the UCL against Plaintiff and other employees.

3 17. **Adequacy of Representation:** Plaintiff is fully prepared to take all necessary steps to
4 represent fairly and adequately the interests of the Class. Plaintiff's attorneys are ready, willing, and
5 able to fully and adequately represent Plaintiff and the Class. Plaintiff's attorneys have prosecuted and
6 settled wage-and-hour class actions in the past and continue to litigate numerous wage-and-hour class
7 actions currently pending in California state and federal courts.

8 18. **Common Question of Law and Fact:** There are predominant common questions of law
9 and fact and a community of interest among the claims of Plaintiff and of the Class. Plaintiff is
10 informed and believes that Defendants uniformly administer a corporate policy and practice of to pay
11 sick pay at the regular rate of pay, failing to pay overtime wages at one and one-half times (or double-
12 time wages at two times) the regular rate of pay, and failing to provide accurate itemized wage
13 statements.

14 19. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the Class
15 in that Plaintiff suffered the alleged harms in a similar and typical manner as other members of the
16 Class suffered. As with other members of the Class, Plaintiff regularly earned non-discretionary
17 remuneration in addition to her base hourly wages, including on-call pay, that Defendants failed to consider
18 when calculating her regular rate of pay. Plaintiff, however, was paid sick pay at her base hourly rate of
19 pay and was paid overtime at 1.5 times her base hourly rate of pay, not regular rate of pay. Plaintiff also
20 was provided wage statements that failed to itemize and show accurate hourly rates of pay, gross wages
21 earned, net wages earned, and total hours worked. Plaintiff thus is a member of the Class and has
22 suffered the alleged violations of the Labor Code.

23 20. The Labor Code is broadly remedial in nature. Its laws serve an important public interest
24 in establishing minimum working conditions and requirements in California. These labor standards
25 protect employees from onerous terms and conditions of employment or exploitation by employers who
26 have superior economic and bargaining power.

27 21. The nature of this action and the format of laws available to Plaintiff and members of the
28 Class make the class action format a particularly efficient and appropriate procedure to redress the

1 wrongs alleged herein. If each employee were required to file an individual lawsuit, the corporate
2 Defendants would necessarily gain an unconscionable advantage since they would be able to exploit
3 and overwhelm the limited resources of each individual plaintiff with their vastly superior financial and
4 legal resources. Requiring each member of the Class to pursue an individual remedy would also
5 discourage the assertion of lawful claims by employees who would be disinclined to file an action
6 against their former or current employer for real and justifiable fear of retaliation and permanent
7 damage to their careers at their current or subsequent employment.

8 22. The prosecution of separate actions by individual members of the Class, even if
9 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect to
10 individual members of the Class that would establish potentially incompatible standards of conduct for
11 Defendants, or (b) adjudications with respect to individual members of the Class that would, as a
12 practical matter, be dispositive of, or substantially impair or impede the ability to protect, the interests
13 of other members of the Class not parties to the adjudications. Further, the claims of the individual
14 members of the Class are not sufficiently large to warrant vigorous individual prosecution considering
15 the concomitant costs and expenses.

16 23. Defendants' pattern, practice, and uniform administration of corporate policy unlawfully
17 violates the Labor Code. Proof of a common business practice or factual pattern will establish the rights
18 of Plaintiff and the Class to recover underpaid wages, including sick pay and overtime, interest thereon,
19 applicable penalties, reasonable attorneys' fees, and costs of suit, pursuant to Sections 201-204, 210,
20 218, 218.5, 218.6, 226, 246, 248.5, 510, 558, 1194, 1198, and 2698 et seq., applicable IWC Wage
21 Orders, the UCL, and Code of Civil Procedure section 1021.5.

22 24. This action is brought for the benefit of the Class, which is commonly entitled to a
23 specific fund with respect to the compensation illegally and unfairly retained by Defendants. The Class
24 is commonly entitled to restitution of those funds being improperly withheld by Defendant.

25 **FIRST CAUSE OF ACTION**

26 **Unpaid Sick Pay (Lab. Code §§ 201-204, 246)**

27 **(By Plaintiff and the Sick Pay Class Against All Defendants)**

28 25. The preceding paragraphs are re-alleged and incorporated by this reference.

1 26. Section 246 provides that an employee is entitled to sick pay wages for use of accrued
2 sick leave. An employer must calculate paid sick leave by using one of two calculations: (i) “Paid sick
3 time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the
4 workweek in which the employee uses paid sick time, whether or not the employee actually works
5 overtime in that workweek,” or (ii) “Paid sick time for nonexempt employees shall be calculated by
6 dividing the employee’s total wages, not including overtime premium pay, by the employee’s total
7 hours worked in the full pay periods of the prior 90 days of employment.”

8 27. Defendants paid Plaintiff and the Sick Pay Class for sick leave at the incorrect rate of
9 pay. Defendants paid Plaintiff and the Sick Pay Class at the base hourly rate of pay, as opposed to the
10 regular rate of pay, which would take into account all non-discretionary remuneration in addition to their
11 base hourly wages, including on-call pay, or by dividing the employees’ total wages, not including
12 overtime premium pay, by the employees’ total hours worked in the full pay periods of the prior 90
13 days of employment, as required by Section 246. This resulted in underpayments of sick pay to Plaintiff
14 and the Sick Pay Class.

15 28. Moreover, Section 201 provides if an employer discharges an employee, the wages
16 earned and unpaid at the time of discharge are due and payable immediately. Section 202 provides that
17 an employee is entitled to receive all unpaid wages no later than 72 hours after an employee quits his or
18 her employment, unless the employee has given seventy-two (72) hours previous notice of his or her
19 intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.
20 Section 203 provides that if an employer willfully fails to pay wages owed in accordance with Sections
21 201 and 202, then the wages of the employee shall continue as a penalty from the due date, and at the
22 same rate until paid, but the wages shall not continue for more than thirty (30) days. Section 204
23 generally provides that wages are due and payable twice during each calendar month, on days
24 designated in advance by the employer as the regular paydays. Consistent with Section 204, Section
25 246 also provides that an employer shall provide payment for sick leave taken by an employee no later
26 than the payday for the next regular payroll period after the sick leave was taken.

27 29. As alleged herein and as a matter of policy and practice, Defendants routinely underpaid
28 sick pay to Plaintiff and the Sick Pay Class. Because Defendants did not pay or timely pay Plaintiff and

1 the Sick Pay Class all owing and underpaid sick pay wages, Defendants violated Sections 201-204,
2 246, and other Labor Code provisions. Defendants willfully failed to timely pay Plaintiff and the Sick
3 Pay Class all their wages due during employment and failed to timely pay all their wages due upon the
4 termination of their employment within the times prescribed by the Labor Code and are therefore
5 subject to applicable penalties, including a waiting time penalty pursuant to Section 203. On
6 information and belief, Defendants were advised by skilled lawyers and knew, or should have known,
7 of the mandates of the Labor Code as it relates to Plaintiff's allegations, especially since the California
8 Supreme Court has explained that "[c]ourts have recognized that 'wages' also include those benefits to
9 which an employee is entitled as a part of his or her compensation, including money, room, board,
10 clothing, vacation pay, and sick pay." *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103
11 (2007) (emphasis added).

12 30. Such a pattern, practice, and uniform administration of corporate policy is unlawful and
13 entitles Plaintiff and the Sick Pay Class to underpaid sick pay, including interest thereon, applicable
14 penalties, including waiting time penalties, attorneys' fees, and costs of suit.

15 **SECOND CAUSE OF ACTION**

16 **Unpaid Overtime (Lab. Code §§ 510, 1198)**

17 **(By Plaintiff and the Overtime Class and Sub-Class Against All Defendants)**

18 31. The preceding paragraphs are re-alleged and incorporated by this reference.

19 32. Section 510 and the applicable IWC Wage Order provide that "[a]ny work in excess of
20 eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight
21 hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no
22 less than one and one-half times the regular rate of pay for an employee" and that "[a]ny work in excess
23 of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for
24 an employee." Section 1198 makes unlawful conditions of labor that are prohibited by the applicable
25 IWC Wage Order.

26 33. As a matter of policy and practice, Defendants permit Plaintiff and the Overtime Class
27 to work more than eight hours in a workday or 40 hours in a workweek without proper overtime pay.
28 Defendants routinely fail to pay all overtime and double-time wages due to Plaintiff and the Overtime

1 Class. Specifically, whenever Plaintiff and the Overtime Class earn non-discretionary remuneration in
2 addition to their base hourly wages, including on-call pay, Defendants do not consider such earnings or
3 properly calculate the regular rate of pay for overtime and double-time purposes.

4 34. As alleged herein and as a matter of policy and practice, Defendants routinely underpaid
5 overtime and double-time wages to Plaintiff and the Overtime Class. Because Defendants did not pay,
6 or timely pay, Plaintiff and the Overtime Class all owing and underpaid overtime and double-time
7 wages, Defendants willfully failed to timely pay Plaintiff and the Overtime Class all their wages due
8 during employment and failed to timely pay all their wages due upon the termination of their
9 employment within the times prescribed by the Labor Code. On information and belief, Defendants
10 were advised by skilled lawyers and knew, or should have known, of the mandates of the Labor Code
11 as it relates to Plaintiff's allegations. By not timely paying Plaintiff and the Overtime Class all due
12 wages during employment and all due wages upon the separation of employment, Defendants thus
13 violated Sections 201-204 and owe applicable penalties, including waiting time penalties, to Plaintiff
14 and the Overtime Class.

15 35. Such a pattern, practice, and uniform administration of corporate policy is unlawful and
16 entitles Plaintiff and the Overtime Class to underpaid overtime and double-time wages, including
17 interest thereon, applicable penalties, including waiting time penalties, attorneys' fees, and costs of suit.

18 **THIRD CAUSE OF ACTION**

19 **Inaccurate Itemized Wage Statements (Lab. Code § 226(a))**

20 **(By Plaintiff and the Wage Statement Class and Sub-Class Against All Defendants)**

21 36. The preceding paragraphs are re-alleged and incorporated by this reference.

22 37. Section 226(a) requires an employer to furnish to its employees itemized wage
23 statements that show accurate information, including without limitation, all applicable hourly rates in
24 effect during the pay period, gross wages earned, net wages earned, and total hours worked.

25 38. As a matter of policy and practice and because of Defendants' sick pay and overtime
26 violations, Defendants failed to provide accurate itemized wage statements to Plaintiff and the Wage
27 Statement Class. Specifically, Defendants failed to furnish Plaintiff and the Wage Statement Class with
28 itemized wage statements that accurately showed all applicable hourly rates, gross wages earned, and net

1 wages earned, including all sick pay, overtime, and double-time wages. As a matter of policy and practice
2 and independent of Defendants' miscalculation of the regular rate of pay, Defendants also routinely
3 provide wage statements that show that the double-time rate as the base hourly rate of pay. Finally, and
4 also as a matter of policy and practice, Defendants routinely provide wage statements that fail to
5 accurately itemize or show the total hours worked by Plaintiff and the Wage Statement Sub-Class. Even
6 when the hours shown on the wage statements are added up, the sum does not equal the total hours
7 worked.

8 39. Such a pattern, practice, and uniform administration of corporate policy is unlawful and
9 entitles Plaintiff and the Wage Statement Class and Sub-Class to recover applicable penalties,
10 attorneys' fees, and costs of suit.

11 **FOURTH CAUSE OF ACTION**

12 **Unfair or Unlawful Business Practices (Bus. & Prof. Code §§ 17200 et seq.)**

13 **(By Plaintiff and the Class Against All Defendants)**

14 40. The preceding paragraphs are re-alleged and incorporated by this reference.

15 41. Plaintiff is informed and believes that at Defendants have engaged and continue to
16 engage in unfair and unlawful business practices in California by utilizing the employment policies and
17 practices alleged herein in violation of Sections 204, 246, 510, and 1198.

18 42. As alleged herein, Defendants uniformly administer a corporate policy and practice of
19 routinely failing to pay sick pay at the regular rate of pay and failing to pay overtime wages at one and
20 one-half times (or double-time wages at two times) the regular rate of pay. Defendants' utilization of
21 such unfair and unlawful business practices constitutes unfair and unlawful competition and provides
22 an unfair advantage over Defendants' competitors, as proscribed by the UCL. Defendants have
23 deprived Plaintiff and the Class the minimum working condition standards and conditions due to them
24 under the Labor Code and applicable IWC Wage Orders.

25 43. Such a pattern, practice, and uniform administration of corporate policy is unlawful and
26 entitles Plaintiff and the Class to full restitution of all resulting monies withheld, acquired, or converted
27 by Defendants, including interest thereon, attorneys' fees, and costs of suit.

28

FIFTH CAUSE OF ACTION

Violations of the California Labor Code (Lab. Code §§ 2698 et seq.)

(By Plaintiff and Aggrieved Employees Against All Defendants)

44. The preceding paragraphs are re-alleged and incorporated by this reference.

45. Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698 et seq. (“PAGA”), Plaintiff brings this cause of action as a proxy for the State of California. In this capacity, Plaintiff seeks penalties for Defendants’ Labor Code violations committed since May 2, 2019, against all aggrieved employees.

46. As alleged herein, Defendants violate Sections 201-202, 204, 226, 246, 510, and 1198 by failing to pay sick pay at the regular rate of pay, failing to pay overtime wages at one and one-half times (or double-time wages at two times) the regular rate of pay, and failing to provide accurate itemized wage statements. Under Section 2699(c), Plaintiff is an “aggrieved employee,” as one or more of the alleged violations was committed against Plaintiff as an employee of Defendants.

47. On or about October 20, 2020, Plaintiff sent written notice to the Labor & Workforce Development Agency (“LWDA”) of specific facts and theories for Defendants’ Labor Code violations. Plaintiff simultaneously sent written notice to Defendants via certified mail. As of the date of the filing of this Complaint, the LWDA has neither responded nor indicated that it intends to investigate the allegations in the written notice.

48. As such, pursuant to Section 2699(a) and (f), Plaintiff seeks recovery of all applicable civil penalties for Defendants’ Labor Code violations against all aggrieved employees for the alleged period.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment for herself and all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

1. For an order certifying the proposed Class;
2. For an order appointing Plaintiff as the representative of the Class;
3. For an order appointing Counsel for Plaintiff as Class Counsel;

1 4. Upon the First Cause of Action for damages, including unpaid sick pay and interest
2 thereon, applicable penalties, and costs and attorneys' fees pursuant to Sections 203, 210, 218, 218.6,
3 and 248.5;

4 5. Upon the Second Cause of Action for damages, including unpaid overtime and interest
5 thereon, applicable penalties, and costs and attorneys' fees pursuant to Sections 203, 210, 218, 218.6,
6 512, and 1194;

7 6. Upon the Third Cause of Action for applicable penalties and costs and attorneys' fees
8 pursuant to Section 226;

9 7. Upon the Fourth Cause of Action for restitution of all funds unlawfully acquired by
10 Defendants by any acts or practices declared to be in violation of the UCL, including interest thereon,
11 and for costs and attorneys' fees;


12 8. Upon the Fifth Cause of Action for penalties pursuant to Sections 210, 226.3, 248.5,
13 558, 1197.1, and 2699, and for costs and attorneys' fees;

14 9. Upon each cause of action for attorneys' fees and costs as provided by Sections 218.5,
15 226, 1194, and 2699, and Code of Civil Procedure section 1021.5; and

16 10. For such other and further relief that the Court may deem just and proper.

17 DATED: October 27, 2020

DIVERSITY LAW GROUP, P.C.

18 
By: _____

19 Larry W. Lee
20 Simon L. Yang
Attorneys for Plaintiff

EXHIBIT B

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6 Attorneys for Defendant
ODYSSEY HEALTHCARE OPERATING A, L.P.

7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 LESLIE OLIVARES, as an individual
and on behalf of all others similarly
12 situated, and as a private attorney
general,

13 Plaintiff,

14 v.

15 ODYSSEY HEALTHCARE
16 OPERATING A, L.P., a Delaware
limited partnership; and DOES 1
17 through 50, inclusive,

18 Defendants.
19

Case No. '20CV2381 GPC DEB

**DECLARATION OF KEITH
JEWELL IN SUPPORT OF
DEFENDANT’S NOTICE OF
REMOVAL OF ACTION TO
FEDERAL COURT UNDER 28
U.S.C. §§ 1332, 1441, 1446**

Complaint Filed: 10/28/2020
Trial Date: Not set

20 **DECLARATION OF KEITH JEWELL**

21
22 I, Keith Jewell, declare as follows:

23 1. I am employed by Gentiva Health Services (USA), LLC (“Gentiva”) as
24 Employment and Litigation Counsel. I made this declaration in support of
25 Defendant Odyssey Healthcare Operating A, L.P.’s Notice of Removal.

26 2. As Employment and Litigation Counsel at Gentiva, I have personal
27 knowledge of the corporate status, corporate structure, and general business
28 operations of Gentiva Health Services, Inc. and its subsidiaries. Gentiva Health

1 Services, Inc.’s subsidiary includes Defendant Odyssey Healthcare Operating A,
2 L.P. (“Odyssey” or “Defendant”). I have seen, heard, and personally participated
3 in helping corporate executives direct, control, and coordinate Odyssey’s business
4 operations. I have access to employee files, employee payroll records, and employee
5 time records, which are kept in the ordinary course of business, and work directly
6 with Odyssey’s Payroll Department to collect and evaluate these records if
7 necessary. If called as a witness, I would and could competently testify to all facts
8 set forth below which are in my personal knowledge.

9 3. Odyssey is a defendant in the class action matter titled *Oliveras v.*
10 *Odyssey Healthcare Operating A, L.P.*, Case No. 37-2020-00039092-CU-OE-CTL.
11 Odyssey was served with Plaintiff Leslie Olivares’s (“Plaintiff”) Complaint on
12 November 5, 2020. The Complaint is the only pleading Plaintiff served on Odyssey.

13 4. Odyssey is a limited partnership organized under the laws of the State
14 of Delaware. The corporate officers responsible for Odyssey’s corporate activities,
15 strategy, and compliance are located in Atlanta, Georgia where its executive and
16 administrative offices are located and the majority of executive and administrative
17 functions are directed, controlled, and coordinated.

18 5. Based on my review of her personnel records, Plaintiff’s wage and tax
19 statements, including her W-2, show that she resides in Temecula, California.
20 Documents included within Plaintiff’s personnel file also appear to show that she
21 currently resides in San Diego, California. Plaintiff worked for Defendant until she
22 resigned in January 2020.

23 6. There are approximately 376 former and current non-exempt
24 employees who worked for Defendant in California from May 2, 2016 to August 1,
25 2020, who earned non-discretionary remuneration, including on-call pay. There are
26 approximately 255 non-exempt employees who worked for Defendant in California
27 and who earned non-discretionary pay, such as on-call pay, from May 2, 2019 to
28 August 1, 2020. From May 2, 2017 to August 1, 2020, approximately 264 non-

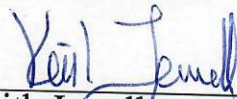
1 exempt employees working for Defendant in California and who earned non-
2 discretionary pay, such as on-call pay, ended their employment with Defendant.

3 7. Based on a sample size of wage records of former and current non-
4 exempt employees who worked for Defendant in California from July 15, 2018 to
5 August 1, 2020, the average hourly rate for such employees is approximately \$43.45
6 per hour.

7 8. Defendant's non-exempt employees working in California are paid bi-
8 weekly.

9 I declare under penalty of perjury under the laws of the United States of
10 America that the foregoing is true and correct.

11 Executed this 7th day of December 2020 in Atlanta, Georgia

12 
13 _____
14 Keith Jewell

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19 4832-7757-3331, v. 1

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6 Attorneys for Defendant
ODYSSEY HEALTHCARE OPERATING A, L.P.

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 LESLIE OLIVARES, as an individual
and on behalf of all others similarly
12 situated, and as a private attorney
general,

13 Plaintiff,

14 v.

15 ODYSSEY HEALTHCARE
16 OPERATING A, L.P., a Delaware
limited partnership; and DOES 1
17 through 50, inclusive,

18 Defendants.

Case No. '20CV2381 GPC DEB

**DECLARATION OF SHANNON
NAKABAYASHI IN SUPPORT
OF DEFENDANT ODYSSEY
HEALTHCARE OPERATING
A, L.P.'S NOTICE OF REMOVAL
OF ACTION TO FEDERAL
COURT UNDER 28 U.S.C. §§
1332, 1441, 1446**

Complaint Filed: 10/28/2020
Trial Date: Not set

20 **DECLARATION OF SHANNON NAKABAYASHI**

21 I, Shannon Nakabayashi, declare and state as follows:

22 1. I am a principal at the firm Jackson Lewis P.C., counsel of record for
23 Defendant ODYSSEY HEALTHCARE OPERATING A, L.P. (“Defendant”) and I
24 am the attorney primarily responsible for representing Defendant in this matter. I
25 make this declaration in support of Defendant’s Notice of Removal.

26 2. The following is based on my personal knowledge, and, if called as a
27 witness, I could and would competently testify to the facts contained herein.
28

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Ex-Employee Claims Odyssey Healthcare Failed to Provide Proper Sick Time, Overtime Pay](#)
