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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

JENNIFER WARD and SACORA BESABE, on
behalf of themselves and all others similarly
situated and aggrieved,

Plaintiffs,

v.

SUTTER VALLEY HOSPITALS, a California
corporation; and DOES 1 through 100,
inclusive,

Defendant.

Case No.: 34-2020-00279954-CU-OE-GDS

CLASS AND REPRESENTATIVE ACTION

Assigned for all purposes to:
The Honorable Lauri A. Damrell
Department 22

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFFS'
[UNOPPOSED] SUPPLEMENTAL MOTION
FOR PRELIMINARY APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT**

Date: August 9, 2024
Time: 9:00 a.m.
Reservation: A-279954-001

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I. INTRODUCTION

On June 20, 2024, the Court issued a Tentative Ruling, memorialized into the Court's Order on June 21, 2024, ("Order") requesting revisions and additional information regarding certain terms of the Parties' class action settlement agreement ("Settlement Agreement") and class notice ("Notice"). In its Order, the Court set a deadline for supplemental briefing to be filed by July 18, 2024, and continued the preliminary approval hearing to August 9, 2024 at 9:00 a.m. Plaintiffs submit this Memorandum as supplemental briefing addressing each of the matters discussed in the Order. As outlined herein, the Parties met and conferred and agreed to modify the Settlement Agreement, Notice, and the Proposed Order in accordance with the Court's instructions.

For the convenience of the Court and its staff, Plaintiffs are submitting a final copy of the revised Settlement Agreement which, subject to the Court's approval, will be promptly signed by all Parties, and a redlined copy of the revised Settlement Agreement showing the revisions, as Exhibits 1 and 2, respectively, to the Supplemental Declaration of David R. Markham ("Supp. Markham Decl."), filed concurrently with this supplemental briefing. The revised Class Notice will be filed as Exhibit 3 and Exhibit 4 will show redlined edits.

II. REMAND OF FEDERAL ACTION AND AMENDED SETTLEMENT COMPLAINT

The Court requested confirmation that the federal court class action would be remanded to this Court, granting this Court jurisdiction to approve the class and representative action settlement covering both actions. Order at p. 6. On June 27, 2024, the Parties filed a stipulation to remand the federal court action to this Court for settlement purposes. Supp. Markham Decl., ¶2. On July 3, 2024 the federal court issued an Order granting the Parties' stipulation and remanding the federal class action to this Court for settlement purposes. *Id.*

Additionally, the Court stated in its Order that "[b]efore the Court can rule on the motion for preliminary approval, proposed Plaintiff Besabe must be made a party to this action and the class claims must be incorporated." Order at p. 7. On July 12, 2024, in advance of filing of this supplemental briefing, the Parties filed a stipulation agreeing to, and giving notice of, the filing of the First Amended Complaint ("FAC") per the Court's instructions. Supp. Markham Decl., ¶3. The FAC includes all claims released in the settlement. *Id.*

Thus, both cases and both Plaintiffs, Ward and Besabe, are now before this Court.

III. PLAINTIFFS MEET CLASS CERTIFICATION REQUIREMENTS FOR SETTLEMENT PURPOSES

Plaintiffs also supplement their briefing to address the Court's concerns regarding class certification requirements. Order at pp. 10-11. In its Order, the court states: "To the extent Plaintiffs claim additional evidence supports class certification, Plaintiffs should summarize that evidence. Plaintiffs should also attempt to reckon with the District Court's decision, which concluded that "[e]ven assuming plaintiffs' declarations are reliable, the record contains no common evidence demonstrating that all the putative class members' claims can be resolved efficiently at the same time. [...] it appears here the wage and hour practices vary among defendant's facilities." *Id.*

Plaintiffs hereby supplement their prior preliminary approval briefing (incorporated here by reference) to emphasize the common policy evidence applicable to Sutter's facilities at issue in this action, including Defendant's overtime preapproval policy and expense reimbursement policies, which apply to all class members equally. Supp. Markham Decl., Ex. 5. Sutter's policy does not allow overtime without written, advanced approval from management. *Id.*, Ex. 5 at SVH0001541. However, in a hospital, the need for overtime is often not known in advance and written pre-approval from a manager is not feasible. This creates a Catch-22 situation, resulting in off-the-clock work on a classwide basis. This applies equally to all class members. *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319 (2004) .

Further, Sutter's policy excludes personal cell phones from reimbursement (Supp. Markham Decl., Ex. 5 at SVH0003460), whereas class members aver they were called on their cell phones with work-related questions. Also, a common question arises whether Sutter is required to reimburse class members for shoes worn in the operating room.

While the federal court found class certification was not appropriate (denying without prejudice to renew and subsequently denying the renewed motion on procedural grounds) the court's ruling did not analyze Sutter's common policies cited above. *See id.*, ex. 7 (7/18/22 Order, pp. 13-16, analyzing class evidence including class member declarations and deposition testimony, but not Sutter's policies). Plaintiffs also cite the presumption under *Donobue v. AMN Servs., LLC*, 11 Cal.5th 58 (2021); under the *Donobue* presumption, time records may serve as common evidence for Plaintiffs' meal break claim.

Because several issues are common to all class members, a class action is superior to numerous individual

1 actions, and the maintenance of this action as a class action will save judicial resources, and help avoid
2 inconsistent judgments. *See Savon Drugs, supra*, 34 Cal.4th at 326. Class members' interests are relatively small,
3 so they are unlikely to prosecute separate actions. Plaintiffs' claims arise from their employment with Sutter in
4 California. Thus, common issues predominate. Supp. Markham Decl., ¶38.

5 **IV. VALUATION AND REALISTIC EXPOSURE ANALYSIS**

6 **A. The Proposed Settlement Furthers the Purpose of the FLSA**

7 FLSA establishes the entitlement to minimum wage, and overtime pay at a rate not less than one and
8 a half times the regular rate of pay after 40 hours of work in a workweek. 29 U.S.C. §201, *et al.* In evaluating
9 whether a settlement which includes FLSA claims is fair and reasonable, courts often consider factors similar
10 to those used in evaluating class action settlements. These factors include the strength of the plaintiffs' case,
11 the risk, expense, complexity, and likely duration of further litigation, the amount offered in settlement, the
12 extent of discovery completed, the stage of the proceedings, the scope of release, the experience and views of
13 counsel, and the possibility of fraud and collusion. *Talavera v. Sun-Maid Growers of California* (E.D. Cal. 2020)
14 2020 WL 2195115, at *7; *see also* Order on p. 8. Plaintiffs considered these factors in their motion for
15 preliminary approval, filed on May 24, 2024, pages 15-20. Plaintiffs' analysis applies to their FLSA claims as
16 well.

17 In addition, some "[c]ourts have generally held that the 'similarly situated' standard under the FLSA
18 is not as stringent a standard as the 'common questions predominate' standard" under Rule 23(b)(3). *Harris v.*
19 *Vector Mktg. Corp.* (2010) 753 F.Supp.2d 996, 1003. Thus, a collective may be certified under the FLSA if the
20 plaintiff can show that his or her position was similar to that of the absent collective members. *Edwards v. City*
21 *of Long Beach* (C.D. Cal. 2006) 467 F.Supp.2d 986, 990; *Tijero v. Aaron Brothers, Inc.* (N.D. Cal. 2013) 301 F.R.D.
22 314, 323. Plaintiffs therefore satisfy this less-stringent FLSA test as well, as they were subject to the same Sutter
23 policies and/or practices as other class/collective members. *See also* section III of this supplemental brief
24 (discussing certification of Plaintiffs' claims for settlement purposes).

25 Further, the Settlement Agreement contains no provisions that are contrary to the purposes of the
26 FLSA or frustrate the implementation of the FLSA in the workplace. Indeed, the Settlement furthers the
27 purposes of the FLSA by providing class members with a substantial recovery for their unpaid overtime claims,
28

1 for which they may have otherwise been unable to recover. *See* 29 U.S.C. § 202 (congressional finding and
2 declaration of policy); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (“The statute was a recognition of
3 the fact that due to the unequal bargaining power as between employer and employee, certain segments of the
4 population required federal compulsory legislation to prevent private contracts on their part which endangered
5 national health and efficiency....”). In this action, Plaintiffs allege they worked off-the-clock answering
6 questions about patients, surgeries, or supplies outside of their shifts, and at times answered doctors or
7 supervisors’ questions during meal breaks, resulting in off-the-clock work. *See* prelim. approval mot. at 7.

8 In their *Kullar* analysis for overtime/double time, Plaintiffs estimated Sutter’s maximum liability at
9 \$395,046.96. *Id.* at 15-16. This was based on Plaintiffs’ estimation, supported by evidence, that class members
10 worked approximately 5 minutes of overtime off-the-clock every other week, or 0.04 hours per week. *Id.* at
11 15. This analysis reflected the fact that half of the class members worked 8-hour shifts, and the other half
12 worked 12-hour shifts. *Id.* at 16. As FLSA provides for overtime only for hours worked in excess of 40 per
13 week, the half of the class who worked three shifts of 12 hours in a workweek would not be entitled to any
14 FLSA recovery, as their total weekly hours worked did not exceed 40. Further, regarding the entitlement to
15 minimum wages under FLSA, as discussed in section IV(B) of this supplemental brief, class members would
16 not recover minimum wages, because as full-time employees (working either 8-hour shifts or 12-hour shifts),
17 any off-the-clock work exceeded their typical full-time shift length, and thus, unpaid hours were correctly
18 calculated at an overtime (or double time) rate.

19 It is Plaintiffs’ position that the recovery under FLSA should be subsumed within the recovery of
20 overtime or double time under California Labor Code, because Plaintiffs’ state overtime claim duplicates their
21 FLSA claims. *Maravilla v. Rosas Bros. Constr.* (N.D. Cal. 2019) 401 F.Supp.3d 886, n.11 (“The Court does not
22 separately address Maravilla’s California Labor Code overtime claim because it entirely duplicates
23 his FLSA overtime claim. The Court can only award damages under one statutory scheme under the general
24 rule barring double recovery.”); *Duran v. Roshan R. Inc.* (N.D. Cal. Sept. 24, 2010) 2010 WL 11640152, at *4
25 (awarding damages only under Labor Code and not the FLSA); *Duarte v. MZR Inc.* (N.D. Cal. July 8, 2010)
26 2010 WL 11586755, at *6, n. 10 (“Although a plaintiff’s state law claim for overtime wages can co-exist with
27 her FLSA claim, courts generally do not provide separate awards for unpaid wages under both statutes, because
28

1 to do so would allow for double recovery. Where the amount of recovery available under the two statutes
2 differ, the court will rest its recommendation concerning damages on the statute that provides the higher
3 award.”) (internal quotations omitted).

4 Thus, Plaintiffs’ *Kullar* analysis for their overtime claim presented in their preliminary approval motion
5 applies to Plaintiffs’ recovery under FLSA. Because the Settlement facilitates the purposes of the FLSA, it
6 should be approved as reasonable.

7 **B. Valuation of Wage Claim**

8 The Order requests clarification regarding the minimum wage exposure in counsel’s *Kullar* analysis.
9 Order at p. 1. However, here, surgical technicians worked 8- and 12-hour shifts, and all unpaid wage exposure,
10 including for unpaid minimum wages, was calculated and accounted for in the unpaid overtime and double-
11 time wages analysis. Supp. Markham Decl., ¶18, n.1. Plaintiff incorporates by reference the *Kullar* analysis for
12 the overtime wage claim presented in her preliminary approval pages, based on approximately 5 minutes of
13 overtime off-the-clock every other week, or 0.04 hours per week. Prelim. Approval Mot. at pp. 15-16.

14 **C. Maximum and Discounted Claim Valuations**

15 The Court additionally states that Plaintiffs only provided an estimate of the reduction applied for
16 settlement purposes for their rest break claims and should expand on the analysis for realistic exposure
17 estimates for their claims. Order at p. 10. Plaintiffs provide maximum and realistic exposure information for
18 each claim as follows:

19 i. Maximum Exposure

20 Overtime/double time claim:¹ **\$395,046.96**. This is based on Plaintiffs’ assumption that class members
21 worked approximately 5 minutes of overtime off-the-clock every other week, or 0.04 hours per week. Supp.
22 Markham Decl., ¶18. Thus, the total number of unpaid hours is 6,840.64 (171,016 workweeks x 0.04 hours per
23 week). To reflect that half of the class members worked 8-hour shifts, and the other half 12-hour shifts,
24 Plaintiffs multiplied one half of the unpaid hours (3,420.32) by an average overtime rate of \$49.50, and the
25 other half, by a doubletime rate of \$66, resulting in maximum unpaid overtime/double time of **\$395,046.96**.

26 ¹ As cited above, because class members worked 8- and 12-hour shifts, all unpaid wages are calculated at the
27 higher overtime/double-time rates and accounted for in the valuation analysis below. Supp. Markham Decl.,
28 ¶18.

1 Meal break claim: \$4,543,528. Evidence in this action shows that class members may have suffered
2 meal break violations once per workweek. Thus, the meal break premium calculation is 171,016 workweeks
3 times 1 times \$33 (= \$5,643,528). Defendant paid at least \$1,000,000 in meal break premiums to class members
4 during the class period, so the total maximum exposure for meal premiums is **\$4,543,528**. *Id.*, ¶18.

5 Rest break claim: \$5,643,528. This is based on 1 violation per workweek, based on Plaintiffs' evidence
6 that rest breaks were at times missed and interrupted due to work duties. The 171,016 workweeks multiplied
7 by the 1 per workweek violation rate, multiplied by \$33 hourly rate equals **\$5,643,528** in maximum exposure
8 for unpaid rest break premiums. *Id.*, ¶18.

9 Unreimbursed Business Expense Claim: \$1,725,500. This is based on \$40 per month for unreimbursed
10 cell phone expenses, and once a year unreimbursed expense of \$100 for operating room shoes. *Id.* On average,
11 class members worked for Sutter for 4.25 years or 51 months. Thus, for cell phone expenses, the maximum
12 exposure is \$1,428,000 (700 class members x 51 months x \$40 per month), and for operating room shoes, it is
13 maximum \$297,500 (700 class members x 4.25 years x \$100 per year), for a total maximum exposure of
14 \$1,725,500. *Id.*, ¶18.

15 Wage statement penalties: \$2,800,000, based on the \$4,000 cap in penalties per class member (700 x
16 \$4000). *Id.*, ¶18.

17 Waiting time penalties: Plaintiffs calculated daily wages for 459 former employees at \$264 for 229 8-
18 hour employees (8 hours at \$33), and at \$396 for 229 12-hour employees, (12 hours at \$33), times 30 days, to
19 amount to \$1,813,680 for 8-hour employees, and \$2,720,520 for 12-hour employees, for a total of **\$4,534,200**.
20 *Id.*, ¶18.

21 Thus, Sutter's potential maximum liability for Plaintiffs' direct claims is **\$12,307,602.96**, and an
22 additional **\$7,334,200** for Plaintiffs' wage statement and waiting time penalties claims, for a total of
23 **\$19,641,802.96**. Thus, the MSA of \$775,000 represents 6.3% of Sutter's **maximum** potential liability for
24 Plaintiffs' direct claims, and approximately 4% of Sutter's **maximum** liability for all Plaintiffs' claims. *Id.*, ¶19.

25 ii. Discounted Valuations

26 Although the above represents a maximum exposure analysis, Plaintiffs recognize several risks if their
27 claims were to proceed and therefore apply a discounted realistic valuation to each claim. *Id.*, ¶23. Plaintiffs
28

1 would apply at least a 50% discount to each claim to account for risks both to obtaining certification and on
2 the merits. Settlements are routinely approved as fair and reasonable when the maximum valuation is
3 discounted by fifty percent, or more, to account for the class certification and merits risks. *See e.g., Milburn v.*
4 *PetSmart, Inc.*, 2019 WL 5566313 *4 (E.D. Cal. Oct. 29, 2019) (approving settlement as fair and reasonable
5 where Plaintiff applied forty to fifty percent discount each for class certification and risks on the merits); *see*
6 *also Galvan v. Superior Tank Co Inc.*, 2016 WL 11502115 *7 (C.D. Cal. July 19, 2016) (approving settlement as
7 fair and reasonable where maximum valuation was discounted for the risk of non-certification, i.e. the rest
8 period claim was discounted by 85% for a risk of non-certification and by 65% on the merits); *Thomas v.*
9 *Cognizant Technology Solutions U.S. Corp.*, 2013 WL 12371622 *6 (C.D. Cal. June 24, 2013) (concluding that
10 settlement between 4 and 5.5% of maximum liability was fair and reasonable, which included a forty percent
11 discount applied to account for risks to class certification).

12 Courts have recognized that the risks of success on the merits coupled with certification risks often
13 support a substantial discount to the maximum exposure valuation when balanced against the risks of not
14 achieving a classwide recovery:

15 ...[T]here are several deficiencies in Plaintiffs' case that could jeopardize their recovery at trial.
16 In such circumstances, courts have approved settlements below the 10% threshold that reflect
17 the plaintiffs' judgment that "a deeply discounted recovery is better than the substantial
18 likelihood of recovering nothing." *Viceral v. Mistras Grp., Inc.*, No. 15-CV-02198-EMC, 2016
19 WL 5907869, at *8 (N.D. Cal. Oct. 11, 2016). *See, e.g., id.* at *7 (approving settlement
20 representing 8.1% of the full verdict value in recognition of the "daunting" risks plaintiffs faced
21 in proving their case); *In re Uber FCRA Litig.*, No. 14-CV-05200-EMC, 2017 WL 2806698, at
22 *7 (N.D. Cal. June 29, 2017) (approving a settlement worth less than 7.5% of the possible
23 verdict where the class faced "substantial risks and obstacles" to prevailing at trial, as well as
24 "the inevitable expense of litigating a large, complex case through trial"); *Balderas v. Massage*
25 *Envy Franchising, LLC*, No. 12-CV-06327 NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014)
26 (approving a settlement representing 5% of the maximum recovery in light of "the strengths
27 of plaintiff's case and the risks and expense of continued litigation").

28 *In re MyFord Touch Consumer Litigation*, 2019 WL 1411510 *10 (N.D. Cal. Mar. 28, 2019).

The valuation of each individual claim, with the 50% discount applied first for certification risks and
then for merits risks, is presented below:

Overtime/double time claim: \$98,761.74. In discounting this claim, Plaintiffs recognize substantial
risks in pursuing this claim. Sutter paid substantial overtime during the class period. (Ms. Ward received close
to \$20,000 in overtime/double time up until 2019). Supp. Markham Decl., ¶24. Additionally, Plaintiffs

1 recognize a steep hurdle in proving off-the-clock work. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1051
2 (2012) (“that employees are clocked out creates a presumption they are doing no work”); *Hertz v. Woodbury*
3 *County*, 566 F.3d 775, 781-782 (8th Cir. 2009) (no duty to audit other available records); *Jong v. Kaiser Found.*
4 *Health Plan, Inc.*, 226 Cal.App.4th 391, 398-399 (2014) (same). Thus, at least a 50% discount is warranted in
5 evaluating this claim for both the merits and certification.

6 Meal break claim: \$1,135,882. Plaintiffs’ meal break claim is discounted 50% to account for substantial
7 risks following denial of certification and on the merits. Evidence showed that Sutter paid millions of dollars
8 in premiums. Sutter will also argue that several deposed class members recanted their testimony about meal
9 break violations. Sutter might also present evidence of its new scheduling system, which was put in place in
10 2019 to help ensure employees take their breaks. *Id.*, ¶24. Further, as typical in a meal break case, Plaintiffs
11 would rely on a timecard review of meal break recordings to assert a presumption under *Donobue v. AMN Servs.,*
12 *LLC*, 11 Cal.5th 58 (2021) that meal breaks were not provided. However, here, the rate of facial timecard
13 violations for the Plaintiffs is very low, as only 7% of Ward’s breaks, and 2.3% of Besabe’s, were missed, and
14 1.4% and 5.4%, respectively, were short. Supp. Markham Decl., ¶24. This could prevent a showing that Sutter
15 failed to provide meal breaks and adds to the risk of prevailing on this claim justifying the 50% discounted
16 valuation each on the merits and certification.

17 Rest break claim: \$1,410,882. Plaintiffs applied a 50% discount each to certification and on the merits
18 to this claim to account for additional risks in prevailing on this claim, such as that rest breaks are not recorded,
19 Sutter’s policy authorized 15-minute rest breaks, in excess of the required 10 minutes, Kronos system allowed
20 employees to submit a rest break premium request, and many class members testified they took rest breaks, or
21 received rest break premiums. *Id.*, ¶24. Thus, at least a 50% discount to maximum value of this claim each for
22 certification and merits is appropriate.

23 Unreimbursed Business Expense Claim: \$431,375. The unreimbursed expenses claim is discounted by
24 50% of the maximum exposure each for certification and the merits. Sutter will likely argue that numerous
25 class members confirmed they were not required to wear special shoes at work (i.e., only closed-toe, non-slip
26 shoes like tennis shoes), and they could wear them outside of the hospital. *Lemus v. Denny’s, Inc.*, 617 F.App’x
27 701, 703 (9th Cir. 2015) (slip resistant shoes not reimbursable if they can generally be used in the occupation).

Further, to the extent Plaintiffs and other class members did not request reimbursement of these expenses, this claim would be susceptible to summary judgment. *Hammit v. Lumber Liquidators*, 19 F. Supp. 3d 989, 1001 (S.D. Cal. 2014) (granting summary judgment when employee failed to request reimbursement). Finally, regarding Plaintiffs' claim for failure to reimburse for personal cell phone expenses, Sutter presented evidence it provided company-issued Cisco phones and landlines to class members, so they were not required to use their personal cell phones for work purposes. Supp. Markham Decl., ¶24. In fact, Ms. Ward's cell phone records showed that her only work-related cell phone calls were during work hours, when she had equal access to a landline on hospital premises. *Id.*

Wage statement penalties: **\$700,000** is the discounted valuation at 50% each on the merits and at certification. *Id.* Wage statement claims are purely derivative of Plaintiffs' unpaid time, and meal and rest break claims, so if Plaintiffs do not prevail on the underlying claims, her derivative claims would also fail. *See Gomez v. Lincare, Inc.*, 173 Cal.App.4th 508, 524-25 (2009). Also, Sutter will likely assert that wages that were not paid cannot form the basis of these derivative claims based on *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018). Supp. Markham Decl., ¶24.

Waiting time penalties: **\$1,133,550** is the discounted valuation at 50% for this derivative claim each on the merits and certification. As with Plaintiffs' wage statement penalties claim, this claim is a purely derivative claim and faces substantial risks both on certification and the merits. *Id.*

Thus, Sutter's realistic discounted liability for Plaintiffs' direct claims is **\$3,076,900.74**, and an additional **\$1,833,550** for Plaintiffs' wage statement and waiting time penalties claims, for a total of **\$4,910,450.74**. Thus, the MSA of \$775,000 represents **25%** of Sutter's **realistic** potential liability for Plaintiffs' direct claims, and approximately **over 15%** of Sutter's **realistic** liability for all Plaintiffs' claims. *Id.*

D. PAGA Valuation, Risks and Analysis

In its Order, the Court requests that in addition to maximum exposure analysis, Plaintiffs should describe risks specific to the PAGA claim and provide realistic exposure for this claim. Order at p. 10.

The Parties agreed \$77,500, or 10% of the MSA will be allocated for payment under the PAGA. 75% of this amount (\$58,125.00) will be paid to the LWDA, and 25% (\$19,375.00) to PAGA-Eligible Employees. *Id.*,

¶25.² The PAGA penalties under this Settlement represent approximately 0.45% of the total potential PAGA penalties for Plaintiff's direct claims, assuming class members suffered four types of violations in every single pay period (49,269 pay periods times \$100 multiplied by 3 penalties for unpaid time, meal and rest break violations (= \$14,780,700), plus 24,634.50 pay periods to represent unreimbursed business expenses incurred on a monthly basis, times \$100 per pay period (= \$2,463,450), for maximum penalties of \$17,244,150. Supp. Markham Decl., ¶25.

The subsequent penalties should be calculated at \$100, not \$200 per pay period because under *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157 (2008), to recover \$200 per subsequent violation, an employer must have been cited first, which has not occurred here. *Id.* at 1207-09; *see also Hernandez v. Best Buy Stores, LP*, 2017 WL 2445438, *2 (S.D. Cal. June 6, 2017) (holding, based on *Amaral*, that \$100 penalty per pay period is warranted because “no court, commissioner, or any other authority had held [that] Best Buy misclassified” the general managers.”); *Trang v. Turbine Engine Components Technologies Corp.*, 2012 WL 6618854, *5 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) (finding that California law imposes the “subsequent violation penalty” only after an employer has been notified by “the court or commissioner” that its conduct violates the Labor Code).

Such allocation falls within the range of other approved PAGA settlements, as courts frequently approve PAGA awards between 0.2% to 2.2% of the total potential penalties. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of 0.2% of the maximum, or \$5 per pay period); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at *2, 7 (N.D. Cal. Sept. 28, 2016) (settlement allocating \$10,000 to PAGA penalties where potential value was over \$5.2 million, resulting in 0.2 percent PAGA recovery approved); *Van Kempen v. Matheson Tri-Gas, Inc.*, 2017 WL 3670787, at *10 (N.D. Cal. Aug. 25, 2017) (approving \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent); *Slavkov v. Fast Water Heater Partners I, LP*, 2017 WL 3834873, at *2 (N.D. Cal. July 25, 2017) (finding that “\$7,500 PAGA payment is reasonable when measured against the total overall settlement [of \$345,000] and the possible weaknesses in Plaintiffs' case,” or 2.2 percent); *Bravo v.*

² Recent amendments to the PAGA statute only apply to actions filed after June 19, 2024.

1 *Gale Triangle, Inc.*, 2017 WL 708766, at *19 (C.D. Cal. Feb. 16, 2017) (\$10,000 in PAGA penalties found
2 reasonable).

3 Further, here, Defendant would likely argue that under Labor Code section 558, certain penalties
4 should actually be \$50 per violation instead of \$100, because although Plaintiffs seek penalties through PAGA,
5 PAGA provides the applicable civil penalty only if a particular Labor Code provision does not specify one.
6 *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 580 (2010). Here, meal and rest break premiums are not
7 penalties, but wages, so section 226.7 does not contain a penalty, and the penalty under section 558 should be
8 applied, as 558 penalties apply to unpaid wages. *Culley v. Lincare, Inc.*, 236 F.Supp.3d 1184, 1195 (E.D. Cal.
9 2017). Failure to pay overtime is also subject to the \$50 civil penalty provided in section 558, because section
10 558 applies to the penalties contained in the same chapter as section 510. *Villacres, supra*, 189 Cal.App. at 580.

11 Additionally, Defendant will raise that PAGA gives the Court **wide latitude** to reduce the amount of
12 civil penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result
13 in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e). In response to
14 the Court’s request to discuss this factor, Plaintiffs confirm that in reducing PAGA penalties, courts have
15 considered issues including whether the employees suffered actual injury from the violations, whether the
16 defendant was aware of the violations, and the employer’s willingness to correct the violation.

17 When applying these factors here, any penalties awarded would likely be reduced due to mitigating
18 factors such as the very high amount of premiums and overtime that Sutter paid during the class period.
19 Additionally, while not determinative, the original denial of class certification can make establishing that the
20 PAGA claims can be tried on a representative basis more difficult. Supp. Markham Decl., ¶30. Further, as
21 discussed above, the percentage of meal break violations that the named Plaintiffs experienced were low,
22 resulting in a low *Donohue* presumption. Also, to the extent class members argue that management discouraged
23 them from requesting premiums, the Labor Commissioner, on a claim filed by 28 Sutter employees, including
24 6 surgical technicians, ruled that “claimants...failed to present evidence that reporting meal or rest period
25 premiums...resulted in retaliatory action, directly or indirectly, from Defendant.” *Id.* These same factors also
26 reduce the likelihood that the Court would conclude that any violations, if found, are “knowing and
27 intentional.”

1 Further, it is unlikely the Court would award full penalties as there is little guidance as to the standard
2 for determining the amount of appropriate penalties under PAGA:

3 [S]ection 2699, subdivision (e)(2) describes the conditions under which a trial court may
4 exercise its discretion to *reduce* penalties. It does not specify guidelines for exercising
5 discretion in general with regard to the amount of penalties, because the amount is fixed
by statute....A court can only exercise its discretion to *award lesser penalties* based on the
enumerated considerations.

6 *Amaral, supra*, 163 Cal. App. 4th at 1213 (internal quotations omitted); *see also Fleming v. Covidien Inc.*, 2011 WL
7 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

8 For the same reasons, even if the Court were to award penalties based on the maximum or a similar
9 amount per pay period, a maximum amount is likely to be found unjust or oppressive, resulting in a
10 discretionary reduction as discussed above. Plaintiffs believe it is likely that based on all the factors and risks
11 as discussed in this motion and in Plaintiffs' preliminary approval motion, PAGA penalties awarded at trial are
12 likely to be at least 75% less than the maximum valuation (i.e., approximately one penalty per period, or
13 \$4,311,037), if not reduced further. For instance, in *Carrington v. Starbucks*, 30 Cal.App.5th 504 (2018), the Court
14 of Appeal affirmed a trial court's award of only \$5 in penalties per pay period, despite finding defendant liable
15 for meal break violations. *Id.* at 522-25, 529. Here, such reduction would amount to an award of \$246,345 in
16 PAGA penalties (49,269 pay periods times \$5), which is only about 3 times the total amount the Parties
17 allocated to the PAGA portion of the settlement here. Supp. Markham Decl., ¶32.

18 These examples of discretionary reductions and analysis whether violations are knowing and intentional
19 conform to the courts' reasoning that "[t]he remedy sought in a PAGA suit consists of civil penalties, not
20 individual or class damages" [*Mendez v. Tween Brands, Inc.*, 2010 WL 2650571, at *4 (E.D. Cal. June 30, 2010)],
21 and in PAGA "[u]nlike class actions, these civil penalties are not to compensate unnamed employees because
22 the action is fundamentally a law enforcement action." *See Ochoa-Hernandez v. CJADERS Foods, Inc.*, 2010 WL
23 1340777, at *4 (N.D. Cal. Apr. 2, 2010).

24 Finally, the LWDA received the settlement on May 24, 2024 and did not object to it. Supp. Markham
25 Decl., ¶34; *see also Rodriguez v. Danell Custom Harvesting, LLC*, 293 F.Supp.3d 1117, 1133 (E.D. Cal. 2018) ("The
26 Agency has not filed an objection to the terms of the settlement. Based on the Agency's lack of objection, the
27 Court preliminarily approves the PAGA penalties.").

28 //

1 **V. PLAINTIFFS' TIME INVESTED AND EFFORTS AS CLASS REPRESENTATIVES**

2 Per the Court's Order, Plaintiffs must expand on the discussion and provide a realistic estimate of the
3 amount of time they spent prosecuting this action, and factors supporting their incentive awards. Order at 11.
4 In their supplemental declarations, Plaintiffs expand on their discussion of types of tasks they devoted time
5 towards prosecuting this action, including pre-litigation investigation and labor claims, document search and
6 review, correspondence with their attorneys, deposition preparation and attending their depositions, being on
7 standby for mediation, and reviewing settlement documents. Supplemental Declaration of Jennifer Ward;
8 Supplemental Declaration of Sacora Besabe. In addition to their extensive participation in prosecuting this
9 action, the \$12,500 incentive awards are further justified by the risks and sacrifices they made as named
10 plaintiffs, including time away as providers for their families, potential liability for Defendant's costs, and risks
11 in securing future employment. *Id.*, ¶¶15-17.

12 Here, the incentive awards are further justified as each represents a mere 1.6% of the \$775,000
13 settlement fund (and 3.2% if combined). Courts typically approve incentive awards in the same range or at a
14 higher percentage of the gross settlement fund than Plaintiffs seek here: *Cassidy Marsh v. The Procter & Gamble*
15 *Paper Prod. Co.*, et al., 2019 WL 13029906, at **4-5 (C.D. Cal. July 11, 2019) (awarding \$15,000 in a service
16 award from a \$650,000 settlement fund, equaling to 2.3% of the settlement fund); *Palacios v. Penny Newman*
17 *Grain, Inc.*, 2016 WL 8730677 (E.D. Cal. May 27, 2016) (approving incentive awards which represented 5% of
18 the gross settlement amount, noting it was less than the 6% found excessive in *Staton v. Boeing Co.*, 327 F.3d
19 938 (9th Cir. 2003)); *Amaro v. Gerawan Farming Inc.*, 2020 WL 6043936, at *10 (E.D. Cal. Oct. 13, 2020)
20 (approving a \$10,000 incentive award, amounting to 2% of the Settlement Amount as being in line with other
21 incentive awards approved by that court); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267-68 (N.D. Cal.
22 2015) (awarding \$15,000 incentive which represented 1.5% of the \$1,000,000 settlement fund).

23 Plaintiffs' incentive awards are justified by the substantial time invested and risks they undertook, and
24 are within the range of reasonableness at the preliminary approval stage.

25 **VI. DISTRIBUTION OF UNCASHED FUNDS**

26 In its Order, the Court requests that the settlement agreement provide that any uncashed checks will
27 go to the unclaimed property fund (not the LWDA for uncashed funds pertaining to the PAGA portion of
28

1 the settlement). The Parties revised the settlement agreement, class notice, and proposed order accordingly.
2 Settlement Agreement, ¶54.

3 **VII. MODIFIED RELEASE LANGUAGE**

4 The Court expressed concern regarding the scope of the release language and asked the Parties to
5 revise to clarify the scope of the FLSA and PAGA release language. Order at p. 8. Regarding the FLSA release,
6 the Parties clarified that class members who do not opt-out but fail to cash their settlement checks do not
7 release their FLSA claims. Settlement Agreement, ¶25. Additionally, the FLSA release is limited to FLSA claims
8 arising from the factual allegations in the action. *Id.* Regarding the PAGA release, the Court stated that the
9 PAGA release must be tethered to the PAGA claims that were or reasonably could have been alleged based
10 on the facts alleged in the LWDA Notices or operative complaint, and remove the language “draft complaints.”
11 Order at p. 9. The Parties agreed and revised the language per the Court’s instructions. Settlement Agreement,
12 ¶26.

13 **VIII. ADDITIONAL REVISIONS TO SETTLEMENT AGREEMENT, AND** 14 **CORRESPONDING EDITS TO CLASS NOTICE AND PROPOSED ORDER**

15 The Order states the Court prefers that an extension of at least fifteen days be granted in the
16 circumstances of a class notice being remailed to a new address (instead of seven days). Order at. 7. The Parties
17 agreed and have revised the settlement agreement, class notice and proposed order accordingly to reflect the
18 15-day extension. Settlement Agreement, ¶36; Notice, pp. 5-7. Further, the release language has been modified
19 in the Notice consistent with the Settlement Agreement. Notice, p. 4. The Notice also plainly defines and
20 explains the FLSA claims to be released by those Participating Class Members who cash their settlement
21 checks. Order at 11. (Notice, p. 4.) The notice separately summarizes the estimated class and PAGA settlement
22 amounts. Notice, p. 5. The proposed order has also incorporated all edits made to the settlement agreement
23 and class notice, and proposed a final approval hearing date. *See* Order at 12.

24 **IX. CONCLUSION**

25 Counsel for the parties have addressed the Court’s concerns as stated in the Order, and modified the
26 Settlement Agreement, Class Notice and supporting forms accordingly. Thus, the Parties respectfully request
27 that the Court preliminarily approve this Settlement.

28 //

1 Dated: July 18, 2024

Respectfully submitted,

2 **THE MARKHAM LAW FIRM**

3 /s/ David R. Markham

David R. Markham

4 Lisa Brevard