

Eric K. Yaeckel [CSB No. 274608]
yaeckel@sullivanlawgroupapc.com
Ryan T. Kuhn [CSB No. 324538]
ryan@sullivanlawgroupapc.com
Karoline D. Kitlowski [CSB No. 347692]
karoline@sullivanlawgroupapc.com
SULLIVAN & YAECKEL LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff DAMON COFFEY, Individually, and on behalf of other members of the general public similarly situated

Additional Counsel Listed on Following Page

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DAMON COFFEY and BRANDIE
LUKOFNAK individually, and on behalf of
other members of the public similarly
situated,

Plaintiff

v.

SOUTHERN CALIFORNIA
PERMANENTE MEDICAL GROUP, INC.,
a California Corporation and DOES 1-10,
inclusive,

Defendants

CASE NO. 37-2020-00029409-CU-OE-CTL

CLASS ACTION & REPRESENTATIVE
ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
CONDITIONAL CERTIFICATION OF
SETTLEMENT CLASS AND
PRELIMINARY APPROVAL OF GOOD
FAITH DETERMINATION OF CLASS
ACTION SETTLEMENT**

Date: January 26, 2024
Time: 8:30 a.m.
Judge: Hon. Keri G. Katz
Dept.: C-74

1 **BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP**

2 Norman B. Blumenthal (State Bar #068687)

3 Kyle R. Nordrehaug (State Bar #205975)

4 Aparajit Bhowmik (State Bar #248066)

5 Nicholas J. De Blouw (State Bar #280922)

6 2255 Calle Clara

7 La Jolla, CA 92037

8 Telephone: (858)551-1223

9 Facsimile: (858) 551-1232

10 Website: www.bamlawca.com

11 Attorneys for Plaintiff BRANDIE LUKOFNAK, Individually, and on behalf of other members of
12 the general public similarly situated
13
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I. SUMMARY OF MOTION

This matter is a “Wage and Hour” representative (*i.e.*, “PAGA”) and *proposed* class action. DAMON COFFEY and BRANDY LUKOFNAK, (collectively “Plaintiffs”) bring Labor Code claims against Defendant SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP (“SCPMG”).

After approximately 3 years of extensive litigation, exchanges on at least 12 sets of formal discovery devices, multiple depositions, a full day Mediation, and extensive negotiations, the parties have agreed to the terms of a proposed class action settlement. **Please Note:** As discussed with the Court at the January 3, 2024 *Ex Parte* hearing, the parties have now agreed on all key terms of settlement (as outlined herein). The parties will submit a brief supplement to the instant motion that includes the fully executed Joint Stipulation of Class and PAGA Action Settlement (the “Agreement”). (Kuhn decl. ¶13). The key terms of the settlement are as follows:

Approximate size of “Class”¹: **50,000 individuals**

Gross settlement amount (“GSA”): **\$9,970,000.00**

Claims administration: **\$123,000.00** (or less)

Costs/expenses of litigation: **\$65,000.00** (or less)

Claims Period: **30 days from Mailing of Notice**

Class representative incentive: **\$20,000** (\$10,000 for each representative)

LWDA payment: **\$225,000.00** (75% Share of \$300,000 allocation)

Sub-Class Allocation: **\$657,000** (Estimated at \$15 per participating employee)

Attorney's fees: **1/3 of GSA (\$3,323,333.33)**

Estimated average payment (before taxes) to each Class Member based on the above figures will be **\$109.63**. These estimates are an “average” only, and do not account for the fact that class members will receive more or less than an “average” share, as the amounts owed are calculated based on the number of workweeks each individual worked for Defendants during the class period.

Please Note: This is a **non reversionary** settlement, in that the entire net settlement amount,

¹ As explained *infra*, there is also a separate settlement Sub-Class, containing an 43,840 employees (many individuals are in both the class and sub-class). The release for the Sub-Class Members is limited as this subclass includes people who were class members in a prior class action settlement, *Leyva v SCPMG*. The limited sub-class release is related to paid sick leave under the Healthy Workplaces, Healthy Families Act and claims for reimbursement for business expenses.

1 after the awarded costs, taxes and fees are deducted, will be automatically disbursed to all class
2 members who do not file a request to “opt-out” of participation in the lawsuit.

3 The parties now move for an order: (1) provisionally certifying the proposed class and sub-
4 class; (2) preliminarily approving the proposed class action settlement; (3) directing that Notice
5 (defined below) of the proposed settlement be provided to Class Members; and (4) scheduling a
6 hearing for final approval of the settlement and entry of the parties’ proposed Final Order Re: Class
7 Action Settlement

8 **II. FACTUAL AND PROCEDURAL HISTORY**

9 The relevant procedural history is set forth below.

10 **1. The Operative Claims, Investigation and Informal Discovery Conducted**

11 On August 21, 2021, Plaintiff Coffey filed the Complaint in this matter. The original
12 Complaint alleged representative California Private Attorney General Act (“PAGA”) claims, under
13 the California Labor code involving, *inter alia*, (1) Meal and Rest Period violations; (2) Minimum
14 wage violations; (3) Overtime violations; (4) Wage statement violations; (5) Failure to reimburse
15 business expenses; and (6) Failure to pay wages upon separation. (Kuhn Decl. ¶ 3; ROA # 1).

16 On August 27, 2021, Plaintiff filed a First Amended Complaint, clarifying issues related to
17 Defendant’s entity status. (Kuhn Decl. ¶4; ROA #8).

18 On April 22, 2021, Plaintiff filed a Second Amended Complaint, which added class action
19 claims based on same Labor Code violations in the original Complaint. (Kuhn Decl. ¶5; ROA #22).

20 The parties have agreed to the filing of a Third Amended Complaint, which has “merged” the
21 related *Lukofnak* matter into this matter. The Third Amended Complaint is the operative pleading for
22 purposes of this proposed settlement. (Kuhn Decl. ¶6). The TAC will be filed by separate stipulation.

23 On January 11, 2020, Plaintiff propounded discovery requests on each of Defendants, including
24 requests for admission, special interrogatories, requests for production of documents, and general and
25 employment form interrogatories. (Kuhn decl. ¶7). Through these requests, Plaintiff sought, among
26 other information and documents, the identities of putative class members, Defendants’ compensation
27 policies, meal and rest period policies, employee handbooks, wage statements, payroll records, time
28 records, job descriptions, and reimbursement policies. (*Id*).

1 Defendants provided discovery responses, documents, and objections to Plaintiff's requests.
2 After a lengthy meet and confer process, Defendant produced, *inter alia*, Plaintiff's time and wage
3 records, copies of the relevant employee handbooks, copies of all other relevant employee policies,
4 and the contents of Plaintiff's employee file. (Kuhn decl. ¶8). After the dissemination of *Belaire-West*
5 Notice, Defendant produced a sampling of non-exempt employee Time Records and Wage Statements.

6 Defendant also propounded several sets of written discovery on Plaintiff. In total it appears
7 there were at least 12 sets of written discovery exchanged between the parties. (Kuhn decl. ¶9).
8 Additionally, Plaintiff Coffey appeared for two full days of deposition. SCPMG also produced its
9 "Persons Most Knowledgeable" for a full day of deposition. (*Id.*)

10 **2. Settlement Discussions**

11 On January 27, 2023, the Parties attended a full day mediation before experienced "Wage and
12 Hour" mediator, David Rotman. (Kuhn decl. ¶ 12). Prior to mediation, counsel for both parties agreed
13 to the informal exchange of information pertinent to a class-wide settlement. Both parties exchanged
14 detailed mediation briefs. (*Id.*) The parties were unable to reach an agreement at the time. (*Id.*)

15 Subsequent to the January 27, 2023 Mediation, the Parties continued to litigate the case. To
16 wit, the Parties fully briefed the Motion for Class Certification. (Kuhn Decl. ¶13). However, the Parties
17 also continued settlement discussions between counsel, and through the Mediator. (*Id.*) Through these
18 discussions, the Parties agreed on key terms of a settlement that would globally resolve all class and
19 representative "Wage and Hour" claims asserted in the operative Complaint in this Action. (*Id.*)

20 On January 3, 2023, the parties agreed on all key terms of the settlement via a "Memorandum
21 of Understanding." As set forth above, the parties will submit a brief supplement to the motion that
22 contains the fully executed Joint Stipulation of Class and PAGA Action Settlement (the "Agreement")
23 once the parties obtain all signatures. (*Id.*) The parties seek preliminary approval of the Agreement.

24 **III. SETTLEMENT TERMS**

25 The Agreement includes the following key terms:

26 **1. Contingent Nature of the Settlement**

27 The parties entered into the Agreement exclusively for the purpose of resolving the action and
28 facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally

1 approve the Agreement, or if the Agreement is terminated for any reason, then the parties have agreed
2 that the Agreement will be null and void and this action will revert to its status with respect to any and
3 all matters as they existed prior to the parties signing the Agreement.

4 **2. Description of the Settlement Classes**

5 Solely for the purposes of the Agreement, the parties have agreed that the term “Class
6 Member” is defined as:

7 All non-exempt persons who were employed by Defendant in the state of California at any
8 time during the Class Period (defined as July 8, 2020, through the earlier of preliminary
approval or February 13, 2024.)

9 Solely for the purposes of the Agreement, the parties have agreed that the term “Sub-Class
10 Member” is defined as:

11 All non-exempt persons who were employed by Defendant in the state of California at any
12 time during the Sub-Class Period (defined as August 21, 2016, through July 7, 2020).

13 Solely for the purposes of the Agreement, the parties have agreed that the term “PAGA Group
14 Member” is defined as:

15 All non-exempt persons who were employed by Defendant in the state of California at any time
16 during the PAGA Period (defined as July 8, 2020, through the earlier of preliminary approval
or February 13, 2024.)

17 **Please Note:** “FLSA Subclass Members” exist, consisting of all non-exempt persons who were
18 employed by Defendant in the State of California at any time from August 21, 2017 through the date
19 of preliminary approval (“FLSA Subclass Period”). The FLSA claims are an alternate theory of
20 recovery. However, they are based on the same underlying violations alleged by the Class Members.

21 The Settlement Class consists of approximately fifty-thousand (50,000) individuals, as
22 determined by Defendant’s employment records.

23 **3. Appointment of Settlement Administrator**

24 The parties agreed to use Rust Consulting, as the “Settlement Administrator” for purposes of
25 providing the Notice to Settlement Class Members, issuing payments pursuant to the Agreement, and
26 to administer the claims. Rust’s sole business has been the administration of class action settlements
27 and class action notices, and has extensive experience. (Kuhn decl.¶ 14).

28 **4. Scope of the Release**

For purposes of the Agreement, Class Members release all “Wage and Hour” claims that are

1 either or both: (1) alleged in the Third Amended Complaint; or (2) or which relate to or arise out of
2 the allegations and claims asserted in the Third Amended Complaint and could have been alleged in
3 the complaint relating in any way to violations of the wage and hour provisions of the California Labor
4 Code or the California Wage Orders, or any other wage and hour provisions of California law.

5 The Sub-Class Members will only be releasing claims based on the facts that are or could have
6 been alleged in the Operative Complaint that occurred during the Subclass Period reasonably related
7 to paid sick leave under the Healthy Workplaces, Healthy Families Act, and claims for reimbursement
8 for business expenses. The release for the Sub-Class Members is limited as this subclass includes
9 people who were class members in a prior class action settlement, *Leyva v SCPMG*.

10 There is also a separate release for individuals who are “PAGA Sub-Class Members” and
11 “FLSA Sub-Class Members” which has been agreed to by the parties and will be further outlined in
12 the forthcoming supplemental filing.

13 **5. Cash Payment and Allocation**

14 The Agreement provides for an automatic cash payment to Class Members. No claims need
15 be submitted. Class Members will be entitled to an average share of approximately **\$109.63**. (Kuhn
16 Decl. ¶15). The actual share will depend on the amount of pay periods they were employed during the
17 limitations period. The Cash Payment will be allocated as follows: one-third (1/3) constitutes wages
18 (subject to withholdings and deductions and reported as wage income on a Form W-2) and two-thirds
19 (2/3) constitutes non-wage penalties, and interest.

20 **6. Proposed Settlement and Notice Program**

21 Subject to Court approval, the Parties agree that, following any Order granting preliminary
22 approval, Defendant will provide to the Settlement Administrator the following information for each
23 Settlement Class Member in a reasonable format requested by the Settlement Administrator: class
24 member names and last known home addresses, telephone numbers, social security numbers, weeks
25 worked with Defendant based on Defendant’s records, and last known mailing addresses for each
26 member of the Class.

27 The Settlement Administrator will perform address updates and verifications prior to the first
28 mailing. The Settlement Administrator will mail the Class Notice (“Notice”) to each Class Member,

1 by first class mail.

2 The proposed Notice is attached to the declaration of Ryan T. Kuhn as **Exhibit A**. The Notice
3 is designed to provide Class Members with detailed information about the lawsuit, the Agreement,
4 their rights and the settlement benefits, and how to participate, exclude themselves, or object. (*See*
5 Kuhn Decl., ¶16, **Exhibit A**).

6 The Class members will be given notice of the release and information about their expected
7 settlement amount based on the workweeks (and whether they fall into a Sub-Class) they were
8 employed with Defendants during the Class period. If they wish to receive a share of the Settlement,
9 class members need not take any additional action. Class Members are also given instructions on how
10 to exclude themselves, file objections, or appear at the final approval hearing to state objections. (*Id.*).

11 The Notice program has additional safeguards. For instance, for Notices returned as
12 nondeliverable, the Class Administrator bid includes performing a skip-trace and mail or re-mail
13 Notice to an updated address (if any), upon receipt of the returned mail. It is the intent of the parties
14 that all reasonable means be used to locate Class Members.

15 The Notice will inform Class Members of the number of weeks worked during the Class
16 Period, (according to Defendant's records) and their estimated settlement amounts. Class members
17 will have the opportunity to dispute the workweek calculation by submitting written documentation
18 to the Claims Administrator. (**Exhibit A** at § IV(D)).

19 PAGA Members do **not** require notice prior to a settlement nor may they opt out of the PAGA
20 penalty portion of the settlement. *Robinson v. S. Ctys. Oil Co.*, (2020) 53 Cal. App. 5th 476, 482–83,
21 review denied (Nov. 24, 2020). However, all PAGA members are also Class Members and can opt-out
22 to retain their individual claims. This is explained in the Class Notice. (**Exhibit A** at § IV(F)).

23 **7. Contingent Costs**

24 Defendant agrees to pay \$3,323,333.33 in attorneys' fees, or thirty-three and one-third (33
25 1/3%) of the total settlement, and up to Sixty Five Thousand and Dollars (\$65,000.00) in litigation
26 costs. (Kuhn Decl. ¶52). For settlement administration costs, SCPMG will pay the actual cost,
27 estimated at One Hundred and Twenty Three Thousand Dollars (\$123,000.00). (Kuhn Decl. ¶53).

28 Defendant also agrees to allocate Three Hundred Thousand Dollars (\$300,000.00) to Plaintiffs'

1 PAGA claims with 75% of the amount, or \$225,000.00, being paid to the LWDA, and 25%, or
2 \$75,000.00, being distributed amongst the class members. (Kuhn Decl. ¶54).

3 Defendant also agrees to pay Plaintiffs Coffey and Lukofnak Ten Thousand Dollars
4 (\$10,000.00) each, as an enhancement award in consideration for their services as Class
5 Representatives. The enhancement awards were decided pursuant to good faith negotiations and is
6 intended to recognize that it was the class representatives who initiated the lawsuit, initiated the PAGA
7 claims, provided critical documents and witnesses to their attorneys, and worked with their attorneys
8 to propound and prepare written discovery, all in an effort to obtain moneys allegedly owed not only
9 to themselves, but to thousands of other employees. (Kuhn Decl. ¶17).

10 **IV. SUMMARY OF CLAIMS AND ESTIMATES OF POTENTIAL DAMAGES**

11 Counsel hereby submits estimates and calculations for the total potential value of all claims
12 so this Court may evaluate if the amount to be paid to the class ultimately could be determined to be
13 fair and reasonable when balanced against the probable outcome of the future litigation. *Kullar v. Foot*
14 *Locker Retail, Inc.*, (2008) 168 Cal. App. 4th 116, 133.

15 Concerning the strength of the plaintiff's case, the California Court of Appeal has said that the
16 "merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the
17 operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
18 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d
19 448,455 ("The fact that a proposed settlement may only amount to a fraction the potential recovery
20 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
21 disapproved"); see also *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 ("This
22 court has aptly held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful
23 and expensive litigation that induce consensual settlements'")]

24 Each of the primary claims also had risks to obtaining both class certification and a finding of
25 liability. If Defendants' asserted defenses were successful, the class would not receive anything. As
26 is set forth below, Plaintiffs submit that the most realistic "best case" scenario would be an average
27 recovery per class member of approximately \$6,496.99 and a worst case scenario would be a recovery
28 of \$0, by way of denial of class certification or defense verdict. (Kuhn Decl. ¶18-20).

1 **A. THE “FAILURE TO PAY ALL COMPENSATION DUE” CLAIMS**

2 Plaintiffs' unpaid wages claims were based on the allegation that employees were performing
3 unpaid work due to the SCPMG standard timekeeping system, which “rounded” employee time entries
4 and caused other losses due to (1) the “grace period” policy, and (2) certain alleged “transitional math
5 errors” caused by the payroll system. Plaintiffs alleged this resulted in regular time and overtime pay
6 being owed where Defendants were on notice of work being performed without pay.

7 Defendants argued that rounding of total hours worked has been recognized under California
8 law. Defendants also denied that any unpaid work occurred, and even if some did occur, SCPMG
9 claimed it was not on notice of these alleged Labor Code violations and had a strict written prohibition
10 against off-the-clock work and a mandate that all time worked must be recorded accurately. SCPMG
11 asserted proof of these alleged violations would require individualized inquiries, which could preclude
12 class certification and make any PAGA claims unmanageable. (Kuhn decl. ¶30).

13 Based on Class Counsels’ analysis, this claim was worth as little as \$0 (a defense verdict or
14 denial of class certification) or as much as \$63,868,000.00. (Kuhn decl. ¶21).

15 **B. THE “MEAL AND REST PERIOD” CLAIMS**

16 Plaintiffs were able to identify thousands of examples of missing or late meal periods without
17 the provision of a meal period penalty payment. However, SCPMG argued that these records do not
18 conclusively show whether (1) SCPMG actually failed to provide the meal period, (2) there was a
19 voluntary waiver, (3) employees forgot to clock out, or (4) employees voluntarily chose to skip or take
20 them late even though they were provided. Additionally, in light of SCPMG's written meal period
21 policy and the wide variations in alleged violations and departments at the hospital, Defendants
22 contended there was no uniform policy or practice, requiring individualized inquiries that would
23 preclude class certification and make any PAGA claims unmanageable. (Kuhn decl. ¶ 31).

24 Plaintiffs also alleged the SCPMG written policies improperly restricted class members from
25 leaving the premises during their rest breaks. Defendants argued that the policy contained no such
26 restriction, and that witness testimony would demonstrate that in practice, there was no such "leave
27 the premises" restriction. SCPMG also contended individualized inquiries abound as to why individual
28 employees may have failed to take appropriate meal periods or rest breaks. (Kuhn decl. ¶32).

1 While there are time records to support the existence of meal period violations, there are no
2 corresponding rest period records, making this aspect of the claim much harder to prove. Some Courts
3 have been disinclined to accept survey evidence that may have been needed to help establish rest
4 period violations. See e.g. *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630.

5 Based on counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
6 of class certification) or as much as \$79,835,000.00. (Kuhn decl. ¶21).

7 **C. THE "ITEMIZED WAGE STATEMENT" CLAIMS**

8 Plaintiffs acknowledge that these claims are largely derivative, in that both the gross and net
9 wages could be found to be inaccurate, due to the above-referenced claims. SCPMG argued that the
10 failure to list gross and net wages are derivative of other claims that may ultimately fail and as a result
11 there is no "knowing and intentional failure" to list information, which triggers liability under Labor
12 Code §226(e). (Kuhn decl. ¶33).

13 The California Supreme Court has recently held that the failure to pay Meal and Rest Period
14 premiums *may* give rise to a claim for Inaccurate Wage Statements (or waiting time penalties).
15 However, such derivative liability is not automatic and the Plaintiff still must show a "knowing and
16 intentional" or "willful" failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
17 *Services, Inc.* (2022) 13 Cal.5th 93,109.

18 Defendants (as with the underlying Meal and Rest Period claims) maintained individualized
19 inquiries would abound as to why breaks were missed and whether Meal Period premiums should have
20 been paid in the first place, requiring individualized inquiries that would preclude class certification
21 and make any PAGA claims unmanageable. (Kuhn decl. ¶ 33).

22 As is broken down further in the declaration of Ryan T. Kuhn, this claim was valued at as little
23 as \$0.00 and as much as \$36,000,000.00. (Kuhn decl. ¶21).

24 **D. THE "REIMBURSEMENT" CLAIMS**

25 Plaintiffs contend that SCPMG violated Labor Code section 2802 by failing to reimburse its
26 employees for certain costs, including cellular phone costs, work supplies and mileage.

27 SCPMG countered that it has a comprehensive written policy for expense reimbursements in
28 its employee handbook. The majority of SCPMG employees were not able to do remote work due the

1 nature of the work involving direct patient care. SCPMG further contended that Plaintiffs' (and
2 others') positions did not require the use of a cell phone. (Kuhn decl. ¶34).

3 As is broken down further in the declaration of Ryan T. Kuhn, this claim was valued at as little
4 as \$0.00 and as much as \$500,000.00. (Kuhn decl. ¶21).

5 **E. THE "DERIVATIVE" CLAIMS (PAGA, LABOR CODE SECTION 203, FLSA)**

6 The remaining claims are derivative, in that PAGA and Labor Code § 203 penalties would only
7 be permissible if the above claims are proven. The Fair Labor Standards Act ("FLSA") claims are
8 duplicative, in that they are just an alternative legal theory of recovery for the same wrong. If unpaid
9 wages are owed under the California Labor Code, they would also be owed pursuant to the FLSA.
10 These claims are not separately factored into the analysis of the maximum scope of liability.

11 The parties agreed to allocate \$300,000 to the PAGA claims, which is 3.01% of the total
12 settlement. This PAGA allocation is in the range routinely approved by California Courts. *See Garcia*
13 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
14 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement
15 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
16 714367, at *13 (approving 2.53% of the estimated \$3.95 million gross settlement amount allocated
17 to the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-
18 EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (**0.15%** of its total
19 value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber FCRA*
20 *Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving a
21 settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
22 \$7,500 – .01% of the total settlement amount).

23 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 claims were worth as little
24 as \$0 (a PAGA defense verdict or denial of certification of the § 203 claim) or as much as
25 \$135,000,000.00 and \$8,296,453.20 respectively. (Kuhn decl. ¶21).

26 **F. THE "SUB-CLASS" CLAIMS**

27 The release for the Sub-Class Members is limited, as this subclass includes individuals who
28 were class members in a prior class action settlement, *Leyva v SCPMG*. The limited sub-class release

1 is related to paid sick leave, under the Healthy Workplaces Healthy Families Act, and claims for
2 reimbursement for business expenses. All other claims alleged by the Class were already released via
3 the *Leyva* Settlement. Given the limited nature of these claims, the parties negotiated a separate
4 “per-person” payment in the amount of \$15 a person will be made to the sub-class members. Based
5 on the “Sub-Class Size,” this results in a total estimated amount of \$657,600.00. (Kuhn Decl. ¶21).

6 **G. CASE LAW SUPPORTS A FURTHER REDUCTION ON ANY RECOVERY**

7 Plaintiff concedes he would be highly unlikely to ever be awarded an amount approaching the
8 maximum damages set forth above. To wit, the majority of the recovery would be "derivative"
9 penalties under PAGA, Labor Code § 203 and Labor Code § 226. The FLSA claims are duplicative
10 and any “double recovery” is unlikely to be awarded. The Court would have great discretion to
11 mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
12 Cal.App.4th 1112, 1135 (disapproved on other grounds).

13 In a recent trial involving Class Counsel, the Court found liability, but then significantly
14 reduced the PAGA penalties, down to \$5 a violation. See *Carrington v. Starbucks Corp.* (2018) 30
15 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011 WL
16 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because
17 employer was "not aware" of violations). And in *Carrington*, the Court also noted that other trial courts
18 have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code
19 violation. See *Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

20 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
21 warranted here. As in the *Carrington* case, there was evidence that SCPMG attempted to provide meal
22 and rest periods in practice, and the written policies contained no facially non-compliant terms. Given
23 this, it is likely that some of the violations by SCPMG were not "willful." Finally, given the defenses
24 raised by Defendants, there was a significant risk that many of the claims would not have been certified
25 or, if they were, certification could not have been maintained through trial and appeal.

26 The Parties agree the failure to pay "ex-employees" under § 203 is derivative of the other
27 claims. As SCPMG asserts a "good faith dispute" for withholding any unpaid wages, it would be
28 difficult to establish any liability for a "willful" failure to pay wages owed.

1 Based on the above, it would be likely that PAGA penalties would be reduced to approximately
2 \$5 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties,
3 or separate FLSA damages. (Kuhn decl. ¶¶27). If this occurred, the average class member's pre-tax
4 share of a realistic best case recovery would be **\$432.00**. (Kuhn decl. ¶ 28).

5 Accordingly, Class Counsel submits the **\$141.53** average recovery secured via this Settlement,
6 is a reasonable compromise and is in the best interests of the Class given all the risks of continued
7 litigation. (Kuhn decl. ¶¶ 29-35).

8 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

9 Under California law, a class action is appropriate when the class is ascertainable and there is
10 “a well defined community of interest in the questions of law and fact involved affecting the parties
11 to be represented.” Cal. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34
12 Cal. 4th 319, 341. State law requirements under California Code of Civil Procedure § 382 for class
13 certification mirror those of federal law under Rule 23 of the Federal Rules of Civil Procedure:
14 numerosity, typicality of the class representatives’ claims, adequacy of representation, predominance
15 of common issues, and superiority. See Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th
16 Cir. 1998) 150 F.3d 1011, 1019. Thus, for settlement purposes, each of these elements must be present.
17 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38.

18 **A. THE PROPOSED SETTLEMENT CLASS IS ASCERTAINABLE**

19 The proposed class is ascertainable because all Class Members currently or formerly worked
20 for Defendant as a nonexempt employee and will be identified through Defendant’s employment
21 records. See *Rose v. City of Hayward*, 126 Cal.App.3d 926 (1981) (finding that “Class Members are
22 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference
23 to official records”). Thus, the ascertainability requirement is met.

24 **B. THE PROPOSED SETTLEMENT CLASS IS SUFFICIENTLY NUMEROUS**

25 The numerosity requirement is met if the class is so large that joinder of all members would
26 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendant’s records show
27 that approximately **50,000 class members** worked for the company during the limitations period.
28 (Kuhn decl. ¶ 36). Thus, joinder of all members of the class would be impracticable.

1 **C. THE COMMONALITY REQUIREMENT WAS MET**

2 The commonality requirement is met if there are questions of law and fact common to the class.
3 *See Hanlon, supra*, 150 F.3d at 1019. Here, for purposes of the Settlement, the parties agree the claims
4 of Class Members all involve the same questions of law and fact. Namely, all class members were
5 subject to the same employment policies and practices of Defendant. (Kuhn decl. ¶ 37). The common
6 question exists as to whether the policies and practices Class Members were subjected to are illegal.
7 Therefore, the commonality requirement is satisfied. *See Hanlon, supra*, 150 F.3d at 1019-20.

8 **D. THE TYPICALITY REQUIREMENT IS MET**

9 The typicality requirement is met if the class representatives and class counsel have no interests
10 adverse to the interests of the proposed Class Members and are committed to vigorously prosecuting
11 the case on behalf of the class. *See Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

12 Here, there are no such adverse interests. Plaintiffs have claims substantially the same as all
13 the other Class Members. (Kuhn decl. ¶38). Factual differences may exist between the class
14 representatives and the Class Members so long as the claims arise from the same events or course of
15 conduct and are based on the same legal theories. *See Hanlon*, 150 F.3d at 1020; see also 1 *Newberg*
16 § 53.13 at 3-76-77 (“When it is alleged that the same unlawful conduct was directed at or affected both
17 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
18 irrespective of varying fact patterns which under lie individual claims.”) Thus, the typicality
19 requirement is also satisfied.

20 **E. THE ADEQUACY REQUIREMENT IS MET**

21 The adequacy of representation component of the community of interest requirement for class
22 certification “comes into play when the party opposing certification brings forth evidence indicating
23 widespread antagonism to the class suit.” *Capitol People First v. Dep’t of Develop. Servs.* (2007) 155
24 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
25 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
26 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*
27 Here, no such “inconsistencies” exist. Each Plaintiff will be compensated based on the same “pay
28 period” formula as all other members of the Class. (Kuhn decl. ¶ 38; Nordrehaug Declaration ¶ 12.)

1 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
2 retain all of their individual rights. (Kuhn decl. ¶ 39). There is therefore no conflict of interest between
3 the Class Representatives and the Class Members. (*Id.*) Thus, at least for settlement purposes, the
4 adequacy prong is met. (*Id.*)

5 **F. COMMON ISSUES PREDOMINATE AND CLASS-WIDE SETTLEMENT IS**
6 **SUPERIOR TO OTHER AVAILABLE METHODS OF RESOLUTION**

7 Class certification is authorized where common questions of law and fact predominate over
8 individual questions, and where class-wide treatment of a dispute is superior to individual litigation.
9 See *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981).

10 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
11 only, the parties have stipulated that all class certification elements are met. (Kuhn Decl. 36). All
12 members of the Class worked under the same conditions and experienced the same policies and
13 practices of Defendant. (See section IV, *supra*). Thus, the class is sufficiently cohesive.

14 Further, it is preferable to resolve all of the Class Members’ claims by means of a classwide
15 settlement than to require each Class Member to litigate individual claims. (Kuhn decl. ¶ 40).

16 **VI. PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT IS PROPER**

17 The trial court has broad discretion to determine whether a class action settlement is fair and
18 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
19 (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are
20 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
21 litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.* (2008) 162 Cal.App.4th
22 43, 52; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
23 settlement is fair, the court must still determine on the record before it whether the settlement should
24 be approved after considering “the strengths and weaknesses of the claims and risks of the particular
25 litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. The courts will
26 consider: (i) the strength of the plaintiff’s case; (ii) the risks, expense, complexity and likely duration
27 of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount
28 offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the

1 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
2 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
3 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

4 When evaluating these factors, the court “must stop short of the detailed and thorough
5 investigation that it would undertake if it were actually trying the case,” but nonetheless it “must
6 eschew any rubber stamp approval in favor of an independent evaluation.” *Kullar*, 168 Cal.App.4th,
7 at 130. Ultimately, the court approves the proposed class action settlement when the settlement is fair
8 and falls “within the range of reasonableness.” *Hernandez v. Vitamin Shoppe* (2009) 174
9 Cal.App.4th 1441, 1446.

10 **A. FAIRNESS OF THE SETTLEMENT**

11 For preliminary approval purposes, a proposed class action settlement is *presumed* to be fair
12 where, as here, (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
13 discovery are sufficient to allow counsel and the court to act intelligently; and (3) counsel is
14 experienced in similar litigation. *Chaves, supra*, 162 Cal.App.4th at 52.

15 The proposed settlement here meets these criteria, and merits preliminary approval. As
16 discussed above, the parties only entered into the Agreement after engaging in a full day of mediation
17 with an experienced mediator who routinely handles “Wage and Hour” class action litigation. (Kuhn
18 Decl. ¶¶12-13). The mediation was preceded by extensive discovery, investigation of claims at issue,
19 interviews of Class Members, disclosure and review of documents detailing company-wide policies
20 and practices, informal information exchanges for mediation purposes, and ongoing discussions about
21 the merits between the parties’ counsel during the span of the litigation. (Kuhn Decl. ¶¶7-11).

22 When negotiating the Settlement, both sides took into account the strengths and weaknesses
23 of their opponent’s positions as pointed out by mediator David Rotman, the data available to evaluate
24 liability and damages, the lack of data or evidence on certain issues, and the substantial and evolving
25 law applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-
26 length negotiations resulting in a unique compromise that permits all parties to move forward and bring
27 this action to close. Despite a mutual desire to resolve this action, the negotiations remained at all times
28 adversarial. (Kuhn Decl. ¶41).

1 As set forth below in section H, *infra.*, counsel for both parties have extensive experience in
2 litigating wage and hour class action lawsuits. Based on this experience, Class Counsel has determined
3 that the settlement is fair, adequate, and reasonable. (Kuhn decl. ¶35).

4 **B. STRENGTH OF PLAINTIFFS' CASE**

5 The most important factor courts consider when evaluating the fairness of the class action
6 settlement is the strength of the plaintiffs' case balanced against the amount offered in settlement.
7 *Kullar*, 168 Cal.App.4th, at 130.

8 All of Plaintiff's claims – individual, PAGA, and class claims – presented hurdles including
9 a substantial risk of a defense verdict by way of summary judgment or at trial. (Kuhn Decl. ¶¶ 29-35).

10 The exchange of mediation briefs, the assistance of an experienced “Wage and Hour” mediator,
11 and the parties' ongoing negotiations all helped the parties realize the strengths and weaknesses of
12 their case, as well as the risks and expenses of continuing litigation.

13 Additionally, as trial approaches, each party's monetary risk increases significantly as
14 substantial additional attorney hours and expert witness hours would have to be devoted to this case
15 by each party. Each party bears a real risk at trial, and considering the balance of the strengths of
16 Plaintiff's claims versus the risks inherent in trial and the consideration given to settle now, the
17 settlement reflects a fair and adequate resolution to this action.

18 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF** 19 **FURTHER LITIGATION**

20 Plaintiffs' Counsel's effectiveness in prosecuting this case has translated into tangible monetary
21 and non-monetary benefits for the Settlement Class Members in the following respects: **(1)** a
22 guaranteed favorable result; **(2)** guaranteed monetary recovery over a reasonably short period of time,
23 as opposed to possibly waiting additional years for a potentially worse result; and **(3)** significant
24 savings in attorneys' fees and costs, which would have increased had the case progressed through trial
25 and possible appeals. (Kuhn decl. ¶42).

26 Without entering into the Agreement, there existed a significant chance that Defendants would
27 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
28 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
the catalyst for programmatic relief. (Kuhn decl. ¶43).

1 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
2 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
3 the parties may be required to hire multiple experts each (as many as 8 total). This would result in not
4 only the production of eight expert reports, but eight depositions as well. And, based on previous
5 discussions between counsel regarding the remaining claims (including the PAGA claims), Plaintiff
6 anticipated at least one motion to compel, and two dueling motions for summary judgment /
7 adjudication (one from each side). (Kuhn decl. ¶44).

8 Importantly, even after engaging in all of the potential continued and protracted litigation set
9 forth above, the putative class would continue to have no guarantee of success on any of the claims
10 advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed
11 resolution is a fair, reasonable, and adequate compromise. (Kuhn decl. ¶45).

12 **D. THE RISK OF MAINTAINING CLASS ACTION STATUS THROUGH TRIAL**

13 Plaintiffs filed a Motion for Class Certification at the time of settlement. (Kuhn decl. ¶46).
14 However, Defendant presented multiple different defenses to certification not only during mediation,
15 but also through its opposition to the Motion for Class Certification. Even if Plaintiff did obtain class
16 certification of the claims, each claim is subject to substantial risk of a Defense verdict at trial. (*Id.*)

17 Regarding the representative (PAGA) claims, there is also a substantial risk that, at trial,
18 Plaintiffs will either fail to obtain a favorable judgment on one or more of these claims, or that a
19 favorable award on one or more PAGA claims may be reduced. *See Thurman v. Bayshore Transit*
20 *Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reversed on other grounds).

21 **E. THE AMOUNT OFFERED IN THE SETTLEMENT**

22 After deduction from the total “Settlement Amount” of the projected costs of administration,
23 proposed class representative service awards, potential attorney fees and costs, the “Net Settlement
24 Amount (“NSA”) will be distributed to all Class Members who do not file a request for exclusion.
25 Participating Class Members will receive their share of the NSA based on the total amount of time they
26 worked during the Class and PAGA Period. (Kuhn Decl. ¶55). Additionally, the “Sub-Class” Members
27 (an extremely limited claim) will receive a separate “per person” payment of \$15.00. (Kuhn Decl. ¶56).

28 Based on the current proposed figures, each Class Member will receive an average of **\$109.63**,

1 although the actual amount will vary based on the amount of pay periods s employed. The Class Notice
2 will list that individual class member’s actual share. (See **Ex. B**). Plaintiff’s counsel maintains this
3 recovery was significant in light of the circumstances of the case. (Kuhn Decl. ¶49).

4 **F. THE EXTENT OF DISCOVERY COMPLETED BY THE PARTIES**

5 Plaintiffs propounded 12 sets of separate written discovery devices on Defendant, including
6 requests for admission, special interrogatories, requests for production of documents, and general and
7 employment form interrogatories. (Kuhn Decl. ¶9). Through these requests, Plaintiffs sought, among
8 other information and documents, the identities of putative class members, Defendants’ compensation
9 policies, Meal and Rest Period policies, employee handbooks, wage statements, time records, job
10 descriptions, and reimbursement policies. *Id.*

11 After significant meet and confer efforts, Defendants provided detailed substantive responses
12 detailing all relevant employment policies, in addition to producing thousands of pages of documents.
13 The production also included a large sampling of other putative class members time and wage records.
14 (Kuhn Decl. ¶¶7-8). In total it appears there were at least 12 set of written discovery exchanged
15 between the parties. (Kuhn Decl. ¶9). Plaintiff’s counsel has also interviewed several Class Members
16 in the course of investigating and litigating this matter. (Kuhn decl. ¶ 47). Counsel has also reviewed
17 thousands of pages of documents produced by Defendants, Plaintiffs, and Class Members. (*Id.*)

18 This information, along with documents and information obtained through formal discovery
19 and from Class Members, allowed Plaintiff’s counsel to prepare a detailed Mediation Brief. (*Id.*) The
20 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
21 of the information obtained from all Parties. (*Id.*) SCPMG also provided a detailed mediation brief,
22 outlining its defenses to both class certification and liability. (*Id.*)

23 **G. THE STAGE OF THE PROCEEDINGS**

24 Plaintiff had already obtained the majority of written discovery, and taken depositions at the
25 time of settlement. Additionally, the Parties had fully briefed the Motion for Class Certification
26 (including an Opposition, Reply, and multiple “Sur-Replies”). The Court did not issue a ruling on the
27 motion. However, the parties were familiar with Plaintiff’s central allegations and Defendant’s
28 defenses thereto. The next phase of this litigation would have been to hear the Class Certification

1 Motion, and prepare for Trial.

2 **H. THE EXPERIENCE AND VIEWS OF COUNSEL**

3 Class Counsel has considerable experience in wage and hour and class action litigation.
4 William Sullivan has over 29 years of experience, 28 years of which has been devoted to both
5 prosecuting and defending class action litigation. Mr. Yaeckel has over 13 years of experience in “class
6 litigation.” Mr. Kuhn has over 5 years of experience in class action litigation. (Kuhn Decl. ¶48). Co-
7 counsel also has extensive class action experience. (Nordrehaug Decl. ¶¶3-5).

8 Plaintiff’s counsel considers the Agreement to represent a fair, adequate and reasonable
9 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
10 believes the Agreement is in the best interests of the Settlement Class Members. (Kuhn Decl. ¶49).

11 **I. PRESENCE OF A GOVERNMENTAL ACTOR**

12 Although the State is not directly involved in this action, Plaintiff “stands in the shoes” of the
13 Labor and Workforce Development Agency (“LWDA”) by bringing his PAGA action. Consideration
14 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount
15 of \$300,000.00, even though the LWDA declined to prosecute the claims itself. To confirm, 75% of
16 the total allocation of \$300,000 amount, or **\$225,000.00**, is being paid to the LWDA, and 25%, or
17 **\$75,000.00**, being distributed amongst the class members. (*Id*). Counsel for the parties believe this
18 is a fair, reasonable, and adequate allocation. (Kuhn Decl. ¶50).

19 **J. CLASS MEMBERS REACTION TO THE PROPOSED SETTLEMENT**

20 Prior to preliminary approval, what can be said of the reaction the class members is limited.
21 However, Plaintiff’s counsel has spoken to some Class Members since the parties reached a proposed
22 settlement agreement, and all were in favor of the Settlement. (Kuhn Decl. ¶ 51).

23 The Settlement Claims Administrator will send a Notice to the Settlement Class Members. The
24 proposed negotiated Class Notice form is attached to the declaration of Ryan T. Kuhn as **Exhibit A**.

25 The proposed Notice advises the Settlement Class Members of their anticipated recovery under
26 the Agreement, how to object, how to exclude themselves, the amount of fees and costs sought by
27 Class Counsel, the amount of enhancement payment sought on behalf of the Class Representative, and
28

the date of the final approval hearing. (*See* Exhibit “A”). Thus, the proposed Notice complies with the notice requirements set forth in CRC Rule 3.766(d) and Rule 3.769(f).

VII. PROPOSED TIMELINE OF EVENTS AND FINAL APPROVAL

Plaintiff also requests that the Court set a Final Approval Hearing in accordance with the proposed chronology of events:

- Within 10 calendar Days of Preliminary Approval: SCPMG will provide to the Claims Administrator Class Members' names, last known addresses, social security numbers, and the and the total number of workweeks each Class Member was employed during the class period;
- Within 7 days of receipt of the Class member data from Defendants, the Claims Administrator will mail the Notice Packet to Class Members;
- 30 Calendar Days After Claims Administrator Has Mailed the Notice Packets to Class Members: Deadline for Class Members to postmark and submit all Requests for Exclusions, or to file written objections to the settlement with the Court;
- Approximately 7 days after the conclusion of the Notice and Claims Period, and at least 16 Court days before the hearing, Plaintiff will file an *Unopposed* Motion for Final Approval; and
- Consistent with the above, Plaintiff requests a final approval hearing that is approximately 100 days after the date the Court enters an Order granting preliminary approval of the Settlement.
- Within the Final Approval Motion Plaintiff will also request approval of (1) Plaintiff's Requested Attorneys Fees, and (2) Class Representative Awards, to be heard concurrently with the Final Approval Motion.

VIII. CONCLUSION

Plaintiff respectfully requests that the Court issue an Order: (1) Certifying the Proposed Settlement Class; (2) Preliminarily approving the settlement as set forth in the Agreement; (3) Approving the proposed Class Notice; and (4) Providing the parties with a Final Approval Hearing.

Dated: January 3, 2024

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel
Ryan T. Kuhn
Attorneys for Plaintiff DAMON COFFEY