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and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

LISA SKERL, an individual; VICTORIA
KROPP, an individual; LORI ROARK, an
individual; on behalf of themselves and all
others similarly situated and the general public,

Plaintiffs,

v.

SUTTER BAY HOSPITALS, a California
corporation; and DOES 1 to 100, inclusive,

Defendants.

Case No. 21-CIV-02057

[Assigned For All Purposes To The Hon.
Nancy L. Fineman, Dept. 4]

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 25, 2023

Time: 2:00 p.m.

Dept: 4

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 25, 2023, at 2:00 p.m., or as soon thereafter as
3 the matter may be heard in Department 4 of the above-entitled court, located at 800 North
4 Humboldt Street, San Mateo, California 94401, Plaintiffs Lisa Skerl, Victoria Kropp, and Lori
5 Roark (“Plaintiffs”) will hereby move the Court for an order granting Plaintiffs’ Motion for
6 Preliminary Approval of Class Action Settlement. In this unopposed motion, Plaintiffs seek the
7 entry of an order to: (1) preliminarily approve the proposed settlement of this class action; (2)
8 certify a class for settlement purposes only and appoint Shanberg Stafford LLP and Bartz Law
9 Group, APC as class counsel for settlement purposes only (hereinafter “Class Counsel”); (3)
10 approve the substance, form, and method to provide class-wide notice; (4) direct that notice of
11 the proposed settlement be given to all Class Members; and (5) schedule a hearing at which time
12 the following will be considered: (i) the request for final approval of the proposed settlement; (ii)
13 the entry of the Final Judgment; and (iii) approval of Class Counsel’s motion for attorneys’ fees
14 and costs, and Plaintiffs’ enhancement awards.

15 This Motion is based upon this Notice, the attached Memorandum of Points and
16 Authorities, the Declarations of Aaron Bartz, Ross Shanberg, Lisa Skerl, Victoria Kropp, and
17 Lori Roark, all documents and records on file in this action, and on such other further oral and
18 documentary evidence as may be given at the hearing on this Motion.

19 Dated: January 9, 2023

SHANBERG STAFFORD LLP
BARTZ LAW GROUP, APC

20 /s/Aaron A. Bartz

21 AARON A. BARTZ
22 Attorneys for Plaintiffs LISA SKERL,
23 VICTORIA KROPP, LORI ROARK and all
24 others similarly situated
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. PRE-TRIAL PROCEEDINGS AND SETTLEMENT.....	2
A. Procedural History.....	2
B. The Parties Engaged in Substantial Discovery	2
C. The Operative Settlement Terms and Plan of Allocation.....	3
III. FACTUAL AND LEGAL BACKGROUND.....	6
1. Unpaid Wages/Rounding	7
2. Meal and Rest Period Claims.....	9
a. Meal period liability and damages.....	9
b. Rest period liability and damages.....	10
3. Failure to Pay Meal and Rest Period Premiums at The Regular Rate.....	11
4. Wage Statement Claim.....	12
5. Waiting Time Penalties.....	13
6. PAGA.....	13
7. Total Damages Exposure.....	14
IV. THE CLASS ACTION SETTLEMENT MEETS THE REQUIREMENTS FOR PRELIMINARY APPROVAL.....	14
A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement.....	15
B. Factors To Consider In Granting Preliminary Approval.....	16
1. The settlement is the product of serious, informed, and non-collusive negotiations.....	16
2. The settlement has no “obvious deficiencies” and falls within the range for approval.....	17

3.	No preferential treatment is given to the class representatives or other members of the class.....	17
4.	The parties engaged in adequate discovery prior to settlement.....	18
5.	The class representatives’ service payments are reasonable.....	18
6.	Plaintiffs’ counsel’s attorney’s fees and costs are reasonable.....	19
V.	THE PROPOSED CLASS NOTICE IS FAIR AND APPROPRIATE.....	19
VI.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Page

State Cases

Amaral v. Cintas Corp. No. 2

163 Cal.App.4th 1157 (2008).....12,13

Bell v. Farmers Ins. Exch.

115 Cal.App.4th 715 (2004).....18

Brinker Restaurant Corp. v. Superior Court

53 Cal.App.4th 1004 (2012).....9

Camp v. Home Depot U.S.A., Inc.

84 Cal.App.5th 638 (2022).....8

Cartt v. Superior Court

50 Cal.App.3d 960 (1975).....19

Cellphone Fee Termination Cases

186 Cal.App.4th 1380 (2010).....18

Cicairos v. Summit Logistics, Inc.

133 Cal.App.4th 949 (2005).....9

Donohue v. AMN Services, LLC

11 Cal.App.5th 58 (2021).....8,9

Dunk v. Ford Motor Co.

48 Cal.App.4th 1794 (1996).....15

Ferra v. Loews Hollywood Hotel, LLC

11 Cal.5th.App 858 (2021).....11,16

Jaimez v. DAIOHS USA, Inc.

181 Cal.App.4th 1286 (2010).....9

1	<i>Kullar v. Footlocker Retail Inc.</i>	
2	168 Cal.App.4th 116 (2008)	6,14
3	<i>Laffitte v. Robert Half Int’l, Inc.</i>	
4	1 Cal.App.5th 480 (2016)	19
5	<i>Naranjo v. Spectrum Security Servs., Inc.</i>	
6	13 Cal.App.5th 93 (2022).....	12,13,15
7	<i>See’s Candy Shops, Inc. v. The Superior Court of San Diego</i>	
8	210 Cal.App.4th 889 (2012).....	7,8,16
9	<i>Serrano v. Priest</i>	
10	20 Cal.App.3d 25 (1977).....	19
11	<i>Thurman v. Bayshore Transit Mgmt., Inc.</i>	
12	203 Cal.App.4th (2012).....	14
13	<i>Wershba v. Apple Computer, Inc.</i>	
14	91 Cal.App.4th 224 (2001).....	15
15		
16	<u>Federal Cases</u>	
17		<u>Page</u>
18	<i>Alonzo v. Maximus, Inc.</i>	
19	832 F.Supp.2d 1122 (C.D.Cal.2011).....	8
20	<i>Bernstein v. Virgin America, Inc.,</i>	
21	3 F.4th 1127 (9th Cir. 2021).....	12
22	<i>Dilts v. Penske Logistics, LLC</i>	
23	267 F.R.D. 625 (S.D.Cal.2010).....	9
24	<i>Fleming v. Covidien, Inc.</i>	
25	2011 WL 7563047 (C.D. Cal. 2011).....	14
26		
27		

1	<i>Hanlon v. Chrysler Com.</i>	
2	150 F.3D 1011 (9th Cir. 1998).....	17
3	<i>Harris v. Vector Mktg. Corp</i>	
4	656 F.Supp.2d 1128 (2009).....	12
5	<i>Hurst v. Buczek Enters., LLC</i>	
6	870 F.Supp.2d 810 (N.D. Cal. 2012).....	12
7	<i>Glass v. UBS Fin. Servs.</i>	
8	2007 WL 221862 (N.D. Cal. Jan. 26, 2007).....	17
9	<i>Gautreaux v. Pierce</i>	
10	690 F.2d 616 (7th Cir.1982).....	15
11	<i>Justice v. Civil Service Com'n</i>	
12	688 F.2d 615 (9th Cir. 1982).....	15
13	<i>Officers for Justice v. Civil Service Com'n,</i>	
14	688 F.2d 615 (9 th Cir.1982).....	1
15	<i>Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.</i>	
16	323 F.Supp.364 (E.D. Pa. 1970).....	15,19
17	<i>Romero v. Producers Dairy Foods, Inc.</i>	
18	2007 WL 3492841 (E.D. Cal. Nov. 14, 2007).....	19
19	<i>Wash. Public Power Supply System Sec. Litig.</i>	
20	720 F.Supp.1379 (D. Az. 1989).....	17
21	<i>Vincent v. Hughes Air West, Inc.</i>	
22	557 F.2d 759 (9th Cir. 1977).....	19
23	<u>State Statutes</u>	
24		<u>Page</u>
25	Cal. Lab. Code § 201.....	13
26	Cal. Lab. Code § 202.....	13
27	Cal. Lab. Code § 203.....	13

1	Cal. Lab. Code § 226.....	10,11,12,14
2	Cal. Lab. Code § 226.7.....	10,11,14
3	Cal. Lab. Code § 256.....	14
4	Cal. Lab. Code § 510.....	10
5	Cal. Lab. Code § 512.....	14
6	Cal. Lab. Code § 1194.....	14
7	Cal. Lab. Code § 1542.....	5
8	Cal. Lab. Code § 2699.....	6,13,14

Other Authorities

		<u>Page</u>
12	DLSE Enforced Policies and Interpretations Manual (2002 Rev.).....	7
13	Policies and Interpretations Manual (2002 Rev.).....	7
14	J. Moore, Moore’s Federal Practice (2003).....	16
15	Manual for Complex Litigation, Fourth (2004).....	15
16	Manual of Complex Litigation, Second (1985).....	15,17,18
17	Newberg on Class Actions (3d ed. 1992).....	15, 16

1 **I. INTRODUCTION**

2 This class action and PAGA settlement is sought on behalf of approximately 22,000
3 current and former non-exempt hourly employees who worked in California for Defendant Sutter
4 Bay Hospitals (“SBH” or “Defendant”), including those employees who worked for individual
5 SBH’s hospitals California Pacific Medical Center (CPMC) and Mills-Peninsula Medical Center
6 (MPMC)¹, between July 20, 2016 and the earlier of the date of preliminary approval or January
7 31, 2023.

8 The case arises out of Plaintiffs’ allegations that SBH violated California’s wage and
9 hour laws, including failing to pay all wages owed and overtime, failing to authorize and permit
10 meal and rest periods, failing to pay Plaintiffs and the class members at the regular rate of pay
11 for meal and rest period premiums, and failing to properly maintain and submit wage statements.

12 After hard fought litigation since 2020, including extensive investigation, discovery, and
13 a marathon 14-hour mediation session, the parties have agreed to a non-reversionary, all-in
14 common fund settlement of **\$12 million**. (See Declaration of Aaron A. Bartz (“Bartz Decl.”),
15 **Exhibit A**.) The net amount to be paid to class members (after payment of class counsel fees
16 and expenses, settlement administration costs, Private Attorneys General Act (“PAGA”)
17 penalties to the LWDA, and Plaintiffs’ enhancement awards), is more than **\$7.68 million**. Each
18 class member’s share of the settlement is based on each of their eligible number of workweeks,
19 and shall receive, on average, approximately \$349. So long as the class members do not opt out
20 of the settlement, they will receive a settlement payment. For purposes of this settlement only,
21 the parties agree that the proposed Settlement Class satisfies each of the requirements of Code of
22 Civil Procedure section 382. The settlement is fair, reasonable, and confers a substantial
23 monetary benefit to the entire class. Accordingly, Plaintiffs request that the court grant
24 preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement and Release
25 (“Settlement Agreement”) submitted herewith (*see* Bartz Decl., **Exhibit A**) conditionally certify
26 the Settlement Class, approve the proposed Notice of Pendency of Class Action Settlement and
27

28 ¹ Defendant Sutter Bay Hospitals is a California corporation, and consists of
numerous individual hospitals, including CPMC and MPMC.

Final Hearing (“Notice of Class Settlement”), and set a hearing date for final settlement approval.

II. PRE-TRIAL PROCEEDINGS AND SETTLEMENT

A. Procedural History

Plaintiff Lisa Skerl (“Skerl”) worked for SBH as a Surgical Tech at the CPMC medical center between 2019 and 2020. Plaintiff Victoria Kropp (“Kropp”) has worked for SBH for 32 years, most recently as a Labor and Delivery nurse at CPMC. Plaintiff Lori Roark (“Roark”) worked as a Lab Technician for MPMC until March 2019.

On July 17, 2020, Plaintiff Lisa Skerl, on behalf of herself and all other aggrieved employees of Defendant, served a Private Attorneys General Act (PAGA) letter, alleging various Labor Code violations, including: (1) failure to pay all wages, including minimum wages, straight time wages, and overtime compensation; (2) failure to provide meal periods; (3) failure to authorize and permit rest periods or provide compensation in lieu thereof; (4) failure to timely pay all wages owed; (5) illegal rounding; and (6) failure to properly maintain and submit accurate itemized wage statements. (Attached as **Exhibit B** to the Bartz Decl. is a true and correct copy of the PAGA letter served on July 17, 2020.)

Thereafter, on July 20, 2020, Plaintiff Skerl filed a class action Complaint against Defendant in the San Francisco Superior Court, alleging similar claims. Then, on December 1, 2020, Plaintiff Skerl filed a First Amended Complaint, adding PAGA claims. Plaintiff Kropp was added to the Complaint on or about October 18, 2021 in a Second Amended Complaint.

Plaintiff Roark filed her operative Complaint against MPMC in this Court on April 12, 2021, alleging similar claims as those alleged by Plaintiffs Skerl and Kropp in the related San Francisco action.

On September 21, 2022, the parties filed a Stipulation and Order to file a First Amended Consolidated Complaint, and later filed the operative First Amended Consolidated Complaint on October 6, 2022. (Attached as **Exhibit C** to the Bartz Decl. is a true and correct copy of Plaintiffs’ First Amended Consolidated Class Action Complaint.)

B. The Parties Engaged In Substantial Discovery

This case was extensively litigated from the start. Plaintiffs served five (5) sets of Requests for Production of Documents and four (4) sets of Special Interrogatories, deposed SBH’s person most knowledgeable, sent out multiple Belaire-West notices for class members,

1 interviewed scores of class members, reviewed more than 40,000 pages of time and payroll as
2 well as policy documents, and exhaustively researched and investigated the potential claims in an
3 effort to prosecute this action. (Bartz Decl., ¶ 7.)

4 Plaintiffs also hired wage and hour damages expert James Toney to analyze voluminous
5 payroll and related wage data and create a damages model for the various claims alleged in the
6 case. (Bartz Decl., ¶ 8.) Based upon the analysis of the time records and payroll data, Mr.
7 Toney and Class Counsel were able to calculate damage estimates on a class-wide basis.
8 (Attached as **Exhibit D** to the Bartz Decl. is a true and correct copy of Plaintiffs' and Mr.
9 Toney's damages analysis for the class).

10 The parties did not attend Mediation in this matter until more than two years into the
11 litigation, and the above discovery had been completed. In advance of Mediation, Defendant
12 produced detailed spreadsheets showing, among other things, the total number of putative class
13 members, the total number of former employees, their dates of employment, their average rates
14 of pay, the total number of workweeks year by year, time records for putative class members, all
15 meal and rest break premiums paid to the putative class members, and the corresponding rates of
16 pay for the premiums. (Bartz Decl., ¶ 9.) Class Counsel thoroughly reviewed, investigated, and
17 analyzed this information in collaboration with their expert Mr. Toney. Based on the volume of
18 data, the parties agreed to a ten percent sampling of pay and time records in order to calculate
19 classwide damages estimates. (*Ibid.*) This informal discovery process occurred over a period of
20 several months and involved extensive meet and confer efforts between counsel for the parties.

21 On August 15, 2022, the parties attended a full-day Mediation before the prominent
22 mediator Michael Loeb, and did not settle until late in the evening on the day of the Mediation,
23 after 14 hours of tense and hard fought negotiations. (Bartz Decl., ¶ 10.) Several more months
24 were necessary to negotiate the specific long form Settlement Agreement entered into in
25 December 2022. (*Ibid.*)

26 **C. The Operative Settlement Terms And Plan of Allocation**

27 The class members entitled to the settlement fund are grouped into three categories: (1)
28 all current and former non-exempt nurses and surgical technicians, and other non-exempt patient
care employees working at CPMC; (2) all current and former non-exempt employees who
worked at MPMC; and (3) all current and former non-exempt hourly employees of SBH,

1 excluding those already included in the CPMC and MPMC group above.² (Bartz Decl., ¶ 11.)
2 The Class Period is between July 20, 2016 and the earlier of the date of preliminary approval, or
3 January 31, 2023. (*Ibid.*) There are approximately 22,000 class members according to SBH's
4 employment records.³ (*Ibid.*)

5 The settlement fund is all in (except for the employer's share of payroll taxes, which SBH
6 shall pay in addition to the \$12 million settlement), there is no claim form requirement, and no
7 residual will revert to SBH. (Bartz Decl., ¶ 12.) Class members will be paid as long as they do
8 not opt out of the settlement. (*Ibid.*) If a Class Member opts out, their share of the Net
9 Settlement Amount will be allocated to other members of the Settlement Class. (*Ibid.*) In the
10 event a class member does not negotiate his or her settlement check, the settlement administrator
11 will forward the check to the State of California, State Controller's Office, where it will remain
12 in the name of the class member until claimed. (*Ibid.*)

13 The payment to the Class Members will be characterized eighty percent interest and
14 penalties, and twenty percent wages. (Bartz Decl., ¶ 13.) This allocation is justified because
15 many of the claims alleged contain provisions for penalties, and the vast majority of the alleged
16 violations occurred years before the settlement, implicating significant alleged interest owed.
17 (*Ibid.*) The class administrator will issue W-2 statements for the wage portion of the settlement,
18 and a form 1099 for all amounts paid as penalties and interest. (*Ibid.*)

19 Based upon Class Counsel's independent analysis and investigation in this matter, the
20 Settlement Class will be compensated based on each member's respective number of workweeks
21 during the Class Period.⁴ (Bartz Decl., ¶ 14.)

22 ² The latter group of SBH non-exempt employees is providing a more limited
23 release than either the CPMC or MPMC settlement classes, which is why there are three separate
24 buckets of class members.

25 ³ This number will be definitively calculated after preliminary approval. As of the
26 date of filing this Motion, however, this is Defendant's best estimate of the number of the class
27 members, extrapolated through January 31, 2023.

28 ⁴ The parties have allocated the settlement such that the CPMC Settlement Class
receives 30% of the Net Settlement Amount, the MPMC receives 20% of the Net Settlement
Amount, and the SBH Premium Calculation and Rounding Class receives 50% of the Net

1 Pursuant to the settlement terms, there will be an approximate net settlement fund of
2 **\$7,683,000.** (Bartz Decl., ¶ 15.) Subject to Defendant’s review and calculation of precise class
3 member data after preliminary approval, the class member payouts are, on average,
4 approximately as follows: (1) \$650 to each member of the CPMC class; (2) \$360 to each
5 member of the MPMC class; and (3) \$270 to each member of the SBH class. (*Ibid.*) In
6 exchange for their payment, the CPMC and MPMC classes will release Defendant from any and
7 all claims, known or unknown, contingent or accrued, arising out of the operative facts alleged in
8 the lawsuit, and the SBH class members will release a narrower set of claims based on rounding
9 and regular rate claims. (*Ibid.*) The named Plaintiffs will, in addition to releasing claims alleged
10 in the lawsuit, give a general release of all claims pursuant to Civil Code section 1542. (*Ibid.*)

11 The parties further agree to appoint an experienced settlement administrator, ILYM
12 Group, Inc., to prepare and send notice to the class, receive and process objections, and prepare
13 and mail settlement checks to Settlement Class Members. (Bartz Decl., ¶ 16.) The settlement
14 administrator will conduct skip-tracing for any Settlement Class Member whose address cannot
15 be found. (*Ibid.*)

16 The all-in settlement fund will also include all of the attorneys’ fees and costs allowed by
17 this Court. (Bartz Decl., ¶ 17.) The attorneys’ fees shall not exceed one-third of the \$12 million
18 settlement fund, or \$4,000,000. (*Ibid.*) Defendant will also pay class counsel’s costs, not to
19 exceed \$25,000.00, as well as settlement administration costs not to exceed \$67,000, out of the
20 common fund. (*Ibid.*)

21 The PAGA allocation of the settlement is \$240,000, of which \$180,000 (75%) will be
22 distributed to the Labor Workforce and Development Agency (LWDA), with the remaining
23 portion - \$60,000 (25%) - going to PAGA Members (all allegedly aggrieved persons who
24

25 Settlement. This allocation is justified because the CPMC includes only nurses, surgical
26 technicians, and patient care employees, who are paid more, on average, than the MPMC
27 settlement class. The SBH Premium Calculation and Rounding Class includes all other non-
28 exempt employees of SBH, and so it necessarily includes damages exposure on a larger scale.
As such, Class Counsel believes it is fair to allocate 50% of the Net Settlement amount to this
group. (*See* Bartz Decl., ¶ 14.)

1 worked for SBH as non-exempt employees in California, at any time from July 17, 2019 through
2 the end of the Class Period). (Bartz Decl., ¶ 18.)

3 The settlement also includes Plaintiffs' class representative enhancements. (Bartz Decl.,
4 ¶ 19.) Based on Plaintiffs' work in connection with this case, including connecting Class
5 Counsel with other witnesses, meeting and conferring with Class Counsel regarding legal
6 strategies, and assisting with developing the claims and theories in this case, and attending
7 Mediation, Plaintiffs collectively seek \$45,000. (*Ibid.*)

8 **In summary, the settlement fund is allocated as follows:**

- 9 (1) A net settlement fund of approximately \$7,683,000.
10 (2) Attorney's fees and costs: \$4,000,000 in attorneys' fees and up to \$25,000 in
11 costs.
12 (3) Settlement administrator expenses not to exceed \$67,000.
13 (4) PAGA payment to the LWDA: \$180,000.
14 (5) Class representative enhancements of \$45,000 for the three named Plaintiffs.
15 (Bartz Decl., ¶ 20.)

16 **III. FACTUAL AND LEGAL BACKGROUND**

17 Plaintiffs' First Amended Consolidated Class Action Complaint alleges claims for 1)
18 Failure to Pay All Wages and Illegal Rounding; 2) Failure to Provide Meal Periods; 3) Failure to
19 Authorize and Permit Proper Rest Periods; 4) Failure to Pay Meal and Rest Break Premiums at
20 the Proper Regular Rate of Pay; 5) Failure to Properly Maintain and Submit Itemized Wage
21 Statements; 6) Waiting Time Penalties; 7) Unfair Business Practices; and 8) Violation of Labor
22 Code § 2699 (PAGA). Plaintiffs further allege that they and the Class are entitled to damages,
23 restitution, wages, attorneys' fees, and interest, among other remedies.

24 Pursuant to *Kullar v. Footlocker Retail Inc.*, 168 Cal.App.4th 116 (2008) and *Dunk*
25 *v. Ford Motor Co.*, 48 Cal.App.4th 1794 (1996), the following describes the settlement's
26 reasonableness. Plaintiffs recognize the expense and length of continued proceedings necessary
27 to continue the litigation against Defendant through trial and through any possible appeals.
28 Plaintiffs have also taken into account the uncertainty and risk of denial of motion for class
certification and the uncertain outcomes resulting from further litigation, and the difficulties and
delays inherent in such litigation. Plaintiffs are also aware of the burdens of proof necessary to
establish liability for the claims asserted in this case, Defendant's defenses thereto, and the

difficulties in establishing damages for the Plaintiffs and Class Members.

Based on the foregoing, Plaintiffs have determined that the settlement is a fair, adequate and reasonable settlement and is in the best interests of the Class Members. The reasonable exposure and the reasonable settlement value for each of the alleged claims are as follows:

1. Unpaid Wages/Rounding

Plaintiffs allege that SBH fail to pay employees for all time worked due to their rounding mechanism that results in rounding off of the time worked which fails to pay employees for all time worked. Defendant records the time worked to the minute but uses a rounding system for purposes of paying wages, including deducting time from class members' wages based upon Defendant's policy and practice of rounding the time on a daily basis for time spent during meal periods. Plaintiffs assert that Defendant's rounding practice is uniform and has applied to all putative class members during the class period. Plaintiffs believe that this was an objective claim and would obtain certification on the claim.

The law on whether rounding is legal or not in California is unsettled. California employers have long engaged in employee time-rounding, yet there is no California statute specifically authorizing or prohibiting this practice. *See's Candy Shops, Inc. v. The Superior Court of San Diego*, 210 Cal.App.4th 889, 901 (2012) ("*See's Candy I*"). Likewise, until the decision of *See's Candy I*, there was no California case law on point. *See's Candy I* confirmed that although there are no California reported decisions holding the federal standard applies under California law, the agency empowered to enforce California's labor laws, the Division of Labor Standards Enforcement ("DLSE") has adopted the federal regulation in its Enforced Policies and Interpretations Manual (2002 Rev.) ("DLSE Manual"). (*Id.* at p. 902.)

A time-rounding policy is improper unless it is: (1) facially neutral; and (2) actually compensates the employee for all hours worked. (*See's Candy I, supra*, 210 Cal.App.4th at p. 901.) California has adopted the federal rounding standard for claims under the California Labor Code, which allows the practice "of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (*Ibid.*; 29 C.F.R. § 785.48(b).) The policies underlying the federal regulation – recognizing that time rounding is a practical method for calculating work time and can be a neutral calculation tool for providing full payment

1 to employees – apply equally to the employee-protective policies embodied in California Labor
2 Law. (*See's Candy I, supra*, 201 Cal.App.4th at p. 907.) Accordingly, California law “permits
3 employers to use a rounding policy for recording and compensating employee time as long as the
4 employer's rounding policy does not ‘consistently result[] in a failure to pay employees for time
5 worked’” and it is “fair and neutral on its face.” (*Id.* at p. 901, quoting *Alonzo v. Maximus, Inc.*,
6 832 F.Supp.2d 1122, 1126 (C.D. Cal. 2011). In other words, a rounding policy must not impose
any burden on employees. (*See's Candy I, supra*, 210 Cal.App.4th at p. 902.)

7 Recently, the California Supreme Court weighed in on the rounding of meal periods, and
8 held that such a practice was illegal. *See Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021).
9 The Court, however, declined to rule on the “validity of the rounding standard articulated in
10 *See's Candy I.*” *Id.* at 72. Thus, whether rounding of time is appropriate in California is still an
11 open question.⁵

12 Defendant contends that its rounding policy is legal under California law, and that it does
13 not individually round meal periods as in *Donohue*. Defendant also hired an expert showing
14 that, if anything, Defendant's rounding policy benefited class members, and that there are no
damages resulting from the rounding policy.

15 Plaintiffs and their expert analyzed payroll and time records for the class members and
16 calculated that approximately 62% of the pay periods for the class members were unfavorable to
17 them. In arriving at the damages calculation, Plaintiffs' expert reviewed payroll records for the
18 class, including pay period counts per year, unfavorable rounding minutes per pay period, and a
19 weighted average rate of pay. Based on that evaluation, the total potential verdict value of the
20 failure to pay wages and rounding claim is approximately **\$48 million**. Because of the
21 uncertainty of the law, and the fact that California appellate courts have upheld other neutral

22
23
24 ⁵ After the parties reached a settlement, the Sixth District in *Camp v. Home Depot*
25 *U.S.A., Inc.*, 84 Cal.App.5th 638, 300 Cal.Rptr.3d 548 (2022), criticized *See's Candy I* and
26 related cases upholding rounding, and reversed summary judgment in favor of the employer.
27 The court invited the California Supreme Court to “review the issue of neutral time rounding by
28 employers and to provide guidance on the propriety of time rounding by employers.” *Id.* at 565.
It is unclear at this point whether the California Supreme Court will accept the Sixth District's
invitation.

1 rounding practices in similar situations, the Plaintiffs placed a reasonable settlement value of the
2 rounding claim at ten percent of the total verdict value, or **\$4.8 million**. This valuation takes into
3 consideration Plaintiffs' counsels' analysis of the law, and evidence produced by the Defendant.

4 **2. Meal and Rest Period Claims**

5 a. Meal period liability and damages

6 Plaintiffs contend that SBH fails to provide duty-free meal periods to Plaintiffs and the
7 class members, who suffered short, late and missed meal periods on a regular basis. Plaintiffs'
8 expert analyzed each pay period for any meal violation (ie short, late, missed) and calculated
9 1.35 million shifts with at least one (1) violation.

10 In *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the California
11 Supreme Court held that “under ... Labor Code section 512, subdivision (a), an employer must
12 relieve the employee of all duty for the designated period but need not ensure that the employee
13 does no work” during the meal period. *Brinker*, 53 Cal. 4th at 1034. However, “...an employer
14 may not undermine a formal policy of providing meal breaks by pressuring employees to
15 perform their duties in ways that omit breaks. *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App.
16 4th 949, 962–963 (2005); *see also Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1304–
17 1305 (2010) [proof of common scheduling policy that made taking breaks extremely difficult
18 would show violation]; *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D.Cal.2010)
19 [indicating informal anti-meal-break policy "enforced through 'ridicule' or 'reprimand' " would
20 be illegal].) The wage orders and governing statute do not countenance an employer's exerting
21 coercion against the taking of, creating incentives to forego, or otherwise encouraging the
22 skipping of legally protected breaks.” *Brinker*, 53 Cal. 4th at 1040.

23 Moreover, in *Donohue, supra*, the Court held that at both the class certification and
24 summary judgment stage, when time records show short, missed, and late meal periods, there is a
25 presumption that an employer violated California’s meal period requirements. *See Donohue,*
26 *supra*, 11 Cal.5th at 78 (“If time records show noncompliant meal periods, then a rebuttable
27 presumption of liability arises.”)

28 Plaintiffs allege that the failure to provide meal periods here was particularly acute, given
that Plaintiffs allege that Defendant understaffed its hospitals, which Plaintiffs contend is shown
on census/patient daily assignment sheets. Class Counsel’s further investigation revealed that
class members were required to carry communications devices during their meal periods, and

1 they were often interrupted during their meal periods to address work issues.

2 Defendant, on the other hand, contends that it has fully compliant meal period policies,
3 and that its objective records reflect strict compliance with California's meal period
4 requirements. Defendant also produced records showing substantial meal period premium
5 payments of more than \$16 million to the class members. Further, Defendant believes that the
6 meal period claim cannot be certified because of the existence of individualized issues as to the
7 why meal periods were not taken, among other reasons.

8 Class Counsel and their expert calculated the maximum verdict value of the meal break
9 claims to be approximately **\$93 million**. This calculation is based on the assumption that each
10 late, missed or short meal period was the result of Defendant's interference with Plaintiffs' and
11 the class members abilities to take duty-free meal periods. Accordingly, Class Counsel and their
12 expert determined a total violation rate for the class members, and average rate of pay based on
13 the payroll data for the class. Based on discussions with Plaintiffs and interviews of other class
14 members, and the fact that Defendant has facially compliant meal period policies, Plaintiffs
15 believe they had a ten percent probability of recovering all of these damages. Accordingly,
16 Plaintiffs contend the reasonable exposure of the meal break claim is approximately **\$9.3
million**.

17 b. Rest period liability and damages

18 *Labor Code* § 226.7(b) provides that "[a]n employer shall not require an employee to
19 work during a meal or rest or recovery period mandated under an applicable statute, or applicable
20 regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and
21 Health Standards Board, or the Division of Occupational Safety and Health."

22 Section 12(A) of the IWC Wage Order(s) states: "Every employer shall authorize and
23 permit all employees to take rest periods, which insofar as practicable shall be in the middle of
24 each work period. The authorized rest period time shall be based on the total hours worked daily
25 at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However,
26 a rest period need not be authorized for employees whose total daily work time is less than three
27 and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which
28 there shall be no deduction from wages."

29 Plaintiffs' theory on the rest break claim is that Plaintiffs and the class were not able to
30 take duty-free rest periods, based upon hospital understaffing and carrying of communications

1 devices while they were taking their rest periods. Defendant contends, on the other hand, that
2 liability is tenuous at best because Defendant had a compliant rest period policy, and that
3 Plaintiffs would not be able to succeed on this claim because of numerous individual issues
4 regarding why rest periods were not taken. Plaintiffs acknowledge the difficulty in proving the
5 rest period violations as a result of an absence of objective evidence.

6 Based on discussions with Plaintiffs and interviews of other class members, Class
7 Counsel assumed a 50% violation rate for all shifts by class members of 3.5 hours or more.
8 Based on that assumption, Plaintiffs' expert calculated total violations across the class,
9 multiplied by an average rate of pay for the class members. As such, Class Counsel and their
10 expert calculated the maximum verdict value of the rest period claims to be **\$124 million**. Based
11 on the difficulty of proving rest period violations on a classwide basis, and the lack of objective
12 evidence proving such violations, Plaintiffs believe they had a five percent chance of recovering
13 all of the rest period damages. As such, Plaintiffs believe the reasonable exposure of the rest
14 break claim is approximately **\$6.2 million**.

15 **3. Failure to Pay Meal and Rest Period Premiums At The Regular Rate**

16 Plaintiffs contend that when Defendant pays for missed meal and missed rest periods,
17 Defendant did so at the base rate, and not the regular rate of pay. During discovery, Plaintiffs
18 determined that Defendant failed to pay meal and rest period violations at the regular rate of pay
19 between 2017 and August 2021.

20 Pursuant to Labor Code §226.7(c), “[i]f an employer fails to provide an employee a meal
21 or rest or recovery period in accordance with state law, . . . ***the employer shall pay the employee***
22 ***one additional hour of pay at the employee’s regular rate of compensation*** for each workday
23 that the meal or rest or recovery period is not provided.” (emphasis added). The California
24 Supreme Court has held that “regular rate of compensation” in section 226.7(c) “has the same
25 meaning as ‘regular rate of pay’ in section 510(a) and encompasses not only hourly wages but all
26 nondiscretionary payments for work performed by the employee.” *Ferra v. Loews Hollywood*
27 *Hotel, LLC*, 11 Cal.5th 858, 878 (2021).

28 Ferra was decided during the pendency of this case, and Defendant does not seriously
contend that it is not liable for these damages. Plaintiffs' expert concludes that the regular rate
claim has a maximum verdict value of **\$665,220**, based on tallying the total number premium
payments and multiplying those payments by the percentage of pay periods when the regular rate

1 was underpaid as well as the average underpayment. Plaintiffs do not discount this claim
2 whatsoever, and believe they have a 100% chance of recovering on this claim.

3 **4. Wage Statement Claim**

4 *Labor Code* §226(a) states in pertinent part: “Every employer shall, semimonthly or at
5 the time of each payment of wages, furnish each of his or her employees, either as a detachable
6 part of the check, draft, or voucher paying the employee’s wages, or separately when wages are
7 paid by personal check or cash, an accurate itemized statement in writing showing (1) gross
8 wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned
9 and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, ...
10 (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the
11 name of the employee and only the last four digits of his or her social security number or an
12 employee identification number other than a social security number, (8) the name and address of
13 the legal entity that is the employer..., and (9) all applicable hourly rates in effect during the pay
14 period and the corresponding number of hours worked at each hourly rate by the employee... .”

15 Plaintiffs’ theory of liability with respect to the paystub claim is that Defendant failed to
16 set forth all premium payments for meal and rest period violations, and in instances where
17 premium payments were identified on paystubs, oftentimes the incorrect rate was listed. In
18 *Naranjo v. Spectrum Security Servs., Inc.*, 13 Cal.5th 93 (2022), the California Supreme Court
19 held that an employer’s obligation to report wages includes an obligation to report premium pay
20 for meal and rest break violations. Plaintiffs therefore contend that any time Defendant failed to
21 do so here should result in paystub penalties. Defendant argues that, even assuming there are any
22 violations, which it denies, Defendant presents evidence of a good faith dispute as to any
23 violation. *Hurst v. Buczek Enters., LLC*, 870 F.Supp.2d 810, 829 (N.D. Cal. 2012) (no section
24 226 violation where the employer "makes a good faith claim" in its defense); *Harris v. Vector*
25 *Mktg. Corp.*, 656 F.Supp.2d 1128, 1146 (2009) (the "employer did not knowingly and
26 intentionally fail to provide itemized wage statements" where there was a "good faith dispute").

27 Pursuant to Labor Code section 226, subd. (e)(1), employees are entitled to \$50 for the
28 initial pay period in which a violation occurs, and \$100 per pay period for subsequent violations.
Nevertheless, pursuant to *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008), the
heightened penalty amount is not recoverable unless there is a showing of a prior citation or in
the absence of a good faith dispute. *See also Bernstein v. Virgin America, Inc.*, 3 F.4th 1127,

1 1144 (9th Cir. 2021). Because there is no evidence here that Defendant has previously been cited
2 with Labor Code violations, Class Counsel believes the \$50 penalty to be applicable for all
3 violations.

4 Based on the pay periods at issue here, Plaintiffs and their expert calculated wage
5 statement penalties by multiplying the total employee count during the statutory period by the
6 total number of pay periods during that period. The maximum verdict value of the paystub
7 penalties are approximately **\$14 million**. Plaintiffs believe they have a ten percent chance of
8 recovering all of those penalties, or **\$1.4 million**, based on the risks set forth above and
9 Defendant's defenses.

10 **5. Waiting Time Penalties**

11 *Labor Code* § 203 provides that if an employer willfully fails to pay, without abatement
12 or reduction, in accordance with *Labor Code* §§ 201 and 202, any wages of an employee who is
13 discharged or who quits, the wages of the employee shall continue at the same rate, for up to
14 thirty (30) days from the due date thereof, until paid or until an action therefore is commenced.

15 In *Naranjo, supra*, the Court held that failing to pay meal and rest period premium
16 payments constituted "wages" for purposes of waiting time penalties. *Naranjo, supra*, 13 Cal.5th
17 at 117. Defendant denies any violations whatsoever, and that even if such violations are proven,
18 that Defendant has a good faith dispute regarding whether such wages are owed.

19 Plaintiffs and their expert determined that the total verdict value of this claim is
20 approximately **\$46 million**, based on termination counts provided, multiplied by the average
21 daily rate per terminated employee and the maximum 30-day waiting time period. Class Counsel
22 believes the reasonable settlement value is far less than the maximum amount because of the
23 willfulness standard for proving such penalties. Plaintiffs believe they have a ten percent
24 possibility of proving all such penalties. As such, Plaintiffs believe the realistic value of the
25 waiting time penalties are **\$4.6 million**.

26 **6. PAGA**

27 Plaintiffs contend that PAGA penalties are owed based on the numerous alleged Labor
28 Code violations identified above. Once a PAGA violation is found, a court must award civil
penalties. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1211-1213 (2008).
Nevertheless, a court has discretion to reduce the award of civil penalties if it finds that "based

1 on the facts and circumstances of the particular case, to do otherwise would result in an award
2 that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2).

3 Significantly, moreover, because the law is unsettled in many areas of the law alleged by
4 Plaintiffs herein, there is a very real possibility that a court would substantially reduce the
5 penalties, even if they are proven. *See, e.g., Fleming v. Covidien, Inc.*, 2011 WL 7563047, *3-4
6 (C.D. Cal. 2011) (reducing penalties from \$2.8 million to \$500,000 based on wage statement
7 violations because to assess full penalties would be unjust and arbitrary); *Thurman v. Bayshore*
8 *Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1134 (2012) (reduction of PAGA penalties by 30%
9 affirmed on appeal).

10 Plaintiffs and their expert calculated the maximum verdict value of the PAGA penalties
11 at approximately **\$96 million**, based on assumed violations of Labor Code sections 1194, 512,
12 226.7, 226, and 256, violations for each and every pay period at issue, stacking of penalties,
13 heightened subsequent penalties, and a 100% violation rate. Plaintiffs believe recovering all of
14 these penalties is highly unlikely, and based on a Court’s discretion to reduce such penalties,
15 Plaintiffs believe they had the chance of recovering five percent of those penalties, or **\$4.8**
16 **million**.

17 **7. Total Damages Exposure⁶**

18 Plaintiffs believe that the **\$12 million** settlement achieved in this case is excellent for the
19 class members. Based upon a realistic exposure of approximately \$32 million, the settlement
20 represents approximately 38% of that total value. Given the many defenses raised, the
21 uncertainty of the certifiability of any class, and the difficulty in proving the claims, Class
22 Counsel believes this settlement is an excellent result for all of the class members.

23
24
25
26 ⁶ The Unfair Competition claim is subsumed into the *Kullar* analysis above. The
27 Unfair Competition claim is based upon the wage and hour violations, and adds an extra year of
28 damages, and is included within the above analysis.

1 **IV. THE CLASS ACTION SETTLEMENT MEETS THE REQUIREMENTS FOR**
2 **PRELIMINARY APPROVAL**

3 When a proposed class action settlement is reached, the settlement must be submitted to
4 the court for approval. H. Newberg & A. Conte, *Newberg on Class Actions* at § 11.41, p. 11-87
5 (3d ed. 1992). Review of a proposed class action settlement involves two hearings. First, the
6 settlement must be preliminarily approved by the court. Second, a final settlement approval
7 hearing is set, where evidence and argument are submitted concerning the fairness, adequacy,
8 and reasonableness of the settlement, and class members may be heard regarding the settlement.
9 See Manual for Complex Litigation, Fourth §§ 21.632-21.633 (2004).

10 The question presented on a motion for preliminary approval of a proposed class action
11 settlement is whether the proposed settlement is “within the range of possible approval.”
12 *Manual for Complex Litigation*, Fourth, § 21.632 at 321; *Gautreaux v. Pierce*, 690 F.2d 616, 621
13 n.3 (7th Cir. 1982). Preliminary approval is merely the prerequisite to giving notice so that “the
14 proposed settlement...may be submitted to members of the prospective Class for their acceptance
15 or rejection.” *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,
16 323 F.Supp. 364, 372 (E.D. Pa. 1970). The court must determine whether the settlement is fair,
17 adequate, and reasonable. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)
18 *citing Officers for Justice v. Civil Service Com’n*, 688 F.2d 615, 625 (9th Cir. 1982) and Fed. R.
19 Civ. Proc. 23(e). There is an initial presumption of fairness when a proposed settlement, which
20 was negotiated at arm’s length by counsel for the Class, is presented for court approval.
21 *Newberg, supra*, §11.41, p. 11-88. However, the ultimate question of whether the proposed
22 settlement is fair, reasonable and adequate is made after notice of the settlement is given to the
23 class members and a final settlement hearing is held by the court.

24 **A. The Role Of The Court In Preliminary Approval Of A Class Action**
25 **Settlement**

26 The approval of a proposed settlement of a class action suit is a matter within the broad
27 discretion of the trial court. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-235
28 (2001); *Dunk*, 48 Cal. App. 4th at 1801. Preliminary approval does not require the trial court to
answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate.
That determination is made only after notice of the settlement has been given to the class
members and after they have been given an opportunity to voice their views of the settlement or

1 to be excluded from the settlement. *See, e.g.,* J. Moore, Moore's Federal Practice §§ 23.80-23.85
2 (2003). With regard to class action settlements, the opinions of counsel should be given
3 considerable weight both because of counsel's familiarity with the litigation and previous
4 experience with cases such as these. *See Officers for Justice, supra*, 688 F.2d at 625.

5 **B. Factors To Consider In Granting Preliminary Approval**

6 A number of factors are to be considered in evaluating a settlement for purposes of
7 preliminary approval. No one factor should be determinative, but rather all factors should be
8 considered. These criteria have been summarized as follows:

9 If the proposed settlement is the product of serious, informed, noncollusive negotiations,
10 has no obvious deficiencies, does not improperly grant preferential treatment to class
11 representatives or segments of the class, and falls within the range of possible approval, the court
12 should direct notice to be given to the class members of a formal fairness hearing, at which
13 evidence may be presented in support of and in opposition to the settlement.
14 *Manual of Complex Litigation*, Second §30.44, at 229. This settlement meets all of
15 these criteria.

16 **1. The settlement is the product of serious, informed, and**
17 **non-collusive negotiations**

18 This settlement is the result of extensive and hard-fought negotiations. Defendant has
19 denied and continues to deny all of the claims and contentions alleged in this case. Nonetheless,
20 Defendant has agreed to settle this case in the manner and upon the terms and conditions set
21 forth in the Settlement Agreement in order to avoid the expense, inconvenience, and burden of
22 further legal proceedings, and the uncertainties of trial and appeals.

23 Plaintiffs and Class Counsel recognize the expense of continuing to litigate and trying
24 this case against Defendant through possible appeals which could take several years. When this
25 case began more than two years ago, several of the legal theories were before the California
26 Supreme Court, including with respect to whether employers were required to compensate meal
27 and rest period premiums at the regular rate of pay, and whether employers that failed to identify
28 premium payments on paystubs and/or make such premium payments were liable for waiting
time penalties. *See, e.g., Naranjo and Ferra, supra*. Plaintiffs took a substantial risk that those
issues went in their favor during the pendency of this case. Even now, Plaintiffs' rounding claim
may or may not be actionable, and historically, Courts of Appeal have upheld neutral rounding

practices. As such, settlement is particularly advantageous to both parties here. Class Counsel are also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the case. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the settlement set forth in the Settlement Agreement is in the best interest of the Class Members.

Here, the litigation has been hard fought and displayed capable and experienced advocacy on both sides. “There is likewise every reason to conclude that settlement negotiations were vigorously conducted at arm’s length and without any suggestion of undue influence.” *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. AZ 1989).

2. The settlement has no “obvious deficiencies” and falls within the range for approval

The proposed settlement herein also has “no obvious deficiencies” and is well within the range of permissible compromise. This settlement, which represents approximately 39% of the claimed exposure faced by Defendant, is entitled to preliminary approval. *See, e.g., Glass v. UBS Fin. Servs.*, 2007 WL 221862, *4 (N.D. Cal. Jan. 26, 2007) (approving settlement of unpaid overtime wages where the settlement amount constituted approximately 25- 35% of the estimated actual loss to the class). Each Settlement Class Member will receive the same opportunity to participate in and receive payment. Clearly, the goal of this litigation, to seek redress for the Class, has been met.

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Com.*, 150 F.3D 1011, 1026 (9th Cir. 1998). Here, Defendant has maintained that its wage and hour policies comply with California law, and has defeated other similar actions seeking class certification of similar issues raised in this case. Notwithstanding the risk of continuing to litigate this case, after vigorous, arms-length negotiations that included an all day mediation, the parties reached a proposed settlement of \$12 million, where each member of the Class will receive payment unless the class member opts out of the settlement.

3. No preferential treatment is given to the class representatives or other members of the class

All of the class members will share in the settlement according to the number of workweeks worked during their employment with Defendant. Class Counsel allocated the settlement amounts to account for certain pay disparities between the classes, for instance, the

1 CPMC class includes only patient care employees, who are, on average, more highly
2 compensated than other non-exempt employees. The compensation formula is objective,
3 justified, and reasonable in this case, and does not improperly grant preferential treatment to any
4 class member.

5 **4. The parties engaged in adequate discovery prior to settlement**

6 The agreement to settle did not occur until Class Counsel possessed sufficient
7 information to make an informed judgment regarding the likelihood of success on the merits and
8 the results that could be obtained through further litigation. Class Counsel developed strong
9 legal theories for their case, and aggressively pursued formal and informal discovery, including
10 reviewing and analyzing tens of thousands of pages of documents, including payroll records,
11 employment policies and manuals, and related documentation produced by Defendant.

12 Based on the foregoing data and their own independent investigation and evaluation,
13 Class Counsel is of the opinion that the settlement with Defendant for the consideration and on
14 the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the
15 best interest of the class in light of all known facts and circumstances, including the risk of
16 significant delay, defenses asserted by Defendant, and numerous issues that could be raised on
17 appeal and potential appeals down the road. Defendant and its counsel also agree that the
18 settlement is fair and in the best interest of the Settlement Class Members.

19 **5. The class representatives' service payments are reasonable**

20 The class representatives collectively have spent many hours reviewing documents
21 produced by Defendant, conferring with Class Counsel, and attending mediation, to achieve the
22 result herein. But for the class representatives, this settlement would not have been reached.
23 The proposed class representative service award payments for Plaintiffs are intended to
24 recognize their initiative, risk, and efforts on behalf of the Settlement Class. Courts routinely
25 approve class representative service payments, also known as incentive awards, to compensate
26 named plaintiffs for the services they provide and the risks they incur during class action
27 litigation. *See In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393 (2010); *see*
28 *also Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (upholding “service
payments” to named plaintiffs for efforts in bringing the case); *Manual for Complex Litigation*, §
21.62, n. 971 (noting that such awards “may sometimes be warranted for time spent meeting with
Class Members, monitoring cases, or responding to discovery”).

1 **6. Plaintiffs' counsel's attorney's fees and costs are reasonable**

2 California courts have recognized that an appropriate method for determining an award of
3 attorneys' fees is based on a percentage of the total value of benefits to class members by the
4 settlement. *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977); *Vincent v. Hughes Air West, Inc.*, 557
5 F.2d 759, 769 (9th Cir. 1977). The purpose of this equitable doctrine is to avoid unjust
6 enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries
7 so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

8 Class Counsel has extensive experience in employment litigation and has successfully
9 handled numerous wage and hour class actions. Class Counsel seeks up to one-third of the
10 Settlement Amount for attorney's fees. Such a percentage is regularly granted in wage and hour
11 class actions. *See, e.g., Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480 (affirming lower
12 court's award of one-third of a class action wage and hour settlement); *Romero v. Producers*
13 *Dairy Foods, Inc.*, 2007 WL 3492841, *4 (E.D. Cal. Nov. 14, 2007) (approving attorneys' fee
14 award of 33% of the settlement fund in a wage and hour case involving allegations of unpaid
15 wages and missed meal and rest breaks).

16 Moreover, Class Counsel seeks costs not to exceed \$25,000, plus class administrator
17 expenses not to exceed \$67,000, which Defendant has agreed to pay out of the settlement
18 amount. (Attached as **Exhibit E** to the Bartz Decl. is a true and correct copy of the settlement
19 administrator's not to exceed quote to administer the settlement.) All such costs, as well as the
20 class administrator's expenses to oversee the class notice procedure and remit the settlement
21 fund to the class, are reasonably necessary in prosecuting this action.

22 **V. THE PROPOSED CLASS NOTICE IS FAIR AND APPROPRIATE**

23 The method and content of a Notice of Settlement to class members should be designed
24 to fairly apprise them of the terms of the proposed settlement and options available to them. *See*
25 *Philadelphia Housing Authority v. American Radiators & Standard Sanitary Corp.*, 323 F. Supp.
26 364, 378 (E.D. Pa. 1970). An appropriate notice is one which has a reasonable chance of
27 reaching a substantial percentage of the class members. *See Cartt v. Superior Court*, 50 Cal.
28 App. 3d 960, 974 (1975).

 The proposed Notice of Class Settlement (attached as **Exhibit 1** to the parties Settlement
Agreement) is fair and reasonable in this case. It describes the nature of the lawsuit, the
Settlement Class, the settlement amount, the proposed plan of allocation of the settlement

1 amount, and the attorneys' fees that Class Counsel may receive. The proposed notice also
2 describes the Settlement Agreement in sufficient detail to allow the Settlement Class Members to
3 make an informed choice to accept or reject it. The proposed Notice also contains information
4 on opting out of the Class, objecting to the settlement, and sets forth the schedule for the final
approval hearing.

5 Moreover, the parties propose that the Notice be mailed by the Settlement Administrator
6 to all Class members at the last known address maintained by Defendant, and updated by the
7 Settlement Administrator, if necessary, after accessing the National Change of Address database.
8 In the event the Notice of Settlement is returned as undeliverable, the Settlement Administrator
9 will perform a skip-trace procedure, and if such procedure reveals a new address, the Settlement
10 Administrator will re-mail the Notice within five days.

11 In summary, the proposed notice here describes the proposed settlement with enough
12 specificity to permit class members to make an informed decision whether to participate in the
settlement.

13 **VI. CONCLUSION**

14 Based on the foregoing, Plaintiffs respectfully request that this Court preliminarily
15 approve the Settlement, approve the Notice of Settlement, and set the date and time for the Final
16 Approval Hearing.

17
18 Dated: January 9, 2023

SHANBERG STAFFORD LLP
BARTZ LAW GROUP, APC

19
20
21 /s/Aaron A. Bartz

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