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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JESSICA MALDONADO, individually, and
on behalf of other members of the general
public similarly situated

Plaintiff

v.

RADY CHILDREN'S PHYSICIAN
MANAGEMENT SERVICES, INC., a
California Corporation; RADY
CHILDREN'S HOSPITAL-SAN DIEGO, a
California Corporation; RADY
CHILDREN'S HOSPITAL AND HEALTH
CENTER, a California Corporation; and
DOES 1-10, inclusive.

Defendants

CASE NO. 37-2021-00014090-CU-OE-CTL

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
FINAL APPROVAL OF (1) CLASS
ACTION SETTLEMENT; (2)
ATTORNEYS' FEES AND COSTS; and (3)
CLASS REPRESENTATIVE AWARD**

Date: December 2, 2022

Time: 9:00 a.m.

Dept: C-73

Judge: Hon. Joel R. Wohlfeil

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1 **I. SUMMARY OF MOTION**

2 This motion seeks final approval of a “wage and hour” class action settlement, that was heavily
3 litigated over the last 18 months. Plaintiff JESSICA MALDONADO and claimant VALENCIA
4 PLOOY, (collectively “Plaintiffs”) have sued on behalf of a class of nonexempt employees who
5 worked for the named Defendants during the operative class period, set forth herein.

6 Following the distribution of the approved Notice to the class, the proposed final settlement
7 figures are as follows:

- 8 • Final size of potential class: **7,919 Participating Class Members**
9 • Objections to Settlement: **Zero (0)**
10 • Opt-Outs: **Seven (7) (>0.01%)**
11 • Gross settlement amount (“GSA”): **\$3,980,000.00**
12 • Claims administration: **\$27,390.51**
13 • Costs/expenses of litigation: **\$15,943.39**
14 • LWDA payment: **\$150,000.00** (75% Share of \$200,000 allocation)
15 • Attorney's fees: **\$1,326,666.67** (1/3 of GSA)
16 • Class representative incentive: **\$10,000.00** (\$5,000 for each representative)

17 **Please Note:** there have been **no (zero) objections** to this proposed settlement. The *average*
18 gross payment to each participating Class Member based on the above figures is **\$308.87** which does
19 not account for the fact that certain class members will receive more or less than an “average” share,
20 depending on the length of time each worked for Defendants during the class period. (Please see the
21 declaration of Settlement Administrator Jeffrey Johnson at ¶ 16.)

22 **II. UPDATED FACTUAL AND PROCEDURAL HISTORY**

23 Should the Court deem it relevant, a much more detailed procedural history of the case, and
24 summary of all claims, was already set forth in Plaintiff’s original Motion for Preliminary Approval.
25 (ROA # 354 at § II-III.) The Court **granted** Preliminary Approval of the parties’ original settlement
26 on September 1, 2022. (ROA # 366.)

27 To briefly re-summarize, this case was highly contested. It has been pending for over 18
28 months and was in “active litigation” for over 14 months. During that time, Plaintiff faced a pleadings

1 challenge (demurrer). There were also ***eighteen (18)*** separate discovery motions pending before the
2 Court, (10 by Plaintiff and 8 by Defendant). (ROA # 354 at § II-III.; and the Declaration of Eric K.
3 Yaeckel ISO Plaintiff’s Motion for Preliminary Approval).

4 Plaintiffs had also prepared a draft motion for class certification, although it was never filed
5 in light of the parties’ agreement to mediate.

6 The parties attended a highly adversarial mediation, presided over by a well respected “wage
7 and hour” mediator (Lisa Klerman). The parties spent several additional months negotiating all final
8 settlement terms and obtaining preliminary approval from the Court. (*Id.*)

9 Most importantly for purposes of final approval, **zero** employees (out of **7,926 individuals**)
10 objected to the terms of this settlement. Only seven employees (less than 0.01 %) have opted out.
11 (Johnson decl. ¶¶ 11-12.) Thus the class overwhelmingly supports the proposed settlement.

12 The parties Joint Stipulation of Class and PAGA Action (herein referred to in this motion as
13 “the Agreement”) contains the terms of the class action settlement and is already on file with the Court.
14 (ROA # 355 : **Exhibit A** thereto.) For ease of reference, the Agreement will be cited to herein again
15 as Agreement or Exhibit A.)¹

16 **III. SETTLEMENT TERMS**

17 The Agreement includes the following key terms:

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

19 The parties entered into the Agreement exclusively for the purpose of resolving the
20 action and facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily
21 and/or finally approve the Agreement, or if the Agreement is terminated for any reason, then the
22 Agreement will be null and void and this action will revert to its status with respect to any and all
23 matters as they existed prior to the parties signing the Agreement. (**Ex. A** at ¶ 40).

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

25 Solely for the purposes of the Agreement, the parties have agreed that the term “Class
26
27

28 ¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used
herein are intended to have the same meaning as set forth in the Agreement.

Member” is defined as:

all current and former hourly non-exempt persons employed by Defendant Rady Children’s Physician Management Services, Inc.; Rady Children’s Hospital-San Diego; and Rady Children’s Hospital and Health Center, in the State of California between February 12, 2019 through the date of preliminary approval of the settlement (September 1, 2022). (**Exhibit A** at ¶ 14).

Class Notices were sent to 7,926 individuals, as determined by Defendants’ employment records. (Johnson decl. ¶ 6(a).) Seven total individuals have opted out of the litigation. (Johnson decl. ¶ 11.) **No (zero)** Class Members have objected to the proposed settlement. (Johnson decl. ¶12.) Following the Notice, there are a total of 7,919 total class members who will all receive a share of the settlement proceeds. (Johnson decl. ¶ 13.)

3. Appointment of Settlement Claims Administrator

CAC Services Group, LLC. (“CAC”) was used as the “Settlement Administrator” for purposes of providing the Notice, and its instructions, to Settlement Class Members, issuing all payments pursuant to the Agreement, and to track all opt-outs and objections to the settlement.

As detailed in the accompanying declaration, CAC successfully completed all steps of the Notice process. (See Johnson decl. ¶¶ 4-14.)

4. Scope of the Release

For purposes of the Agreement, Class Members release all “Wage and Hour” claims that are either or both: (1) alleged in the Second Amended Complaint; or (2) or which relate to or arise out of the allegations and claims asserted in the Second Amended Complaint and could have been alleged in the complaint relating in any way to violations of the wage and hour provisions of the California Labor Code or the California Wage Orders, or any other wage and hour provisions of California law. (See **Exhibit A** at ¶ 30.)

5. Cash Payment and Allocation

The Agreement provides for an automatic cash payment to the members of the class who do not submit valid requests for exclusion. The settlement is non-reversionary, in that all of the Net Settlement Amount, after all costs and fees are deducted, will be paid to the participating Class

1 Members.

2 Based on the final counts after the notice period, participating Class Members will be entitled
3 to an average share of approximately **\$308.87**. (Johnson decl. ¶ 16.) The actual amounts received vary
4 based on length of employment during the class period. The highest estimated payout is \$534.51 and
5 the lowest amount is \$5.69. (Johnson decl. ¶ 16.)

6 The settlement checks returned as undeliverable and those settlement checks remaining
7 un-cashed for more than one hundred twenty (180) calendar days after issuance will be tendered to
8 Children's Legal Services of San Diego in the names of the Settlement Members who did not cash such
9 checks. (**Ex. A** at ¶ 59.) The parties selected the Children's Legal Services of San Diego as it appears
10 to be a competent non-profit organization in good standing that satisfied all requirements under
11 California Code of Civil Procedure § 384. The parties do not have any affiliation or involvement with
12 this cy pres recipient.
13

14 **6. Contingent Costs**

15 Defendant agrees to pay One Million Three Hundred and Twenty Six Thousand Six Hundred
16 and Sixty Six Dollars and Sixty Five Cents (\$1,326,666.67) in attorneys' fees, which is thirty-three
17 and one-third (33 1/3%) of the total settlement, and up to Twenty Thousand and Dollars (\$20,000.00)
18 in litigation costs. (*See Exhibit A* at ¶ 43).

19 For costs incurred in administrating the settlement process, Defendants will pay the actual
20 costs, quoted at not to exceed \$30,000.00, out of the settlement amount to the Settlement
21 Administrator. (*See Exhibit A* at ¶ 45). The settlement administrators actual costs are \$27,390.51.
22 (Johnson decl. ¶ 17.)

23 Defendant also agrees to allocate Two Hundred Thousand Dollars (\$200,000.00) to Plaintiffs'
24 PAGA claims with 75% of the amount, or \$150,000.00, being paid to the LWDA, and 25%, or
25 \$50,000.00, being distributed amongst the class members. (*See Exhibit A* at ¶ 46.)

26 Defendants also agree to pay each Plaintiff Five Thousand Dollars (\$5,000.00) as an
27 enhancement award in consideration for their service as Class Representatives. (**Ex. A** at ¶ 7.) The
28

1 enhancement awards were decided pursuant to good faith negotiations and is intended to recognize that
2 it was the class representatives who initiated the lawsuit, initiated the PAGA claims, provided critical
3 documents and witnesses to their attorneys, and worked with their attorney to propound and prepare
4 written discovery, all in an effort to obtain moneys allegedly owed not only to themselves, but to all
5 other employees. For further justification of the enhancements, please see the attached declarations of
6 Ms. Maldonado and Ms. Plooy.

7 **IV. CONTROLLING LAW**

8 The following facts and law support this undisputed request.

9 **A. FINAL APPROVAL OF CLASS ACTION SETTLEMENTS**

10 The trial court has broad discretion to determine whether a class action settlement is fair and
11 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.

12 Fairness is presumed where (1) the settlement is reached through arm's-length bargaining; (2)
13 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel
14 is experienced in similar litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.*,
15 (2008) 162 Cal.App.4th 43, 52; *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1802. But, even
16 where it appears the settlement is fair, the court must still determine whether the settlement should be
17 approved after considering "the strengths and weaknesses of the claims and risks of the particular
18 litigation." *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 129. It considers: (i) the
19 strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration of further
20 litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered
21 in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
22 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
23 reaction of putative class members. *Dunk, supra*, 48 Cal.App.4th, at 1800-1801; *In re Microsoft*,
24 *supra*, 135 Cal.App.4th, at 723.

25 The court should approve a class action settlement when the settlement is fair and falls "within
26 the range of reasonableness." *Hernandez v. Vitamin Shoppe*, (2009) 174 Cal.App.4th 1441, 1446.

27
28 ////

1 **B. ATTORNEYS' FEES**

2 The California Supreme Court has recently determined that the percentage of the benefit,
3 ("percentage method") is proper for determining a reasonable attorney fee award in an employment
4 class action case. *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480.

5 The California Supreme Court's rationale was as follows:

6 we clarify today that use of the percentage method to calculate a fee in a common fund
7 case, where the award serves to spread the attorney fee among all the beneficiaries of
8 the fund, does not in itself constitute an abuse of discretion. We join the overwhelming
9 majority of federal and state courts in holding that when class action litigation
10 establishes a monetary fund for the benefit of the class members, and the trial court in
11 its equitable powers awards class counsel a fee out of that fund, the court may
12 determine the amount of a reasonable fee by choosing an appropriate percentage of the
13 fund created. The *recognized advantages* of the percentage method—including relative
14 ease of calculation, alignment of incentives between counsel and the class, a better
15 approximation of market conditions in a contingency case, and the encouragement it
16 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
17 litigation (See pt. I, ante; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d
18 797; *Rawlings v. Prudential-Bache Properties, Inc., supra*, 9 F.3d at p.
19 516)—**convince us the percentage method is a valuable tool that should not be
20 denied our trial courts.**

21 *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503 (emphasis added).

22 The Court also determined that while permissible, a lode-star "cross check" of the percentage
23 method was **not** required of California's trial courts. *Id.* at 506.

24 In fact the *Laffitte* Court further noted how advocating a lodestar, over a percentage of the
25 recovery, creates perverse litigation incentives:

26 Critics of the lodestar method note, for example, the difficulty in applying the method
27 and cite the **undesirable incentives created by that approach**—i.e., a financial
28 **incentive to extend the litigation so that the attorneys can accrue additional
hours** (and thus, additional fees). Moreover, some courts and commentators have
criticized the lodestar method because **it gives counsel less of an incentive to
maximize the recovery** for the class.

29 *Id.* at 494 (emphasis added).

30 Finally, "regardless whether the percentage method or the lodestar method is used, **fee awards
in class actions average around one-third of the recovery.**" *Chavez v. Netflix, Inc.*, (2008) 162
Cal.App.4th 43, 66, n.11 (2008); See e.g., *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d

454, 463 (upholding award of 33.3 percent of the settlement fund).

Please Note: As more specifically set forth below, the investigation of the claims in this case was somewhat unique, due (in primary part) to the effects of the Covid pandemic. For example, certain discovery methods (*i.e.* PMK depositions, “group” meetings with Class Members) were either prohibited or restricted, thus requiring a more time-intensive “individual analysis.” (Yaeckel decl. ¶ 12.)

C. CLASS REPRESENTATIVE ENHANCEMENTS

An incentive award may be appropriate to induce someone to serve as a class representative. In determining whether to make an incentive award, the court may consider (1) the risk, both financial and otherwise, the class representative faced in bringing the suit; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit received by the class representative as a result of the litigation. *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1270 citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395.

Additional factors to consider include:

“‘the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.’ Federal district courts have identified other factors as well, including ‘the risk to the class representative in commencing suit, both financial and otherwise,’ ‘the notoriety and personal difficulties encountered by the class representative,’ the duration of the litigation, and ‘the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.’”

Clark v. Am. Residential Servs. LLC (2009) 175 Cal.App.4th 785, 804.

V. ARGUMENT

A. THE PROPOSED SETTLEMENT IS MADE IN GOOD FAITH

As specifically set forth below, the settlement meets all requirements for Court approval.

///

1 **1. Strength of Plaintiffs' Case and Investigation and Discovery**

2 The most important factor courts consider when evaluating the fairness of the class action
3 settlement is the strength of the plaintiff's case balanced against the amount offered in settlement.
4 *Kullar, supra*, 168 Cal.App.4th at 130.

5 This is a class and representative action, with Plaintiffs' claims premised on Labor Code
6 violations, established (in part) from Defendants' uniform policies. *Brinker Rest. v. Superior Court*,
7 (2012) 53 Cal. 4th 1004, 1051 (holding that, where a company's uniform policy prohibits off-the-clock
8 work, certification of claims for such off-the-clock work is inappropriate, especially where the court
9 is merely "presented with anecdotal evidence of a handful of individual instances in which employees
10 worked off the clock.") Thus, Plaintiff's counsels' approach was to investigate Defendants' uniform
11 employment policies by, inter alia, scrutinizing putative class members' time and wage records, as well
12 as Defendants' written meal and rest period policies.

13 As detailed more thoroughly in the preliminary approval motion, extensive (and often highly
14 contested) discovery occurred, followed by additional informal exchanges prior to mediation. (See
15 ROA # 354 at § II).

16 Plaintiff obtained verified copies of Defendants' uniform time keeping, employee
17 compensation, Meal Period, Rest Period, and reimbursement policies. In addition to Plaintiffs' time
18 and wage records, Defendants also produced a large sampling of class member's records. Including
19 "outside" documentation, Counsel reviewed over 12,600 pages of documents. Through this review,
20 Plaintiffs' counsel was able to analyze and verify the following: the uniformity of Defendants'
21 "timekeeping" and compensation practices and the average net effect it had on Defendants' nonexempt
22 employees; the format and content of Defendants' itemized wage statements; the average rate of pay
23 for Defendants' nonexempt employees; and the average number of apparent meal period violations per
24 employee based on multiple sets of timekeeping data.

25 From this data, a detailed valuation of all claims was performed, and was presented to this
26 Court at the preliminary approval stage. (See ROA # 354 at § IV and the declaration of Eric Yaeckel
27 in Support of Preliminary Approval.)
28

1 While Plaintiffs maintained the claims were all viable, Plaintiffs (and their counsel) recognize
2 there were substantial risks to proceeding on behalf of a class and representative group. Defendants
3 presented several potentially valid defenses to certification, liability and mitigation of damages. (*Id.*)

4 **Please Note:** The majority of the investigation and discovery in this case was conducted during
5 the height of the Covid Pandemic. This made discovery and investigation much more “labor
6 intensive,” in that certain discovery methods (*i.e.* PMK depositions, “group” meetings with Class
7 Members) were either prohibited or restricted, by operation of law. This required more
8 “individualized” investigation and analysis, which - in certain areas - required more attorney billable
9 time. As *one* example, the bulk of evidence regarding the challenged policies and practices is usually
10 gathered from a "PMK" deponent. However, in this case, Plaintiffs were required to obtain this
11 information through numerous sets of written discovery. As a *second* example, prior to Covid, Mr.
12 Sullivan (Plaintiffs’ Trial counsel) would regularly hold "group" interviews with putative class
13 members, which would “streamline” the process. Due to Covid, Mr. Sullivan was required to set
14 individual meetings, which lead to numerous additional hours being expended on investigation.
15 (Yaeckel decl. ¶ 12.)

16 **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

17 Plaintiff’s Counsel’s effectiveness in prosecuting this case has translated into tangible monetary
18 benefits for the Settlement Class Members in the following respects: **(a)** a guaranteed favorable result;
19 **(b)** guaranteed monetary recovery over a reasonably short period of time, as opposed to possibly
20 waiting additional years for a potentially worse result; and **(c)** significant savings in attorney’s fees and
21 costs, which would have greatly increased had the case progressed through trial and possible appeals

22 If not for this settlement, any request by Plaintiffs to certify a class would have been heavily
23 contested by Defendants. (See ROA # 354 at § IV).

24 Moreover, as referenced in section A(1) above, the investigation and discovery phase was made
25 much more time consuming, due to the unique challenges of the Covid-19 pandemic. Due to the Covid
26 restrictions, an extra amount of hours went into the prosecution of this case, without any guaranteed
27 result for the proposed class. (Yaeckel decl. ¶ 12.)

28 Given the existence of viable defenses, for the vast majority of the class claims, it was unlikely

1 that all class claims could have been certified and brought to trial. Therefore, this class action
2 settlement is a superior result for both parties. In exchange for a full release, Class members are able
3 to recover substantial monetary amounts *now*. Defendant is also able to “buy its peace” and avoid the
4 costs of defending all future claims stemming from the same wage and hour issues in this case.

5 Regarding Plaintiff’s PAGA representative claims, there is also a substantial risk that Plaintiff
6 would either fail to obtain a favorable judgment on one or more of these claims, or that a favorable
7 award on one or more PAGA claims can be reduced. *See Thurman v. Bayshore Transit Mgmt., Inc.*,
8 (2012) 203 Cal.App.4th 1112, 1135 (holding the Superior Court may “mitigate” PAGA penalties, even
9 after a finding of liability.)

10 **3. The Experience and Views of Counsel**

11 Class Counsel has considerable experience in wage and hour and class action litigation. Mr.
12 William Sullivan has over 28 years of experience, 27 years of which has been devoted to both
13 prosecuting and defending class action litigation. Mr. Eric Yaeckel has over 11 years of experience
14 as an attorney who is primarily engaged in prosecuting class and representative actions.

15 Based on a detailed analysis of all the claims and the risks involved in continuing litigation,
16 class counsel submits the \$3,980,000.00 Gross Settlement Fund represented a fair, and more than
17 reasonable, settlement. (Yaeckel decl. ¶¶ 3-10.)

18 **4. Presence of a Governmental Actor**

19 Although the State is not directly involved in this action, Plaintiffs “stand in the shoes” of the
20 Labor and Workforce Development Agency (“LWDA”) by bringing a PAGA action. Consideration
21 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount of
22 \$150,000.00 (which is the LWDA’s 75% share of a \$200,000 allocation).

23 The LWDA was notified and declined to prosecute the claims itself. Counsel for the parties
24 believe this is a fair, reasonable, and adequate allocation. (Yaeckel decl. ¶ 11.) The LWDA was also
25 served with copies of the Settlement and Preliminary Approval Motion and has not objected or
26 responded to date. (*Id.*) They have also been served with the notice of this motion and all supporting
27 documents. (See concurrently filed Proof of Service.) Counsel will submit a declaration updating the
28 Court should the LWDA provide any response.

1 **5. Reaction of the Class Members to the Proposed Settlement**

2 A total of 7,926 members of the settlement class were notified and only seven (7), or 0.01%,
3 members opted out of the class. (Johnson decl. ¶¶ 6, 10, 11.)

4 Perhaps most importantly, **there have been No (Zero) objections to the terms of the**
5 **proposed settlement.** (Johnson decl. ¶ 12.)

6 “By any standard, the lack of objection of the Class Members favors approval of the
7 Settlement.” *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2008) 559 F.Supp.2d 1036,1043; see also
8 *Ross v. A.H. Robins*, (S.D.N.Y. 1988) 700 F. Supp. 682, 684 [“The absence of objectants may itself
9 be taken as evidencing the fairness of a settlement.”]

10 **B. THE REQUESTED ATTORNEY’S FEES AND COSTS ARE REASONABLE**

11 Plaintiffs will seek, and Defendants will not oppose, a payment of One Million Three Hundred
12 Twenty Six Thousand and Six Hundred Sixty Six Dollars and 67 cents (\$1,326,666.67) in attorneys’
13 fees, which is 1/3 of the total settlement, and Twenty Six Thousand Dollars (\$20,000.00) in litigation
14 costs. (See **Exhibit A** at ¶ 43.)

15 As set forth below, the requested attorney’s fees are inherently reasonable, on the basis of both
16 a percentage of the recovery and a lodestar method, given the results obtained for the class. The
17 following factors establish the reasonableness of the attorney’s fees requested.

18 **1. The Contingent Nature of the Fee Agreement, and Inherent Risk Therein,**
19 **Supports Awarding a Percentage of the Recovery**

20 In the instant matter, Plaintiffs’ Counsel was retained on a contingency basis. (Yaeckel decl.
21 ¶ 15.) A percentage fee of 35% (thirty-five percent) was freely negotiated. (*Id.*) As part of the
22 Agreement, Counsel was required to continue the prosecution of the matter regardless of the outcome
23 of the preliminary motions (i.e. class certification.) (*Id.*)

24 There is an **established practice** in the private legal market to reward attorneys for taking the
25 risk of non-payment by paying them a **premium over their normal hourly rates** for winning
26 contingency cases. *In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994)
27 19 F.3d 1291, 1299. If attorneys' efforts create a benefit for others in addition to their own client, the
28 court is empowered to award fees from that fund. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 478.

1 The rationale for fee enhancement in contingency cases has been explained as follows:

2 'A contingent fee must be higher than a fee for the same legal services paid as they
3 are performed. **The contingent fee compensates the lawyer not only for the legal
4 services he renders but for the loan of those services. The implicit interest rate
5 on such a loan is higher because the risk of default (the loss of the case, which
6 cancels the debt of the client to the lawyer) is much higher than that of
7 conventional loans.'** (Prosner, Economic Analysis of Law (4th ed.1992) pp. 534,
8 567.) 'A lawyer who both bears the risk of not being paid and provides legal
9 services is not receiving the fair market value of his work if he is paid only for
10 the second of these functions. If he is paid no more, competent counsel will be
11 reluctant to accept fee award cases.' (Leubsdorf, The Contingency Factor in
12 Attorney Fee Awards (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct,
13 rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an
14 appropriate component in considering whether a fee is reasonable]; ABA Model
15 Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
16 Conduct, rule 1.5(a)(8). [] **Such fee enhancements are intended to compensate for
17 the risk of loss generally in contingency cases as a class.**

18 *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

19 The percentage of the fund approach also sets expectations and incentivizes counsel in taking
20 on the risk of a contingency case:

21 The bases of the equitable rule which permits surcharging a common fund with the
22 expenses of its protection or recovery, including counsel fees, appear to be these:
23 fairness to the successful litigant, who might otherwise receive no benefit because his
24 recovery might be consumed by the expenses; correlative prevention of an unfair
25 advantage to the others who are entitled to share in the fund and who should bear their
26 share of the burden of its recovery; **encouragement of the attorney for the
27 successful litigant, who will be more willing to undertake and diligently
28 prosecute proper litigation for the protection or recovery of the fund if he is
assured that he will be promptly and directly compensated should his efforts be
successful.**

Jordan v. California Dep't of Motor Vehicles (2002) 100 Cal.App.4th 431, 446 (with emphasis added)
citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

As a result the percentage of the recovery, routinely approved in California at 33 & 1/3 percent,
properly incentivizes and awards counsel for diligently pursuing this matter in the face of numerous
obstacles to both certification and liability.

2. The Continuing Obligation to Devote Time and Effort to the Litigation

Since the tentative agreement, Plaintiff's Counsel has had to devote considerable time to
maintain the litigation, achieve Court approval for the proposed settlement, and assist the proposed
Class Members. (Yaeckel decl. ¶ 16.)

3. The Extent to which the Litigation Precluded Other Employment

Plaintiff's counsel was precluded from accepting other employment and clients due to the

1 necessity of maintaining the prosecution of the instant matter and also precluded them from bringing
2 clients to the firm (Yaeckel decl. ¶ 17.)

3 **4. The Experience, Reputation, and Ability of the Attorneys who Performed the**
4 **Services, and the Skill They Displayed in Litigation**

5 Plaintiff's counsel, William B. Sullivan, has been a California-licensed attorney for
6 approximately 28 years. William B. Sullivan has approximately 27 years of experience in "class action"
7 litigation, both as plaintiff and defense counsel. (Yaeckel decl. ¶ 3.) Mr. Yaeckel has over 11 years
8 experience prosecuting class and representative actions on behalf of California Employees. (Yaeckel
9 decl., ¶ 4.) Class counsel are the attorneys of record in a matter very recently (and favorably) decided
10 before the California Supreme Court titled *Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021).
11 The *Donohue* matter is a certified class and PAGA action. (Yaeckel decl. ¶ 5.) The *Donohue* matter
12 is a certified class and PAGA action. Plaintiff's counsel, are currently lead counsel on approximately
13 30 employment "wage and hour" claims with class action, or representative action allegations.
14 (Yaeckel decl. ¶ 6.)

15 Plaintiff's counsel have recent (and successful) Trial experience in "Wage and Hour" cases.
16 In a recent successful PAGA trial, before the Hon. Katherine Bacal, Plaintiff's counsel was awarded
17 their full requested attorneys fees and the hourly rates billed were all approved. See *Carrington v.*
18 *Starbucks Corp.* San Diego Superior Court, Case No. 37-2014-00018637-CU-OE-CTL and published
19 appellate opinion at 30 Cal.App.5th 504. (Yaeckel decl. ¶¶ 8-9.)

20 Based on said experience, it is the opinion of counsel that this settlement represents a fair and
21 adequate payment. (Yaeckel decl. ¶ 7.)

22 **6. The Amount Involved and the Results Obtained on Behalf of the Class**

23 This is not a "coupon" class action case. (Yaeckel decl. ¶ 18.) The Class is set to receive
24 significant monetary benefits they would not have received if Class Counsel did not act. (*Id.*)
25 Participating members of the Class will receive an average of \$308.87, with some class members
26 receiving as much as \$534.51. (Johnson decl. ¶ 15.)

27 **7. A Percentage of the Common Fund Award is Proper**

28 The controlling law, is more extensively set forth above. See Section IV(B) above.

1 Plaintiff's counsel submits that the request for 33 & 1/3 % in attorneys fees from the "common
2 fund" settlement is proper. *Laffitte v. Robert Half Intern. Inc.*, (2016) 1 Cal.5th 480, 503, 506.
3 Historically, courts have awarded fees as high as fifty percent (50%) of the common fund, depending
4 on the circumstances of the case. *Newberg*, § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C.
5 1981) 526 F.Supp.494 (awarding attorneys' fees in the amount of 45% of the \$7.3 million settlement
6 fund); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195
7 (awarding approximately 53% of the settlement fund as attorney fees).

8 California Courts routinely approve class action attorneys' fee awards "averag[ing] around
9 one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court
10 found 20 to 40 percent range of contingency fee in marketplace was appropriate in class actions).

11 Additionally, a common fund award is not dependent on a determination of the actual amount
12 claimed out of the fund by those entitled-it is the creation of the fund that is the crucial fact. In *Winslow*
13 *v. Harold G. Ferguson Corp.*, the California Supreme Court expressly held that "it is equitable that
14 [the attorney's] compensation and expenses should come from the entire fund saved for all classes
15 concerned before it is distributed." *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 284.
16 Likewise, *Lealao* expressly recognizes that "in a traditional common fund case, [a percentage-based
17 fee] may be calculated on the basis of the total fund made available rather than the actual payments
18 made to the class." *Lealao, supra*, 82 Cal.App.4th at p. 51; *see also Boeing, supra*, 444 U.S. at p. 478
19 ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or
20 his client is entitled to a reasonable attorneys' fee from the fund as a whole").

21 **8. The Lodestar Cross-Check**

22 *If* deemed necessary, a "lodestar cross-check" of the settlement also confirms the propriety of
23 the request. **Please Note:** a simple review of the Court's Registrar of Actions (reflecting over 360
24 Entries) confirms this was, by no means, an "expedited" or "easy" settlement. Substantial litigation had
25 to occur before the Defendants agreed to mediation.

26 As set forth in the attached Declaration of Eric K. Yaeckel, the actual lodestar attorney's fees
27 incurred (to date) are estimated to amount to be approximately **\$678,666.00**. The Attorney's fees are
28 broken down as follows:

1 Mr. William Sullivan served as lead investigator and trial counsel, per the specific request of
2 Plaintiffs. (Yaeckel decl. ¶ 19(a).) The billing rate for Mr. William Sullivan is **\$720.00** per hour.
3 (Sullivan decl. ¶ 19(a).) Over the course of the investigation (including pre-filing), Mr. William
4 Sullivan has currently expended approximately **565.2** hours in the service of this action. **565.2** hours
5 times **\$720.00** equals **\$406,944.00**. The work includes nearly all preliminary investigation, nearly all
6 client and Class interaction/meetings, and almost all pre-settlement work, including the preparation
7 of Plaintiff's Mediation Brief and damages analysis. (*Id.*) This time also includes traveling to at least
8 36 interviews with proposed Class Members residing across various parts of California. (*Id.*) The
9 preliminary investigation included the review and analysis of several thousand documents, as well as
10 additional phone interviews with at least 22 other Class Members. (*Id.*) Mr. Sullivan undertook a
11 significant (approximately 80 hours of) pre-filing investigation, wherein many of the Class Member
12 interviews took place. (*Id.*) During this time, Mr. Sullivan also investigated Defendant, its business
13 practices, and any variations in Class Members' job duties and rates of pay. (*Id.*)

14 Mr. Eric Yaeckel, was the partner primarily assigned to oversee the "day to day" activity of the
15 primary associates assigned to this case. The billing rate of Mr. Yaeckel is **\$600.00** per hour. (Sullivan
16 Decl. ¶18(b)). Mr. Eric Yaeckel has currently expended approximately **246.5** hours in the service of this
17 action. **246.5** hours times **\$600.00** equals **\$147,900.00**. (Yaeckel Decl. ¶19(b).) Aside from supervising
18 the Associates, this work includes attending hearings and most of the day to day communication with
19 opposing counsel. Mr. Yaeckel also primarily handled the numerous exchanges between the mediator
20 and Defense counsel to negotiate and finalize the settlement following the progress made at mediation.
21 Mr. Yaeckel also undertook the review and drafting of all settlement documents and the preliminary
22 and final approval motions. (Yaeckel Decl. ¶19 (b)).

23 Mr. Ryan Kuhn and Mr. Jason Baluarte also served as Associate Attorneys assigned to the case.
24 (Yaeckel decl. ¶19(c).) The associates' billing rate on this matter is **\$420.00** per hour. The associates
25 expended approximately **259.1** hours in the service of this action. **259.1** hours times **\$420.00** equals
26 **\$108,822.00**. The work performed by the associates consisted of, for the most part, analysis of
27 Defendants' documents and records, in preparation for mediation and a class certification motion. The
28 associates were also assigned to discovery creation/review, the preparation of "meet and confer" letters

1 and other contact with defense counsel, and the drafting and filing of numerous separate motions,
2 including pleadings challenges and numerous different motions to compel discovery. The associates
3 also provided an analysis of employment records to determine “commonality” and damages. (Yaeckel
4 decl. ¶ 19(c).)

5 Based on past experience, counsel estimates Mr. Yaeckel will incur an additional 25 hours in
6 assisting Class Members on questions and issues regarding the settlement, meeting with Class
7 Members (including those who file "late" submissions), and preparing for and attending the Final
8 Approval hearing in this matter. 25 times \$600.00 equals **\$15,000.00**. (Yaeckel decl. ¶ 19(d).)

9 **9. The Lodestar Multiplier**

10 Given the attorneys fees incurred – in the approximate amount of **\$678,666.00**– a multiplier
11 of approximately **1.95** is necessary for the full award requested (and undisputed) by Plaintiff.

12 California courts and the Ninth Circuit hold that the trial court in determining whether to apply
13 a multiplier should look at the case and its results as a whole. Historically, California courts have
14 approved **multipliers of 1.5 to 4**. See *Coalition for Los Angeles County Planning v. Board of*
15 *Supervisors*, (1977) 76 Cal. App. 3d 241, 251 (multiplier of 2+); *Kern River Public Access Committee*
16 *v. City of Bakersfield*, (1985) 170 Cal. App. 3d 1205, 1228 (multiplier of 1.5); *Downey Cares v.*
17 *Downey Community Development Commission*, (1987) 196 Cal. App. 3d 983, 994 (multiplier of 1.5);
18 *Sternwest Com. v. Ash*, (1986) 183 Cal. App. 3d 74, 75.

19 Furthermore, the Federal courts have applied multipliers ranging from 1.7 to 4.0, even when
20 the class action involved relatively routine issues. See *Rabin v. Concord Assets Group, Inc.*, (S.D.N.Y.
21 1991) Fed. Sec. L. Rep. (CCH) Par. 96,471 at 92, 091 (multiplier of 4.4); *Behrens v. Wometco*,
22 (S.D.Fla 1988) 118 F.R.D. 534, 549 (multiplier of 3); *Rievman v. Burlington Northern Railroad Co.*,
23 (S.D.N.Y. 1987) 118 F.R.D. 29, 35 (noting multiplier~ between 3 and 4.5 are common).

24 Here, the multiplier requested is within the range of what California and federal courts often
25 apply in class action cases. Moreover, the results obtained here, versus the risk of a zero recovery,
26 given the numerous asserted defenses, support this modest multiplier request. (Yaeckel decl. ¶ 22.)

27 Additionally, the settlement provides the class with a substantial monetary amount and the class
28 strongly supports the fairness of the settlement, even after being notified of the requested attorneys’

1 fee award (7 opt-outs, **and 0 objections**). In the event the Court deems a lodestar analysis is necessary
2 it will confirm that Plaintiff's fees are reasonable.

3 **10. The Amount of Costs**

4 Class Counsel has expended approximately **\$15,943.39** in costs, including filing fees, travel,
5 mediation, copying and document preparation charges, expert fees, and delivery/service fees. (Yaeckel
6 decl. ¶ 20.) Defendant agreed not to oppose an amount of up to \$20,000.00 in costs. Accordingly,
7 Plaintiff's counsel therefore seeks approval of the actual costs of \$15,943.39. (Yaeckel decl. ¶ 21.)

8 **C. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT IS REASONABLE**

9 Plaintiffs each request an enhancement award of **\$5,000** (\$10,000 total) to both Ms. Maldonado
10 (the named Plaintiff) and Ms. Plooy (the unnamed "nurse representative") for serving as the class
11 representatives. Defendants do **not** oppose this request. The class was notified and does **not** object.

12 A Plaintiff put their future employment prospects at risk by becoming a class representative as
13 the fact that they filed a class action lawsuit "is searchable on the internet and may become known to
14 prospective employers when evaluating" the employee as a candidate. *Guippone v. BH S&B Holdings,*
15 *LLC*, 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011).

16 Both Plaintiffs contributed extensive time and resources in the prosecution of this case. Each
17 Plaintiff was able to provide information instrumental to the prosecution of this matter including
18 identifying numerous witnesses that could corroborate her claims. The plaintiffs also assisted with
19 reviewing and providing insight on Defendant's documents produced. (See Maldonado decl. ¶¶ 3-8;
20 Plooy decl. ¶¶ 3-8.)

21 **Please Note:** Ms. Plooy was not named in the Complaint in this matter. However, she has been
22 actively assisting in prosecuting the litigation. Early in the litigation, Defendants raised a "standing
23 defense" as to Ms. Maldonado's ability to represent the Rady Children's Hospital workers, as Ms.
24 Maldonado worked in an administrative position. Ms. Plooy was a nurse in the actual Hospital. She
25 was able to provide valuable insight and information on the day to day practices of the Hospital.
26 Moreover, it was not until Ms. Plooy joined the case that Defendants finally agreed to a mediation.
27 (Yaeckel decl. ¶ 25.)

28 Moreover, by "sticking her neck out" as a Class Representative in a publicly filed lawsuit, each

1 Plaintiff took a substantial risk that may adversely impact her ability to work in this field in the future.

2 Any company who does a detailed background check, will be able to determine that Plaintiffs
3 asserted legal claims against their former employer. An entire industry exists that allows employers
4 to run extensive background searches on potential employees. Companies who provide these services
5 specifically highlight the fact that their services allows employers to weed out litigious employment
6 candidates. (Yaeckel decl. ¶¶ 26-28.)

7 In addition, the Plaintiffs co-workers have all been notified of the lawsuit, so there is a large
8 pool of peers who now know of each of them bringing claims against a former employer, which could
9 also jeopardize future positions.

10 Each Plaintiff also risked personally owing a large cost award, into the tens of thousands of
11 dollars, had her claims been unsuccessful. (See Maldonado decl. ¶ 9; Plooy decl. ¶ 9.)

12 Despite all the risks Plaintiffs, at all times remained committed to securing a monetary recovery
13 on behalf of the entire class. (See Maldonado decl. ¶ 10; Plooy decl. ¶ 10.)

14 Accordingly, Plaintiff asks the Court to approve a class representative enhancement in the
15 amount of \$5,000 to Ms. Maldonado and \$5,000 to Ms. Plooy.

16 **VI. CONCLUSION**

17 Based on the foregoing, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion
18 consistent with the accompanying proposed Order and Final Judgment.

19
20 Dated: November 7, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

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Attorneys for Plaintiff JESSICA MALDONADO in a
representative capacity, and on behalf of the general
public similarly situated