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KYLE FRENCHER, on behalf of herself
and others similarly situated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGLES – CENTRAL CIVIL WEST

KYLE FRENCHER, on behalf of herself and others similarly situated.

PLAINTIFF,

vs.

PACIFICA OF THE VALLEY CORPORATION dba PACIFICA HOSPITAL OF THE VALLEY; and DOES 1 to 100, Inclusive.

DEFENDANTS.

Case No.: BC559056

Assigned for all Purposes to the Hon. Elihu M. Berle, Dept. 323

CLASS ACTION

PLAINTIFF KYLE FRENCHER'S NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed and served concurrently with Plaintiff's Compendium of Evidence Volumes 1-3; Proposed Trial Plan; and [Proposed] Order]

Date: October 7, 2016
Time: 1:30 p.m.
Dept.: 323

TO THE HONORABLE COURT, TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE that on October 7, 2016 at 1:30 p.m. and/or later date and time to be determined[1], Plaintiff Kyle Frencher will, and hereby does, move for an Order Certifying

[1] Pursuant to the courtroom clerk in Department 323, only for purposes of filing, Plaintiff is to notice the motion for October 7, 2016 at 1:30 p.m., the date of the status conference, and the Court will schedule the hearing date at the Status Conference.

Plaintiff's action as a Class Action in Department 323 of Los Angeles Superior Court located at 600 South Commonwealth Avenue, Los Angeles, California 90005. Specifically, Plaintiff requests this Court to:

1. Certify that this action is maintainable as a class action pursuant to California Code of Civil Procedure § 382;

2. Certify the classes as follows:

i. **Minimum Wage Class:** "All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class who were not compensated for all hours worked."

ii. **Auto Deduct Class:** "All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class who worked any shift more than 6 hours and were automatically deducted 30 minutes for meal breaks."

iii. **2nd Meal Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a second meal break."

iv. **2nd Meal Waiver Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a second meal break after signing a meal waiver."

v. **3rd Rest Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a third rest break."

vi. **[1st Meal Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 5 hours and did not receive a thirty minute uninterrupted first meal break."]

vii. **Wage Statement Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2013, and the date the court signs an order certifying a class."

viii. **Final Wage Class:** "All former hourly employees employed by Defendant at any time between September 29, 2010 through the date of a signed order certifying the class who worked more than 10 hours and did not receive a second meal break or third rest break, who worked more than 5 hours and did not receive an uninterrupted thirty minute first meal break, or Defendant failed to pay wages for all hours the employees were working or were under direction and control of Defendant."

3. Appoint the named Plaintiff Kyle Frencher as representative of the subclasses, and

4. Appoint Joseph Lavi, Esq. and Vincent Granberry, Esq. of Lavi & Ebrahimian, LLP, as Class Counsel for all of the subclasses as defined above.

Dated: September 22, 2016

Respectfully submitted,
LAVI & EBRAHIMIAN, LLP

By: /s/ Joseph Lavi
Joseph Lavi, Esq.
Vincent C. Granberry, Esq.
Attorneys for PLAINTIFF
KYLE FRENCHER
and Other Class Members

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As our Supreme Court recently reiterated: "Claims alleging a uniform policy consistently applied to a group of employees in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1033 ("*Brinker*").) Our case is precisely such a case because Plaintiff alleges claims which challenge "uniform polic[ies] consistently applied to a group of employees in violation of the wage and hour laws…" (*Id.*) Specifically, Plaintiff's "theories of recovery" on her claims are:

1. Minimum Wage: Defendant failed to pay wages at the minimum wage rate for all hours worked by employees. This claim has two bases. First, Defendant used "rounding" to deduct recorded work time from all class members' clocked hours. (Lavi Decl. Ex. 1^2 p. 39:3-12 [Depo. of Susan Standley hereinafter "Standley"].) Rounding is only legal if it rounds equally in both directions *and* if, on balance over time the employee time is not consistently shortchanged. Here, Defendant's rounding parameters are not neutral on their face. (Lavi Decl. Ex. 3 p. PACIFICA 73, 76 [time system parameters]; Ex. 1 p. 73:11-74:19, 75:11-77:9.) Regardless, rounding is a proper issue for certification because the legality determines Defendant's liability for the proposed subclass.

The second basis for failure to pay minimum wage for all hours worked is Defendant *automatically* deducts 30 minutes for meal breaks from worked hours once employees work 6 hours regardless of whether the employee received or clocked out for a meal break. For half the class, Defendant did not record meal periods which raises the presumption they did not receive meal periods. (*Safeway, Inc. v. Sup. Ct.* (2015) 238 Cal.App.4th 1138, 1159-1160 ("*Safeway*").) Accordingly, automatically deducting 30 minutes from employees' daily worked hours was illegal and deprived the employees who did not take a full 30 minute meal break of wages earned.

2. Second Meal Breaks: Defendant admits its policies and procedures **never** informed the employees they were entitled to a 2^{nd} meal break when they worked more than 10 hours in a day even though employees regularly worked over 10 hours. (Ex. 2 p. 22:4-24, 40:20-41:2, 60:13-21 [Depo. of Patty Guebara hereinafter "Guebara"]; Ex. 4 p. PACIFICA 6 [meal period policy in handbook].) Defendant uniformly failed to provide second meal periods to employees working over 10 hours in a day as is evidenced by class member declarations stating Defendant never informed them of or provided them an opportunity to take a 2^{nd} meal period when they worked over 10 hours. (Exs. 9-39.) Because the failure to provide meal breaks is uniform and applies across-the-class, this "theory of recovery ... is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-*

On Drug Stores, Inc. v. Sup. Ct. (2004) 34 Cal.4th 319, 327 ("*Sav-On"*).) Defendant also admits it never had a policy in place to pay premium wages when the employees did not receive a 2nd meal period. (Guebara 66:3-7, 74:6-20.) Lack of a policy to provide payment of meal and rest premiums under any circumstance is amenable to class treatment. (*Safeway* at 1150, 1158-1162 [lack of policy to pay meal or rest premiums under any circumstance is amenable to class treatment].)

In addition, Defendant cannot argue class members waived 2nd meal breaks since—as made clear by the Supreme Court in *Brinker*—issues of waiver do not arise for breaks that are required by law but never authorized because an employee cannot decline to take a break which they never had an opportunity to take. (*Brinker*, at 1033; see *Benton v. Telcom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 719-720 ("*Benton*").) Because Defendant did not have a policy providing for 2nd meal periods when working over 10 hours, second meal periods could not be waived.

As to 2nd meal break waiver subclass: For a subclass of 181 employees or approximately 18% of the class members, which does not include Plaintiff or 82% of the class, Defendant alleges the class members waived their entitlement to 2nd meal breaks. Plaintiff asserts the waivers are defective since Wage Order 5 requires "any such waiver must be documented in a written agreement that is voluntarily **signed by both the employee and the employer**" (Wage Order No. 5, subd. 11(D) [underline added]) and **none** of the 181 waivers were ever signed by Defendant. (Ex. 5.)

3. Third Rest Breaks: Defendant uniformly failed to provide third rest periods to employees working over 10 hours in a day. Defendant admits its policies never informed the employees they were entitled to a 3rd rest break when they worked more than 10 hours. (Guebara 20:3-21:12, 40:15-41:2; Ex. 4 p. PACIFICA 6 [rest period policy in handbook].) Class members have stated Defendant's policy never informed them of or provided them with an opportunity to take 3rd rest breaks when they worked over 10 hours. (Ex. 9-39.) Defendant admits that under its policy, Defendant did not permit a 3rd rest break until employees worked more than 12 hours (Guebara 21:9-16, 40:15-41:2; 72:25-73:3, 85:14-86:5), leaving employees who worked more than 10 hours up to 12 hours without a 3rd rest break. Furthermore, Defendant's policy also only permitted rest periods scheduled by supervisors. (Guebara 20:3-21:12, 40:15-41:2; Ex. 4 p. PACIFICA 6.) Yet, Defendant never trained any of the supervisors on how or when to schedule 3rd rest breaks. (Guebara 33:14-17; 33:22-25; 34:5-8.) Defendant admits it lacked a policy to pay premium wages when the employees did not receive a 3rd rest period. (Guebara 73:22-74:5, 66:8-12.) Lack of such policy under any circumstance is amenable to class treatment. (*Safeway* at 1150, 1158-1162.)

[2] Hereinafter, all references to "Exhibits" refer to exhibits to the Declaration of Joseph Lavi.

4. First Meal Periods: Defendant consistently failed to record meal breaks for at least half of the class (Standley 29:19-25, 30:23-31:7) and automatically deducted half an hour from the employees' work time. If an employer fails to record a meal period as required by law "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Brinker*, at 1053 [concur. opn. of Werdegar, J.]; *Safeway, Inc.*, 238 Cal.App.4th at 1159-1160.) Based on this presumption and the payroll records demonstrating missed meal periods, "the record shows facts necessary to establish liability are capable of common proof." (*Safeway* at 1160.)

5. Wage Statements and Final Wages: As a result of the aforementioned policies, the wage statements for the class inaccurately reflected the hours worked and wages earned in violation of Labor Code section 226. Defendant also failed to provide all unpaid wages to employees after separation of employment in violation of Labor Code sections 201 and 202.

Defendant's policies blatantly violate basic California wage and hour laws. Defendant's violations are confirmed and established on a class-wide basis by admissions of Defendant's Persons Most Knowledgeable, class members' timecards, class members' declarations, deposition testimony, discovery responses, written policies, and Plaintiff's declaration. The procedures are so well-defined by Defendant's PMKs that class member testimony is unnecessary to adjudicate most of the issues. As detailed below, this motion should be granted and the classes certified.

II. SUMMARY OF RELEVANT FACTS

A. The Parties

Defendant Pacifica of the Valley (hereinafter "Defendant" or "Pacifica") operates a hospital in Los Angeles. Plaintiff Kyle Frencher (hereinafter "Plaintiff" or "Frencher") worked for Pacifica as a nurse from approximately September 2012 to October 2013, which was an hourly paid position. (Ex. 40 ¶4 [Frencher Decl.]; Ex. 48 p. 43:8-15, 45:23-25 [Depo. of Frencher hereinafter referred to as "Frencher Depo."].) Class members consist of at least 974 employees working at Pacifica. (Ex. 5 p. 2:25-3:17 [Def.'s Resps. to Spec. Interrogs. Nos. 1 and 2 stating as of September 15, 2015, Pacifica had 645 current employees and 329 former employees].)

B. Defendant's Persons Most Knowledgeable

Defendant designated Standley as its Person Most Knowledgeable (PMK) regarding policies and procedures for: 1) clocking in and out; 2) calculation of compensable work hours; 3) compensation of non-exempt employees; 4) rounding; 5) auto deduction of time from worked hours; 6) duration of meal breaks; 7) payment of premium wages for missed meal breaks; 8) wage statements; and 9) payment of final wages to terminated or resigned employees. (Standley 11:12-

12:8, 12:22-13:7, 13:19-14:3, 14:11-19, 15:2-11, 15:18-16:2, 16:9-19, 17:1-9, 17:18-18:2.)

Guebara is Defendant's PMK regarding 1) 1st and 2nd meal breaks, 2) meal break waivers, 3) 3rd rest breaks, 4) payment of premium wages for missed 3rd rest breaks, and 5) number of times that premium wages were paid to class members during the class period. (Guebara 14:20-15:4, 15:11-20, 16:6-14, 18:2-6, 72:10-15.) Guebara is Defendant's Human Resources Manager which is the highest ranked agent in human resources. (Guebara 10:12-18, 29:12-14.)

C. Plaintiff's Theories For Unpaid Minimum Wage

1. Defendant Fails To Pay For All Hours Worked By Deducting Time Through "Rounding" Because The Rounding Was Not Neutral And Discipline Policies Ensured Class Members Could Not Gain Benefit of Clocking In Late

Defendant's policies required employees to clock in and out at the beginning and end of the day, as well as recording the beginning and end of their meal breaks. (Standley 19:13-21, 21:3-10, 25:22-25; Ex. 4 p. PACIFICA 6 [paragraph re: "MEAL PERIOD".) Defendant's timekeeping system precisely records punch data and the recorded punches reflect accurate work time because supervisors verified the employees' punches were accurate. (Standley 32:12-22, 81:5-83:3.) Yet, Defendant used a rounding policy on the employees worked hours. (Standley 39:3-12, 74:15-75:10, 96:7-16.) However, Defendant set rounding parameters which are illegal on their face. Defendant set different parameters for the outside and inside rounding depending on whether the employee is clocking in or out. Defendant set a 7 minute grace period for outside the shift while it has a zero minute grace period for inside the shift. It also rounds one minute for time recorded inside the shift, while it rounds 15 minutes for time recorded outside the shift. (*Id.*; Ex. 3 p. PACIFICA 73, 74, 76..)

Furthermore, the rounding was not neutral since Defendant admits it: did not have a grace period at the beginning of the shift, did not provide the employee with a grace period to clock in, **and employees would be considered tardy if they clocked in after their shift started**. (Standley 84:1-86:6; Ex. 6 p. PACIFICA 90-91.) If employees clocked in any time after the start of their scheduled shift, it could lead to discipline and possible termination. (Standley 23:7-10, 25:4-25, 25:22-25, 50:2-11, 58:2-8, 59:1-13, 84:1-85:2, 86:8-88:12; Ex. 6 pp. PACIFICA 90, 91-93; Ex. 4 p. PACIFICA 13 [Attendance policy].) Defendant's tardiness policy ensured class members could not obtain any "benefit" from rounding by because they would be disciplined if they clocked in late.

If putting in place a rounding policy which was illegal on its face was not enough, Defendant admits the rounding was in place to avoid paying overtime. (Guebara 79:3-23.) This is why Defendant's policies and procedures only informed the employees: "You are prohibited from clocking earlier than seven (7) minutes before the start of your shift or clocking out later than (7)

minute beyond your scheduled quitting time unless prior permission is obtained from your Supervisor or Department Head. (Ex. 7 p. PACIFICA 25 [Def.'s "TIME AND ATTENDANCE" policy of handbook].) Defendant's policies never informed the class member that they could clock in up to 7 minutes after start of shift or that they could clock out up to 7 minutes before end of the shift. (Standley 23:19-24:4, 25:22-25, 57:4-24, 45:6-11, 24:17-25:3, 45:13-16, 56:16-57:1.)

2. Pacifica Automatically Deducts 30 Minutes Each Day An Employee Works More Than 6 Hours Regardless Of Whether The Employee Took A Meal Period Or Received Less Than A Full 30 Minute Uninterrupted Meal Period

Regardless of whether an employee took a meal break or received less than a 30 minute meal break, Defendant *automatically* deducts 30 minutes for a meal period from the employees' daily compensable hours if they work more than six hours. (Standley 26:20-27:13, 33:25-34:5, 62:17-63:17, 65:6-14, 68:22-69:1, 92:1-19, 63:23-64:7, 89:9-16; Ex. 8 p. PACIFICA 85 [auto-deduct 30 mins. if shift more than 6 hrs]; Frencher Depo. 62:20-22.) There are at least 410 hourly employees per day that are auto-deducted 30 minutes for meal breaks per day. (Standley 35:5-13, 36:11-37:19; 38:12-15.) Defendant did not record meal times for over half the employees and admits it does not know the length of meals or whether they were taken when employees do not clock out. (Standley 29:19-25, 30:23-31:7, 89:4-8.) Defendant's failure to record meal times violates Wage Order 5. (Wage Order No. 5, subd. 7(A)(3).) When an employer systematically fails to create records of meal periods as required by a wage order, a presumption arises the employee did not receive a meal break which she was relieved of her duties. (*Safeway* at 1159-1160.) For example, Frencher rarely received a 30 minute meal break since due to interruptions to return to work, yet, she was deducted 30 minutes of pay each day. (Frencher Depo. 59:16-60:14, 62:20-22, 61:25-62:3.) Regardless, Defendant's uniform policy of automatically deducting 30 minute meal periods raises certifiable issues. In *Jaimez vs. DAIOHS USA, Inc.*, the court of appeal found that class certification was proper in circumstances identical to this case due to the auto deduction of meal periods. (*Jaimez vs. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304 ("*Jaimez*").) The court held Defendant's "policy and practice before 2006 of deducting 30 minutes per shift for each RSR, regardless of whether the RSR took a meal break, raises common legal *and* factual issues." (*Id.* [original italics].)

D. The Second Meal Break Theory Of Recovery

1. Defendant Failed To Inform The Employees They Were Entitled To 2nd Meal Breaks And Failed To Provide Them With An Opportunity To Take 2nd Meal Breaks When They Worked More Than 10 Hours

It is undisputed, and Defendant admits that Defendant's policies failed to inform the employees that they are entitled to a 2nd meal break if they work more than 10 hours in a day.

(Guebara 22:4-24, 40:20-41:2, 60:13-21.) Defendant's meal period states:

> You must take a thirty (30) minutes meal period after not more than five (5) hours of work, except, that when a work period is not more than six (6) hours per day the meal period may be waived by mutual consent of the hospital and yourself. Every effort will be made to schedule your meal period as close to the middle of the shift as possible.

(Ex. 4 p. PACIFICA 6 [meal period policy in employee handbook].) Defendant admits it knew the employee handbook did not inform the employees they were entitled to a 2nd meal break, yet it did nothing to fix it or to inform the employees they are entitled to 2nd meal breaks when they worked more than 10 hours in day. (Guebara 107:17-109:6). Defendant's policies and procedures only provided the employees with one meal break. (Frencher Depo. 58:3-18; see Ex. 9-39.)

Furthermore, Defendant admits that Charge Nurses were in charge of scheduling employees' meal breaks. (Guebara 31:10-32:7, 82:11-20.) Yet, Defendant admits it never trained charge nurses how to schedule 1st or 2nd meal breaks. (Guebara 32:21-23, 33:18-21, 34:1-4.) No one ever trained or informed charge nurses the employees are entitled to a 2nd meal break if they work more than 10 hours in a day. (Guebara 87:6-88:4.) Defendant admits it has not taken any steps since September 2010 to inform employees of their meal break policies. (Guebara 37:23-38:2.) Defendant also admits it has not taken steps to ensure that charge nurses, supervisors, directors, leads or managers were properly scheduling meal breaks. (Guebara 88:5-25, 97:13-16, 97:21-98:2, 99:2-5, 107:7-10.)

In addition, class members have submitted evidence that Defendant never informed them of entitlement to or gave them an opportunity to take a 2nd meal break when they worked more than 10 hours. (Exs. 9-28, 39-40 [Decls. of class stating worked over 10 hours but never informed of right to take or given opportunity to take a 2nd meal break]; Exs. 29-38 [Questionnaire resps. by class stating worked over 10 hours but never informed of right to take or given opportunity to take a 2nd meal break].) In addition, Defendant admits that all meal periods are unpaid time and if an employee ever took a 2nd meal break, Defendant would need to deduct the additional 30 minutes from the employee's daily hours to account for the second meal period. (Standley 27:14-15, 97:14-98:8.) Yet, Defendant admits that no employee has ever been deducted pay to account for a 2nd meal break. (*Id.*) Thus, proving that no employee has ever taken a 2nd meal break during the class period.

2. Defendant Cannot And Will Not Be Able To Claim That The Employees Waived Their 2nd Meal Breaks

Defendant cannot argue that the class members waived their 2nd meal breaks since, as made clear by the Supreme Court in *Brinker*, issues of waiver do not arise for breaks that are required by law but never authorized because an employee cannot decline to take a break which they never had an opportunity to take. (*Brinker*, at 1033; see *Benton*, at 719-720.) Defendant admits that Pacifica's

meal break policy in the **employee handbook** fails to provide for a second meal period. (Ex. 4 p. PACIFICA 6; Guebara 22:4-24, 40:20-41:2, 60:13-21.) A company creates an employee handbook to communicate its policies in a written form to employees so they understand what **company policies exist.** It is easily understood a handbook is not created with the intent that there are additional secret policies which are not reflected in the handbook. The handbook's lack of a second meal period policy on its own is substantial evidence of **company policy** creating common issues for class certification. As such, since Defendant did not have a policy providing for 2nd meal periods when employees worked over 10 hours, those meal periods could not be waived.

Furthermore, Wage Order No. 5 requires "any such waiver must be documented in a written agreement that is voluntarily **signed by both the employee and the employer**" (Wage Order No. 5, subd. 11(D) [bold added]). However, Defendant does not have any written waivers that were signed by both the class members and Defendant.

3. Pursuant To Wage Order 5, The Employees Could Only Waive Their 2nd Meal Breaks If The Waiver Was In Writing And Signed By The Employee And The Employer

For the 2nd Meal Waiver Class—a subclass of 181 employees or approximately 18% of the class members which does not include Plaintiff—Defendant alleges the class members signed a waiver giving up their entitlement to 2nd meal breaks. Defendant admits that to be valid, the meal break waivers had to be in writing. (Guebara 65:21-66:2.) Defendant admits that is why it obtained approximately 181 signed 2nd meal break waivers from the class members during their orientation. (Guebara 59:1-6; Ex. 41 p. 10:26-17:17 [Def.'s Resps. to Special Interrogs. Set 2, Nos. 82-87 stating they produced written meal period waivers during the class period]; Ex. 50 [181 meal break waivers]; Lavi Decl. ¶¶47-49 [confirming Defendant produced approx. 181 written 2nd meal break waivers for the class].) The employees that signed a meal break waiver have signed one of the two versions of the meal break waiver that have been in place since 2000. (Guebara 53:6-17, 57:4-10; Ex. 42, 43 [representative written meal break waivers bates numbered Pacifica 3015 and 2993, respectively]; Lavi Decl. ¶¶ 47-49; Ex. 50.) Defendant admits it is unable to identify any employees that waived their 2nd meal breaks, other than the ones that have signed waivers. (Guebara 59:12-60:1). Frencher was never offered a meal break waiver and had never seen one. (Frencher Depo. 86:16-24.) Regardless, Plaintiff asserts the waivers which were signed are defective.

Wage Order No. 5 requires "any such waiver must be documented in a written agreement that is voluntarily **signed by both** the employee **and the employer**" (Wage Order No. 5, subd. 11(D) [bold added]). Yet, none of the waivers presented by Defendant were ever signed by an agent

of Defendant. (Ex. 50.) Regardless, the validity of the waiver can be addressed in a subclass and the defense of the written waiver would raise common questions of law and fact among that subclass.

4. Defendant Did Not Have A Policy To Pay For Premium Wages If An Employee Did Not Receive A 2nd Meal Break And Admits It Has Never Paid Premium Wages For Missed 2nd Meal Breaks

Defendant admits that during the class period, the non-exempt employees have worked more than **218,000** shifts over 10 hours in a day of which more than **197,000** shifts were over 11 hours in a day and more than **15,000** shifts were over 12 hours in a day. (Ex. 44 pp. 2-16 [Def.'s Resps. to Special Interrogs. Set Two, Nos. 46-63]; Ex. 41 pp. 2-10 [further resps. to Special Interrogs., Set Two, Nos. 48, 51, 53, 54, 57, 59, 60, 63].) Defendant further admits it did not have any policies and procedures in place during the class period for payment of premium wages for missed 2nd meal breaks. (Guebara 66:3-7; 74:6-20.) **This is why Defendant admits it has never paid premium wages for missed 2nd meal breaks to any employees, including Plaintiff, during the class period.** (Standley 92:24-93:1; Ex. 44 p. 20:19-25:2 [admits never paid 2nd meal premiums in response to interrogs. set two, Nos.70-75; Ex. 45 pp. 11:2-3, 12:8-9, 13:14-15, 14:20-21, 15:26-27, 17:3-5 [admit never paid 2nd meal premium wages in response to interrogs. gen. No. 17.1 for RFA Nos. 18, 21, 24, 27, 30, and 33; Ex. 45 p. 4:24-25, 5:8-9, 6:16-17, 7:1-2 [admit never paid 2nd meal premium and no wavier from Pl. in response to interrogs. gen. No. 17.1 for RFA Nos. 4, 5, 8, 9.)

E. The Third Rest Break Theory Of Recovery

1. Defendant Failed To Inform The Employees That They Were Entitled To 3rd Rest Breaks When They Worked More Than 10 Hours As Well As Failing To Provide Them With An Opportunity To Take 3rd Rest Breaks When They Worked More Than 10 Hours

Defendant mistakenly understood California law only entitles employees to a rest break for every four hours of work. (Guebara 106:2-13.) As such, Defendant's rest break policy informed the employees: "You are provided a 15-minute rest period for each four (4) hours of working time. . . . Your Supervisor will arrange the time for your particular rest periods." (Guebara 20:3-21:12, 40:15-41:2; Ex. 4 p. PACIFICA 6 [rest period policy in handbook].) Defendant admits that based on its rest break policy, non-exempt employees were only entitled to a 3rd rest break after working more than 12 hours. (Guebara 21:9-16, 40:15-41:2; 72:25-73:3, 85:14-86:5.) This is in clear violation of *Brinker.* Accordingly, at a minimum, Defendant's policies uniformly failed to provide 3rd rest breaks to the employees who worked more than 10 hours up to 12 hours, because on its face Defendant's policy did not provide for a 3rd rest period. (See *Brinker,* at 1033-1034 [policy of rest break every 4 hours does not provide a second rest for employees working longer than 6 hours up to 8 hours].)

Class Members have submitted declarations and questionnaire responses showing Defendant

never informed them they were entitled to 3rd rest breaks when they worked more than 10 hours in a day and never provided them with an opportunity to take a 3rd rest break when they worked more than 10 hours. (Ex. 9-28, 39-40 [Decls. of class stating worked over 10 hours but never informed of right to take or given opportunity to take a 2nd meal break]; Exs. 29-38 [Questionnaire resps. stating worked over 10 hours but never informed of right to take or given opportunity to take a 2nd meal break]; Frencher Depo. 58:3-18.) Accordingly, Plaintiff has submitted substantial evidence to demonstrate Defendant's policy failed to provide a 3rd rest break when employees worked more than 10 hours. In addition, Defendant admits it knew the employee handbook did not inform employees of their right to 3rd rest breaks, yet it did nothing to fix it or inform the employees otherwise. (Guebara 109:7-10). Since September 2010, Defendant has not taken any steps to make sure that charge nurses, directors, supervisors, manager or leads are properly scheduling the employees for their 3rd rest breaks. (Guebara 97:17-20, 98:15-25, 107:11-14.)

2. Defendant Has Never Paid Premium Wages For Missed 3rd Rest Breaks

As stated above, Defendant also admits that during the class period, non-exempt employees worked more than 218,000 shifts over 10 hours in a day of which more than 197,000 were over 11 hours in a day and more than 15,000 over 12 hours in a day. Defendant further admits that it did not have any policies or procedures the class period for payment of premium wages for missed 3rd rest breaks. (Guebara 66:8-12, 73:22-74:5.) **The lack of a policy to pay missed 3rd rest break premiums explains why Defendant admits it never paid premium wages for missed 3rd rest breaks to any employees during the class period**. (Guebara 72:16-20; Ex. 44 p. 25:5-29:21 [never paid rest break wages in response to Special Interrogs. Set Two, Nos. 76-81; Ex. 45 pp. 5:20-21, 6:4-5, 11:14-15, 13:26-27, 15:4-5, 16:10-11 [never paid 3rd rest break wages in response to Form Interrogs. General, Set Two, No. 17.1 for RFA Nos. 6, 7, 19, 22, 25, 28 and 31].).

F. First Meal Breaks

Defendant admits it consistently failed to record 1st meal breaks for at least half of the class members (Standley 29:19-25, 30:23-31:7 [half the employees do not record meal breaks]) and Defendant automatically deducted half an hour from the employees' work time. California law holds that if an employer fails to record a meal period as required by law "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Brinker,* at 1053 [concur. opn. of Werdegar, J.]; *Safeway,* at 1159-1160.) Based on this presumption and in combination with the payroll records demonstrating missed meal periods, "the record shows facts necessary to establish liability are capable of common proof." (*Safeway,* at 1160.)

G. The Wage Statement Theory Of Recovery: Defendant's Wage Statements Are Inaccurate Based On Derivative Claims

During the class period, all hourly employees were paid on a biweekly basis and employees have been provided with wage statements containing the same information during the class period, and all employees' paystubs are identical. (Standley 49:20-23, 93:15-22.) Based on the foregoing failure to pay proper wages for all hours worked and missed meal and rest breaks, wage statements failed to include accurate statements of gross wages earned, total hours worked, net wages earned, and hourly rates with corresponding number of hours worked at each rate.

H. Defendant's Policies and Procedures Regarding Payment of Final Wages

Based on the foregoing, Pacifica has failed to pay wages to Plaintiff and class members for "rounded" and unpaid hours (at applicable minimum wage), auto deducted time, and for unpaid meal and rest premiums. Defendant admits the same policies and procedure for payment of final wages applies to all. (Standley 93:23-94:6.)

I. Defendant's Admits Its Policies Apply To More Than 600 Current Employees And At Least 1,013 Class Members Over The Class Period

As of May 2016, Defendant has 608 current non-exempt employees and 405 former employees (Ex. 46 p. 2:25-4:6 [Def.'s responses to Spec. Interrogs. No. 1 stating Pacifica has 608 current employees and 405 former employees]; see Standley 29:2-9.) During the class period, the non-exempt employees have been subject to the same policies and procedures and have received the same employee handbook which they are expected to follow. (Standley 18:23-19:11, 80:3-17, 48:3-6; 59:1-4, 44:13-19; Guebara 19:19-20:6, 25:3-17, 40:2-14, 84:24-85:13)

III. ARGUMENT

A. CLASS CERTIFICATION IS APPROPRIATE WHERE THERE IS AN ASCERTAINABLE CLASS WITH A WELL-DEFINED COMMUNITY OF INTEREST AND PROCEEDING ON A CLASS BASIS IS SUPERIOR TO NUMEROUS INDIVIDUAL SUITS

The California Supreme Court has recognized the class action as "a means to prevent a failure of justice in our judicial system" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 ("*Linder*")) and "an essential tool for the protection ... against exploitative business practices" (*State of Cal. v. Levi Straus & Co.* (1986) 41 Cal. 3d 460, 471). At certification, the court should not focus on merits, but on whether the case meets requirements for class treatment. (*Linder*, at 443.) Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc. § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal. App, 4th 1325, 1332.) Thus, class certification is appropriate where the party moving for class certification shows the following

five elements: (1) the proposed class is numerous yet ascertainable; (2) common issues of law and fact predominate; (3) the claims of the proposed class representatives are typical of the class; (4) The proposed class representatives will adequately represent the class; and, (5) the class action is the superior means to resolve the litigation. This case soundly meets each of these requirements.

Liability is *exclusively* a post-certification determination. The focus during certification is limited to whether or not there is a systematic, class wide practice, not whether there is liability following from such a practice. (*Ghazaryan v. Diva Limousine, LTD.* (2008) 169 Cal.App.4th 1524, 1531.) Class certification is "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious." (*Linder*, at 439.) Although a class member's precise amount of damages may ultimately vary, individual variations are not a bar to certification. (*Vasquez v. Super. Ct.* (1971) 4 Cal. 3d 800, 815 ("*Vasquez*").) "[T]he necessity for class members to individually establish eligibility and damages does not mean individual questions predominate." (*Reyes v. Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1278.)

B. THE NUMEROSITY ELEMENT IS SATISFIED FOR EACH CLASS

The numerosity analysis addresses how many individuals fall within the class definition and whether their joinder is impracticable. (*Hendershot v. Ready to Roll Transp., Inc.* (2014) 228 Cal.App.4th 1213, 1222.) While there is no minimum number of class members (*Hebbard* v. *Colgrove* (1972) 28 Cal.App.3d 1017, 1030), Defendant has stated there are approximately 1,013 class members. (Ex. 46 p. 2:25-4:6 [Interrog. responses stating Pacifica has 608 current employees and 405 former employees]; see Standley 29:2-9.) Thus numerosity is satisfied.

C. THE PROPOSED SUBCLASSES ARE ASCERTAINABLE

A class is "ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Harper v.* 24 *Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977.) A class definition may plead ultimate facts or conclusion of law. (*Hicks v. Kaufman & Broad Home Corp*. (2001) 89 Cal.App.4th 908, 915.) The class will be deemed sufficiently ascertainable if it is feasible to determine whether a given individual is a member of that class. (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 706.) Plaintiff proposes the following objectively precise and clear class definitions for the following subclasses:

i. **Minimum Wage Class:** "All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class who were not compensated for all hours worked."

ii. **Auto Deduct Class:** "All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed

order certifying the class who worked any shift more than 6 hours and were automatically deducted 30 minutes for meal breaks."

iii. **2nd Meal Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a second meal break."

iv. **2nd Meal Waiver Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a second meal break after signing a meal waiver."

v. **3rd Rest Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 10 hours and did not receive a third rest break."

vi. **1st Meal Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 5 hours and did not receive a thirty minute uninterrupted first meal break."]

vii. **Wage Statement Class:** "All current and former hourly employees employed by Defendant at any time between September 29, 2013, and the date the court signs an order certifying a class."

viii. **Final Wage Class:** "All former hourly employees employed by Defendant at any time between September 29, 2010 through the date of a signed order certifying the class who worked more than 10 hours and did not receive a second meal break or third rest break, who worked more than 5 hours and did not receive an uninterrupted thirty minute first meal break, or Defendant failed to pay wages for all hours the employees were working or were under direction and control of Defendant."

Even though it is not necessary to identify all class members, Pacifica can identify class members through its employment records. In fact, Defendant has identified the class members and provided contact information of more than 575 class members as part of the *Belaire* notice process. (Lavi Decl. ¶3.) In addition, Defendant can use its payroll records to determine which employees' hours were rounded and which employees worked more than 5 hours, 6 hours, or 10 hours and can identify which employees signed waivers. Accordingly, the ascertainable element exists here.

D. THE TYPICALITY ELEMENT IS SATISFIED IN THE PENDING ACTION

Plaintiff's claims are typical of the proposed classes. Representative plaintiffs need not have all claims or identical interests with the class or suffer all of the same damages as every class member, they need only have claims that are "typical of the class" which arise from the same practice or course of conduct for claims of other class members and be based on the same legal theories. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47.)

Plaintiff's interest is identical to the other class members since Defendant's PMK testified that all of the policies described above applied to **all of Defendant's hourly employees**, including Plaintiff. (Standley 18:23-19:11, 80:3-17, 48:3-6; 59:1-4, 44:13-19; Guebara 19:19-20:6, 25:3-17, 40:2-14, 84:24-85:13.) Plaintiff, like the Minimum Wage Class, was not paid for all worked hours.

Plaintiff, like the Auto Deduct Class, was auto-deducted 30 minutes per day once she worked more than 6 hours. Plaintiff, like the 2nd Meal Class, worked more than 10 hours and did not receive an opportunity to take a 2nd meal break or a premium wage for 2nd meal breaks. Plaintiff, like the 3rd Rest Class, worked more than 10 hours and never received an opportunity to take a 3rd rest break or premium wages for missed 3rd rest breaks. Plaintiff, like the Wage Statement Class, received inaccurate wage statements which failed to accurately reflect wages and hours worked. Plaintiff, like the Final Wage Class, was not compensated for all of her owed wages at the time her employment ended with the Defendant. Thus, Plaintiff is typical member of the classes she seeks to represent.

E. PLAINTIFF AND THE PROPOSED SUBCLASSES SHARE A COMMUNITY OF INTEREST

The community of interest requirement embodies three factors: (l) predominant common questions of law **or** fact; (2) a class representative with claims or defenses typical of the class; and (3) a class representative and counsel who can adequately represent the class. (Code Civ. Proc. § 382.) It is unnecessary that all questions be common to the class, only that some such questions predominate. (*Vasquez,* at 809.) The Court considers "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. (*Sav-On,* at 327.) Here, common questions of fact and law predominate for each subclass and claim and Plaintiff shares common questions of fact or law with other class members.

1. Defendants' Policies And Procedures Raise Common Questions Of Fact

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Brinker,* at 1021.) "The answer hinges on '*whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.*'" (*Id*. [quoting *Sav-On,* at 327].) Class member claims need not be identical or even uniform and there is no requirement that class claims be resolvable without individualized adjudication. (*Sav-On,* at 334; *Brinker,* at 1022; see also 2 Newberg on Class Actions §4:23 (4th Ed.).) Instead, "[p]redominance is a comparative concept" and "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions - *not* between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceedings whatsoever." (*Sav-On,* at 334, 339 fn. 10.) Here, common issues predominate.

2. Common Issues Predominate On The Minimum Wage Class

a. Common issues predominate on the bases of Pacifica's deduction of time before and after the shift by "rounding"

Common issues of fact predominate based on the PMKs' binding admissions. Defendant admits time card reports reflect accurate work time verified by supervisors and that it "rounded" employees' worked hours during the class period. But Defendant's rounding parameters were per se illegal. Defendant set different parameters for outside and inside rounding depending on whether the employee is clocking in or clocking out. Defendant had a 7 minute grace period for outside the shift while it had a zero minute grace period for inside the shift. It also has a rounding of one minute for any time recorded inside the shift, while it rounds 15 minutes for time recorded outside the shift.

The rounding is not neutral since Defendant admits it did not have a grace period at the beginning of the shift, did not provide employees with a grace period to clock in, **and the employees would be considered tardy if they clocked in any time after start of the shift leading to discipline and possible termination.** (Standley 84:1-86:6; Ex. 6 p. PACIFICA 90-91, 93 [Attendance and Tardiness policies].) This ensured the class could not obtain any "benefit" from rounding by clocking in later than their shift start time.

Defendant's rounding also creates a common issue of law. To be lawful, rounding must work in both directions and must "not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked." (29 C.F.R. §785.48(b); *See's Candy Shops, Inc. v. Sup. Ct.* (2012) 210 Cal.App.4th 889, 900-902, 907-908.) Thus, if rounding operates in only one direction or otherwise favors the employer by consistently and disproportionately rounding time against the employee, the rounding policy is unlawful. (*Id.*) Rounding applies to the entire class as a common practice. Thus, whether the practice systematically undercompensates is a common question of law and analysis of payroll data can establish by common proof that, on balance, Defendant's rounding policy during the time it was in place consistently short-changed employees.

b. Common issues predominate on the bases of Pacifica's policy to auto-deduct time for meal periods

Regardless of whether an employee has taken a meal or whether an employee received less than a 30 minute meal break, Defendant *automatically* deducts 30 minutes of pay from the employees' compensable hours if they work more than six hours. (Standley 26:20-27:13; 33:25-34:5; 62:17-63:17; 65:6-14; 68:22-69:1; 92:1-19; 63:23-64:7; 89:9-16; Ex. 8 p. PACIFICA 85 [auto-deduct rule]; Frencher Depo. 62:20-22.) In addition, Defendant did not record meal times for over half the employees and admits it does not know the duration of meal breaks or whether they were taken when employees do not clock out. (Standley 29:19-25, 30:23-31:7, 89:4-8). When an

employer fails to record meal periods as required by a wage order, a presumption arises that the employee did not receive a meal break for which she was relieved of her duties. (*Safeway*, at 1159-1160.) Wage Order 5 required Pacifica to record meal periods. (Wage Order 5, subd. 7(A)(3).) Accordingly, a rebuttable presumption arises that employees did not receive legally compliant meals Pacifica's auto-deduction creates a common issue of fact and law common to the class.

In *Jaimez vs. DAIOHS USA, Inc.*, certification was proper in circumstances identical to this case due to auto-deduction of meal periods. (*Jaimez*, at 1304.) The court held Defendant's "policy and practice before 2006 of deducting 30 minutes per shift for each RSR, regardless of whether the RSR took a meal break, raises common legal *and* factual issues." (*Id.* [original italics].) Similarly here, since September 2010 to present, Defendant automatically deducted 30 minutes a day from the employees' daily worked hours for meal breaks when employees worked more than 6 hours and did not clock out for meal breaks. This creates a common issue of fact and law as held in *Jaimez*.

Similarly in *Faulkinbury*, the court found defendant's policy, of automatically requiring on duty meal periods and agreements regardless of the working conditions, was a uniform policy that could be determined on a class basis. (*Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 232-233.) Analogous to *Faulkinbury*, Pacifica automatically deducted the 30 minute meal period regardless of whether it was taken or a shortened meal was taken. This claim alleges a uniform policy of auto-deduction consistently applied to a group of employees.

3. Common issues predominate on the Second Meal Break Class

This issue is clearly amenable for class treatment as factual and legal issues predominate. An employer must provide second meal breaks to employees when they work over 10 hours in a workday. (Wage Order No. 5 subd. 11(A).) Pacifica's admissions create a common issue of fact and law that render this class ideally suited for class treatment. Pacifica clearly demonstrates it lacked a policy to provide second meal periods. Pacifica admits it knew employees were entitled to a 2nd meal break when employees worked more than 10 hours and knew the employee handbook did not inform the employees of their right to a 2nd meal break, but did nothing to fix it or to inform the employees of their right to 2nd meal breaks. (Guebara 107:17-109:6.) Defendant admits charge nurses had to schedule meal breaks. Yet, it never trained charge nurses how to schedule 2nd meal breaks and never informed them employees are entitled to 2nd meal breaks. (Guebara 32:21-23, 33:18-21, 34:1-4, 87:6-88:4.) Defendant admits it has not taken any steps since September 2010 to inform employees of meal break policies or to ensure charge nurses and supervisors were properly scheduling meal breaks. (Guebara 37:23-38:2, 88:5-25, 97:13-16, 97:21-98:2, 99:2-5, 107:7-10.)

Class members state Defendant never informed them of an entitlement to a 2nd meal break when working more than 10 hours and Defendant never provided them with an opportunity to take a 2nd meal break. (Exs. 9-28, 39-40 [Decls. of class]; Exs. 29-38 [Questionnaire resps. by class].)

In addition, Defendant admits all meal periods are unpaid time and if an employee ever took a 2nd meal break, Defendant would need to deduct the 30 minutes from the employee's daily hours to account for the second meal period. (Standley 27:14-15, 97:14-98:8.) Defendant admits that no employee has ever been deducted pay to account for a 2nd meal break. (*Id.*)

Defendant further admits it did not have any policies or procedures in place to pay premium wages for missed 2nd meal breaks and admits Defendant has never paid any premium wages for missed 2nd meal breaks to any employees, including Plaintiff, during the class period. (Guebara 66:3-7; 74:6-20; Standley 92:24-93:1; Ex. 44 p. 20:19-25:2; Ex. 45 pp. 11:2-3, 12:8-9, 13:14-15, 14:20-21, 15:26-27, 17:3-5; Ex. 45 p. 4:24-25, 5:8-9, 6:16-17, 7:1-2.) Defendant's lack of a policy to provide wages when employees missed meal periods by itself renders a class action proper.

In *Safeway, Inc. v. Sup. Ct.,* lack of meal break records or a procedure to provide employees with premium wages for missed meal breaks created predominant issues of law and fact suitable for class treatment. (*Safeway,* at 1158-1162.) Just as in *Safeway,* Defendant lacked policies to pay premium wages for missed 2nd meal breaks, it never paid premium wages for missed 2nd meal breaks, and it did not inform employees of entitlement to 2nd meal breaks when working more than 10 hours. Per *Safeway,* Defendant's lack of a policy to pay premium break wages, itself, creates common issues of fact and law amenable to class treatment. In addition, as to the Second Meal Waiver Class, Defendant cannot argue employees waived their 2nd meal breaks since Wage Order 5 requires waivers had to be in **writing and signed by Defendant** and none are signed by the Defendant. Regardless, validity of waivers raises common issues of fact and law for the subclass.

4. Common issues predominate on the 3rd Rest Break Class

California law requires an employer to provide third rest breaks to employees who work over 10 hours in a day. (Wage Order 5, 12(A); *Brinker*, at 1039-1041.) Defendant wrongfully understood that under California law employees were only entitled to a rest break for every four hours of work. (Guebara 106:2-13; 20:3-21:12, 40:15-41:2; Ex. 4 p. PACIFICA 6.) Defendant admits that based on its rest break policy, non-exempt employees were only entitled to a 3rd rest break **after working more than 12 hours**. (Guebara 21:9-16, 40:15-41:2, 72:25-73:3, 85:14-86:5.) Accordingly, at a minimum, Defendant's policies uniformly failed to provide rest periods to employees who worked more than 10 hours up to 12 hours, because Defendant's policy did not

provide for a 3rd rest period. (See *Brinker,* at 1033-1034 [policy of rest break every 4 hours did not provide for a 2nd rest break for employees working longer than 6 hours up to 8 hours].)

Moreover, class members have submitted declarations and questionnaire responses showing Defendant never informed them they were entitled to a 3rd rest breaks when they worked more than 10 hours in a day and never provided them an opportunity to take a 3rd rest break when they worked more than 10 hours. (Exs. 9-28, 39-40 [Decls. of class]; Exs. 29-38 [Questionnaire responses]; Frencher Depo. 58:3-18.) Accordingly, Plaintiff has submitted substantial evidence to demonstrate Defendant failed to provide a 3rd rest break to employees who worked more than 10 hours.

Furthermore, Defendant admits it knew the employee handbook did not inform employees they were entitled to a 3rd rest break when they worked more than 10 hours, yet it did nothing to fix it or inform the employees otherwise. (Guebara 109:7-10). Since September 2010, Defendant has not taken any steps to ensure charge nurses, directors, supervisors, manager or leads are properly scheduling the employees for their 3rd rest breaks. (Guebara 97:17-20, 98:15-25, 107:11-14.)

Defendant further admits it did not have any policies or procedures in place for payment of premium wages for missed 3rd rest breaks and never paid any premium wages for missed 3rd rest breaks. (Guebara 66:8-12, 73:22-74:5, 72:16-20; Ex. 44 p. 25:5-29:21; Ex. 45 pp. 5:20-21, 6:4-5, 11:14-15, 13:26-27, 15:4-5, 16:10-11.) In *Safeway, Inc. v. Superior Court,* the court of appeal held that a company's absence of a procedure to provide employees with premium wages for missed meal or rest breaks creates predominant issues of law and fact suitable for class treatment. (*Safeway,* at 1158-1162.) Accordingly, per *Safeway,* Defendant's lack of a policy to pay premium break wages, itself, creates common issues of fact and law amenable to class treatment.

5. Common issues predominate on the First Meal Class

Defendant admits it failed to record meal breaks for at least half of the class and automatically deducted half an hour from employees' work time. "If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement… An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief." (*Brinker,* at 1053; *Safeway,* at 1159-1160.) Based on this presumption and the payroll records demonstrating missed meal periods, "the record shows facts necessary to establish liability are capable of common proof." (*Safeway,* at 1160.)

In *Jaimez vs. DAIOHS USA, Inc.*, the court of appeal found certification was proper in circumstances identical to this case due to auto deduction of meal periods. (*Jaimez,* at 1304.) The court held Defendant's "policy and practice before 2006 of deducting 30 minutes per shift for each RSR, regardless of whether the RSR took a meal break, raises common legal *and* factual issues." (*Id.* [original italics].) Similarly, in the pending action, since September 2010 to present, Defendant has automatically deducted 30 minutes a day from the employees' daily worked hours for meal breaks when employees worked more than 6 hours and did not clock out for meal breaks.

6. Common issues predominate on the Wage Statement Class

An employer must provide employees with wage statements accurately reflecting, *inter alia*, gross and net "wages earned," applicable hourly rates, and corresponding number of hours worked. (Lab. Code § 226, subd. (a).) "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or [statutory penalties]." (*Id.*, subd. (e).) An employee is deemed to suffer injury if the employee cannot promptly and easily determine any requisite information from the wage statement alone. (*Id.*, subd. (e)(2).) In addition, the meaning of "suffering injury" includes difficulty and expense involved in reconstructing pay records, including filing a lawsuit. (*Jaimez,* at 1305-1307.) Failure to provide accurate information makes it difficult for an employee to determine exactly how they are being underpaid. Whereas, accurately stating the amount hours worked and showing clear underpayment eliminates that injury. Whether the "injury" and "knowing and intention" requirements are met are additional common questions. (*Jaimez,* at 1305-1307.) Pacifica admits it provided employees with wage statements containing the same information. (Standley 49:20-23, 93:15-22). Because the inaccuracy of the wage statements is based on the aforementioned certifiable conduct, this claim is similarly predominated by common issues of fact and law as explained above.

7. Common issues predominate on the Final Wages Class

Labor Code sections 201 and 202 require an employer to provide all unpaid wages at the time of termination and within 72 hours of resignation. Defendant admits during the class period the same policies and procedures for payment of final wages applied to all class members. (Standley 93:23-94:6). Thus, due to the derivative nature and to the extent that of the predicate claims are certified, so too should Plaintiff's Labor Code section 201 and 202 claims.

F. CLASS TREATMENT IS SUPERIOR TO INDIVIDUAL ADJUDICATIONS

Before certifying a class, the court must determine whether substantial benefits will result from class litigation–*i.e.*, whether class treatment is superior to individual adjudications. (*Daar,* 67 Cal.2d at 713.) Substantial benefits are present and a class action is superior to individual litigation

where certification allows many plaintiffs' claims to be adjudicated in a single proceeding, thus saving time, conserving judicial resources, and limiting duplication of effort. (*Id*. at 714-15.) "[T]here are at least three different benefits from class treatment: redress for numerous aggrieved parties who could not otherwise maintain individual actions; the avoidance of the possibility of multiple actions; and the disgorging of the wrongdoer's unjust enrichment." (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1229.) All three benefits are achieved by certifying a class here. First, certifying this case enables the class to seek redress under California's remedial wage and hour statutes for rightfully earned wages. Individual suits are unlikely because of the disproportionate expense of such litigation in relation to the small value of individual claims and for current employees, fear of retaliation is always a real-life, practical obstacle to vindicating wage and hour rights absent class treatment. (*Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443, 460 [overruled on other grounds].) Second, a class trial avoids the possibility of multiple actions challenging the same conduct, thus saving time and resources for all concerned (including the Court). (*Sav-On*, at 340.) Third, certification would allow Plaintiff, on behalf of the class, to obtain their rightful pay, additional damages and penalties for Defendant's wrongful conduct. Again, there is hardly stronger public policy in California than the right of an individual employee to be paid correctly. (*Id.*)

G. PLAINTIFF AND COUNSEL ARE ADEQUATE REPRESENTATIVES

Certification requires adequacy of the proposed class representative and class counsel. The class representative "assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain." (*La Sala v. American Sav.* & *Loan Assn.* (1971) 5 Cal.3d 864, 871.) Plaintiff's claims are coextensive with the interests of the class. Plaintiff has been injured by the same company-wide practices to which the other class members are subject, and seek the same relief as her fellow class members. Plaintiff has already demonstrated her ability to advocate for the interests of the class members in this case by initiating this litigation, attending her deposition, participating in discovery on behalf of herself and the putative class members as well as attending a full day mediation. (Frencher ¶5; Lavi Decl. ¶6.)

Plaintiff's counsel also meets the adequacy threshold. Plaintiff's counsel has certified and/or settled numerous wage-and-hour class actions, including appealing class action issues on behalf of thousands of class members. (Lavi Decl. ¶¶4-6.) Plaintiff's counsel has repeatedly been appointed class counsel in both California State and Federal courts. (*Id.*) Counsel's wage-and-hour class action expertise establishes they are qualified to represent the interests of this class, as they have thus far, and should be appointed class counsel. (*Id.*)

H. TRIAL OF THIS CASE IS EASILY MANAGED[3]

Courts regularly certify class actions to resolve wage-and-hour claims. (*Bufil,* 162 Cal.App.4th at 1208.) Given the size of this class and susceptibility of all causes of action being established by statistical proof; class treatment is superior to individual case-by-case resolution. Liability is susceptible to common proof based largely on the binding admissions of Defendant's PMK and analysis of payroll records. On the minimum wage and auto deduction, simple analysis of payroll records will determine whether Defendant illegally shaved time from employees' daily hours and the amount of improperly deducted time. If necessary, whether Defendant's rounding failed to pay employees' wages over time can be used solely from analysis of payroll records. Similarly, for the Second Meal Break and Third Rest Break Classes, objective payroll records will determine whether class members worked in excess of 10 hours and employees are simply entitled to an hour of wage each day they did not receive either one. As for the meal and rest break claims, damages are easily determined as recently recognized in *Safeway v. Superior Court*, 238 Cal.App.4th 1138, the timecards which establish "that a significant number of employees accrued unpaid meal break premium wages is capable of common proof, in view of [employer's] time punch data and the presumption identified by Justice Werdegar." "The time punch data and records identified by [plaintiff] are capable of raising a rebuttable presumption that a significant portion of the missed, shortened and delayed meal breaks reflected meal break violations under section 226.7."

The use of statistical methods to augment the efficiency of class treatment is permitted and even required where class treatment has singular advantages. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 755 [there is "little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case."]; *Williams v. Super. Ct.*, 221 Cal.App.4th at 1369 ["California law permits statistical sampling to determine damages."]; *see also Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 33 [reaffirming openness "to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology"]; *Sav-On*, at 333 [approving statistical sampling to determine centralized, systematic practices].)

IV. CONCLUSION

For the reasons set forth above and in the trial plan filed and served with this motion, Plaintiff respectfully requests that the Court grant the Motion for Class Certification as to each of the classes, appoint Plaintiff as class representative, and appoint Joseph Lavi and Vincent Granberry as class counsel.

[3] See also Plaintiff's Proposed Trial Plan

Dated: September 21, 2016

Respectfully submitted,
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KYLE FRENCHER
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