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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

KYLE FRENCHER, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED. PLAINTIFF, V. PACIFICA OF THE VALLEY CORPORATION DBA PACIFICA HOSPITAL OF THE VALLEY; AND DOES 1 TO 100, INCLUSIVE DEFENDANT.	CASE NO: BC559056 **DEFENDANT PACIFICA OF THE VALLEY CORPORATION DBA PACIFICA HOSPITAL OF THE VALLEY'S OPPOSITION TO PLAINTIFF KYLE FRENCHER'S MOTION FOR CLASS CERTIFICATION** *Concurrently filed with the Declarations of Archana Acharya and Patti Guevara* DATE: JANUARY 13, 2017 TIME: 9:00 A.M. DEPT.: 322 JUDGE: HON. ELIHU M. BERLE CASE FILED: SEPTEMBER 29, 2014

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Defendant Pacifica Hospital of the Valley ("Pacifica" or the "Hospital") respectfully submits the following Opposition to Plaintiff's Motion for Class Certification (the "Motion"):

I. INTRODUCTION

Plaintiff's primary class theories are that: (1) Pacifica uses a biased, non-neutral time rounding system that causes employees to not be paid for all hours worked and their wage to fall below minimum wage; and (2) Pacifica does not provide hourly employees the opportunity to take uninterrupted meal breaks (both first and second) or third paid rest breaks if they work a shift of 10 or more hours. Plaintiff seeks to certify a sweeping class of all hourly employees within the entire Hospital, covering employees across over thirty decentralized departments. However, her superficial, simplistic assertions fall well short of the substantial evidence needed to show common issues predominate over individual ones, the classes are ascertainable, and an effective trial plan to adjudicate the claims on a class basis is possible.

Plaintiff must put forward substantial evidence of collective proof to establish her claims, and her Motion fails to do so. Furthermore, she intentionally omits significant, relevant facts (presumably to mislead the Court about how things work at the Hospital) that show collective proof is not feasible. For instance, Plaintiff hides the fact that the class of employees she seeks to certify is represented by two entrenched, aggressive unions with two collective bargaining agreements governing employment terms, including terms Plaintiff challenges herein. The Unions have a long history of vigorously protecting their members' rights and routinely addressing matters of concern with Hospital management – yet they have never found any issue with any of the facts now underlying Plaintiff's theories. To the contrary, there is a long-standing, agreed-upon practice between the Unions and Pacifica affording the Hospital's managers and hourly employees flexibility to operate decentralized departments, including flexibility regarding clocking in and out for meal breaks or using an auto-deduct option, when and for how long to take meal breaks and rest breaks, and to waive the opportunity to take such breaks, or work through them and receive premium pay. Plaintiff chose not to disclose how such flexibility allows members of the purported class to take meal breaks of 45 minutes or more and extended paid rest breaks, whenever they want, and that each of the Hospital's thirty-something departments handles breaks in its own way. Plaintiff also did not disclose that she never filed a grievance and that neither Union has ever grieved any of the claims so purportedly widespread and applicable to every hourly employee.

Instead, Plaintiff relies on only superficial similarities to argue common issues predominate, pointing to written policies supposedly applicable to all employees in some instances (such as rounding, tardiness, time reporting and auto-deduct), or the absence of written policies in others (such as second meal and third rest breaks). This overly simplistic focus ignores the individual discretion department managers, charge nurses/shift managers, and employees have and exercise regarding break schedules and how departments are managed. It further ignores that Pacifica, as endorsed by the Unions, operates in a decentralized manner, and thus the policies Plaintiff superficially hangs her case upon are not uniform to the class. Rather, practices between departments are far from it. Pacifica presents numerous declarations stating that, depending on the manager and charge nurse/shift manager: (1) some employees clock-in and out for meal breaks; (2) others elect to have 30 minute breaks auto-deducted; (3) some have 30 minute unpaid meal breaks auto-deducted but routinely take 45 minute or more breaks (resulting in being paid for part of their breaks); (4) some employees are permitted to take three, four or more breaks during a shift; (5) others may and do take substantially extended rest breaks (up to an hour or so) rather than a multiple short ones; (6) some employees are permitted to take extended paid rest breaks; and (7) some waive their opportunity to take meal and/or rest break. This huge level of disparity yields only one conclusion: the critical item for each of Plaintiff's claims – namely liability – cannot be feasibly determined on a class basis, but instead requires case-by-case assessment due to decentralized management used by Pacifica and desired and policed by the Unions (because paid breaks benefit the membership). Employees also do not clock-in or out for rest breaks or first unpaid meal breaks if their meal breaks are auto-ducted, and thus there are no records showing when rest breaks may have been missed or combined for an extended rest break, or meal breaks interrupted. This lack of records – again, a function of practices agreed upon by employees and their Unions – also illustrates that common issues do not predominate, mini-trials are required to determine liability, and the class is not ascertainable.

Plaintiff's declarations suffer the same fate as the Motion's arguments – too superficial and therefore unpersuasive. First, they only make representations pertaining to missed second meal breaks and third rest breaks – not any of the other claims. Second, several declarations are from individuals who worked only eight-hour shifts, meaning they were not entitled to second meal breaks or third rest breaks even as they claimed not to receive them. Third, Plaintiff's claim that no employees had the

opportunity to take third rest break is directly contradicted by witness declarations providing that many were permitted to take multiple paid breaks whenever they wanted and often did – facts confirmed by Plaintiff's testimony that she could take paid rest breaks when she wanted without alerting her charge nurse and that she never complained to Pacifica or the Union about interrupted meal breaks or missed meal or rest breaks. Her claim that no employees were notified that they could take a second meal break is also belied by the fact that she admits a significant portion of the purported class were asked if they would like to waive their second meal break, and several of Plaintiff's declarants executed meal waivers.

Plaintiff's rounding claim is similarly superficial and flawed. However, perhaps more disturbing is that Plaintiff's own records – which she obtained in discovery – refute everything about that claim. Her, and many others', records prove Pacifica's rounding policy is neutral and not illegal as alleged.

Finally, Plaintiff has failed to establish by substantial evidence a trial plan to show a collective, rather than individual, way to identify which employees (if any) whose meal breaks were auto-deducted actually had breaks interrupted or missed, and which employees (if any) who worked shifts over 10 hours were actually denied the opportunity to take a second meal break and third rest break, taking into account Pacifica's decentralized management, the different practices within each department, and the absence of documents showing when and for how long employees take meal and rest breaks. The ultimate question here is whether hourly employees were provided, on a systematic, uniform basis, the opportunity to take meal breaks and third rest breaks (and/or waived them because they were provided equivalent benefits such as frequent extended breaks, or otherwise) – not Plaintiff's assertions based on superficial policy generalities or blanket assumptions that every meal break and every third rest break was denied. In short, the Court should deny class certification as to all of Plaintiff's proposed claims.

II. STATEMENT OF RELEVANT FACTS

Pacifica is located in Sun Valley, and offers a full range of inpatient and outpatient services, including 24-hour Emergency Care, Surgery, Behavioral Health Services and Maternity. [Declaration of Patti Guevara ("Guevara Decl."), ¶ 3.] Employees work in any one of its 30+ departments. [*Id.*]

A. Union Representation Has Led To Decentralization Of Hospital Operations

For many years, and at all times relevant, the vast majority of Pacifica's non-exempt employees have been represented by either the Service Employees International Union United Healthcare Workers

West ("UHW") or the SEIU Local 121RN ("121RN") (the "Union" or "Unions"). [Guevara Decl., ¶ 1.] All non-exempt Hospital employees, other than a small amount of hourly administrative employees, complete paperwork at the start of their employment with Pacifica to become a Union member and authorize a payroll deduction for Union dues. [Deposition of Plaintiff ("Plaintiff's Depo."), 42:11-14.[1]]

Approximately every three years, Pacifica and the Unions negotiate collective bargaining agreements ("CBAs"), which – in addition to Hospital policies – govern employment terms. [Guevara Decl., ¶ 2.] Over the history of this Union-Hospital relationship, both sides have worked out a manner of operating in which the written policies and CBAs are almost deliberately vague and lack specific detail. [*Id*.] Additionally, because of longstanding union representation and a pattern of practice, per preemptive federal law, Pacifica legally cannot change any practice without involving the unions and collective bargaining.[2] [Deposition of Patti Guevara ("Guevara Depo."), 78:12-79:2; Guevara Decl., ¶ 2; Acharya Decl., ¶ 21, Ex. 20.] The Hospital's handbook and written policies are therefore only a "guideline" for employees; and often what is written as a policy "does not take place" in practice, and rather Union/Pacifica agreed-upon practices do. [Guevara depo., 22:24-25, 71:24-72:1.] While one might think there is an expectation that employees follow policy, the reality is that "it doesn't always happen … Not with our unions. [Union representation and the] CBAs pretty much override any policies that the hospital has." [Deposition of Susan Standley ("Standley Depo."), 48:12-22.] For example, even if a policy, such as attendance, states that employees who violate the policy receive a written warning leading to termination, such actions "rarely" occur. [Standley Depo., 25:10-21.]

Pacifica and Union representatives, including several stewards who work as supervisors and charge nurses, meet monthly to discuss concerns or issues affecting Union members. [Guevara Decl., ¶ 2; Acharya Decl., ¶¶ 14-24, Exs. 13-23.] In fact, Plaintiff's charge nurse, Amina Mohammed, was a steward. [Acharya Decl., ¶ 5, Ex. 4.] These stewards are part of bargaining and are very involved with the Union; "they know the contract" and "they know … how everyone's meal and rest periods are done." [Guevara Depo., 33:3-10.] The flexible implementation of policies at Pacifica extends to Union

[1] All deposition excerpts are attached to the Declaration of Archana Acharya ("Acharya Decl.").
[2] The National Labor Relations Act imposes a "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." 29 U.S.C. § 158(d).

stewards, such that Pacifica has "empowered the charge nurses [and supervisors]" at the department level "to arrange for employees to schedule their breaks and meal periods." [Guevara Depo., 32:16-20.]

This decentralized environment has fostered a loose, flexible atmosphere; indeed, even as she used pejorative and "colorful" language, Plaintiff conceded the existence of such an atmosphere. [Plaintiff's Depo., 100:8-11 ("I came from Kaiser, who is a high-paying hospital, who has their shit together, basically. And I moved to Pacifica, who seemed like a bunch of loo-loos running around with their heads cut off").] Moreover, because of the heavily involved Unions, any issue is immediately reported to the stewards and quickly addressed by Pacifica in the hopes of avoiding a formal grievance. [Guevara Decl., ¶ 2.] Pacifica thus allows each department and the Unions to oversee meal and rest breaks, and the understood reality is if any employee did not receive a meal or rest period to which he or she was entitled, the Union would have contacted Pacifica to rectify the issue. [Guevara Depo., 37:16-38:17; 60:4-12.] However, Pacifica has never received a grievance regarding meal or rest periods, and has never received a complaint for a missed rest period that did not result in corresponding premium pay in the next paycheck. [Guevara Depo., 72:16-20; Guevara Decl., ¶ 2.] The Unions have also never filed a grievance over time rounding practices, a fact addressed in more detail *infra*. [Guevara Decl., ¶ 2.]

B. The Individualized Nature Of Each Department At Pacifica

Pacifica has over 30 different departments, including medical departments where nurses work; dietary departments that include cafeteria and kitchen staff; the housekeeping department; and the administrative department. [Guevara Decl., ¶ 3.] Each department operates independently, such that scheduling issues that might affect an employee on any given shift in one department would not affect another working a different shift in another department. [*Id.*] Each department has a copy of the general Hospital policies and separate policies that specifically pertain to that department. [Guevara Depo., 24:4-6.] Because of varying nature of each department, supervisors and charge nurses in each department have autonomy to decide when and how to implement any written policies, especially those regarding meal and rest breaks. [Guevara Decl., ¶ 3; Acharya Decl., ¶¶ 5, 14-24, Exs. 4, 13-23.]

Moreover, the scheduling of meal and rest periods is not only different for each department, but different *for each shift within each department* because scheduling is up to the Charge Nurse, lead, or supervisor overseeing each shift within each department. [Guevara Depo., 29:9-11, 30:22-31:3, 80:9-13,

82:11-23; Acharya Decl., ¶¶ 5, 14-24, Exs. 4, 13-23.] While a few supervisors are regimented, most "are more lax than others," such that the vast majority of employees independently decide when to take their breaks, the frequency of breaks, and the duration of their breaks. [Guevara Depo., 31:10-14, 93:4-12; Standley Depo., 23:13-14; Acharya Decl., ¶¶ 5-35; Exs. 4-34.] For example, Plaintiff admits that when she worked in the Med-Surg department under Ms. Mohammed, each nurse took a meal or rest break whenever she wanted, whereas when Plaintiff briefly worked in the adult neurological department, the charge nurse specifically scheduled each nurse's lunch breaks but permitted the nurses to take rest breaks at their personal convenience. [Plaintiff's Depo., 64:8-21, 65:18-20, 69:11-70:5.]

Because of this flexible environment – which her primary charge nurse followed – Plaintiff was responsible for taking the meal and rest breaks provided to her and thus has no knowledge of how or when any of the nurses in her shift, let alone other employees, took their breaks. [Plaintiff's Depo., 65:2-8.] She has no knowledge of whether any nurses in her shift took multiple lunch or rest breaks on any given day, and because all the nurses in her shift had only one 30-minute meal period automatically deducted from their 12-hour shift, there is no uniform way to verify for each shift who took a break, how many breaks were taken, or how long any break was. [Plaintiff's Depo., 66:1-3, 67:2-7.]

1. The Reality Of First Meal Periods And Pacifica's Auto-Deduct Practice

Non-exempt employees at Pacifica work either an 8.5 hour shift or a 12.5 hour shift. [Guevara Decl., ¶ 4.] At all times relevant, Pacifica automatically deducted only 30 minutes from non-exempt employees' shift, regardless of whether any employee worked an 8.5-hour shift or a 12.5-hour shift; employees were paid for all other breaks as long as they did not clock out. [*Id.*] However, employees also have the option to clock out and in for breaks, which overrides the automatic deduction. [Standley Depo., 34:10-17.] This practice varies not only by department, but more specifically by individual employee – in most departments, there were and are employees who clock out and in for meal periods, whereas others prefer to have time automatically deducted for convenience and their supervisors let them do so. [Acharya Decl., ¶¶ 5-35; Exs. 4-34.] If any employee clocked out for a meal period less than 30 minutes, Pacifica would add one hour of premium pay. [Guevara Decl., ¶ 4.] Therefore, if any employee believed the auto-deduct practice did not entitle him to a lawful meal period, he could (in addition to the measures set forth below) clock out and in and Pacifica would automatically compensate

the employee with premium pay for the missed meal period. [*Id*.] The reality however is that because Pacifica's practice is to automatically deduct only 30 minutes from the employees' shifts unless there is an override, and because Pacifica does not police breaks, employees who take a first meal period longer than 30 minutes are paid for the balance of that off-duty time and those who do not waive their second meal period are provided a paid off-duty second meal period. [Standley Depo., 31:7-9.]

Any employee who missed a meal period also can submit a Punch Variance Form, notifying her supervisor who would notify payroll, or directly note on her time sheet that a meal period was missed, and Pacifica would include corresponding amounts of premium pay in the employee's next paycheck. [Acharya Decl., ¶¶ 5, 14, 15, 17-19, 21-23, 25, 29, 39, Exs. 4, 13, 14, 16, 17, 19-22, 24, 28, 38; Guevara Depo., 76:1-11; 83:25-84:6] During the putative class period, Pacifica received approximately 200 such forms and paid premium pay each time – a fact confirming that when employees actually do not take a meal period, they report it and Pacifica complies with the law in response. [Guevara Depo., 73:6-7; Acharya Decl., ¶ 39, Ex. 38.] Pacifica also has paid premiums in response to a supervisor's notification or to an employee's notation on a time card hundreds of times. [Acharya Decl., ¶ 40, Ex. 39.] Because of the ready availability of these mechanisms, which have resulted in Pacifica paying premiums for missed meal periods hundreds of times, plus the Unions' prompt addressing of employee issues, Pacifica practice is that if an employee has not reported a missed lunch or completed a Punch Variance Form, and there is no comment or note from the supervisor or Union steward, it assumes the meal period has been taken and processes the 30-minute auto-deduction. [Standley Depo., 30:1-7, 19-21.]

2. The Reality Of Second Meal Periods And Third Rest Periods

Pacifica acknowledges it does not have written policies for when employees should take second meal periods or third rest periods. This is intentional. As set forth above, through longstanding practice worked out with the Unions, Pacifica does not operate strictly under written policies, and rather does so through employee practice and Union representation. "Employees take multiple rest breaks throughout the day. No one is monitoring how many breaks they take. I have to say employees … basically run the place and are allowed to take as many breaks as they need." [Guevara Depo., 68:7-11.] As supervisors and charge nurses for each shift in each department oversee the schedule for that shift – and generally let employees take their breaks whenever they want – *there is no uniform or consistent approach to meal*

and rest periods, let alone second meal or third rest periods. [Guevara Decl., ¶ 3; Acharya Decl., ¶¶ 5-35, Exs. 4-34.] Moreover, as a result of Union-approved auto-deduct practice, there is no record of how many breaks any employee took during any given shift, or for how long she was on break. [Guevara Decl., ¶ 5; Acharya Decl., ¶¶ 5-35, Exs. 4-34.] Pacifica's only record of individuals who missed a meal or rest period are those who reported it and received premium pay. [Guevara Decl., ¶ 5.] Pacifica also has no record of disciplining an employee for taking too many breaks, again because of the flexibility afforded to departments and the legal inability to unilaterally change practices agreed upon with the Unions. [Guevara Depo., 68:12-15; Acharya Decl., ¶¶ 14-24, Exs. 13-23.] While it may be possible there are individuals who for some reason were denied a meal or rest period and failed to report it, it is also probable – and much more likely – that there are individuals who took advantage and had multiple extended meal and rest periods each shift. [Guevara Decl., ¶ 5; Acharya Decl., ¶¶ 14-24, Exs. 13-23.]

Additionally, meal waiver forms are distributed at time of hire to 12.5-hour shift employees – the only employees entitled to second meal periods. [Guevara Depo., 53:10-17.] No one is required to sign the waiver and many individuals, including Plaintiff, chose not to. [Guevara Depo., 53:10-17; Guevara Decl., ¶ 7.] Even if someone signed a waiver, he or she was not prohibited from taking second meal periods; if they complained about a missed break at any time, "we would have corrected it" and paid that employee an hour of premium pay. [Guevara Depo., 100:11-15.] Because all 12.5-hour shift employees receive this waiver at the time of their hire, they accordingly are made aware that during the course of their employment at Pacifica, they are entitled to second meal periods. [Guevara Depo., 61:4-13.]

Although Plaintiff's proposed class includes all non-exempt employees, a large portion of these individuals only worked 8.5-hour shifts, such that they were not entitled to second meal or third rest periods. [Guevara Decl., ¶ 6; Acharya Decl., ¶¶ 14, 16-19, 21-23, Exs. 13, 15-18, 20-22.] In fact, several questionnaires submitted in support of the Motion – purporting to claim issues with missed second meal and/or third rest periods – were submitted by those who did not work shifts greater than 10 hours and thus could not have "missed" breaks to which they had no entitlement. [Guevara Decl., ¶ 6.]

C. Objective Records Show Pacifica's Rounding Policy Is Neutral

Pacifica rounds time punches to the nearest quarter hour, and such rounding applies neutrally; "seven minutes consistently all the way around." [Standley Depo., 40:10-15.] In other words, if an

employee clocks in seven minutes before the hour then the punch rounds to the hour, and if she clocks in seven minutes after the hour, the punch rounds to the quarter hour. [Standley Depo., 39:13-19.] Plaintiff's own records, as well as those of other employees – including those who submitted declarations on behalf of Plaintiff – prove this to be true. [Acharya Decl., ¶¶ 36-38, Ex. 35-37.]

Additionally, because of the seven-minute grace period with rounding to the nearest quarter hour, "the union will not allow [Pacifica] to discipline anybody for clocking in and out within their seven minute grace period." [Standley Depo., 56:3-5.] Accordingly, even if a policy, like attendance, states that an employee will be disciplined, such actions "rarely" occur in practice. [Standley Depo., 25:10-21.] Rather, because of the grace period, employees can clock in six minutes late, leave seven minutes early, and still be paid for their full shift, which happens often. [Guevara Depo., 79:25-80:8.]

During the PMK deposition on rounding, counsel repeatedly asked about an unidentified screenshot from Pacifica's computers supposedly showing different rounding parameters. The PMK repeatedly testified that she did not understand the screen shot because it was something from Pacifica's IT department. [*See e.g.* Standley Depo., 65:10-14; 66:14-16; 67:6-10; 67:23-68:2.] She also repeatedly testified that from her lengthy experience at Pacifica, she knew that regardless of the screenshot, rounding applied consistently and neutrally at all times. [Standley Depo., 71:9-10.] In fact, when asked whether there were different parameters for the inside and outside of time punches, she directly said, "That's not how my end result works." [Standley Depo., 73:11-15.] Even more surprising is that Plaintiff's counsel had a 2,500+ sampling of employee time records which detail actual punches right next to rounded punches and total hours paid for each shift (showing unequivocally Pacifica's neutral rounding practice). [Acharya Decl., ¶ 36, Ex. 35.] And yet, almost the entirety of Plaintiff's "evidence" in support of her rounding class is based on a single IT screenshot, for which she has zero testimony or evidence in support and for which there is vast objective evidence against. [*See* Motion, pp. 4-5.] Like other parts of the Motion, Plaintiff's rounding "evidence" superficial, not substantial as the law requires. Moreover, Plaintiff has failed to inform the Court that Pacifica produced copies of employee punches, which, as shown above, prove neutrally rounded time entries. [*See* Acharya Decl., ¶¶ 37-38, Ex. 36-37.] Her reliance on a screen shot that Pacifica's PMK could not explain and a vague written policy – despite actual evidence of neutral rounding for <u>every</u> class member – is a troubling misrepresentation

confirming Plaintiff cannot satisfy her burden of establishing improper rounding.

D. The Reality of Plaintiff's Own Meal And Rest Breaks

Plaintiff has worked in hospitals for 40 years, and she concedes the general practice in hospitals is there is no set schedule for nurses to take breaks; rather, each shift's charge nurse in each department handles break scheduling, and Plaintiff had no knowledge of how other charge nurses in any of the department in the hospitals where she worked scheduled breaks. [Plaintiff's Depo., 23:18-24:2, 24:8-12, 26:12-21, 27:13-23.] Nurses always had flexibility regarding when they would go on their rest breaks and lunch breaks. [Plaintiff's Depo., 30:2-9.] In other words, she described Pacifica as the norm. [*Id*.]

Not surprisingly, scheduling of meal and rest breaks at Pacifica is similarly handled by each shift charge nurse or supervisor in each department, like the majority of Plaintiff's breaks handled by Ms. Mohammed. [Plaintiff's Depo., 48:3-14.] Plaintiff admits Ms. Mohammed was very lax when it came to scheduling breaks, that she did not create a schedule of breaks, and it was up to each nurse to take her meal and rest breaks whenever she wanted. [Plaintiff's Depo., 64:8-21.] Plaintiff knew she could go on a break whenever she wanted [Plaintiff's Depo., 65:18-20], and she admits nobody at Pacifica ever told her that she could not go on a break. [Plaintiff's Depo., 79:5-8.] In fact, because of this environment, Plaintiff admits that some nurses in her shift "would take long breaks" of "maybe 45 minutes," but were only auto-deducted 30 minutes. [Plaintiff's Depo., 65:20-23.] And as described in the next paragraph, Plaintiff's own testimony about her breaks is actually a serious understatement of what actually occurred – she took full advantage of the flexibility Pacifica affords, taking so many breaks to the point that she was a clear abuser of the decentralized system. [Acharya Decl., ¶¶ 5-13, Exs. 4-12.]

Despite her admissions, Plaintiff claims that all but five meal periods at Pacifica were interrupted by individuals who she could not recall. [Plaintiff's Depo., 81:20-83:8.] Incredibly, despite boldly pronouncing years later she can recall exactly five breaks, Plaintiff never complained to any coworker, supervisor, Union representative, or anyone that she was not getting the breaks to which she was entitled even though her own supervisor was a chief steward.[3] [Plaintiff's Depo., 76:4-10, 85:13-21.] To further

[3] Plaintiff claimed she never filed a grievance because she did not know who to go to for union help.. [Plaintiff's Depo., 35:23-36:5.] This is outlandish and incredible, given that there are several union representatives throughout the Hospital, including Plaintiff's own supervisor, Ms. Mohammed, who is one of the most vocal stewards in the entire Hospital. [Acharya Decl., ¶¶ 5-13, Exs. 4-12.]

discredit her allegations, nine of Plaintiff's colleagues – who worked next to her on the same shift in the same department and/or observed her actions on a day-to-day basis – all testify that not only were they provided all meal and rest breaks, but that Plaintiff nearly always took longer meal and rest breaks than what she was entitled. [Acharya Decl., ¶¶ 5-13, Exs. 4-12.] In fact, her charge nurse, her coworkers, her "smoking buddy," and an employee whose work station is within viewing distance from Pacifica's designated smoking area stated that because Plaintiff was a chain smoker, she would often take a break of at least 20 minutes *every hour* to walk to the designated smoking area outside of the hospital, smoke a cigarette, and return to her department.[4] [Acharya Decl., ¶¶ 5-13, Exs. 4-12.]

E. Plaintiff's Trial Plan Is Impermissibly Vague

Plaintiff's Motion claims she will establish liability by "simple analysis of payroll records" that "will determine whether Defendant illegally shaved time from employees' daily hours and the amount of improperly deducted time," and "objective payroll records will determine" issues related to second meal periods and third rest periods. [Motion, 20:5-8.] Yet all the foregoing makes clear that Plaintiff and her counsel have either intentionally understated the relevant facts or woefully misunderstood how things at Pacifica work, and there is no way to conduct any type of "simple analysis" based on superficial facts that liability is as Plaintiff and her counsel claim. Rather, the fact is – as is evident from the declarations – significant variations in testimony and questions as to who voluntarily or orally waived a break or was provided a break but chose not to for a given shift will turn a class trial into hundreds of mini trials.

III. PLAINTIFF FAILS TO SATISFY HER CERTIFICATION BURDEN

To justify class certification, Plaintiff has the burden to establish, not just through some evidence, but substantial evidence, the existence of both an ascertainable class and a well-defined community of interest among class members. *See Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1108 (2003). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Sav-On Drug Stores, Inc., v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004). The "ultimate question" on a certification motion is "whether the

[4] Plaintiff denied any such conduct, claiming she hardly smokes and never took smoking breaks at deposition. [Plaintiff's Depo., 77:18-24.] Given that *nine different witnesses* all provided consistent statements to the opposite effect, the Court must question Plaintiff's truthfulness and credibility.

issues which may be jointly tried, when compared to 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 Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012) (citations omitted). Because class treatment must provide substantial benefits to the courts and litigants, Plaintiff must establish that common issues *predominate* over questions specific to individual class members. *Sav-On*, 34 Cal. 4th at 326. Plaintiff thus "must explain how the procedure will effectively manage the issues in question." *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1432-1433 (2006).

The Motion fails to satisfy these burdens. While Plaintiff offers characterizations that seemingly have superficial appeal, scrutiny into the details (which the Motion omits) of Pacifica's decentralized management structure reveal significant variations, not the commonality Plaintiff alleges. For example, while there is agreement that Pacifica uses rounding for timekeeping, there is tremendous disagreement regarding whether the rounding is fair and neutral, and the objective evidence shows Plaintiff is wrong. She claims trounding is biased against employees based on misrepresented testimony of Pacifica's PMK and unidentified screen shots that Plaintiff purports represents biased rounding parameters. Yet her own records, and those of others, clearly demonstrate that Pacifica's rounding was and is neutral, plus Pacifica's PMK testified and provided examples illustrating the rounding practice is neutral.

Moreover, while Pacifica acknowledges that some employees have 30 minutes auto-deducted for a first meal break, there is no class-wide uniform policy – and Plaintiff offered no evidence of one – to auto-deduct meal periods regardless whether the breaks are taken or not. For example, she incorrectly represents that **all** putative class members have 30 minutes auto-deducted. However, the only evidence supporting that claim is Plaintiff's testimony, yet she testified that she has no knowledge of whether others outside her department had 30 minutes auto-deducted. In response to this limited evidence, Pacifica presented testimony of numerous witnesses explaining that due to decentralized management, some workers are required to clock-in and out for meal breaks, and others have the option to clock in and out for meal breaks or elect to have 30 minutes auto-ducted but take breaks of longer duration.

Similarly, Plaintiff makes only a half-hearted attempt to meet her burden to identify ascertainable classes. She summarily describes the classes based solely on her theories of liability but fails to identify how putative class members all supposedly suffering the same harm can be filtered only by time records

or otherwise, from putative class members not suffering the alleged harm due to the great variance in practice occurring at a department and individual level. For example, putative class members do not clock in or out for rest breaks so there are no records that could show which employees (if any) missed a third rest break or missed meal breaks even though their meal break was auto-deducted.

Finally, Plaintiff failed to submit a trial plan that can manage the claims on a class basis. She asserts that common proof can be determined by payroll records but her plan makes no provision for, and neither acknowledges nor explains, how such records could demonstrate when employees missed first meal breaks when 30 minutes was auto-deducted or missed rest breaks when that information is not documented. Stated simply, her trial plan could only be effective if every employee missed every possible first break, a supposition clearly inconsistent with the evidence.

A. Plaintiff's Claims Of Commonality Are Too Superficial

Plaintiff predictably claims this matter is ideally suited for class treatment and argues she has the necessary evidence to support certification. However, careful review of the claims and her brief reveal that her assertions are not correct. Plaintiff must "place *substantial evidence* in the record that common issues predominate." *Lockheed*, 29 Cal. 4th at 1108 (emphasis added); *see also Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 914 (2001); *Quacchia v. Daimler Chrysler Corp.*, 122 Cal. App. 4th 1442, 1448 (2004). As a consequence, the mere "raising of common questions – even in droves" is not enough to establish predominance of common issues. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rather, to warrant class treatment, Plaintiff's claims "must depend upon a common contention … of such a nature that it is capable of class-wide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Common issues do not predominate if the ability of each class member to recover depends on a set of facts applicable only to him. *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 809 (1996).

Plaintiff's commonality/predominance arguments boil down to little more than simple statements about either the existence of common written policies or lack thereof. But she fails to show any of those policies were uniformly applied to the classes and none of her allegedly "common evidence" is capable of proving whether individual class members were denied the opportunity to take meal or rest breaks or minimum wage violations. Furthermore, the fact that the Unions have not raised the matter of missed

meal breaks or rest breaks or rounding with Pacifica illustrates that there are no uniform company-wide policies to deny meal or rest breaks or deny wages as part of a biased rounding practice.

1. Plaintiff Does Not Show Common Issues Predominate Regarding Rounding

Plaintiff's reliance on computer screen shots and misconstrued deposition testimony illustrates the problem with her superficial representations of illegal uniform practice. She say Pacifica uniformly employs rounding parameters that are not neutral. Objective evidence proves she is incorrect.

Though she could have looked at time records to see how rounding actually works (one would think this is the best evidence), Plaintiff instead points to a screen shot and tardiness policy generally requiring employees timely report to work. This is woefully short of substantial evidence of actual rounding. Without evidence (except misrepresented PMK testimony), Plaintiff claims the screen shot proves uniform illegal rounding due to large grace periods outside shifts and no grace periods inside shifts. She also claims rounding is not neutral because tardiness and time reporting policies subject employees to discipline for reporting late or leaving early. But this is not how it actually works, and Plaintiff's time records and those of others actually show rounding is neutral on its face. [Archarya Decl., ¶¶36-38, Ex. 35-37.] If rounding is facially neutral and as applied over time, it is lawful "because its net effect is to permit employers to efficiently calculate hours without imposing any burden on employees." *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 903 (2012). Pacifica's policy neutrally rounded, up and down, employee time punches to the nearest quarter hour. Under the legal test then, liability under Pacifica's facially neutral rounding could only be determined by going through each person's time records in a class of nearly 1,000. That is the antithesis of class treatment.

Plaintiff's argument that Pacifica's maintenance of an attendance policy causes the neutral rounding policy to become improper because it compels employees to clock in early similarly fails to establish commonality. Plaintiff fails to present any actual evidence, let alone substantial evidence, that putative class members actually felt compelled to clock in early because of this policy, and witness testimony confirms employees, as a matter of practice policed by the Unions are not disciplined for being a few minutes late. How any employee reacted to an attendance policy that generally does not result in discipline would thus vary by individual such that the purported impact of the policy would be highly individualized. As such, common questions do not predominate the rounding policy claim.

2. Plaintiff Fails To Establish Predominance For Meal And Third Rest Breaks

Plaintiff continues her superficial treatment with regard to her claims about denied opportunities for first and second meal breaks and third rest breaks. She conveniently glosses over the decentralized management and pervasively unionized environment resulting in disparate practices across numerous departments and the impact of the Unions on department-level implementation of those practices. Numerous witnesses testified that meal and rest break practices vary between departments and based on the charge nurse or lead. Common issues thus cannot predominate in such a decentralized structure resulting in different practices. *See Ramirez v. United Rentals, Inc.*, Case No. 5:10-cv-04374 EJD, 2013 U.S. Dist. LEXIS 82951, at *15-16 (N.D. Cal. June 12, 2013) (certification denied because employer left meal break compliance up to managers, some of which used auto-deduct while others did not, and where managers employed different strategies to track wages owed with varying degrees of success). And sole reliance on company's non-specific written policies regarding meal breaks does not and cannot establish commonality. *See Villa v. United Site Servs. of Cal., Inc.*, Case No. 5:12-CV-00318-LHK, 2012 U.S. Dist. LEXIS 162922, at *16 (N.D. Cal. Nov. 13, 2012) (defendant's written policies cannot resolve whether individual class members were provided valid meal breaks). Plaintiff has failed to carry her burden to establish uniform policies applicable to the putative classes, or any other common proof.

a. Plaintiff Fails To Show Pacifica Uniformly Auto-Deducts 30 Minutes Regardless Of Whether Employees Took Uninterrupted Breaks

Plaintiff's sole evidence of a uniformly applicable auto-deduct policy and representing an actual missed meal period (as opposed to merely showing an automatic deduction instead of punches for times in and out of break), is her own testimony about her experience in one department. However, she also concedes she has no knowledge of how other departments handled meal or rest breaks (and admitted from her own experience that another department handled them differently, including auto-deductions), and the evidence overwhelmingly demonstrates there is not even uniform use of auto-deduction at the Hospital. Witnesses also confirm that they always could manually clock in and out for meal breaks. Some department managers require workers to manually clock out for first meal breaks. Others do not, allowing their subordinates to have first meal breaks auto-deducted. Additionally, employees often use auto-deduct because it allows them to take extended meal breaks without a record of the break length (or

that Pacifica paid them for non-work time), which Plaintiff admitted was true. Additionally, regardless of whether workers manually clocked in and out for first meal breaks or used auto-deduct, Pacifica had a process, which hundreds in fact used, whereby they received premium pay for missed/interrupted meal breaks. Anyone who missed one could submit a Punch Variance Form, notified a supervisor, or note on her time sheet the missed meal period, and Pacifica would have included corresponding premium pay in the next paycheck, as the Hospital in fact did hundreds of times during the relevant period.

In the face of these facts, Plaintiff's heavy reliance on *Jaimez v. DAIOHS USA, Inc.* is misplaced. In *Jaimez*, the common issue was not auto-deduction, but whether the employer scheduled drivers for too many deliveries so they could not actually take a break while also auto-deducting the break. That is not the case here, where employees have broad freedom to take as many breaks whenever they want to, and employees (including Plaintiff, per the declarations of her co-workers) liberally used that freedom. Also, unlike *Jaimez*, the legal and factual issues here regarding auto-deduct require individual answers from each putative class member, including why did they not manually punch, did they miss or have meal breaks interrupted (because there are no records of break length or taking them when auto-deduct is used), why they did not request premiums or complain to their supervisor or Unions, among others. In these circumstances, certification is not proper. *Ramirez*, 2013 U.S. Dist. LEXIS 82951, at *15-16.

b. Plaintiff Shows No Regular Denial Of Second Meal/Third Rest Breaks

Plaintiff's claims regarding second meal and third rest breaks are also superficial and without establish common proof. She again ignores the impact of different meal and rest break policies between departments and supervisors. She, as well as managers, charge nurses and co-workers, all acknowledge that some departments are managed informally, meal and rest breaks are not specifically scheduled, and employees can and do take breaks when they choose. This practice permits them to take extended breaks (including 45-60 minute meal and 30-45 minute rest breaks). Additional evidence shows that some departments managed meal and rest breaks more strictly, limiting them to the scheduled time. For those working in flexible departments, it is hard to imagine how informal practices, where employees take breaks based on their own preferences, were denied second meal or third rest breaks if they worked a 10 to 12 hour shift. Plaintiff even admitted she was never told she could take a break – she simply took them when she wanted. Her focus on a lack of clocking out for second meal breaks as evidence of

a supposed uniform denial of such breaks ignores the many explanations for why employees chose not to clock out for second meal breaks they in fact took – if they clocked out, they would not be paid for those breaks, but if they did not clock out, they could take extended paid breaks. Additionally, some employees likely would prefer to work through a second meal break knowing they could take a paid rest break whenever they wanted rather than take an unpaid break and extend their shift by 30 minutes.

Against these facts, Plaintiff's declarants' testimony regarding supposedly having no knowledge or opportunity to take second meal or third rest breaks neither persuades nor establishes by substantial evidence a purported uniform policy to deny such breaks. Of note, the declarations are largely identical, totally ignoring the many differences in scheduling of breaks between departments. They also do not address whether the declarant ever complained about missing breaks to a supervisor or Union, which Pacifica is confident never occurred because the Hospital would have heard about it from the Unions. At least nine declarants worked 8.5 hours and were not entitled to second meal or third rest breaks. Three of the declarants executed second meal break waivers, giving them the notice of the right to second meal breaks they claim never occurred. Furthermore, department managers and Plaintiff's co-workers establish that at least a significant portion of the putative class took meal and rest breaks when they wanted, contradicting the Plaintiff's declarants' testimony. Such conflicting testimony regarding a purportedly common policy is insufficient to establish commonality for class certification. *See Roth v. CHA Hollywood Med. Ctr., L.P.*, Case No. 2:12-cv-07559-ODW (SHx), 2013 U.S. Dist. LEXIS 153856, at *18 (C.D. Cal. Oct. 2013) (denying certification of hourly nurses alleging denied second meal breaks and third rest break because "The fact that some putative class members had no issue taking proper breaks demonstrates that there will be no way to determine that HPMC has a uniform, class-wide policy of rendering employees unable to take rest and meal periods in each instance").

The fact that a large portion of the putative class received second meal waivers, and a portion executed them, further shows there is no uniform policy to deny wholesale second meal breaks, and common facts do not predominate over individual ones. Receipt of waivers notified employees of the right to second meal breaks, and there also are no records indicating which individuals were provided the waivers; the records only show who executed them. As to Plaintiff's claim that all 181 waivers are categorically unenforceable because they are not executed by Pacifica, that argument is oversimplified.

Wage Order No. 5-2001 (11)(D) only applies to "employees in the Healthcare Industry" and a large portion of the putative class (all those in non-clinical roles) are not "employees in the Healthcare Industry" and thus do not require Pacifica's signature or even written waivers. Plaintiff of course does show how to identify which workers signed such supposedly categorically unenforceable waivers.

In sum, there is no common proof capable of proving or disproving classwide liability on the second meal and third rest break claims. In these circumstances, the authority strongly indicates class certification is improper. *See Sotelo v. Medianews Group, Inc.*, 207 Cal. App. 4th 639, 652-55 (2012) (affirming the denial of certification because the plaintiffs could not show any uniform policy or practice that would establish classwide liability for meal and rest break violations); *Roth*, 2013 U.S. Dist. LEXIS 153856 at 17-19 (adjudication of break claims required individual determination of whether each nurse was too busy, had no coverage, or both for each rest and meal break to which she was entitled); *Rai v. CVS Caremark Corp*, Case No. CV 12-08717-JGB (VBKx), 2013 U.S. Dist. LEXIS 177730, at *15-16, 23-24 (C.D. Cal. Oct. 11 2013,) (denying certification on meal and rest break claims because the class not ascertainable in that there was no way to identify those purportedly injured by policy by records or other similar means, and because the class did not satisfy predominance where declarations showed differences in policies and practices requiring individual analysis); *Purnell v. Sunrise Senior Living Mgmt., Inc.*, Case No. SA CV10-00897 JAK, 2012 U.S. Dist. LEXIS 27430, at *20 (C.D. Cal. Feb. 27, 2012) (no commonality where issue of whether workers "were denied meal breaks, or clocked in and out incorrectly, or took breaks at their own discretion devolves into individualized inquiries about different class members' employment history"). As in those cases, in this matter individual questions need to be answered; specifically, whether all employees were denied the opportunity for those breaks, did they waive their rights to such breaks, were they provided waivers for second meal breaks, did they ever complain to the Union or managers, and if not, why, among others. These kinds of factual questions, all requiring individual analysis to resolve liability questions, preclude class treatment.

B. Plaintiff Fails To Identify Ascertainable Classes

In addition to these commonality and predominance flaws, Plaintiff's class definitions are overly broad and do not allow identification of putative class members all suffering the same purported harm under Plaintiff's theories. "The party seeking certification has the burden to establish the existence of

… an ascertainable class." *Sav-On*, 34 Cal. 4th at 326. For a proposed class to be ascertainable, (1) the class definition must state precise, objective criteria that allow identification of persons who have claims and will be bound by the case results; and (2) there must be a way to identify and give them notice of the litigation without undue expense or time, usually by reference to official or business records. *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1459 (2011); *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010); *Medrazo v. Honda of North Hollywood*, 166 Cal. App. 4th 89, 101 (2008). To illustrate why her classes are not ascertainable, below are two (of the six) classes that Plaintiff identifies:

> Minimum Wage Class: All current and former hourly non-exempt employees employed by Defendant [during relevant time] who were not compensated for all hours worked.
>
> Auto Deduct Class: All current and former hourly non-exempt employees employed by Defendant [during relevant time] who worked any shift more than 6 hours and were automatically deducted 30 minutes for meal breaks.

Based on the facts described herein, the proposed Auto Deduct Class includes both individuals who received all their meal periods and those who may not, but there is no accounting for submission of pay requests for employees who took hour long breaks and were paid for 30 minutes of that break, etc. There are no records indicating which employees missed meal breaks and were automatically deducted for them (except employees that were paid premium wages, eliminating liability). Ascertainable classes must be specific and limited to those suffering the purported harm, and if they do not satisfy these requirements, certification should be denied. *Sevidal*, 189 Cal. App. 4th at 919 (denying certification because class members could not be "readily identified" since defendant did not maintain or have records identifying those who purchased a product with an erroneous country-of-origin designation).

C. Plaintiff Fails To Present A Workable Trial Plan

In addition to all these deficiencies, Plaintiff also fails to show how a class action trial would be manageable. *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 27, 30 (2014) ("Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability"). She claims common proof of the claims is possible through simple analysis of payroll records, time cards and statistical methods, but the facts here and the variance from department-to-department, employee-to-employee confirms proof of liability would be anything but simple or common. Neither payroll records, time cards, nor any other

records can show who among the putative class suffered the alleged harm under any of Plaintiff's theories. For instance, because employees do not clock out when meal periods are auto-deducted, even if they took their breaks, the records will not identify instances where employees missed or had breaks interrupted while they were auto-deducted. Similarly, because they do not clock out for rest breaks, the records cannot show instances of missed breaks. *See Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (plaintiff's suggestion of simply examining records to show when meal breaks were not taken would be unavailing because it will not answer why employees did not take breaks).

Plaintiff also summarily claims statistical methods or representative testimony may be used but provides little more than vague explanation as to how that would actually work, let alone identify how such evidence can solve the challenges created by Pacifica's decentralized operations. She thus has not carried her burden. *See Dunbar*, 141 Cal. App. 4th at 1432-1433 ("[i]t is not sufficient … simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question"); *Wash. Mut. Bank*, 24 Cal. 4th at 924-25 (a court "cannot simply rely on counsel's assurances of manageability" and "cannot accept 'on faith'" the accuracy of assertions as to manageability) ("class action proponents 'should not expect the court to ferret through, disseminate, and craft manageable schemes'" because that "burden 'clearly rests' with the proponents"). In sum then, Plaintiff has not met her burden to provide a workable plan to manage the class claims. *See e.g. Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS, 2013 U.S. Dist. LEXIS 7868, at *22-23 (C.D. Cal. Jan 17, 2013) ("[P]laintiff's expert repeatedly mischaracterizes any late, short, or missed meal periods as 'violations' – in fact, there is no way of determining on a classwide basis whether these were violations, a legal conclusion, or whether individual class members voluntarily opted to start their meal break late, cut it short, or not take a break at all"); *Purnell*, 2012 U.S. Dist. LEXIS 27430, at *20 (using "questionnaire as a screening device . . . to examine whether [thousands] of class members were denied meal breaks, or clocked in and out incorrectly, or took breaks at their own discretion devolves into individualized inquiries about different class members' employment history").

IV. CONCLUSION

For the reasons stated herein, Pacifica respectfully request that the Court deny class certification, and permit Plaintiff to proceed with her claims only in her individual capacity.

DATE: NOVEMBER 15, 2016

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By: _____
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Attorneys for Defendant PACIFICA OF THE VALLEY CORPORATION dba PACIFICA HOSPITAL OF THE VALLEY

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action; my current business address is 555 South Flower Street, Suite 3500, Los Angeles, CA 90071-2411.

On November 15, 2016, I served the foregoing document(s) described as: **DEFENDANT PACIFICA OF THE VALLEY CORPORATION dba PACIFICA HOSPITAL OF THE VALLEY'S OPPOSITION TO PLAINTIFF KYLE FRENCHER'S MOTION FOR CLASS CERTIFICATION** on the interested parties in this action as follows:

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___ BY MAIL

___ I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at Los Angeles, California. I placed the envelope(s) for collection and mailing on the above date following ordinary business practices.

_X_ BY ELECTRONIC SERVICE

_X_ Pursuant to CRC Rule 2.251, CCP § 1010.6, and the Court Order Authorizing Electronic Service, I caused a copy of the document(s) to be served by electronic mail as a PDF attachment to the email address listed in the Service List by uploading it to the CASE ANWHERE website at www.caseanywhere.com

_X_ Executed on November 15, 2016, at Los Angeles, California.

_X_ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Diana V. Galvez