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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cindy Johnson, Barbara A. Craig, and Stephanie L.
Walker on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

Arizona Hospital and Healthcare Association et al.,

Defendants.

No. CV07-1292-PHX-SRB

**PLAINTIFFS' MOTION AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
(1) FINAL APPROVAL OF THE
SETTLEMENT AND PLAN OF
ALLOCATION; (2) AWARD OF
ATTORNEYS' FEES, COSTS
AND EXPENSES; AND (3)
SERVICE AWARDS TO THE
REPRESENTATIVE PLAINTIFFS**

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1 **I. MOTION**

2 Plaintiffs and Class Representatives Cindy Johnson, Barbara A. Craig and Stephanie
3 L. Walker (collectively "Plaintiffs" or "Named Plaintiffs" or "Class Representatives")
4 respectfully move the Court for an Order granting Final Approval of the proposed
5 Settlement¹ and Plan of Allocation, awarding attorneys' fees, reimbursement of expenses and
6 incentive awards to Class Representatives for their efforts on behalf of Class Members^{2,3}

7 **II. INTRODUCTION**

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11 ¹ Technically, there are two settlements: one relating to nearly all the hospital defendants (the
12 Class Settlement Agreement and Release dated September 3, 2010 (the "Settlement
13 Agreement")) and one relating to the AzHHA defendants (the AzHHA Class Settlement
14 Agreement and Release dated September 3, 2010 (the "AzHHA Settlement Agreement"))
15 (collectively, the "Settlement Agreements"). The Settlement Agreements were previously
16 provided to the Court as Exhibits A and C to Plaintiffs' Motion for Preliminary Approval of
17 Settlement, Certification of the Settlement Classes, Approval of the Form of Notice and
18 Memorandum In Support ("Prelim. Appr. Mot.") (Doc. Nos. 639, 639-2 & 639-4). For all
practical purposes, there is one overall settlement and this memorandum will treat the
combined settlement with all Settling Defendants as a single settlement for convenience,
referred to as "the Settlement."

19 ² Pursuant to the schedule approved by the Court in its September 27, 2010 Order Granting
20 Plaintiffs' Motion for Preliminary Approval of Settlement, Certification of Settlement
21 Classes, and Approval of Form of Notice (Doc. No 642) ("Preliminary Approval Order")
22 and in accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988
23 (9th Cir. 2010), Plaintiffs filed their Motion for An Award of Attorneys' Fees,
24 Reimbursement of Expenses and Incentive Awards to the Class Representatives for Their
25 Efforts on Behalf of Class Members, and Memorandum in Support (Doc. No. 650) ("Pls.
26 Mot. for Fees") on January 28, 2011, in advance of the February 11, 2011 deadline for
27 Class Members to object to the Settlement.

28 ³ Capitalized terms not otherwise defined in this memorandum have the same meanings
ascribed to them in the Settlement Agreements. The Settlement is on behalf of two
Settlement Classes, the Per Diem Settlement Class and the Traveler Settlement Class.
Preliminary Approval Order at ¶¶ 1-2. Plaintiffs will refer to members of both classes,
collectively, as "Class Members." We will refer to the two classes as the "Settlement
Classes".

1 On September 27, 2010, this Court granted preliminary approval of a \$22,476,818.18
2 (plus interest) settlement of the Per Diem Settlement and Traveler Settlement Classes' claims
3 against Settling Defendants⁴. The terms of the Settlement Agreements are set forth in the
4 Class Settlement Agreement and Release and the AzHHA Class Settlement Agreement and
5 Release, both dated September 3, 2010, that were attached to the Prelim. Appr. Mot. In its
6 Preliminary Approval Order, this Court also certified the Traveler Settlement Class and
7 slightly modified the definition of the Per Diem Class that the Court had previously certified
8 (Doc. No. 584);⁵ approved the form and manner of providing notice to Class Members;
9 approved the proposed claim form and Plan of Allocation; appointed the Named Plaintiffs to
10 serve as representatives of the Settlement Classes, and appointed Co-Lead Class Counsel and
11 Class Counsel⁶ (collectively, "Class Counsel").

12 Pursuant to the Preliminary Approval Order, the Mailed Notice and the Claim Form
13 have been distributed to Class Members; the Published Notice has been published in
14 newspapers, journals, magazines and websites likely to be read or viewed by Class Members;
15 and the Settlement Agreement, AzHHA Settlement Agreement and the proposed Plan of
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21 ⁴ The "Settling Defendants" refers to the Defendants joining this settlement: the Arizona
22 Hospital and Healthcare Association and AzHHA Service Corporation (collectively,
23 "AzHHA") and the Defendants listed on Exhibit 1 to the Settlement Agreement (attached
24 as Exhibit A to Plaintiffs' Prelim. Appr. Mot.)

25 ⁵ This modification comprised setting a definite end date to the Class Period of September
26 12, 2007, and identifying more precisely the positions included in the term "per diem nurse
27 service." See Plaintiffs' Prelim. Appr. Mot. at 20-21 (Doc. No. 639) (describing
28 modifications) and this Court's Preliminary Approval Order at ¶¶1-2.

⁶ The Court appointed David F. Sorensen of Berger & Montague, P.C. and David Balto of
Law Offices of David Balto as Co-Lead Class Counsel and Keller Rohrback, P.L.C., and
Brownstein Hyatt Farber Schreck L.L.P. as Class Counsel (collectively "Class Counsel").

1 Allocation (as well as Pls.' Mot. for Fees) have been made available to Class Members. *See*
2 Declaration of Claims Administrator (attached as Exhibit 1).

3 Final approval should be granted because the Settlement -- which provides cash
4 payments of more than \$22.4 million plus important structural, prospective relief -- is fair,
5 adequate and reasonable. Similarly, Plaintiffs' Mot. for Fees also should be granted because
6 they, too, are fair and reasonable. Significantly, there have been no objections filed or served
7 to the Settlement or to the Mot. for Fees.⁷
8

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10 In all, more than 26,000 copies of the Mailed Notice were sent by first class mail to
11 Class Members.⁸ Notice was also published. The opt-out deadline was Jan. 14, 2011, and the
12 deadline for objections was Feb. 11, 2011⁹. To date, no Class Member has objected to the
13 Settlement and fewer than 200 persons have chosen to opt-out.¹⁰ This response shows
14 overwhelming support for the Settlement. Moreover, Pls.' Mot. for Fees (Doc. No. 650) was
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18 ⁷ The deadline for objections was Feb. 11, 2011. To date, none has been filed of record, nor
19 have any been served on Plaintiffs' counsel or counsel for the Settling Defendants.

20 ⁸ See Declaration of Claims Administrator at ¶¶ 4 & 7. As of February 11, 2011 there were
21 26,600 Mailed Notices sent to potential Class Members. Of these, 26,550 were mailed on
22 October 27, 2011, within 30 days of and in accordance with the Court's Preliminary
23 Approval Order. Fifty Nine additional Mailed Notices were thereafter sent to potential
24 Class Members pursuant to their request. As explained in the Declaration of Claims
25 Administrator, of the 26,000 Mailed Notices that were sent to potential class members,
2,193 were returned as undeliverable and, despite reasonable efforts, the Claims
Administrator was not able to find a valid alternative address. *See* Declaration of Claims
Administrator at ¶¶ 5-7.

26 ⁹ The deadline to request exclusion from the Per Diem and Traveler Settlement Class was
27 January 14, 2011 and the deadline to file objections to the Settlement was February 11,
28 2011. Preliminary Approval Order at ¶¶ 11 & 15.

¹⁰ *See* Declaration of Claims Administrator at ¶ 17.

1 filed and made publicly available before the deadline for objections, yet again, no objections
2 have been filed.¹¹

3 The Settlement provides for a cash payment of \$22,476,818.18 plus interest¹² and
4 important prospective, structural relief. At this time, Plaintiffs are seeking final approval of
5 the Settlement, and final approval of the motion for fees of 25% of the gross Settlement Fund
6 (i.e., \$22,476,818 plus interest) costs and expenses of \$872,524.62, and service awards
7 totaling \$60,000 to the Class Representatives, and dismissal of the Litigation with respect to
8 the Settling Defendants. A revised form of the Proposed Orders and Final Judgments are
9 attached as Exhibits 2 and 3.¹³ The claims process will continue, as the deadline for
10 submission of claims is June 2, 2011. After all claims are submitted and reviewed, Plaintiffs

14 ¹¹ The Mailed Notice and the Publication Notice informed Class Members that (1) the motion
15 for fees, costs, expenses and service awards would be filed by Jan. 28, 2011 and would be
16 available for inspection on the dedicated website and Class Counsels' websites; and (2)
17 notified Class Members that Plaintiffs' would be seeking an award of fees of up to 25% of
the gross Settlement Fund.

18 ¹² As of February 25, 2011 the Settlement Fund had accrued \$ 12,670.22 in interest. The
19 Settlement Fund is explained in footnote 1 of Pls.' Mot. for Fees.

20 ¹³ There are two separate proposed Orders and Final Judgments, one for the Settlement
21 Agreement (previously attached as Exhibit 9 to the Settlement Agreement (Doc No. 639-2))
22 and the other for the AzHHA Settlement Agreement (previously attached as Exhibit 9 to the
23 AzHHA Settlement Agreement (Doc. No. 639-4)) (collectively, "Proposed Orders and Final
24 Judgments"). Plaintiffs are submitting revised Proposed Orders and Final Judgments to fill
25 in information about certain dates and court filings, the absence of objections and the
26 amount of attorneys' fees and reimbursement of outstanding and unreimbursed expenses
27 requested. See [Proposed] Order and Final Judgment Approving Settlement, Awarding
28 Attorneys Fees, Costs and Expenses, Awarding Representative Plaintiff Incentive Awards,
Approving Plan of Allocation and Ordering Dismissal as To All Settling Defendants
(attached as Exhibit 2) and [Proposed] Order and Final Judgment Approving Settlement,
Awarding Attorneys Fees, Costs and Expenses, Awarding Representative Plaintiff
Incentive Awards, Approving Plan of Allocation and Ordering Dismissal as To the AzHHA
Defendants (attached as Exhibit 3).

1 and the Court-appointed Claims Administrator will develop a final schedule of allocated
2 payments pursuant to the Proposed Allocation Plan by Hal J. Singer, Ph.D (Doc No. 639-6)
3 ("Allocation Plan"), approved by the Court in its Preliminary Approval Order at ¶ 13. The
4 Settlement Fund, net of deductions for any attorneys' fees awarded, unreimbursed and
5 outstanding expenses, claims administration expenses and incentive awards to the class
6 representatives, would be distributed among Class Members after the claim deadline and
7 after claims are reviewed and processed. As directed by and since the Court entered its
8 Preliminary Approval Order on September 27, 2010, the Allocation Plan along with the
9 terms of the Settlement have been made available to Class Members.
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11

12 The Settlement resolves all claims asserted by Plaintiffs and the Settlement Classes
13 against nearly all Defendants, and provides for valuable prospective structural relief and is an
14 excellent recovery for the Class. Both the Settlement and the Plan of Allocation under which
15 the proceeds will be distributed are fair, reasonable, and adequate under the governing
16 standards for evaluating class action settlements in this Circuit.
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19 **III. PROCEDURAL AND FACTUAL BACKGROUND**

20 **A. The Litigation**

21 This case was filed in July 2007 against AzHHA and a number of Arizona hospitals
22 that participated in the AzHHA Registry Program, and alleged that the hospitals and AzHHA
23 had unlawfully fixed and suppressed the wages paid to temporary nursing personnel, since at
24 least 1997, by agreeing amongst themselves to fix and suppress the "bill rates" paid to
25 temporary nurse staffing agencies. Plaintiffs alleged that the wrongful suppression of bill
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1 rates necessarily suppressed compensation to temporary nursing personnel, because bill rates
2 are correlated to wage rates.

3 The named plaintiffs are three registered nurses: Cindy Johnson, Barbara A. Craig,
4 and Stephanie L. Walker. Plaintiffs brought claims both under federal and state antitrust law,
5 and asserted additional state law causes of action. After various of the originally-named
6 defendants filed "Notices of Non-Parties at Fault" pursuant to A.R.S. § 12-2506(b), and
7 Arizona Rule of Civil Procedure 26(b)(5) naming additional parties as allegedly at fault by
8 virtue of these additional parties' participation in the Registry Program, Plaintiffs amended
9 their Complaint by, inter-alia, naming these additional parties as defendants. *See*
10 Consolidated Third Amended Complaint, filed November 10, 2009 at ¶¶ 36-64 (Doc. No.
11 317).

12 Three defendants moved to dismiss. After extensive briefing and oral argument, the
13 Court denied the motion as to Plaintiffs' claims under the Sherman Act, 15 U.S.C. § 1 (Count
14 I); the Arizona Uniform State Antitrust Act, A.R.S. § 44-102 (Count II); and for unjust
15 enrichment under Arizona state law (Count V); while dismissing other state law claims
16 (Counts III and IV). *See* Order dated March 19, 2009 (Doc. No. 449).

17 The Plaintiffs and Defendants ("Parties") have vigorously litigated this case for
18 nearly three years and engaged in extensive fact and expert discovery before agreeing to a
19 settlement. Plaintiffs have engaged in vigorous discovery, including: (1) obtaining and
20 reviewing many thousands of documents from Defendants; (2) obtaining and analyzing
21 electronic data from Defendants; (3) obtaining data and documents from a number of third
22 party temporary nurse staffing agencies pursuant to subpoena; (4) obtaining and reviewing

1 the discovery record from *PC Healthcare Enterprises, Inc. dba Health Temp v. Arizona*
2 *Hospital and Healthcare Association, et al.*, No. CV-05-1793-PHX-MHM (D. Ariz.); and (5)
3 taking or defending 17 fact and expert depositions. The Plaintiffs worked with their expert,
4 Dr. Hal Singer, to prepare for and defend his deposition in defense of his Class Certification
5 report and took the deposition of Defendants' expert, Dr. Steven Scheffman.
6

7 Plaintiffs moved for Class Certification on January 26, 2009 (Doc No. 428) and on
8 July 14, 2009, the Court certified a litigation class of per diem nurses but declined to certify a
9 class of traveler nurses.¹⁴
10

11 **B. Settlement Negotiations**

12 The Parties began settlement discussions in the summer of 2009, and completed two
13 rounds of mediation conducted by an outside mediator, the Honorable Edward Infante (Ret.),
14 of JAMS, a leading alternative dispute resolution firm over four full days in June and August,
15 2009. Subsequently, the Parties engaged in months of discussions, working out numerous
16 issues and complexities associated with settling a case with so many defendants¹⁵, while also
17 taking into account Abrazo's decision not to settle, which, in turn, implicated a judgment
18 sharing agreement among all Defendants.
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24 ¹⁴ Plaintiffs subsequently filed a petition under Fed. R. Civ. P. 23(f) with the Ninth Circuit
25 Court of Appeals for review of this decision, and Defendants filed a contingent cross-
26 petition. Those proceedings have been stayed by agreement of the Parties (with the
27 concurrence of the Court of Appeals acting through a Court mediator), pending settlement.
28 Plaintiffs also filed, in this Court, an Alternative Motion for Class Certification Under Fed.
R. Civ. P. 23(c)(4) (Doc. Nos. 593, 594). That Motion remains pending as well, but briefing
has been stayed (again, pending settlement talks).

¹⁵ See Consolidated Third Amended Complaint at ¶¶ 20-67.

1 Ultimately, on September 3, 2010, the Plaintiffs and the Settling Defendants (“the
2 Settling Parties”) reached an agreement to settle the Action for \$22,476,818.18 plus interest
3 in exchange for, inter-alia, the Class releasing the claims specified in paragraph 48 of the
4 Settlement Agreements against Settling Defendants.
5

6 In sum, the Settlement was the result of lengthy and contentious arm’s-length
7 negotiations. The process was in all respects thorough, adversarial, and professional.
8

9 **C. Terms of the Settlement Agreement**

10 The complete terms and conditions of the proposed Settlement are set forth in
11 Exhibits A and C to Pls.’ Prelim. Appr. Mot. (Doc Nos. 639-2 and 639-4). The following is a
12 summary of certain issues related to the Settlement that are relevant to this Court’s
13 consideration of this motion that have not already been described above:
14

15 **1. Notice.** Pursuant to the Settlement, the Mailed Notice was sent within
16 30 days of the Court’s Preliminary Approval Order by first-class mail to 26,550 persons who
17 had been identified as likely class members from Settling Defendants’ records, Arizona nurse
18 licensing data, and records obtained from nurse staffing agencies via subpoena. *See*
19 Declaration of Claims Administrator at ¶ 3; *see also* Declaration of Claims Administrator
20 attached as Ex. F to Prelim. Appr. Mot. (Doc. No 639-7), and Declaration of Stephen M.
21 Durbin attached as Ex. G to Prelim. Appr. Mot. (Doc. No. 639-8).
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24 Likewise, the Publication Plan approved by the Court (as amended, see Doc Nos. 646
25 & 647) has been fully implemented. The Published Notice appeared in the publications and
26 other media identified in the Publication Plan approved by the Court in its Preliminary
27 Approval Order (attached as Ex. 5 to the Settlement Agreement and the AzHHA Settlement
28

1 Agreement (Doc Nos. 639-2 & 639-4)) (as amended by Order of November 18, 2011 (Doc
2 No. 647).

3 Pursuant to the Publication Plan, the Published Notice was published in the Sunday
4 edition of four major newspapers whose combined circulation covers nearly all major
5 geographical locations in Arizona, in a local Spanish-speaking newspaper, Prensa Hispana,
6 and in nursing publications and websites that would likely be read/viewed by Class Members
7 nationwide and beyond. *See* Declaration of Claims Administrator at ¶8 ; *see also* Amended
8 Publication Plan (Doc. No. 646); Prelim. Appr. Mot. at 33-37.

11 A website devoted to the settlement was also established, which made available for
12 review and downloading the Mailed Notice and Published Notice as well as review of
13 Prelim. Appr. Mot., the Preliminary Approval Order, Settlement Agreements, Allocation
14 Plan, and Pls.' Mot. for Fees. Declaration of Claims Administrator at ¶¶11-12. Class
15 members were directed to this website in the Mailed Notice and Published Notice. *Id.* The
16 Settlement website has been operational since October 27, 2010 and is accessible 24 hours a
17 day, seven days a week. *Id.* As of February 25, 2011, the website has received 3,189 unique
18 visitors. Declaration of Claims Administrator at ¶12. This same information was also
19 posted on each of Class Counsel's websites.

23 In addition to a dedicated website, a toll free number was established where class
24 members could call and obtain more information about the Settlement by speaking with live
25 operators or by following automated prompts. As of February 25, 2011, the toll free number
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1 had received 390 telephone inquires where an individual elected to speak with a live
2 representative. *See* Declaration of Claims Administrator at ¶ 14.¹⁶

3 The method of Notice consisting of mailing the Mailed Notice to Class Members that
4 could be identified from Defendants' Records, nurse licensing data and records from third
5 party nurse staffing agencies, publishing the Published Notice in media likely to be read or
6 viewed by Class Members and establishing a dedicated website and toll-free phone number
7 satisfies Rule 23(e)'s requirements and due process. *In re Lifelock Inc. Mktg. & Sales*
8 *Practices Litig.*, No. 08-1977, 2010 WL 3715138 at * 6 (D. Ariz. Aug. 31, 2010) (finding
9 that notice by mail, publication and posting on a dedicated website satisfy the requirements
10 of due process and Rule 23); *see also Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 369 (D.
11 Ariz. 2009) (finding that notice by mail and publication satisfy due process); *In re Portal*
12 *Software Inc, Sec. Litig.*, No 03-5138, 2007 WL 1991529 at * 7 (N.D. Cal. June 30, 2007)
13 (finding that notice by mail and publication satisfy the requirements of due process and Rule
14 23).

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19 **2. Allocation Plan.** As more fully discussed in Section IV B of this
20 Motion, the Allocation Plan sets forth the manner in which the Net Settlement Fund¹⁷ will be
21 allocated amongst members of the Settlement Classes who submit timely and valid claims.
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25 ¹⁶ Class Counsel have also received and answered inquires about the Settlement from Class
26 Members.

27 ¹⁷ As described in the Mailed Notice at Question No. 11, the Net Settlement Fund is the
28 amount of the Settlement Fund that remains after interest is included and attorneys' fees of
25% of the Settlement Fund, costs, incentive awards, notice costs and claims administration
expenses are deducted. *See* Ex. 3 to Settlement Agreement and AzHHA Settlement
Agreement.

1 As described in the Allocation Plan, factors considered and incorporated into the Allocation
2 Plan include: (a) whether the class member is a member of the Per Diem or Traveler
3 Settlement Class; (b) what position the class member occupied (such as RN, LPN, CNA etc);
4 (c) how many hours the class member worked for a Defendant hospital or other AzHHA
5 hospital during the Class Period (Jan. 1, 1997-to Sept. 12, 2007) and (d) whether the hospital
6 and the agency with whom the class member worked was participating in the Registry
7 program at the time of the class member's placement at the defendant hospital. *See*
8 Allocation Plan at ¶¶3 and 7. As between the Settlement Classes, the weights attached to
9 members of the Per Diem and the Traveler Classes differ to reflect this Court's decision not
10 to certify the class of Traveler nurses for purposes of litigation. Allocation Plan at ¶3. In
11 addition, Class Members who worked in positions with higher bill rates (e.g. RNs) will
12 receive more per hour than those who worked in positions with lower bill rates (e.g. LPNs,
13 CNAs), all else being equal. Allocation Plan at ¶3.¹⁸

14 A copy of the proposed Allocation Plan was made available on both the website
15 established for this litigation and on Class Counsels' websites. The Court-approved Mailed
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24 ¹⁸ As explained in the Allocation Plan at ¶ 21, the per-hour amount that Class Members could
25 receive has been capped at \$30 per hour. If so few claims are made that this cap is reached
26 and there are excess funds remaining in the Settlement Fund, Class Counsel will request
27 that the Court approve a *cy pres* award to one or more accredited nursing schools within the
28 State of Arizona. Allocation Plan at ¶ 21. *See also* Settlement Agreement and AzHHA
Settlement Agreement at ¶ 52. The Settling Defendants have agreed to this and have agreed
that in no event shall any of the settlement funds revert to them (unless the Settlement does
not become final).

1 Notice also expressly described the proposed method of allocation. That text is reproduced
2 below¹⁹:

3 If the Court grants final approval to the Settlement, your share of the Net Settlement Fund will depend, first, on which class you are part
4 of. More money will go to members of the Per Diem Class than the Traveler Class because the Court previously certified a Per Diem Class
5 to go forward to trial, but previously denied a Traveler Class. The Settling Defendants agreed to certification of a Traveler Settlement Class
6 in light of settlement, and the Court has certified a Traveler Settlement Class in light of settlement. But the different allocation amounts
7 reflect the risk that, absent a settlement, no travel class would ever be certified in the face of opposition by Defendants, which would mean
8 that temporary travel nurses would not recover anything unless they hired a lawyer, brought their own individual lawsuit, and then won at
9 trial or obtained their own settlement. Generally, Per Diem Class members will receive, on average, four times what Traveler Class
10 members receive for each hour claimed.

11 Next, the amount you get will depend on the temporary position you filled, and for how many hours. Temporary RNs will get more per
12 hour generally than LPNs, for example, because the AzHHA Registry rates were higher for RNs than LPNs. The total number of hours you
13 worked also will affect the amount. Also, hours worked through agencies that did not participate in the AzHHA program will be allocated
14 less than hours worked through agencies that did participate.

15 Your share of the Net Settlement Fund will also depend on the total number of valid claim forms that Class Members submit. The money
16 will be distributed among all the class members submitting timely, valid claims. If very few claims are submitted, there will be a maximum
17 amount that anyone can receive, and the remaining money, and any money from uncashed checks, will be donated to one or more accredited
18 nursing schools in Arizona.

19 The Allocation Plan is available at www.rg2claims.com/azhha/courtdocuments.html.

20 The benefits available under the Settlement will become available after the claims against the Settling Defendants are resolved, either
21 through final approval of this Settlement, or after trial and any appeals or appeal rights have expired.

22 Mailed Notice at Question No. 1 (attached as Exhibit A to Declaration of Claims
23 Administrator).

24 **II. ARGUMENT**

25 **A. The Settlement Agreement Merits Final Approval**

26 There is a "strong judicial policy that favors settlement particularly where complex
27 class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.
28 1992). "[T]here is an overriding public interest in settling and quieting litigation," and this is
"particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950
(9th Cir. 1976). Having preliminarily approved the Settlement and caused notice to issue to
members of the Settlement Classes consistent with Fed. R. Civ. P. 23(e)(1) (Doc. No. 642),

¹⁹ The Published Notice also described how the Settlement Fund would be allocated. *See* Published Notice at 2-3 (attached as Exhibit 4 to the Settlement Agreements).

1 the Court must decide whether final approval is warranted. Ultimately, after affording
2 Settlement Class members the opportunity to comment on the proposed Settlement at the
3 Fairness Hearing, the Court should finally approve the Settlement if it determines that the
4 Settlement is “fundamentally fair, adequate and reasonable.” *Officers for Justice v. Civil*
5 *Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). *See*
6 *also id.* (the "court's intrusion upon what is otherwise a private consensual agreement
7 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
8 reasoned judgment that the agreement is not the product of fraud or overreaching by, or
9 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
10 reasonable and adequate to all concerned.") The Ninth Circuit has explained that:

14 Therefore, the settlement or fairness hearing is not to be turned into a trial or
15 rehearsal for trial on the merits. Neither the trial court nor this court is to reach
16 any ultimate conclusions on the contested issues of fact and law which
17 underlie the merits of the dispute, for it is the very uncertainty of outcome in
18 litigation and avoidance of wasteful and expensive litigation that induce
19 consensual settlements. The proposed settlement is not to be judged against a
hypothetical or speculative measure of what *might* have been achieved by the
negotiators.

20 *Id.* (emphasis in original)

21 Indeed, a settlement is presumptively fair if "the settlement agreement was reached in
22 arm's length negotiations after relevant discovery [has] taken place." *In re Immune Response*
23 *Securities Litig.*, 497 F.Supp.2d 1166, 1171 (S.D. Cal. 2007) (quoting *Linney v. Cellular*
24 *Alaska P'ship*, 1997 WL 450064, at * 5 (N.D. Cal. July 18, 1997)).

26 The initial presumption of fairness applies to this Settlement. Negotiations occurred
27 at arm's-length for many months during, and with the assistance of Justice Edward Infante
28 (Ret.) of JAMS and there is no hint of collusion; the parties engaged in significant discovery

1 before negotiating this Settlement allowing Plaintiffs to understand the factual and legal
 2 issues of the case; and, as previously explained (*see* Prelim. Appr. Mot. at 26), Class Counsel
 3 have extensive experience litigating precisely this type of antitrust class action claim, and
 4 Defendants were represented by, inter alia, 25 separate, experienced and well-known law
 5 firms. *See In re Wireless Facilities, Inc.*, 253 F.R.D. 630, 634 (S.D. Cal. 2008) (“Settlements
 6 that follow sufficient discovery and genuine arms-length negotiations are presumed fair.”);
 7 *City P’ship Co. v. Atlantic Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)
 8 (“When sufficient discovery has been provided and the parties have bargained at arms-
 9 length, there is a presumption in favor of the settlement.”)²⁰

10 Further, the Settlement satisfies the eight factors articulated by the Ninth Circuit to
 11 determine whether a settlement is fair, adequate, and reasonable:
 12

- 13 (1) strength of the plaintiff’s case;
- 14 (2) risk, expense, complexity, and likely duration of further litigation;
- 15 (3) risk of maintaining class action status throughout the trial;
- 16 (4) amount offered in settlement;
- 17 (5) extent of discovery completed and stage of the proceedings;
- 18 (6) experience and views of counsel;
- 19 (7) presence of a governmental participant; and
- 20 (8) reaction of the Class members to the proposed settlement.

21 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (quoting *Molski v. Gleich*, 318 F.3d
 22 937, 953 (9th Cir. 2003)); *Draney v. Wilson, Morton Assaff McElligot et al.*, No. Civ. 79-
 23 1029, 1985 WL 5820 at * 1 (D. Ariz. Sept. 30, 1985). These factors are not exclusive, and
 24 one factor may warrant more weight than others depending on the circumstances. *See*
 25 *Officers for Justice*, 688 F.2d at 625 (9th Cir. 1982) (“The relative degree of importance to be
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 28 ²⁰ *See* Pls.’ Mot. for Fees at 5-6 for a description of the significant motions Plaintiffs filed
 prior to reaching the Settlement.

1 attached to any particular factor will depend upon and be dictated by the nature of the
2 claim(s) advanced, the types of relief sought, and the unique facts and circumstances
3 presented by each individual case."); *see also*, *Nat'l Rural Telecoms. Coop. v. DIRECTV Inc.*,
4 221 F.R.D. 525-526 (C.D. Cal. 2004) ("one factor alone may prove determinative in finding
5 sufficient grounds for court approval".) (citing *Torrise v. Tucson Elec. Power Co.*, 8 F.3d
6 1370, 1375 (9th Cir. 1993)).
7

8 Under these criteria, the proposed Settlement merits final approval.
9

10 1. **The Strength of Plaintiffs' Case Favors Approval of the Proposed**
11 **Settlement.**

12 As evidenced by the vigor with which Class Counsel have prosecuted this action,
13 Class Counsel believe strongly in the merits of this case, and believe the evidence developed
14 supports the claims alleged.
15

16 Nonetheless, Plaintiffs also recognize the risks of continued litigation. The Settling
17 Defendants have not, by settling, admitted to any wrongdoing or liability. Had they not
18 settled, the Settling Defendants were prepared to mount a vigorous defense and a number of
19 key issues would be hotly contested. Thus, while Plaintiffs and Class Counsel believe this is
20 a strong case for Plaintiffs, the outcome of continued litigation was not guaranteed. *See In re*
21 *Manufacturers Life Ins. Co. Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217
22 at * 17 (S.D. Cal. Dec. 18, 1998) ("even if it is assumed that a successful outcome for
23 plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement-
24 -which is not at all apparent--there is easily enough uncertainty in the mix to support settling
25 the dispute rather than risking no recovery in future proceedings") (citation omitted).
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1 Accordingly, the overall strength of the case and the substantial recovery obtained supports
2 final approval of the proposed Settlement.

3 2. **The Risk, Expense, Complexity, and Likely Duration of Further**
4 **Litigation Weighs in Favor of Approval.**

5 It has often been observed that “[a]n antitrust class action is arguably the most
6 complex action to prosecute.” *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639
7 (E.D. Pa. 2003) (internal citations omitted); *see also Weseley v. Spear, Leeds & Kellogg*, 711
8 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions are “notoriously
9 complex, protracted, and bitterly fought”). It is equally well established that “unless the
10 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and
11 expensive litigation with uncertain results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV,*
12 *Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citing Newberg on Class Actions, § 11:50 at
13 155). To conduct this inquiry

14 [t]he Court shall consider the vagaries of litigation and compare the
15 significance of immediate recovery by way of the compromise to the mere
16 possibility of relief in the future, after protracted and expensive litigation. In
17 this respect, [i]t has been held proper to take the bird in the hand instead of a
18 prospective flock in the bush.

19 *Id.* at 526 (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974));
20 *see also Lifelock*, 2010 WL 3715138 at * 4 (“Courts also make a related assessment in
21 considering the risk of continued litigation balanced against the certainty and immediacy of
22 recovery from the Settlement.”) (internal quotation and citation omitted).

23 As indicated above, continued litigation of this case against the Settling Defendants
24 posed risks for both sides. This case presents complex legal and factual issues. The Settling
25 Defendants, for example, vigorously disputed whether their conduct and agreement, even
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1 assuming they were deemed wrongful, had any effect or any material effect on the
2 compensation to Class Members. To meet these and other defenses and to address the
3 complexities and nuances of this case adequately, significant expenditures of time and money
4 would be required, including particularly the time and cost of enforcing and completing
5 discovery against each of the 39 Settling Defendants and consulting with experts going
6 forward. Indeed, as explained in Pls.' Mot. for Fees, Class Counsel has already expended
7 17,907.35 hours and incurred \$872,524.62 in unreimbursed and outstanding expenses in
8 litigating the case thus far.²¹ Given the nature of this case, a judgment at trial might well be
9 appealed by the losing party. Therefore, delay not just through the trial stage but post-trial
10 motions and the appellate process as well could force Class Members to wait many years for
11 recovery, further reducing the Settlement's value. Balancing the risks and uncertainty of
12 continued litigation against the Settling Defendants with the substantial monetary and non-
13 monetary relief obtained now, the Settlement is an excellent resolution of the Class Members'
14 Claims against the Settling Defendants.

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19 3. **The Risk of Maintaining Class Action Status Throughout the Trial**
20 **Weighs in Favor of Approval.**

21 As noted, this Court declined to certify the claims of Traveler nurses for purposes of
22 litigation. Plaintiffs have filed a petition to appeal that ruling to the Ninth Circuit, but there
23 are no guarantees that petition will be accepted and, if accepted, succeed. Moreover, the
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26 ²¹ See Declaration of David F. Sorensen on Behalf of Class Counsel and Berger & Montague,
27 P.C. In Support of Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of
28 Expenses and Incentive Awards to the Class Representatives for Their Efforts On Behalf of
Class Members at ¶¶ 9 & 11 (attached as Exhibit A-1 to Pls.' Mot. for Fees (Doc. No 650-
1)).

1 Defendants filed a contingent cross-petition, seeking to have the Ninth Circuit review this
2 Court's decision certifying a class of Per Diem personnel. While Plaintiffs believe their own
3 petition to be meritorious, and believe Defendants' contingent cross-petition to be both
4 untimely and meritless, Defendants hold opposite views on both scores. While Plaintiffs
5 accord this factor more weight in relation to the Traveler Settlement Class than the Per Diem
6 Settlement Class, given the pending 23(f) proceedings, class certification remained an issue
7 which, if decided finally against Plaintiffs, could deny Class Members any effective means of
8 recovery.
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11 4. **The Amount Offered in Settlement Weighs in Favor of Approval.**

12 The Settlement here provides for payment of more than \$22.4 million in cash. Even
13 after deductions for fees, costs, etc., the amount for Class Members (approximately \$15
14 million) is very substantial. A settlement should not be judged against a "speculative
15 measure" of what could have been attained. *Linney v. Cellular Alaska P'ship*, 151 F.3d
16 1234, 1242 (9th Cir. 1998). *See also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (a
17 proposed settlement "may be acceptable even though it amounts to only a fraction of the
18 potential recovery that might be available to the class members at trial").²² Here, assuming
19 liability can be established, several variables would be at work in fixing the amount of
20 damages. Among the factors to be considered would be the magnitude of the effect of the
21 alleged conspiracy on the bill rates and the relationship between the bill rates and the
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27 ²² Indeed some courts approve settlements where injunctive relief is the only form of
28 recovery obtained for the class. *See Lifelock* 2010 WL 3715138 at * 5 ("Many Courts have
approved settlements where, as here, the consideration offered consists of injunctive
relief.").

1 compensation of Class Members. These matters have been, and would be, hotly contested
2 in the absence of Settlement.

3 Though merits discovery had not closed, and merits expert reports had not yet been
4 exchanged, Plaintiffs have identified a number of AzHHA documents that, Plaintiffs
5 contend, show that AzHHA bill rates were at least \$10 per hour lower than they otherwise
6 would have been but for the alleged wrongful conduct. Defendants have disputed, *inter*
7 *alia*, the probative value of the AzHHA documents, but multiplying the \$10/hr figure by all
8 AzHHA Registry usage hours (i.e. Per Diem and Traveler) for the entire 1997-2007 time
9 period (approximately 23.9 million hours), yields an overall figure of \$239 million in single
10 damages. Using that figure as a point of comparison (a figure which does not factor in,
11 *inter alia*, Defendants' argument that the class period should be shorter, their arguments
12 about the value of the AzHHA documents, or their other arguments concerning damages) a
13 settlement of more than \$22.4 million is well within the range of reasonableness. *See, e.g.*,
14 *In re Tableware Antitrust Litig.*, No. C-04-3514 VRW, 2007 WL 4219394 at * 2 (N.D. Cal.
15 Nov. 28, 2007) (settlement representing 4 percent of estimated single damages was
16 reasonable); *In re Omnivision Technologies Inc.*, No. 04-2297, 2007 WL 4293467 at * 5
17 (N.D. Cal. Dec. 6, 2007) (approving settlement that was 9% of the "maximum potential
18 recovery"); *In re Apple Computer Derivative Litig.*, 2008 WL 4820784 at * 2 (N.D. Cal.
19 Nov. 5, 2008) (citing to study of settlements in securities litigation and observing that
20 average settlement was 2.4 percent of estimated damages).
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1 Because this litigation will continue against the non-settling defendants, we are
2 hesitant to say much more.²³ Suffice it to say that the \$22.4 million settlement is a very
3 substantial sum that falls well within any reasonable estimate of an appropriate recovery. *See*
4 *Officers for Justice*, 688 F.2d at 624 (“[T]he very essence of a settlement is compromise, a
5 yielding of absolutes and an abandoning of highest hopes.”) (citations and internal quotations
6 omitted).

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9 **5. The Extent of Discovery Completed and the Stage of the Proceedings Weigh in Favor of Approval.**

10 The extent of discovery conducted helps to determine the parties’ grasp of the
11 strengths and weaknesses of the case. *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527
12 (citing Manual for Complex Litigation § 30.42 (3d ed. 1995)). Approval of a settlement is
13 more likely if the settlement was reached after careful investigation and consideration of the
14 “legal and factual issues surrounding the case.” *Id.* (quoting 5 Moore’s Federal Practice, §
15 23.85(2)(e) (3d ed.)).

16
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18 Class Counsel have undertaken extensive discovery in this action. As described
19 previously, Plaintiffs received significant document and data productions from Settling
20 Defendants including AzHHA, deposed many critical witnesses and obtained important
21 documents from multiple third parties, as well as developed expert testimony and marshaled
22 substantial evidence on various critical issues including proof of antitrust injury and damages
23 and analyzed the opposing expert report produced by Defendants. Given that Plaintiffs have
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27 ²³ *See* Manual for Complex Litigation - Fourth § 21.651 (2004) (“Given that the litigation
28 might continue against other defendants. The parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement’s strengths and weaknesses that led them to settle separately.”)

1 litigated this case for three years, substantial discovery has been completed, and that the
2 Court has already ruled on Defendants' Motion to Dismiss and Plaintiffs' Motion for Class
3 Certification, the proceedings are sufficiently advanced to permit Class Counsel to
4 evaluatethe strengths and weaknesses of their case against Settling Defendants. *Lifelock*,
5 2010 WL 3715138 at * 5 ("The Parties have litigated these class actions for over two full
6 years, have conducted extensive discovery, and initiated and adjudicated dispositive motions.
7 These actions have therefore progressed sufficiently to enable the Parties and counsel to
8 assess the risks of proceeding as opposed to settlement").

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11 6. **The Experience and Views of Counsel Weigh in Favor of**
12 **Approval.**

13 "Great weight is accorded to the recommendation of counsel, who are most closely
14 acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms. Coop.*, 221
15 F.R.D. at 528 (citing *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.
16 1997)). Thus, in the absence of fraud or collusion during negotiation, deference should be
17 afforded to the judgment of counsel. *Id.* (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th
18 Cir. 1977)).

19
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21 This action has been litigated and settled by experienced and competent counsel on
22 both sides. The law firms representing the Class are well known for their extensive
23 experience in handling antitrust class action cases and other complex litigation, having
24 served as lead counsel in a large number of similar antitrust cases throughout the country.
25 *See* Firm Biographies attached as Exhibit A-1-4 to Pls.' Mot. for Fees. (Doc No. 650-1). That
26 such qualified and well informed counsel endorse the Settlement as being fair, reasonable
27 and adequate to the Class heavily favors this Court's approval of the Settlement.
28

1 The prospective relief obtained for Class Members here goes beyond the relief
2 acquired in the DOJ action. AzHHA, which is subject to the DOJ Final Judgment until 2017,
3 has agreed to an additional five years of prospective relief on top of that, which provides that
4 AzHHA will not operate its Registry Program in a manner that violates Section 1 of the
5 Sherman Act, 15 U.S.C. § 1, the Arizona state antitrust act, A.R.S. § 44-1401, and the
6 limitations imposed by the DOJ Final Judgment. *See* AzHHA Settlement Agreement at ¶ 70.
7 Similarly, the other Settling Defendants have agreed to seven years of prospective relief
8 (beginning when the Settlement becomes final) with provisions similar to those agreed to by
9 AzHHA. *See* Settlement Agreement at ¶ 70. Additionally, the Settlement provides members
10 of the Settlement Classes with special rights including accelerated discovery and attorneys'
11 fees in case of any violation by the Settling Defendants. *See* Settlement Agreement at ¶ 70;
12 AzHHA Settlement Agreement at ¶ 70. In short, in this action, Class Counsel obtained relief
13 for Class Members that was not obtained in the DOJ action and will provide significant
14 monetary and non-monetary relief to Class Members.²⁵

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19 8. **Reaction of Class Members to the Proposed Settlement Favors**
20 **Approval Because No Objections Have Been Received.**

21 As noted above, no class member has objected to the Settlement before or after the
22 February 11, 2011 deadline to submit objections. Furthermore, fewer than 200 persons
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27 ²⁵ To the extent that the structural relief obtained here compliments the relief obtained in the
28 DOJ action, this factor weighs in favor of the Settlement. *See Lifelock*, 2010 WL 3715138
at * 4 ("Combined with the FTC settlement redress remedy, Class Members secure relief,
both monetary and injunctive that they sought when they initiated the Litigation.")

1 requested exclusion from the class, a tiny fraction of the 26,600 persons to whom Mailed
2 Notice was sent.²⁶

3 "By any standard, the lack of objection of the Class Members favors approval of the
4 Settlement." *In re Omnivision Technologies, Inc.*, 2007 WL 4293467 at * 6 (N.D. Cal. 2007)
5 (approving settlement with three objections) (citing *Churchill Village LLC v. Gen. Elec.*, 361
6 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices
7 sent)); *Bellows*, 2008 WL 5458986 at * 8 ("The absence of any meaningful objection by a
8 Class Member is an important factor in evaluating the fairness, reasonableness, and adequacy
9 of the settlement and supports approval of the settlement here."); *Rodriguez v. West Pub.*
10 *Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (upholding approval of a settlement with 54
11 objections out of 376,000 notices). Here, there have been no timely objections to the
12 Settlement.
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17 9. **The Plan of Allocation is Fair and Reasonable and Should be**
18 **Given Final Approval**

19 The same standards that govern the assessment of the settlement as a whole- whether
20 the settlement is fair, reasonable and adequate-also apply to the plan of allocation.
21 *Omnivision* 2007 WL 4293467 at * 7 ("Approval of a plan of allocation of settlement
22 proceeds in a class action is governed by the same standards of review applicable to approval
23 of the settlement as a whole: the plan must be fair, reasonable and adequate.") (internal
24 quotations and citations omitted). In addition, "it is reasonable to allocate the settlement
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²⁶ See *supra* note 7-8.

1 funds to class members based on the extent of their injuries or the strength of their claims on
2 the merits." *Id.*

3 In an antitrust action alleging class members suffered decreased compensation as a
4 result of defendants' price fixing conspiracy, the court in *Law v. Nat'l Collegiate Athletic*
5 *Assoc.*, 108 F.Supp.2d 1193, 1196 (D. Kan. 2000) stated: "if differences exist between the
6 likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of
7 the settlement ... in favor of plaintiffs whose claims comprise the set that was more likely to
8 succeed." (internal citations and quotations omitted); *see also, In re Exxon Valdez*, No. 89-
9 0095, 1996 WL 384623 (D. Alaska June 11, 1996), *aff'd*, 161 F.3d 12 (9th Cir. 1998)
10 (approving plan of allocation that applied discount to recovery for class members whose
11 claims had been weakened by prior court rulings).

12 Under the proposed Plan of Allocation here, the Net Settlement Amount will be
13 distributed among the members of each Settlement Class based upon the Class Members': (1)
14 membership in the Per Diem or Traveler Settlement Class; (2) position (RN, LPN, etc.) the
15 class member occupied; (3) how many hours the class member worked for a Defendant
16 hospital or other AzHHA hospital during the Class Period (Jan. 1, 1997 to Sept. 12, 2007);
17 and (4) whether the hospital and agency with whom the Class Member worked participated
18 in the AzHHA Registry Program at the time of the Class Member's placement at the
19 defendant hospital. *See* Allocation Plan at ¶¶ 1 & 7. As between the two Settlement Classes,
20 as the Mailed Notice and Published Notice explained, the members of the Per Diem
21 Settlement Class will be allocated more per-hour (a 4 to 1 ratio), all else being equal, than
22 members of the Traveler Settlement Class, reflecting this Court's rulings on class
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1 certification. *See* Mailed Notice at Question 12; Published Notice at 2-3; Allocation Plan at
2 ¶¶ 3-4. Within each class, AzHHA bill rates have been used to determine the relative share
3 to be awarded to different nursing positions included in the classes, such as RNs, LPNs, etc.
4 Allocation Plan at ¶ 6. Positions with higher AzHHA bill rates are allocated higher per-hour
5 allocation amounts. *Id.* Further, Class Members' settlement distribution amount will differ as
6 to whether the hours they worked were through agencies that participated in the Registry
7 Program and whether the hospital where they worked was in the Registry Program at the
8 time they worked there. Allocation Plan at ¶¶ 6 & 7. Adjustments have been made to reflect
9 all of these factors so as to achieve a fair allocation.
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12 Accordingly, the Allocation Plan is fair, reasonable and adequate under the Ninth
13 Circuit's factors for determining whether a settlement is fair, adequate and reasonable. The
14 plan reflects the relative strengths, risks and complexities of class member claims, has been
15 recommended by experienced counsel backed by detailed expert analysis from Dr. Singer,
16 and has met no objection from Class Members who were apprised of the Allocation Plan
17 through the Notice, and should be approved.
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1 **III. CONCLUSION**

2 For the reasons discussed above, Plaintiffs respectfully request that their Motion be
3 granted.

4 Dated: February 25, 2011.

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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that on February 25, 2011 the foregoing
3 **PLAINTIFFS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES**
4 **IN SUPPORT OF MOTION FOR (1) FINAL APPROVAL OF THE SETTLEMENT**
5 **AND PLAN OF ALLOCATION; (2) AWARD OF ATTORNEYS' FEES, COSTS AND**
6 **EXPENSES; AND (3) SERVICE AWARDS TO THE REPRESENTATIVE**
7 **PLAINTIFFS** was served and notice of this filing will be sent to all parties listed
8 below by operation of the Court's CM/ ECF System:

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