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5 **LOS ANGELES**
6 **SUPERIOR COURT**

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10
11 **IRENE MUTUC, MARIA HUSSER**
12 **MEJIA, RHONDA MAURER and**
13 **JANET CARNES on behalf of**
14 **themselves and all persons similarly**
15 **situated,**

16 **Plaintiffs,**

17 **vs.**

18 **HUNTINGTON MEMORIAL**
19 **HOSPITAL, an affiliate of SOUTHERN**
20 **CALIFORNIA HEALTHCARE**
21 **SYSTEMS, a California corporation and**
22 **DOES 1 to 100, inclusive,**

23 **Defendants.**

Case No. BC 288727

SUPPLEMENT TO
STATEMENT OF DECISION

24 **VII.**

25 **RESTITUTION**

26 In its initial Statement of Decision, the Court found that the wages earned by the
27 Class had been underpaid during the Class period and that it was entitled to restitution as
28 well as injunctive relief. Without determining the amount of restitution, the Court did
conclude that the amount testified to by Defendant's expert, Dr. Ward, was not the correct
measure. However, during the trial, Defendant had contested the validity of the calculation
of unpaid wages presented by Plaintiff's expert, Mr. James Toney, on two grounds. One

1 was based on the contention that the regular rate of pay used was erroneous because it
2 included the SSP as a component thereof, but, as has been discussed hereinabove, the
3 Court has found that the SSP is not exempt from inclusion in the remuneration that is to be
4 used in determining the regular rate of pay and, therefore, the regular rate of pay used by
5 Mr. Toney was correct. The other argument against Toney's calculation was that it resulted
6 in an amount which represented, in part, the payment of overtime on overtime and it was
7 on this issue that the Court ordered a limited reopening of evidence to take further
8 testimony from Mr. Toney which occurred on November 30, 2007.

9 A brief recitation of related events is probably useful to an understanding of the
10 issues to be addressed herein. On November 29, 2007, Defendant submitted its Brief on
11 Restitution without leave or request of the Court. Defendant reiterated therein its argument
12 that Toney's calculation resulted in the payment of overtime on overtime and, for the first
13 time, presented the further arguments that restitution should only be ordered for class
14 members who worked a short shift and that restitution should only be assessed for either
15 the week, or two-week period, in which the SSP had been paid. Plaintiff objected to the
16 filing of this brief on the ground that the Court had neither requested nor granted leave for
17 supplemental briefing but the Court overruled the objection, believing that the issues raised
18 should be addressed, and granted leave to Plaintiff to file a response.

19 On November 30, 2007, the further testimony was received from Mr. Toney and
20 counsel presented further argument on the issue of restitution including, for the first time,
21 Defendant's contention that Toney's calculation improperly included straight time pay.
22 Thereafter, on December 14, Defendant filed a "Supplemental Brief Regarding Restitution"
23 indicating that it was filed pursuant to an order of the Court. This was incorrect as the
24 Court had granted Defendant's request to file supplemental briefing on a different issue.
25 A request for judicial notice was also filed by Defendant and Plaintiff has objected to both
26 the brief and the request for judicial notice. The objection to the brief has been overruled
27 because, even though it was not ordered by the Court, it addressed the arguments already
28 made and there is no prejudice to Plaintiff. The objection to the request for judicial notice

1 is sustained for the reasons set forth in the Court's minute order of January 14, 2008.

2 After consideration of all evidence and arguments presented, the Court has
3 concluded that the underlying assumptions and method of calculation presented by Plaintiff
4 provide the proper measure of the restitution to be ordered as is set forth hereafter in the
5 discussion of the arguments presented by Defendant against that methodology.

6 A. The Restitution Properly Includes Straight Time Pay.

7 Defendant's counsel argued for the first time on November 30 that Toney's
8 calculation is erroneous because it includes approximately \$20 million, or about 2/3 of the
9 total, for straight time pay and any such claim was precluded by (1) the prior court of
10 Appeal decision in *Mutuc* which Defendant claims directed the Court to determine only the
11 overtime pay due, if any; (2) because the complaint in this action did not make any claim
12 for such pay; and (3) that there is no legal authority for additional straight time pay. Each
13 of these arguments is without merit. The issue before the Court of Appeal was whether the
14 trial court had properly denied summary adjudication of the issue of whether the SSP is a
15 subterfuge or artifice designed to evade the overtime law. In affirming the trial court's
16 order, the Court of Appeal found that Defendant had not established as a matter of law that
17 the SSP is not a subterfuge but nowhere in its opinion did it direct or indicate that the trial
18 court was precluded, in deciding the remaining issues, from considering whether there was
19 straight time owed.

20 It is true that the first amended complaint, the operative pleading, states in a number
21 of places that Defendant has failed to pay properly calculated overtime to the Class
22 members and, to at least some extent, lacks clarity as to the specific components of its
23 claim. Nevertheless, it also states in a number of places that the Class seeks
24 compensation for all wages earned but not paid. (See, for example, the allegations
25 contained in Paragraphs 28, 32, 43, 47, 54, 57 and the prayer for the 1st cause of action.)
26 Any lack of clarity could have been addressed by several different means but the Court
27 finds the first amended complaint was sufficient to put Defendant on notice that the claims
28 asserted included the failure to have paid the proper straight time wages earned. Further,

1 if this was a serious argument, it most certainly would have been made at trial.

2 It is unclear what was meant by the last argument that there is no legal theory in
3 California law to support the payment of additional straight time pay as the entire structure
4 of California and Federal wage laws and regulations includes safeguards to assure the
5 payment of all wages earned. If the contention is that it is for the employer and its
6 employees to determine the base (and other types of) pay for a given job, that is correct
7 as far as it goes. However, the regular rate of pay, which is not limited by the parties'
8 agreement, does affect the straight time pay as has been discussed previously and will be
9 hereafter.

10 B. Plaintiff's Calculation of Wages Due Does Not Include
11 Payment Of Overtime On Overtime.

12 As was the case with his original testimony, the further testimony from Mr. Toney
13 confirmed that the calculated straight time rate which he used to determine the overtime
14 earned, but not paid, to the class members did not include overtime already paid. He
15 started with the average straight time rate for 12-hour employees working 10 or more hours
16 that had been determined by Defendant's expert, Dr. Ward, based on what had actually
17 been paid. Because the base rate was the lower 12-hour rate, Toney then determined
18 what that average rate should have been if the Defendant had paid the proper straight time
19 rate which should have included the SSP. This result was what he called the calculated
20 rate. He then used that average calculated rate to determine the average rate that should
21 have been paid for overtime and double time. The difference between what was actually
22 paid for regular time, overtime and double time became the average underpayment of
23 wages per employee. He performed this calculation for both the 12-hour nurses and the
24 other 12-hour employees. The average difference then became the basis for calculating
25 the underpayment for both categories (nurses and non-nurses) of employees.

26 At no time was overtime already paid used as a basis for determining the calculated
27 rate. Its only use was to find the difference between what had been paid and what should
28 have been paid in order to establish the amount of unpaid wages. As a consequence,

1 Defendant's contention that the calculated rate was really just the addition of overtime to
2 the base rate is unpersuasive as it seems to ignore the method of calculation described by
3 Mr. Toney. Much of Defendant's criticism of the creation and use of the calculated rate is
4 really a product of its own actions. As an example, it is true that the parties negotiated a
5 lower base rate for 12-hour employees but is not Mr. Toney who has, in effect, established
6 a higher rate of pay. Rather, it was Defendant's decision to also pay the SSP to 12-hour
7 employees for each hour worked for 9.9 hours or less on a 12-hour shift that resulted in a
8 higher rate of straight time pay. Thus, in determining what an employee should have
9 earned for 10 or more hours worked, Toney didn't "gross up" the base rate, but instead,
10 simply calculated what the law requires for straight time which necessarily affected the
11 overtime rate as well.

12 Defendant had established pay codes that represent the differing elements of
13 employees' pay (see Exh. 46-10). These differing pay codes are not simply a bookkeeping
14 formality, but instead, represent differing and discreet components of pay which actually
15 exist and are used in the computation of the pay due the employees. The SSP is never
16 paid as overtime but, rather, as the Court has found, represents a component of the regular
17 rate of pay (which, by definition, is the remuneration paid for non-overtime work) for all 12-
18 hour employees who work 9.9 or fewer hours in a scheduled shift. Overtime is paid such
19 employees for 8.1 through 9.9 hours worked in a scheduled 12-hour shift and that overtime
20 is based on the regular rate calculated by the inclusion of the SSP. Toney's calculations
21 respected these differing pay categories and, as a result, his use of the SSP was only for
22 the determination of the regular rate of pay and he did not include any overtime payments
23 in determining that regular rate.

24 C. All Class Members Who Have Worked A Full 12-Hour Shift
25 Are Entitled to Restitution.

26 Defendant contends that a 12-hour employee who has not worked a short shift, and
27 thus has not been paid the SSP on any occasion, has received all wages due. The
28 argument can, essentially, be summarized as follows: (1) it is admitted that an employer

1 may establish differing base rates of pay for 8-hour and 12-hour employees performing the
2 same kind of work; (2) the Class members entered into agreements for a lower base rate
3 than was being paid 8-hour employees; (3) many of the 12-hour employees never worked
4 a short shift during the class period and, thus, never received payment of the SSP; and (4)
5 therefore, they have not been damaged because they have received the pay, including
6 overtime at the proper rate, agreed upon. As a result, it argues such employees do not
7 have a 17200 claim because they have suffered no harm.

8 The foregoing is based on the premise that so long as an employer always makes
9 an employee work longer than a regular day or workweek, it does not have to pay the
10 regular rate of pay that would exist for a non-overtime day or week. The Court, however,
11 finds no basis in the applicable regulations or case law to support this limitation on the
12 determination and applicability of the regular rate to an employee's pay. The right of
13 employers and employees to set the base, and other categories of pay, by agreement is
14 not absolute and that right does not include the right to determine the regular rate of pay.
15 That determination is by operation of law, based on the agreed rates, which requires the
16 inclusion of all remuneration, not including the exceptions provided by law, for a non-
17 overtime week. 29 U.S.C. Sec. 207(e) states that the regular rate "shall be deemed to
18 include all remuneration paid to ... the employee" excluding certain enumerated payments
19 set forth therein. In *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 US. 419 (1945),
20 the U.S. Supreme Court stated that "Once the parties have decided upon the amount of
21 wages and the mode of payment the determination of the regular rate becomes a matter
22 of mathematical computation, the result of which is unaffected by any designation of a
23 contrary 'regular rate' in the wage contracts." It further described it as the hourly rate
24 actually paid the employee for the normal, non-overtime workweek for which the person is
25 employed. There is nothing therein to suggest that an employer can avoid the legal
26 requirement, or the consequences thereof, by requiring its employees to work longer than
27 the regular work day or week. Thus, it is quite clear that payment of the agreed wages
28 does not satisfy an employer's obligation if those wages are not based on the correct

1 regular rate.

2 For Defendant's 12-hour employees, their non-overtime work day was 8 hours and
3 the non-overtime workweek was 40 hours and, in every instance, they will be paid the SSP
4 for each of those non-overtime hours. That pay becomes part of the regular rate and is in
5 effect for all 12-hour employees while that wage agreement exists and it becomes the
6 regular rate for all weeks. [See 29 CFR 778.327(b).] There may be other wage structures
7 in which the regular rate is not a constant, perhaps where piece work or other incentives
8 apply, but in this instance, the regular rate is known because the base rate and SSP will
9 always be paid to a 12-hour employee for an 8 hour day, or 40 hour week. The
10 consequences of the legal requirements for establishing the regular rate of pay also cannot
11 be avoided by an employer's decision to pay a lower rate merely because the work in
12 question is performed during the statutory overtime hours (29 CFR 778.316). Because the
13 regular rate necessarily includes the SSP at all times, Defendant's argument that an
14 employee who never worked a short shift has not been damaged is incorrect. The opposite
15 is true because such an employee was damaged each time he/she worked 10 hours or
16 more because the time beginning at the 10th hour was paid a lower base and overtime rate.
17 The only time that damage did not occur was when they worked 9.9 hours or less in a
18 scheduled shift.

19 D. The Restitution Due Is Not Limited To Those Pay Periods
20 In Which The SSP Was Paid.

21 Defendant's argument that any restitution to an employee should only be assessed
22 for the week or pay period in which a SSP payment was made to that employee is based
23 on the same premise as the argument discussed in the last section to the effect that no loss
24 has been suffered until the SSP has been paid. Defendant states that Federal and State
25 regulations or statutory law compel such a conclusion. (See Par. II B of Defendant's Brief
26 filed December 14, 2007.) Its reasoning is that the calculation of the regular rate is based
27 on the remuneration paid for a normal non-overtime workweek (under Federal law),
28 coupled with the fact that the State of California assesses penalties for the underpayment

1 of wages by each pay period, compels the conclusion that either of those time periods must
2 also be the measure for limiting any restitution. The workweek basis for determining the
3 regular rate under Federal law might very well not be the rule in California because the
4 State, in addition to mandating overtime for a workweek of more than 40 hours, also
5 requires overtime for a workday of more than 8 hours [Labor Code Sec. 510(a)] whereas
6 Federal law is based on a workweek regardless of the number of hours worked in any one
7 day [29 U.S.C. Sec. 207(a)(1)]. But, again, whatever the measure may be, the basis of the
8 regular rate determination or the measure of punishing continuing violations are entirely
9 different concepts from the award of restitution for unpaid wages. The wage and hour laws
10 were intended to provide broad protection to employees and are to be interpreted broadly
11 to accomplish such purpose [*Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207 (1959)],
12 so, if there was to be some limitation imposed, it would and should have been done by
13 statute or regulation and not left to surmise based on unrelated concepts.

14 This issue is, in any event, of no moment under the facts of this case because the
15 Court has found that damage occurred every time an employee worked 10 or more hours
16 in a workday. As stated previously, the only time a loss did not occur was when an
17 employee worked 9.9 or fewer hours in a given shift and no restitution is being ordered in
18 those instances. Rather, the restitution is for the wages that were unpaid (straight time,
19 overtime and double time) whenever a Class member worked 10 or more hours and did not
20 receive the proper regular rate and the overtime and double time based on that regular
21 rate.

22 This result is the product of choices made by Defendant to, in part, respond to the
23 concerns of both the 8-hour and the 12-hour employees after Defendant had made the
24 decision to offer 12-hour shifts which, in turn, may have been seen by it as either necessary
25 or desirable to be competitive in the labor market. It is not for the Court to assess the
26 wisdom of the choices made but only the effect thereof. Nevertheless, it appears that there
27 were alternatives available at the time the decisions were made, such as the proper
28 adoption of an alternative workweek schedule, that could have accomplished substantially

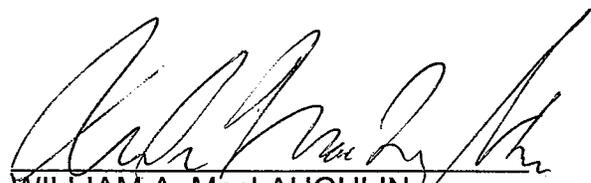
1 similar results and this decision does not preclude changes that could be made to comply
2 with the wage law and still attain the several purposes that appear to have driven the
3 adoption of the wage and hour structure in question.

4 E. Conclusion.

5 Because the Court finds that Mr. Toney's calculation of wages earned but not paid
6 to the Class to be based on the correct assumptions, as well as on a valid database, and
7 to be mathematically correct in the calculation, the Court orders restitution in the amount
8 of \$32,857,014.83 through December 31, 2007, with interest continuing thereafter until paid
9 at the lawful rate of 10% per annum.

10 A further status conference will be set by separate notice to schedule further
11 proceedings in this matter.

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13 Dated: JAN 25 2008

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15 
16 WILLIAM A. MacLAUGHLIN
17 Judge of the Superior Court
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19 ep: 1/24/08
20 mutac v. huntington.ssd