

## SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Agreement, along with all exhibits hereto (collectively, the “Settlement Agreement”), is entered into by and between SSM Health Care of Wisconsin, Inc. (Defendant) and Roberta Fosbinder-Bittorf (the “Class Representative” or the “Plaintiff”), for herself and on behalf of a class and collective class of all similarly-situated employees, in the case of *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, Case No. 11-cv-592, filed in the United States District Court for the Western District of Wisconsin (the “Lawsuit”).

### RECITALS

WHEREAS, the Class Representative filed a lawsuit under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* and Wisconsin wage payment and overtime laws, Wis. Stats. §§ 103, 104, 109, *et seq.*, as a class and collective action to recover unpaid wages against Defendant on August 23, 2011 (dkt. #1);

WHEREAS, Defendant filed an Answer denying the material allegations in the Complaint on September 19, 2011. (dkt. #6);

WHEREAS, the Class Representative is represented in the Lawsuit by the law firms of Hawks Quindel, S.C. and Habush Habush & Rottier, S.C. (“Class Counsel”);

WHEREAS, the Collective Class was conditionally certified by the Court on March 21, 2013 and Notice was mailed to the Collective Class. (dkt. #100);

WHEREAS, thereafter the parties attended a mediation on June 6, 2013, where, by arms length negotiations, the parties reach a settlement of this matter.

WHEREAS, Defendant denies all of the allegations in the Lawsuit and any and all liability and damages of any kind to anyone with respect to the alleged facts or causes of action asserted in the Lawsuit, but nonetheless, without admitting or conceding any liability or damages whatsoever, has agreed to settle the Lawsuit on the terms and conditions set forth in this Settlement Agreement to avoid the burden, expense, and uncertainty of continuing the Lawsuit;

WHEREAS, the parties recognize that the outcome in the Lawsuit is uncertain and that achieving a final result through the litigation process would require substantial additional risk, discovery, time and expense;

WHEREAS, the Class Representative and her counsel have conducted an investigation and evaluation of the facts and law relating to the claims asserted in the Lawsuit to determine how best to serve the interests of all potential class members and believes, in view of the costs, risks, and delay of continued litigation balanced against the benefits of settlement, that the settlement as provided in this Settlement Agreement is in the best interest of all and that the settlement provided in this Settlement Agreement represents a fair, reasonable, and adequate resolution of the Lawsuit; and

WHEREAS, the parties have agreed to settle this case as to all nurses identified on Exhibit A who worked for Defendant at Saint Mary's hospital in Madison, Wisconsin at any time from August 23, 2009 to April 13, 2013 and were subject to Defendant's meal break policy ("Class Members");

NOW THEREFORE, the parties, intending to be legally bound and in consideration of the mutual covenants and other good and valuable consideration set forth below, do hereby agree as follows:

### **AGREEMENT**

1.           **Settlement.** It is agreed by and among the parties that this action, and any claims, damages, or causes of action arising out of or related to the dispute which is the subject of said action, be settled and compromised as between the Class Representative, opt-in Plaintiffs and participating Class Members and Defendant, subject to court approval and pursuant to the terms and conditions set forth in this Settlement Agreement.

2.           **Settlement Fund.** Defendant agrees to establish a Settlement Fund in the amount of \$3,500,000.00 (“Settlement Fund”) to resolve the Plaintiff, opt-in Plaintiffs, and the participating Class Members claims. This Settlement Fund is inclusive of attorneys’ fees, costs, liquidated damages, and additional consideration to the Class Representative, such that Defendant’s settlement liability, other than the Defendant’s share of payroll taxes, shall not exceed \$3,500,000.00.

3.           **Attorneys’ Fees and Costs.** Class Counsel will apply for an award of attorneys’ fees and costs, to be approved by the Court, not to exceed \$1,166,666.66, one third of the Settlement Fund. Defendant does not oppose such application. If any award of fees and costs is less than 25% of the Settlement Fund is approved, the Plaintiff shall have the right, in her sole discretion, to void this

Agreement by filing a Notice of Withdrawal From Settlement by Counsel. In no event shall Plaintiff file such a Notice of Withdrawal later than 5 days after the award of Attorney's fees and costs. If Plaintiff files such a Notice of Withdrawal, the case will proceed as if no settlement had been attempted. In that event, the parties agree to enter into new good-faith negotiations relative to the terms of any settlement before resuming litigation.

4. **Enhancement Payment.** The Class Representative will receive an additional \$15,000 in recognition of her efforts in bringing this claim and the assistance she provided counsel in bringing this matter to resolution. Participating Plaintiffs, who have been deposed, responded to written discovery, and provided evidentiary support during this litigation, Carolyn Mannina, Trisha Bratten and JoLynn Meyers, shall each receive \$5,000 in recognition of their efforts. These amounts are in addition to any amount allocated to them in section 5 below.

5. **Allocation to Class.** The class shall be allocated \$2,303,333.33 to be divided between unpaid wages and liquidated damages. All Class members shall be allocated settlement funds on pro rata basis based on the total value of their individual claim. Individual claim values have been calculated for each class member by determining the number of deducted but not cancelled meal periods for the class member during the Class Period and multiplying the deducted but not cancelled meal periods by the employee's regular or overtime rate, depending on whether said meal period would have been considered overtime work had it been compensated. Any amount accepted by any non-excluding class member in this

settlement shall represent full payment of any wages and liquidated damages that could have been claimed through this lawsuit.

**6. Settlement Approval Process.**

a. The parties agree to seek the Court's approval for the Settlement Agreement and, for settlement purposes only, certification of the following Fed. R.

Civ. P. 23 Class:

All persons who have been or are currently employed by SSM as a nurse at St. Mary's Hospital at 700 South Park Street in Madison, Wisconsin during the period from August 23, 2009 and April 13, 2013.

b. The Plaintiff will file an unopposed Motion for Preliminary Approval of Settlement with the Court and a Proposed Order Approving Settlement no later than July 19, 2013. The parties will cooperate and take all necessary steps to effectuate judicial approval of this Settlement Agreement.

c. **Preliminary Approval of Settlement.** No later than July 19, 2013, Class Counsel shall present this Settlement Agreement to the Court, along with an unopposed motion requesting that the Court issue a Preliminary Order Approving the Settlement, and a Joint Stipulation to Certify the Plaintiff's Class for settlement purposes only, which shall include the following:

i. Preliminary approval of the settlement memorialized in this Settlement Agreement as fair, reasonable, and adequate;

ii. Certification of this case for settlement purposes, as a class action under Federal Rule of Civil Procedure 23;

- iii. Appointing Roberta Fosbinder-Bittorf as Class Representative;
- iv. Appointing Hawks Quindel, S.C. and Habush Habush & Rottier, S.C. as Class Counsel pursuant to Rule 23(g);
- v. Approving the Notice substantially in the form of Exhibit B for distribution to all Class Members by Plaintiff's counsel;
- vi. A finding that the Notice to be given constitutes the best notice practicable under the circumstances, including individual notice to all Class Members who can be identified with reasonable effort, and constitutes valid, due, and sufficient notice to Class Members in full compliance with the requirements of applicable law, including the due process clause of the United States Constitution;
- vii. A direction that each potential Class Member who wishes to be excluded from the Settlement Class must opt-out per the instructions set forth in the Notice, and that their response must be received by the date set forth in the Preliminary Approval Order;
- viii. A direction that any Class Member who has not properly and timely requested exclusion from the Settlement Class shall be bound in the event the Court issues a Final Order Approving Settlement;
- ix. Scheduling of a Fairness Hearing to determine whether this Settlement Agreement should be approved as fair, reasonable, and

adequate and whether the proposed Final Order Approving Settlement should be entered;

x. A direction that Class Counsel shall file a Petition for Approval of Attorneys' Fees and Costs at least 21 days prior to the Fairness Hearing, and a direction that any supplemental brief in support of final approval of the Settlement Agreement or in response to any objections to the application for attorneys' fees be filed at least 7 days before the Fairness Hearing, and that the Court shall determine at the Fairness Hearing in what amount attorneys' fees and reimbursement of costs and expenses should be awarded to Class Counsel;

xi. A direction that any Class Member who wishes to object in any way to the proposed Settlement Agreement must file and serve such written objections per the instructions set forth in the Notice no later than 42 days after the mailing of the Notice, together with copies of all papers in support of his or her position. The Class Notice shall state that the Court will not consider objections of any Class Member who has not properly served copies of his or her objections on a timely basis.

d. **Objection to Settlement.** Any Class Member who intends to object to the fairness of the Settlement Agreement must, by the date specified in the Preliminary Order Approving Settlement (which shall be 42 days after the mailing

of the Class Notice), which shall be no less than 15 business days before the Fairness Hearing, file any such objection with the Court and provide copies of the objection to: William E. Parsons, Hawks Quindel, S.C., 222 W. Washington Ave. Suite 450, Madison, Wisconsin 53703, and to Noah A. Finkel, Seyfarth Shaw, LLP, 131 South Dearborn Street, Suite 2400, Chicago, Illinois, 60603.

Any objection to the Settlement Agreement must include: (i) the objector's full name, address, and telephone number; (ii) the objector's dates of employment with Defendant and job title(s) while employed; (iii) a written statement of all grounds for the objection accompanied by any legal support for such objection; (iv) copies of any papers, briefs, or other documents upon which the objection is based; (v) a list of all persons who will be called to testify in support of the objection; and, (vi) a statement whether the objector intends to appear at the Fairness Hearing. If the objector intends to appear at the Fairness Hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the Fairness Hearing.

Any Class Member who does not file a timely written objection to the settlement and notice of his or her intent to appear at the Fairness Hearing shall be foreclosed from seeking any adjudication or review of the settlement by appeal or otherwise.

e. **Request for Exclusion.** Any Class Member who wishes to be excluded from the Settlement Class must submit a request for exclusion no later than 42 days after the mailing of the Notice. Any Class Member who fails to submit a timely

request to be excluded shall be subject to and bound by this Settlement Agreement and every order or judgment entered pursuant to this Settlement Agreement.

f. **Defendant's Right to Withdrawal Based Upon Requests for Exclusion.**

In the event that ten percent (10%) or more of Class Members elect to exclude themselves from the Settlement, Defendant shall have the right, in its sole discretion, to void this Agreement by filing a Notice of Withdrawal From Settlement by Counsel. In no event shall Defendant file such a Notice of Withdrawal later than 5 days after the close of the Notice period. If Defendant files such a Notice of Withdrawal, the case will proceed as if no settlement had been attempted. In that event, the parties agree to enter into new good-faith negotiations relative to the terms of any settlement before resuming litigation.

g. **Fairness Hearing.** On the date set forth in the Preliminary Approval Order, a Fairness Hearing will be held at which the Court will: (i) decide whether to certify the Settlement Class; (ii) decide whether to approve the Settlement Agreement as fair, reasonable, and adequate; and, (iii) decide any petitions for attorneys' fees and costs.

If this Settlement Agreement is finally approved by the Court, a Final Order Approving Settlement and directing the entry of judgment pursuant to Federal Rule of Civil Procedure 54(b) shall be entered as follows:

- i. Certifying the Settlement Class for purposes of this Settlement Agreement;

ii. Approving the Settlement Agreement as fair, reasonable, and adequate as it applies to the Class;

iii. Appointing Roberta Fosbinder-Bittorf as Class Representative;

iv. Appointing Hawks Quindel, S.C. and Habush Habush & Rottier, S.C. as Class Counsel;

v. Declaring the Settlement Agreement to be binding on Defendant and the Class Representative, as well as all of the Class Members who have not been excluded;

vi. Dismissing with prejudice the released claims;

vii. Dismissing without prejudice the claims of Class Members who have properly and timely excluded themselves in full accordance with the procedures set forth in this Settlement Agreement;

viii. Dismissing with prejudice the Class Representative's claims under the FLSA and Wisconsin law;

ix. Forever discharging Defendant from all released claims; and

x. Indicating the amount of attorneys' fees and expenses to be awarded to Class Counsel.

7. **Confidentiality and No Publicity.** Although filed with the Court, the Plaintiff and Class Counsel agree, until final approval of the settlement is

granted, not to communicate the terms of the settlement to any third party.

Following final approval of the settlement, Class Counsel agrees that that in Class Counsel's communication with the media, if any is to occur, the settlement shall not be used to portray the SSM or St. Mary's in a negative light. However, the parties also recognize that what is ultimately published or produced by any media outlet is outside of the control of Class Counsel, beyond the actual substance of Class Counsel's statements.

**8. Settlement Administration.** If the Court grants preliminary approval of this Settlement Agreement, Class Counsel shall serve as the Administrator and shall be responsible for administering the Settlement, sending the Class Notice, calculating the Plaintiff's and each Class Member's portion of the Settlement Fund, and distributing payments from the Settlement Fund to the Plaintiff and other Class Members aside from W2 Payments which shall be issued by Defendant. Fees and expenses of the settlement administration shall be paid by Plaintiff's counsel. The parties agree to the following procedure for settlement administration:

a. **Settlement Calculations.** Individual settlement allocations shall be made in the amounts set forth in Exhibit A. The amounts allocated to each Plaintiff in Exhibit A shall be split equally between 1099 and W2 income.

b. **Issuance of Notice.** Within 10 days of the Court's order granting preliminary approval of the Settlement, Plaintiff's counsel will mail the Notice to the Class Members and opt-in Plaintiffs in a form substantially similar to what is

attached hereto and made a part of this Settlement Agreement as Exhibit B. The Notice shall inform Class Members of their right to exclude themselves from the settlement, object to the settlement, and the approximate amount they are entitled to receive if they choose to participate in the settlement. If any Notices to Class Members are returned by the postal service as undeliverable, Defense counsel agrees, at Plaintiff's counsel's request, to provide Plaintiff's counsel with that individual's social security number, which will be maintained as confidential, and destroyed upon conclusion of this settlement process, and Plaintiff's counsel agrees to make its best efforts in locating the individual, including running a skip trace on the individual. The Notices will be promptly re-mailed to the updated address. If, after a second mailing of the Notice, the Notice is returned by the postal service, Defendant shall post in workplace, in the unit where the nurse is or was employed, a request for contact information regarding the individual. If no contact information is provided within two weeks of posting, the parties shall be deemed to have exhausted all efforts in their attempts to locate the individual and the individual shall be bound by this settlement.

**9. Release.**

a. Upon the Court entering a Final Order Approving Settlement, the Class Representative's claims shall be deemed to have been dismissed with Prejudice.

b. Upon the Court entering a Final Order Approving Settlement, the Class Representative and Class Members who do not exclude themselves from the

settlement and who return a timely executed Consent Form, shall be deemed to have released all federal and Wisconsin state wage and hour claims that were raised or could have been raised in the course of the Class Representative's or Class Members' employment with Defendant or during the time period from August 23, 2009 to the date of the Court's Final Approval Order ("Class Period"). As to those individuals who do not exclude themselves from the settlement and who did not return a timely executed Consent Form, they shall be deemed to have released all Wisconsin state wage and hour claims that were raised or could have been raised in the course of the Class Representative's or Class Members' employment with Defendant.

**10. Settlement Payments.**

a. Funding of the Settlement and Payment of Attorneys' Fees. If no objections to the settlement are filed, Defendant shall transfer the total amount of the Settlement Fund less amounts allocated to the participating Class Members as W2 wages, to the Hawks Quindel, S.C. IOLTA trust account within 10 days after the Court enters the Final Order Approving Settlement. Defendant will issue Class Counsel one or more IRS Forms 1099 for the attorneys' fees and costs paid consistent with apportionment provided by Class Counsel. If objections to the settlement are filed, but the settlement is approved, and no appeals are filed, then Defendant shall transfer the total amount of the Settlement Fund less amounts allocated to the participating Class Members as W2 wages, 40 days after the Court enters the Final Order Approving Settlement. If an appeal is filed, no payments

shall be issued until and unless the settlement is upheld on appeal or the objection is otherwise resolved. If an appeal is filed and the settlement is upheld or the objection is otherwise resolved, Defendant shall transfer the total amount of the Settlement Fund less amounts allocated to the participating Class Members as W2 wages to Class Counsel as Administrator within 10 days after the resolution.

b. Settlement Checks. Upon the Court entering a Final Order Approving Settlement and as otherwise provided in subparagraph a. above, Class Counsel shall send Class Representative and Class Members who do not exclude themselves from the settlement a settlement check containing their allocated portion of the Settlement Fund designated as 1099 Income and Defendant shall send the Class Representative and Class Members who do not exclude themselves a settlement check containing their allocated portion of the Settlement Fund designated as W2 wages. Payments will be made no later 21 days from the funding of the settlement per paragraph a. above.

c. Reissuing of Payments. If any settlement checks are returned as undeliverable within 120 days of issuance, Class Counsel shall promptly attempt to locate the person. Defendant agrees to provide Class Counsel with Social Security numbers for those individuals whose settlement checks are returned. Upon request by a participating Class Member, Class Counsel and Defendant will promptly reissue checks that were mailed but not cashed by the participating Class Member, during the 120-day time period. However, Class Counsel and Defendant shall deduct from the individual's settlement amount any cost associated with canceling a

previously issued settlement check. Any settlement check that remains undeliverable or is not cashed after 120 days following its issuance shall be cancelled and voided. Class Counsel and Defendant will not reissue checks after the 120-day time period. Any settlement check that remains undeliverable or is not cashed after 120 days following its issuance, and following its cancellation and voiding and deduction for any cost related to the same, shall revert in the manner described in paragraph 11 below.

d. Tax Treatment. For tax purposes, each participating Class Member's Settlement Share, as set forth in Exhibit A, constitutes a combination of alleged unpaid wages, as well as liquidated damages to be divided equally. The payment of the alleged unpaid wages shall be deemed payment of the alleged unpaid wages and subject to all legally required garnishments, liens, wage withholding orders, regular withholdings, and similar obligations, and reported on an IRS Form W-2 to be issued by the Defendant. The remaining amount shall be for alleged interest and liquidated penalty claims and shall not be subject to payroll withholdings, and shall be reported on an IRS Form 1099 to be issued by the Class Counsel. The Class Representative and Participating Class Members' Enhancement Payments shall be reported on an IRS Form 1099. The amounts payable under this Settlement will not trigger any additional benefits or liabilities under Defendant's benefits plans, including any retirement plans in which participating Class Members participate. Attorneys' fees and costs paid pursuant to Paragraph 6 shall be paid without withholding and shall be reported to the IRS and Class Counsel under Class

Counsel's name and taxpayer identification number, which Class Counsel shall provide for this purpose through an executed IRS Form W-9, on an IRS Form 1099. Defendant will bear the employer's share of payroll taxes separately from the Settlement Fund.

11. **Reversion.** Any settlement amounts allocated to individuals who either exclude themselves from the settlement or who fail to cash their settlement check within 120 days of issuance shall revert in the following manner: The first \$100,000 shall revert to Defendant. Any amount over \$100,000 shall be divided equally between the Neighborhood Law Project at the University of Wisconsin Law School and the Catholic Multicultural Center. No later than 150 days after issuance of settlement checks, Class Counsel as the Administrator shall provide Defendant with an accounting of all settlement checks which were not cashed. If those amounts, in addition to the amount of settlement funds allocated to excluding Settlement Class members exceeds \$100,000, the Administrator and Defendant shall make payment to the Neighborhood Law Project at the University of Wisconsin Law School and the Catholic Multicultural Center, no later than 160 days after issuance of the settlement checks.

12. **No Admission of Liability.** By entering into this Settlement Agreement, Defendant admits no liability of any kind, and Defendant expressly denies any liability or wrongdoing. Accordingly, the parties agree that none of them has prevailed nor shall this Settlement Agreement be construed as evidence that any party has prevailed in this matter. This Settlement Agreement shall not be

admissible in any court or other proceeding except as necessary in connection with a claim of breach of this Settlement Agreement or an effort to enforce this Settlement Agreement. However, Defendant does agree to take reasonable steps to reinforce education of nurses and managers regarding Wisconsin law and the FLSA regarding meal periods including interruptions and the ability to leave the facility during uncompensated meal period prior to the date selected by the Court for the Fairness Hearing.

13. **Choice of Law.** The enforcement of this Settlement Agreement shall be governed and interpreted by and under the laws of the State of Wisconsin whether or not any party is or may hereafter be a resident of another state.

14. **Extension of Time.** The parties may agree upon a reasonable extension of time for deadlines and dates reflected in this Settlement Agreement, without further notice to the Court, subject to Court approval as to Court dates.

15. **No Waivers, Modifications, Amendments.** This Settlement Agreement constitutes the entire agreement of the parties concerning the subjects contained herein, and all prior and contemporaneous negotiations and understandings between the parties shall be deemed merged into this Settlement Agreement. No waiver, modification, or amendment of the terms of this Settlement Agreement, whether purportedly made before or after the Court's approval of this Settlement Agreement, shall be valid or binding unless in writing, signed by or on behalf of all parties and then only to the extent set forth in such written waiver, modification or amendment, subject to any required Court approval. Any failure by any party to

insist upon the strict performance by the other party of any of the provisions of this Settlement Agreement shall not be deemed a waiver of any of the other provisions of this Settlement Agreement, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Settlement Agreement.

16. **Court Retains Jurisdiction to Enforce Agreement.** The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of the Agreement, to the extent permitted by law, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Settlement Agreement. Any action to enforce this Settlement Agreement shall be commenced and maintained only in this Court.

17. **Agreement to Cooperate/Severability.** The parties acknowledge that it is their intent to consummate this settlement, and they agree to cooperate to the extent necessary to effectuate and implement all terms and conditions of this Settlement Agreement and to exercise their best efforts to accomplish the foregoing terms and conditions of this Settlement Agreement. The provisions of this Settlement Agreement shall be deemed severable, and the invalidity or unenforceability of any one or more of its provisions shall not affect the validity or enforceability of any of the other provisions.

18. **Counterparts.** This Settlement Agreement shall become effective upon its execution, subject to subsequent Court approval. The parties may execute this Settlement Agreement in counterparts, and execution in counterparts shall have

the same force and effect as if the Class Representative and Defendant had signed the same instrument. Any signature made and transmitted by facsimile for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement and shall be binding upon the signing party.

**19. Corporate Signatories.** Each party executing this Settlement Agreement or any of its exhibits on behalf of any party hereto warrants that such person has the authority to do so. Any person executing this Settlement Agreement or any such related documents on behalf of a corporate signatory hereby warrants and promises for the benefit of all parties hereto that such person is duly authorized by such corporation to execute this Settlement Agreement or any such related documents.

**20. Captions.** The captions or headings of the paragraphs in this Settlement Agreement are inserted for convenience or reference only and shall have no effect upon the construction or interpretation of any part of this Settlement Agreement.

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: Roberta Fosbinder-Bittorf

Title: Class Representative

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

On Behalf of SSM Health Care of Wisconsin, Inc.

**REVIEWED AND APPROVED AS TO FORM:**

**HAWKS QUINDEL, S.C.**

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: William E. Parsons

Title: Class Counsel

**HABUSH HABUSH & , S.C.**

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: Daniel Rottier

Title: Class Counsel

**SEYFARTH SHAW LLP**

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: Noah Finkel

Title: Attorneys for Defendant

**BECK, CHAET, BAMBERGER & POLSKY, S.C.**

Date: \_\_\_\_\_ By: \_\_\_\_\_

Printed Name: Christopher Johnson

Title: Attorneys for Defendant