

1 R. Joseph Barton (SBN 212340)  
2 BARTON & DOWNES LLP  
3 1633 Connecticut Ave. NW, Suite 200  
4 Washington, DC 20009  
5 Tel: (202) 734-5458  
6 Email: [jbarton@bartondownes.com](mailto:jbarton@bartondownes.com)

7 *Attorney for Plaintiff and the Class*  
8 *Additional Counsel Listed Below*

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **EASTERN DIVISION**

12 DANIELLE GAMINO, )  
13 individually and on behalf of all )  
14 others similarly situated, )

15 *Plaintiff,* )

16 v. )

17 KPC HEALTHCARE HOLDINGS, )  
18 INC., *et al.*, )

19 *Defendants,* )

20 and )

21 KPC HEALTHCARE, INC. )  
22 EMPLOYEE STOCK )  
23 OWNERSHIP PLAN, )

24 *Nominal Defendant* )  
25 )  
26 )  
27 )  
28 )

Case No.: 5:20-cv-01126-SB-SHK  
[Consolidated with Case No.: 5:21-cv-01466-SB-SHK]

**PLAINTIFF’S MEMORANDUM OF  
LAW IN SUPPORT OF MOTION  
FOR PRELIMINARY APPROVAL  
OF SETTLEMENT WITH  
DEFENDANT SPCP GROUP, LLC**

Date: July 7, 2023  
Time: 8:30 a.m.  
Courtroom: 6C

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1 **INTRODUCTION**

2 Plaintiff seeks preliminary approval of the settlement reached in this case by  
3 Plaintiff (on behalf of the Class) with the last remaining Defendant, SPCP Group,  
4 LLC (“SPCP”). Pursuant to the Settlement, SPCP has agreed to pay \$100,000 into  
5 a Settlement Fund, which after deduction of only additional expenses that were not  
6 reimbursed from other settlements – but not any attorneys’ fees – will be allocated  
7 to the Class. In exchange, the Class will dismiss with prejudice and release claims  
8 asserted in the First Amended Complaint (ECF No. 179) (“FAC”) against SPCP.  
9 The release by the Class is limited to claims relating to or arising out of the  
10 allegations of the FAC or the same factual predicate. In addition, Plaintiff will  
11 withdraw her currently pending appeal of this Court’s order granting summary  
12 judgment to SPCP and SPCP will withdraw and release its claims for attorneys’  
13 fees and costs. This Settlement represents a fair, reasonable, and adequate result for  
14 the Class given the uncertainty of establishing both liability and the amount of  
15 monetary relief against SPCP —and the partial compensation for the Plan’s losses  
16 from the settlements with both Alerus Financial, N.A. (“Alerus”) and the KPC  
17 Defendants<sup>1</sup>— and the possibility that an award of attorneys’ fees or costs could  
18 potentially reduce the value of the prior settlements. Thus, the Court should  
19 preliminarily approve this settlement, authorize notice to the Class, and schedule a  
20 final fairness hearing.

21 **BACKGROUND**

22 This case arose out of a complex August 28, 2015 transaction (“2015  
23 Transaction”) in which the KPC Healthcare, Inc. Employee Stock Ownership Plan  
24 KPC Healthcare Holdings, Inc. (the “ESOP”) purchased KPC Healthcare, Inc. for  
25 approximately \$270 million. ECF No. 1. Plaintiff Gamino, a former employee of  
26

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27 <sup>1</sup> The KPC Defendants consist of all Defendants except SPCP and Alerus.  
28

1 KPC and an ESOP participant, has sought to recover for all ESOP participants as a  
2 result of Defendants' fiduciary breaches and violations. *Id.*

3 **I. The Original Litigation**

4 The original complaint was filed only against the ESOP fiduciaries (i.e., the  
5 KPC Defendants and Alerus) because Plaintiff (to whom SPCP's involvement was  
6 never disclosed during her employment) and Class Counsel were unaware of  
7 SPCP's involvement in the 2015 Transaction. ECF No. 431-1 at ¶ 2. Only after the  
8 KPC Defendants and Alerus began producing documents in the Spring of 2021 did  
9 Class Counsel learn about SPCP's involvement in the 2015 Transaction. *Id.* After  
10 Class Counsel learned of SPCP's involvement and evaluated potential claims  
11 against SPCP, Plaintiff sought to add SPCP as a defendant. ECF No. 174 at 3.  
12 Based on arguments by the KPC Defendants and Alerus, the Court denied  
13 Plaintiff's motion. *Id.*

14 **II. The Litigation Against SPCP**

15 After Plaintiff filed a separate case against SPCP, the Court consolidated the  
16 cases over SPCP's opposition. ECF Nos. 18, 38 & 49 in No. 21-cv-01466. SPCP  
17 also moved to dismiss including based on arguments about insufficient allegations  
18 that SPCP knowingly participated in the 2015 Transaction. ECF No. 33 at 17-21 in  
19 No. 21-cv-01466. In denying SPCP's motion, this Court held the Complaint  
20 adequately alleged that SPCP had knowledge that the transaction at issue was  
21 "imprudent" or the amount it "received were unreasonable." *Gamino v. SPCP*  
22 *Grp., LLC*, No. 5:21-CV-01466-SB-SHK, 2022 WL 336469, at \*4 (C.D. Cal. Feb.  
23 2, 2022) ("*Gamino I*"). Plaintiff sought class certification, which the Court granted  
24 over SPCP's opposition. ECF No. 243. Class Counsel pursued discovery on the  
25 claim against SPCP, including document requests, interrogatories, requests for  
26 admission, and the deposition of the primary person at SPCP involved in the 2015  
27 Transaction. ECF No. 431-1 at ¶ 3. Class Counsel obtained discovery of financial  
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1 records and other materials necessary to trace the proceeds SPCP had received  
2 from the 2015 Transaction and engaged an expert forensic accountant to assist in  
3 that process. *Id.*

4 SPCP moved for summary judgment, ECF No. 296, which the Court  
5 granted. ECF No. 338 at 16. Following final approval of the settlements reached  
6 between the Class and the other Defendants, SPCP sought its costs and attorneys'  
7 fees from Class Counsel and/or the Class's Settlement Fund. ECF Nos. 420, 421  
8 422. Plaintiff timely appealed from the Court's order granting summary judgment  
9 to SPCP following entry of final judgment. ECF No. 427. The Clerk of Court  
10 awarded costs to SPCP in the amount of \$28,796.40. ECF No. 435.

### 11 **III. The Settlements**

12 Plaintiff entered into settlements with the KPC Defendants on July 25, 2022  
13 and with Alerus on October 7, 2022. ECF No. 322-3; ECF No. 395-3. The Court  
14 preliminarily approved those settlement agreements on September 28 and  
15 November 18, 2022. ECF No. 391; ECF No. 399. Following notice to the Class  
16 and a fairness hearing, the Court granted final approval of both settlements, which  
17 generated a collective \$9 million Settlement Fund for the benefit of the Class. ECF  
18 No. 418 at 6.

19 The terms of the proposed Settlement with SPCP are set forth in the  
20 Settlement Agreement. Barton Decl. Ex. 1 ("Agmt."). In short, the Settlement  
21 Agreement provides for a payment of \$100,000 into an Escrow Account. *Id.* §  
22 III.1. The only amounts to be deducted from this amount, subject to approval by  
23 the Court will be expenses for settlement administration, one-half of the expenses  
24 to comply with the Class Action Fairness Act ("CAFA") and expenses incurred by  
25 Class Counsel that were incurred after the prior settlements. *Id.* §§ IV.1 & X.2.  
26 Class Counsel will not seek any attorneys' fees out of this Settlement or an  
27 additional service award for Plaintiff. *Id.* § IV.2. Class Counsel's proposed Plan of  
28



1 Allocation is essentially the same as that previously approved by the Court in  
2 connection with the other settlements. Barton Decl. Ex. 2. The Settlement  
3 contemplates that payments will be made to the Class through the ESOP. Agmt. §  
4 IV.5, In exchange, the Class will dismiss the claims asserted in the FAC against  
5 SPCP with prejudice, dismiss its appeal and release SPCP from any and all claims  
6 that the Class alleged in the Complaint and that arise from the same factual  
7 predicate. *Id.* § XII.1(a). SPCP also agrees to release its claims for attorneys’ fees  
8 and costs. *Id.* § XII.1(c)-(d).

### 9 ARGUMENT

10 The Ninth Circuit has held that there is a “strong judicial policy that favors  
11 settlements, particularly where complex class action litigation is concerned.” *Class*  
12 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted).  
13 To protect the interests of the class, a class action cannot be settled without court  
14 approval. Fed. R. Civ. P. 23. The request for preliminary approval only requires an  
15 “initial evaluation” of the fairness of the proposed settlement. *Manual for Complex*  
16 *Litigation* § 21.632 (4th ed. 2004). The purpose of preliminary approval is to  
17 determine “whether to direct notice of the proposed settlement to the class, invite  
18 the class’s reaction, and schedule a fairness hearing.” William B. Rubenstein, *et*  
19 *al.*, *Newberg on Class Actions* § 13:10 (5th ed. 2013). “At the preliminary stage,  
20 there is an ‘initial presumption of fairness,’ and a court may grant preliminary  
21 approval if the settlement: (1) appears to be the product of serious, informed, non-  
22 collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly  
23 grant preferential treatment to class representatives or segments of the class; and  
24 (4) falls within the range of possible approval.” *Gamino v. KPC Healthcare*  
25 *Holding, Inc.*, No. 5:20-CV-01126-SB-SHK, 2022 WL 16963528, at \*2 (C.D. Cal.  
26 Sept. 28, 2022) (“*Gamino II*”) (quoting *In re Tableware Antitrust Litig.*, 484  
27  
28

1 F.Supp.2d 1078, 1079 (N.D. Cal. 2007)). The proposed Settlement satisfies the  
2 requirements for preliminary approval.

3 **I. The Settlement is the Result of Serious, Informed, and Non-collusive**  
4 **Negotiations.**

5 The first factor is met where the settlement “appears to be ... the product of  
6 informed, vigorous, arms-length bargaining.” *Ontiveros v. Zamora*, Civ. No. 2:08-  
7 567 WBS DAD, 2014 WL 3057506, at \*14 (E.D. Cal. July 7, 2014); *Colesberry v.*  
8 *Ruiz Food Prods. Inc.*, No. CV F04-5516, 2006 WL 1875444, at \*6 (E.D. Cal.  
9 June 30, 2006) (granting preliminarily approval of ESOP settlement where  
10 everything “indicates th[e] settlement is the product of arm’s length negotiations  
11 and there is no indication Plaintiffs or their attorneys have been improperly  
12 influenced by Defendants”); *Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016  
13 WL 234364, at \*6 (N.D. Cal. Jan. 20, 2016) (“An initial presumption of fairness is  
14 usually involved if the settlement is recommended by class counsel after arms’  
15 length bargaining.”) (cleaned up). The fact that experienced counsel has been  
16 actively engaged in the litigation and has diligently pursued the necessary  
17 discovery evidences the non-collusive nature of the settlement. *W. v. Circle K*  
18 *Stores, Inc.*, No. CIV S-04-0438, 2006 WL 1652598, at \*11 (E.D. Cal. June 13,  
19 2006).

20 As this Court recognized in preliminarily approving the settlement with  
21 Alerus, “Plaintiff has conducted and evaluated substantial discovery in this case.”  
22 Plaintiff has conducted and evaluated substantial discovery in this case to date.”  
23 *Gamino II*, 2022 WL 16963528, at \*2. Class Counsel sought and obtained more  
24 than 240,000 pages of documents from Defendants and 14 non-parties. ECF No.  
25 322-2 at ¶ 3. On at least ten occasions, Plaintiff had to bring discovery disputes to  
26 the attention of the Magistrate Judge through his pre-motion conference procedure.  
27 *Id.* Class Counsel also took seventeen depositions at locations across the country  
28

1 prior to reaching the Settlement. ECF No. 395-1 at ¶ 2. Class Counsel’s review of  
2 the extensive discovery was supplemented with the assistance of two outside  
3 experts: an expert on business valuation and a forensic accountant. ECF No. 322-2  
4 at ¶ 3. The latter reviewed voluminous financial documents in an effort to trace the  
5 proceeds of the 2015 Transaction still in SPCP’s possession. Barton Decl. ¶ 2.

6 The opinion of experienced plaintiffs’ advocates and class action lawyers is  
7 to be considered on preliminary approval. *Knutson v. Schwan's Home Serv., Inc.*,  
8 No. 3:12-CV-00964-GPC-DHB, 2014 WL 3519064, at \*3 (S.D. Cal. July 14,  
9 2014); *Hester v. Vision Airlines, Inc.*, No. 2:09-CV-00117-RLH-NJK, 2014 WL  
10 1366550, at \*5 (D. Nev. Apr. 7, 2014). As this Court previously recognized,  
11 “Plaintiff’s counsel all have extensive expertise in class action litigation,  
12 particularly with regards to ERISA and ESOPs.” ECF No. 174 at 8.

13 In short, the settlement with SPCP is the product of extensive arms-length  
14 negotiations conducted by informed and experienced counsel after more than two  
15 years of hard-fought litigation, extensive discovery, zealous advocacy, and  
16 vigorous arms-length bargaining.

17 **II. The Settlement Has No Obvious Deficiencies And Does Nor Provide for**  
18 **Unduly Preferential Treatment to Plaintiff or Any Segment of the Class**

19 The second and third factors are whether the agreement has any “obvious  
20 deficiencies” or displays any unduly “preferential treatment of class representatives  
21 or segments of the class,” or excessive compensation of attorneys. *Gamino II*, 2022  
22 WL 16963528, at \*2; *Grant v. Cap. Mgmt. Servs., L.P.*, No. 10-CV-2471-WQH  
23 BGS, 2013 WL 6499698, at \*5 (S.D. Cal. Dec. 11, 2013); *Newberg on Class*  
24 *Actions* § 11:25 (4th ed. 2010). The Ninth Circuit has advised courts to be  
25 concerned (a) “when counsel receive a disproportionate distribution of the  
26 settlement, or when the class receives no monetary distribution but class counsel  
27 are amply rewarded”; (b) “when the parties negotiate a ‘clear sailing’ arrangement  
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1 providing for the payment of attorneys” fees separate and apart from class funds,  
2 which carries ‘the potential of enabling a defendant to pay class counsel excessive  
3 fees and costs in exchange for counsel accepting an unfair settlement on behalf of  
4 the class’”; and (c) “when the parties arrange for fees not awarded to revert to  
5 defendants rather than be added to the class fund.” *In re Bluetooth Headset Prods.*  
6 *Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Such signs do not necessarily mean  
7 that a settlement is improper, but only that it is supported by an explanation of why  
8 the fee is justified and does not betray the class’s interests. *Id.* at 949.

9 The Settlement does not unduly favor the Class Representative or segments  
10 of the Class. As the Ninth Circuit has recognized, “[a] class action settlement need  
11 not necessarily treat all class members equally.” *Cohen v. Resolution Tr. Corp.*, 61  
12 F.3d 725, 728 (9th Cir. 1995), *vacated on other grounds*, 72 F.3d 686 (9th Cir.  
13 1996). Differential treatment is appropriate when it is “rationally based on  
14 legitimate considerations.” *Id.* In a case in which a subgroup of the class is treated  
15 differently, the court must ensure that the settlement is “fair, reasonable and  
16 adequate to *all* concerned.” *Id.* (emphasis added). Where the disparate treatment is  
17 rationally based on legitimate considerations and there was no indication of any  
18 collusion against them, the settlement may be approved. *See id.* at 727, 728  
19 (approving such a settlement); *see also Santos v. Camacho*, No. CIV. 04-00006,  
20 2008 WL 8602098, at \*10 (D. Guam Apr. 23, 2008), *aff’d sub nom. Simpao v.*  
21 *Gov’t of Guam*, 369 F. App’x 837 (9th Cir. 2010). The Settlement Agreement itself  
22 does not differentiate between members of the Class.

23 The Settlement Agreement does not contain any obvious deficiencies. Class  
24 Counsel will not seek any further attorneys' fees and will only seek expenses for  
25 settlement administration and other litigation expenses incurred after the prior  
26 settlements, but otherwise neither Class Counsel nor Plaintiff will seek any monies  
27 from the Settlement Fund. Consistent with the requirements of the Ninth Circuit,  
28

1 the only claims that will be released are only those “where the released claim is  
2 ‘based on the identical factual predicate as that underlying the claims in the settled  
3 class action.’” *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (quoting  
4 *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008)). “Put another way, a  
5 release of claims that ‘go beyond the scope of the allegations in the operative  
6 complaint’ is impermissible.” *Marshall v. Northrop Grumman Corp.*, 469  
7 F.Supp.3d 942, 948–49 (C.D. Cal. 2020). Here, the claims to be released by the  
8 Class are those based on the same factual predicate as those alleged in the  
9 Complaint against SPCP. Agmt. § XII.1(a). Additionally, the Settlement obtains  
10 releases by SPCP against the Class and eliminates the risk that any attorneys’ fees  
11 or costs will reduce the amount of the prior settlements. *Id.* § XII.1(c)-(d).

12 **III. The Settlement Provides Significant Benefits to the Class and is Within**  
13 **the Range of Reasonableness.**

14 As to the final factor, “[t]o determine whether the settlement amount is  
15 adequate, ‘courts primarily consider plaintiffs’ expected recovery balanced against  
16 the value of the settlement offer.’” *Gamino II*, 2022 WL 16963528 at \*3 (quoting  
17 *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007)).  
18 “The Court need not ‘specifically weigh[ ] the merits of the class’s case against the  
19 settlement amount and quantif[y] the expected value of fully litigating the matter.’”  
20 *Marin v. Gen. Assembly Space, Inc.*, No. CV 17-05449, 2018 WL 4999955, at \*9  
21 (C.D. Cal. July 31, 2018) (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948,  
22 965 (9th Cir. 2009)) (alterations in original).

23 Here, the Settlement Agreement provides that SPCP will pay \$100,000.00  
24 into a Settlement Fund. Agmt. § III.1. As SPCP was not a fiduciary of the KPC  
25 ESOP, the claims against SPCP were brought exclusively under ERISA §  
26 502(a)(3), 29 U.S.C. § 1132(a)(3). *Gamino I*, 2022 WL 336469, at \*4. For  
27 equitable relief against a non-fiduciary to be “appropriate” under § 502(a)(3), a  
28

1 plaintiff must identify and seek to recover a “specific fund to which they are  
2 entitled.” *Id.* As a result of the equitable character of the claims against SPCP,  
3 Plaintiff and the Class could only recover funds or other things of value from  
4 SPCP that are traceable to the proceeds of the 2015 Transaction or profits thereon.  
5 *See* ECF No. 296-1 at 45-47. Here, Plaintiff identified four funds each obtained by  
6 SPCP in consideration for its then-existing warrants from which Plaintiff could  
7 recover. *Gamino I*, 2022 WL 336469, at \*4. Specifically, SPCP received (a) \$18.8  
8 million in cash, (b) a promissory note in the original principal amount of  
9 \$26,946,000, (c) a warrant to purchase 762,592 share so KPC stock at an exercise  
10 price of \$2.50 per share and (d) 10.2% of any net payments received by KPC (or  
11 its subsidiaries) under California’s hospital quality assurance fee (QAF) program  
12 based on services provided from January 1, 2017 to December 31, 2024. First  
13 Amended Complaint (ECF No. 21 in 5:21-cv-01466 (C.D. Cal)).

14 As to the cash consideration, at the time that Plaintiff’s expert forensic  
15 accountant disclosed his report on May 27, 2022, Plaintiff’s expert was only able  
16 to identify \$1,015,898.63 in proceeds traceable to the cash consideration in SPCP’s  
17 possession. Barton Decl. ¶ 2. And SPCP disputed whether most or any of it was in  
18 fact traceable. *Id.* As Plaintiff’s expert analysis is now a year old, there is even  
19 significant uncertainty regarding whether the funds identified by Plaintiff’s expert  
20 may by this point have been dissipated. *Id.*

21 As to the notes and warrants, based on the information disclosed about the  
22 sale of the KPC stock by the ESOP in 2021 (and assuming that transaction was for  
23 adequate consideration), those notes and warrants appear to have little present  
24 value. Barton Decl. ¶ 3.

25 Finally, the QAF rights – assuming they have been paid notwithstanding  
26 KPC’s financial distress – expire next year, well before any realistic trial date even  
27 if Plaintiff were successful in her appeal at the Ninth Circuit. *Id.* Even if the Class  
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1 were successful on appeal, it could thus face a situation where there would no  
2 longer be any equitable relief of value available to it.

3 In Class Counsel’s estimation, the passage of time and dissipation of the  
4 proceeds significantly reduced the amount that could be recovered for the Class.  
5 And the likelihood of continued dissipation presents a further concern. Based on  
6 the information known about the funds that are and would be able to Plaintiff and  
7 the Class after a trial (assuming a successful appeal and trial decision), the  
8 \$100,000 appears to represent 9.8%<sup>2</sup> of the amount that could be recovered for the  
9 Class at trial (assuming that the \$1,015,89 remained traceable by the time of trial).

10 Of course, this Court has previously approved settlements with the KPC  
11 Defendants and Alerus for \$9 million, which must be considered in evaluating the  
12 proposed settlement with SPCP. *See Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th  
13 Cir. 2003) (quotation and citation omitted) (“It is the settlement taken as a whole,  
14 rather than the individual component parts, that must be examined for overall  
15 fairness”). While the Settlement with SPCP represents a modest increase to the  
16 aggregate amount of these settlements, the reasonableness of the settlement with  
17 SPCP should be considered against the backdrop of the aggregate result in this  
18 case: \$9.1 million for the Class, which will be paid out to the class in a manner that  
19 will preserve the tax-advantaged treatment of the Class’s ESOP benefits. Agmt. §  
20 III.1.

21 Class Counsel recognizes and acknowledges the expense, risk, and length of  
22 continued proceedings necessary to prosecute the litigation against SPCP through  
23 appeal and trial. “In most situations, unless the settlement is clearly inadequate, its  
24 acceptance and approval are preferable to lengthy and expensive litigation with  
25 uncertain results.” *Casey v. Dr.'s Best, Inc.*, No. 820CV01325JLSJDE, 2022 WL

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27 <sup>2</sup> Based on \$100,000 divided by \$1,015,898.  
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1 1726080, at \*8 (C.D. Cal. Feb. 28, 2022) (quoting *Nat’l Rural Telecomms. Coop.*  
2 *v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)). This is “especially true  
3 here given that ‘ERISA actions are notoriously complex cases, and ESOP cases are  
4 often cited as the most complex of ERISA cases.’” *Gamino II*, 2022 WL  
5 16963528, at \*3 (citing *Foster v. Adams & Assocs., Inc.*, No. 18-CV-02723-JSC,  
6 2021 WL 4924849, at \*6 (N.D. Cal. Oct. 21, 2021) and *Pfeifer v. Wawa, Inc.*, No.  
7 CV16-497, 2018 WL 4203880, at \*7 (E.D. Pa. Aug. 31, 2018)). Continued  
8 litigation would have been fraught with risks, including the risk that the Class  
9 would recover nothing on the claim against SPCP.

10 These risks were particularly salient as this Court had previously entered  
11 summary judgment for SPCP. ECF No 338. As overturning a judgment is always  
12 difficult, Plaintiff faced risk on appeal and then the risk of whether Plaintiff would  
13 succeed at trial (assuming a successful appeal) and the risk of whether that  
14 judgment would be upheld on appeal. Even if Plaintiff had succeeded on appeal  
15 and succeeded at trial, Plaintiff might achieve a Pyrrhic victory for the Class – in  
16 which Plaintiff proved all the elements of a knowing participation claim, but there  
17 were no recoverable assets.

18 Moreover, the Class faced a concrete and imminent risk: SPCP had sought  
19 its litigation expenses and attorneys’ fees from the Settlement Fund. ECF Nos. 420,  
20 421 422. An award could have reduced the proceeds from the settlements with the  
21 KPC Defendants and Alerus by more than \$625,000. *Id.* Class Counsel’s informed,  
22 strategic calculation was that the benefits of achieving immediate and substantial  
23 relief for the Class by settling the claim against SPCP outweighed the benefits of  
24 continuing to litigate this claim, particularly in light of the risks signaled by the  
25 Court’s summary judgment order, the risks to the Settlement Fund already  
26 achieved for the benefit of the Class, and the substantial possibility that there might  
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1 be no relief whatsoever available to the Class following further, protracted  
2 litigation if SPCP further dissipated the proceeds of the 2015 ESOP Transaction.

3 **IV. The Proposed Plan of Allocation Should be Preliminarily Approved.**

4 Class Counsel’s proposed Plan of Allocation is substantially the same as the  
5 proposed Plan of Allocation that the Court approved for the settlements with the  
6 KPC Defendants and Alerus. *Compare Gamino II*, 2022 WL 16963528, at \*1 with  
7 Barton Decl. Ex. 2. It provides that each claimant will be allocated a pro rata share  
8 of the fund based on the number of vested and unvested shares of KPC stock in her  
9 ESOP account as of August 31, 2021, or if she terminated employment prior to that  
10 date, the number of vested shares in her account at the time of her termination and  
11 any unvested shares she held that vested on plan termination. *Id.* The Plan of  
12 Allocation does not include unvested shares that were previously forfeited or  
13 shares that will be distributed to current employees from the ESOP’s suspense  
14 account because KPC forgave the loan it provided to the ESOP. *Id.* Differences in  
15 the amounts to be received by Class members are a function of differences in the  
16 underlying losses suffered by Class members in connection with the 2015 ESOP  
17 Transaction. ECF No. 361 at 7-10 (explaining justification for structure of plan of  
18 allocation in light of termination of KPC ESOP). For the same reasons, the  
19 substantially similar Plan of Allocation previously approved by the Court as fair,  
20 adequate, and reasonable is fair, adequate, and reasonable here. *See Gamino II*,  
21 2022 WL 16963528, at \*1; *see also Kaplan v. Houlihan Smith & Co.*, No. 12 C  
22 5134, 2014 WL 2808801, \*3 (N.D. Ill. June 20, 2014) (approving plan of  
23 allocation where “[t]he way the settlement proceeds will be divided among the  
24 class members” is that “[t]he settlement amount (after fees and expenses) will be  
25 divided pro rata, based on the number of shares each class member held in his/her  
26 ESOP account on [a specified date].”); *Cunningham v. Wawa, Inc.*, No. CV 18-  
27 3355, 2021 WL 1626482, at \*6 (E.D. Pa. Apr. 21, 2021) (holding plan of  
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1 allocation in ESOP case fair, adequate, and reasonable where it distributed  
2 settlement funds pro rata based on number of shares previously held by class  
3 members).

4 **V. The Court Should Modify the Class Definition.**

5 The Court previously certified a Class consisting of “All participants in the  
6 KPC Healthcare, Inc. Employee Stock Ownership Plan from August 28, 2015 or  
7 any time thereafter (unless they terminated employment without vesting in the  
8 ESOP) and those participants’ beneficiaries,” subject to certain standard exclusions  
9 to prevent conflicts of interest. ECF No. 243. While an open-ended class period  
10 made sense while the litigation was ongoing, courts generally agree that it is  
11 appropriate to fix an end-date to the class period to effect class settlements.

12 *Sampson v. Knight Transp., Inc.*, C17-0028-JCC, 2021 WL 2255129, at \*2-3  
13 (W.D. Wash. June 3, 2021) (surveying law and setting an end date as of the court’s  
14 order); *Guidry v. Wilmington Tr.*, 333 F.R.D. 324, 329 (D. Del. 2019) (collecting  
15 cases and setting end date based on interests of “fairness and efficiency”). This  
16 Court previously modified the Class definition with respect to the claims against  
17 the KPC Defendants and Alerus in precisely this way. ECF No. 391 at 5-6. The  
18 Class definition should be similarly modified as to the claims against SPCP.

19 This modification will “not alter the reasoning underlying the Court’s prior  
20 Order granting class certification.” *Gamino II*, 2022 WL 16963528, at \*2. “An  
21 order that grants or denies class certification may be altered or amended before  
22 final judgment.” Fed. R. Civ. P. 23(c)(1)(C); *Sampson*, 2021 WL 2255129, at \*2  
23 (“the district court retains flexibility and is free to modify a class definition in light  
24 of developments during the course of litigation”); *Howell v. Advantage RN, LLC*,  
25 401 F.Supp.3d 1078, 1085 (S.D. Cal. 2019) (courts retain discretion to modify the  
26 class definition “in light of subsequent developments in the litigation”). Without an  
27 end date, participants would continue to enter the Plan (and thus the Class) even  
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1 after notice had been given and allocations calculated. This would make  
2 administration of the Settlement impractical and give rise to due process concerns,  
3 as participants joining the Plan after the distribution of class notice would be class  
4 members, would be providing a release of claims, but would not receive notice.

5 Here, the amended Class definition should consist of “All participants in the  
6 KPC Healthcare, Inc. Employee Stock Ownership Plan from August 28, 2015,  
7 through August 31, 2021 (unless they terminated employment without vesting in  
8 the ESOP) and those participants’ beneficiaries,” with the same exclusions in the  
9 existing Class definition to prevent conflicts of interest. No ESOP participants  
10 accrued ESOP shares after August 31, 2021, so the proposed end date for the Class  
11 is consistent with the Plan termination.

12 **VI. The Proposed Class Notice and Plan of Notice are Appropriate.**

13 Rule 23(e) requires that the court to direct notice in a reasonable manner to  
14 all Class Members who would be bound by the settlement. *Gamino II*, 2022 WL  
15 16963528, at \*3. A proper notice should “(i) the nature of the action; (ii) the  
16 definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a  
17 class member may enter an appearance through an attorney if the member so  
18 desires; (v) that the court will exclude from the class any member who requests  
19 exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding  
20 effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P.  
21 23(c)(2)(B); *Manual for Complex Litigation, supra*, § 21.312; *see Moreno*, 2021  
22 WL 1717081, at \*4 (approving notice containing this information). Here, the  
23 proposed notice to the Class provides information on all of these subjects and  
24 informs Class Members about their rights under the Settlement as well as their  
25 right to be heard at the final fairness hearing. *See Barton Decl. Ex. 3.*

26 Notice will be provided using the same data previously used to provide  
27 notice of the prior settlements. The members of the Class will receive notice by  
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1 email if KPC had a record of the Class member's email or, if no such record is  
2 available, by U.S. Mail. Agmt. § II.4. The Court approved the same plan of notice  
3 with respect to the settlement with the KPC Defendants and Alerus, *Gamino II*,  
4 2022 WL 16963528, at \*3. Courts in this District have approved similar notice  
5 plans. *Kaupelis v. Harbor Freight Tools USA, Inc.*, No. SACV191203JVSDFMX,  
6 2022 WL 2288895, at \*3 (C.D. Cal. Jan. 12, 2022); *Stone v. Howard Johnson Int'l,*  
7 *Inc.*, No. 12CV01684PSGMANX, 2015 WL 13648551, at \*2 (C.D. Cal. June 15,  
8 2015); *Lima v. Gateway, Inc.*, No. SACV091366DMGMLGX, 2014 WL  
9 12634889, at \*3 (C.D. Cal. Nov. 7, 2014). Publication notice is not necessary in  
10 this case, because data identifies the names and addresses of all participants in the  
11 ESOP. ECF No. 322-2 ¶ 7. Class Counsel will also cause the Settlement  
12 Administrator to post copies of the Class Notice, Settlement Agreement, and other  
13 important documents to a settlement website to be established for that purpose.  
14 Agmt. § II.8.

15 The Court previously appointed CPT Group as the Settlement Administrator  
16 and therefore it is proposed CPT Group will administer the Settlement with SPCP  
17 as it has the settlements with KPC Defendants and the Alerus settlement. Barton  
18 Decl. ¶ 7. CPT has provided a bid to provide class notice and settlement  
19 administration services for this settlement for \$2,500.00. *Id.* at Ex. 4.

## 20 CONCLUSION

21 For the forgoing reasons, the Court should grant Plaintiff's motion to  
22 preliminarily approve the proposed Settlement, approve the proposed Class notice,  
23 authorize its distribution to the Class, and set deadlines as set forth in Plaintiff's  
24 motion.

1 DATED: June 5, 2023

Respectfully submitted,

3 /s/ R. Joseph Barton

4 R. Joseph Barton (SBN 212340)  
5 Colin M. Downes (admitted *pro hac vice*)  
6 BARTON & DOWNES LLP  
7 1633 Connecticut Ave, N.W. Suite 200  
8 Washington, DC 20009  
9 Tel: (202) 734-7046  
10 Email: [jbarton@bartondownes.com](mailto:jbarton@bartondownes.com)  
11 Email: [colin@bartondownes.com](mailto:colin@bartondownes.com)

12 Daniel Feinberg (SBN 135983)  
13 Nina Wasow (SBN 242047)  
14 Darin Ranahan (SBN 273532)  
15 FEINBERG JACKSON WORTHMAN &  
16 WASOW LLP  
17 2030 Addison Street, Suite 500  
18 Berkeley, CA 94704  
19 Tel: (510) 269-7998  
20 Fax: (510) 269-7994  
21 Email: [dan@feinbergjackson.com](mailto:dan@feinbergjackson.com)  
22 Email: [nina@feinbergjackson.com](mailto:nina@feinbergjackson.com)  
23 Email: [darin@feinbergjackson.com](mailto:darin@feinbergjackson.com)

24 Richard E. Donahoo (SBN 186957)  
25 Sarah L. Kokonas (SBN 262875)  
26 William E. Donahoo (SBN 322020)  
27 DONAHOO & ASSOCIATES, PC.  
28 440 W. First Street, Suite 101.  
Tustin, CA 92780 Tel: (714) 953-1010  
Email: [rdonahoo@donahoo.com](mailto:rdonahoo@donahoo.com)  
Email: [skokonas@donahoo.com](mailto:skokonas@donahoo.com)  
Email: [wdonahoo@donahoo.com](mailto:wdonahoo@donahoo.com)

Major Khan (admitted *pro hac vice*)  
MKLLC LAW  
1120 Avenue of the Americas, 4th Fl.  
New York, NY 10036  
Tel: (646) 546-5664  
Email: [mk@mk-llc.com](mailto:mk@mk-llc.com)

*Attorneys for Plaintiff and the Class*

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