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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO**

DOMENIC CIARLANTI, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

PROVIDENT CREDIT UNION, a
California nonprofit corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 20-CIV-03398

(Assigned to the Honorable V. Raymond Swope,
Dept. 23)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: December 4, 2023

Time: 2:00 p.m.

Dept.: 23

Complaint Filed: August 11, 2020

FAC Filed: March 25, 2021

SAC Filed: May 20, 2022

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 4, 2023, at 2:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable V. Raymond Swope in Department 23 of the above-entitled court, located at 400 County Center, Redwood City, California 94063, Plaintiff Domenic Ciarlanti (“Plaintiff”) will and hereby does move the Court for the following relief with respect to the Joint Stipulation of Class Action Settlement (“Settlement Agreement”) entered into by Plaintiff and Defendant Provident Credit Union (“Defendant”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Settlement Agreement referenced above;
2. That the Court conditionally certify the following class for settlement purposes only: All current and former non-exempt employees employed by Defendant in the State of California during the period from August 15, 2019, through January 1, 2023, who were paid non-discretionary incentives and/or different base hourly rates, and in that same workweek, either were paid overtime and/or sick pay wages (the “Class”);
3. That Plaintiff Domenic Ciarlanti be appointed as the Class Representative, and Larry W. Lee, Max W. Gavron, and Mai Tulyathan of Diversity Law Group, P.C., and William L. Marder of Polaris Law Group, be appointed as Class Counsel;
4. That the Court preliminary approve the Settlement Agreement and the total Gross Settlement Amount in the amount of Four Hundred Thousand Dollars (\$400,000.00);
5. That the Court finds on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, the enhancement payment to the Class Representative, Class Counsel’s award of attorneys’ fees and litigation costs, settlement administration costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court;
6. That the Court approve the mailing of the proposed Class Notice to be sent to Class Members;
7. That the Court appoint Phoenix Settlement Administrators as the Settlement Administrator; and

1 8. That the Court schedule the matter for a Final Fairness and Final Approval
2 Hearing.

3 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
4 provides for court approval of the settlement of a purported class action and allows the Court to
5 preliminarily certify a class for settlement purposes.

6 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
7 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
8 Class Members to participate in, opt out of, or object to the settlement. This Motion is based on
9 the Memorandum of Points and Authorities included herein, the Settlement Agreement and the
10 proposed Class Notice, the supporting Declarations of Larry W. Lee, Max W. Gavron, Mai
11 Tulyathan, William L. Marder, and Plaintiff Domenic Ciarlanti, and upon the oral arguments of
12 counsel (should there be any), and on the complete records and file herein.

13
14 DATED: August 7, 2023

DIVERSITY LAW GROUP, P.C.

15 By: 

Larry W. Lee

Max W. Gavron

Mai Tulyathan

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17
18 Attorneys for Plaintiff, the Class, and Aggrieved
19 Employees
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action under the California Labor Code. Plaintiff Domenic Ciarlanti (“Plaintiff”)
4 alleges that Defendant Provident Credit Union (“Defendant”) failed to pay overtime wages at the
5 correct regular rate of pay in violation of Labor Code §§ 510, 558, and 1194, failed to pay sick
6 pay at the correct regular rate of pay in violation of Labor Code §§ 201-203 and 246, failed to
7 provide accurate itemized wage statements in violation of Labor Code § 226(a), and engaged in
8 unfair business practices in violation of Business and Professions Code § 17200, *et seq.*, the
9 California Labor Code, and the applicable IWC Wage Orders. Based on these violations,
10 Plaintiff asserts class and PAGA claims pursuant to Labor Code § 2698, *et seq.* for violation of
11 Labor Code §§ 201-203, 226(a), 246, 510, 558, and 1194. Defendant denied all material
12 allegations. The Parties have reached a class and PAGA action settlement, the terms of which
13 are reflected in the Parties’ Joint Stipulation of Class Action Settlement (“Stipulation” or
14 “Settlement Agreement”).¹

15 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
16 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
17 principles applicable to the claims asserted against Defendant. Through the exchange of formal
18 discovery as well as informal discovery in connection with mediation, Defendant provided
19 necessary data pertaining to the number of putative class members, number of pay periods at
20 issue, sample time and payroll records, and information regarding Defendant’s relevant policies
21 and practices. The information provided by Defendant allowed Plaintiff to review and analyze
22 the liability and potential exposure. On January 19, 2022, the Parties attended a full day of
23 mediation with the Honorable Ronald M. Sabraw (Ret.), but the Parties did not reach an
24 agreement and thus resumed litigation. The Parties agreed to participate in a second mediation
25 session on January 25, 2023, after which the Parties were able to reach the current settlement.

26 The terms of the Settlement Agreement provide that Defendant pay a Gross Settlement
27

28 ¹ The Parties Joint Stipulation of Class Action Settlement is attached to the Declaration of Mai Tulyathan as **Exhibit D**.

Amount of Four Hundred Thousand Dollars (\$400,000.00) to resolve the class and PAGA claims. Significantly, the entire Gross Settlement Amount will be distributed to the class on a **non-reversionary** basis, such that no remaining monies will revert to Defendant. Further, no claim forms are required. The following represents the key terms of the Settlement:

- Gross Settlement Amount of \$400,000.00;
- Estimated class size of 324 individuals;
- Enhancement payment to the Class Representative of up to \$10,000.00;
- Class Counsel's attorneys' fees of one-third of the Gross Settlement Amount, or up to \$133,333.33;
- Class Counsel's litigation costs of up to \$20,000.00;
- Settlement administration costs of up to \$8,500.00;
- PAGA penalties of \$50,000.00, of which 75 percent, or \$37,500.00, will be paid to the Labor & Workforce Development Agency ("LWDA"), and the remaining 25 percent, or \$12,500.00, will become part of the Net Settlement Amount to be distributed to Class Members;
- Net Settlement Amount of approximately \$190,666.67 to be distributed to Class Members on a *pro rata* basis, based on the number of pay periods worked by Class Members during the Class Period; and
- Raw average of approximately **\$588.48** to be paid to each Participating Class Member.

The Parties and their respective counsel believe that the settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and his counsel are confident that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that the Class might not be certified and/or that Plaintiff could fail to establish liability.

Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On June 17, 2020, Plaintiff submitted his written notice to the LWDA, alleging violations of Labor Code §§ 201-203, 226(a), 246, 510, 558, and 1194, pursuant to the PAGA, Labor Code § 2699. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2, Exhs. A & B.) Thereafter, on August 11, 2020, Plaintiff filed a class and PAGA complaint against Defendant in the San Mateo County Superior Court, alleging five causes of action for: (1) violation of Labor Code §§ 510, 558, and 1194; (2) violation of Labor Code §§ 201-203; (3) violation of Labor Code § 226(a); (4) violation of Business & Professions Code § 17200, *et seq.*; and (5) violation of the Private Attorneys General Act (the “PAGA”), Labor Code § 2698, *et seq.* (the “Action”). (*Id.* at ¶ 3.) Defendant filed its Answer on or about November 12, 2020. (*Id.* at ¶ 5.)

On March 11, 2021, the Court granted Plaintiff leave to file a First Amended Complaint (“FAC”) pursuant to the Parties’ stipulation. (*Id.* at ¶ 6.) The FAC modified the time period of Plaintiff’s overtime regular rate class and PAGA claims so as not to overlap with the time period that was released as part of a prior class action settlement in the matter of *Ray Wilkerson v. Provident Credit Union*, San Mateo County Superior Court Case No. 19CIV00916 (the “Wilkerson” settlement). (*Id.*) As the *Wilkerson* settlement purports to release Plaintiff’s overtime regular rate class and PAGA claims up to and including August 14, 2019, Plaintiff modified the FAC so that the applicable class and PAGA periods begin from August 15, 2019, to the present. (*Id.*) The FAC was filed with the Court on March 25, 2021. (*Id.*)

On April 25, 2022, the Court granted Plaintiff leave to file a Second Amended Complaint (“SAC”) pursuant to the Parties’ stipulation, to add additional claims regarding overtime and sick pay allegations and to broaden the class definitions to include individuals who were paid non-discretionary remunerations. (Tulyathan Decl. at ¶ 7.) The SAC was filed with the Court on May 20, 2022, and is the operative complaint. (*Id.*)

Plaintiff’s class and PAGA claims as pled in the SAC are predicated upon the following allegations. With respect to Plaintiff’s overtime and sick pay regular rate claims, Plaintiff contends that Defendant failed to pay overtime wages and sick pay wages at the correct regular rate of pay. In this regard, Plaintiff alleges that the regular rate of pay that Defendant used to pay

1 overtime and sick pay wages to Plaintiff and other employees was not calculated based on a
2 combination of all hourly rates paid in the workweek. Rather, the regular rate of pay for
3 overtime and sick pay was calculated based only on the lowest hourly rate of pay. As another
4 theory of liability, Plaintiff also alleges that Defendant failed to correctly calculate the regular
5 rate of pay for paying overtime and sick pay wages whenever Plaintiff and other employees
6 earned non-discretionary incentives. In this regard, said non-discretionary incentives were not
7 included in the regular rate of pay when paying overtime and sick pay wages. Thus, Plaintiff
8 alleges that he and other employees were underpaid overtime and sick pay wages. (Tulyathan
9 Decl. at ¶ 8.)

10 In addition to the claims above, Plaintiff also alleges derivative wage statement claims
11 under Labor Code § 226(a). Specifically, as a result of the regular rate claims, Plaintiff asserts
12 that the corresponding wage statements issued to Plaintiff and other employees failed to identify
13 the required information under Labor Code § 226(a). (Tulyathan Decl. at ¶ 9.) As a result of
14 these alleged violations, Plaintiff seeks unpaid wages, waiting time penalties, statutory penalties,
15 and civil penalties under the California Labor Code and PAGA, as well as attorneys' fees and
16 costs. (*Id.*)

17 After Plaintiff initiated the Action, the Parties began initial settlement discussions but
18 were not able to reach a resolution. (*Id.* at ¶ 10.) The Parties then engaged in formal discovery,
19 including written requests for production of documents and special interrogatories. (*Id.*) During
20 discovery meet and confer discussions and after further investigation of the Action, the Parties
21 agreed to participate in private mediation with Judge Ronald M. Sabraw (Ret.). (*Id.* at ¶ 11.) On
22 January 19, 2022, the Parties participated in the first session of mediation with Judge Sabraw, but
23 did not reach a resolution. (*Id.* at ¶ 12.) The Parties subsequently resumed litigation and formal
24 discovery. (*Id.*) As the Parties continued to meet and confer on further production of discovery,
25 the Parties agreed to participate in a second session of mediation with Judge Sabraw on January
26 25, 2023. (Tulyathan Decl. at ¶ 13.)

27 In connection with mediation, the Parties agreed to conduct informal discovery to allow
28 Plaintiff to assess the claims and liability, as well as analyze the maximum exposure of damages

1 and penalties. (Tulyathan Decl. at ¶ 14.) Defendant produced class data, including the number
2 of putative class members, number of pay periods at issue, sample time and payroll records, and
3 information regarding Defendant’s relevant policies and practices. (*Id.*) Defendant also
4 produced a 25 percent sample of putative class members’ time and payroll records. (*Id.*)
5 Plaintiff subsequently analyzed said data to calculate the maximum class and PAGA penalties
6 available in this case. (*Id.*)

7 On January 25, 2022, the Parties participated in the second session of mediation with
8 Judge Sabraw. (Tulyathan Decl. at ¶ 15.) After thorough investigation and evaluation of the
9 facts and claims, the Parties and their counsel ultimately reached the current settlement. (*Id.*) In
10 resolution of Plaintiff’s class and PAGA claims, the Parties entered into Settlement Agreement, a
11 true and correct copy of which is attached as **Exhibit D** to the Declaration of Mai Tulyathan.
12 (*Id.*)

13 The Parties recognize the risk, expense, and delay in continuing litigation with the class
14 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. (*Id.* at ¶ 17.)
15 Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims
16 arising from or relating to the class and PAGA claims as set forth in the Settlement Agreement.

17 **III. DISCUSSION**

18 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
19 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
20 review after notice has been distributed to the class members for their comment or objections.
21 The *Manual for Complex Litigation, Third* § 30.41 states:

22 Approval of class action settlements involves a two-step process.
23 First, counsel submits the proposed terms of settlement and the court
24 makes a preliminary fairness evaluation. If the preliminary
25 evaluation of the proposed settlement does not disclose grounds to
26 doubt its fairness or other obvious deficiencies, such as unduly
27 preferential treatment of class representatives or of segments of the
28 class, or excessive compensation for attorneys, and appears to fall
within the range of possible approval, the court should direct that
notice...be given to the class members of a formal fairness hearing,
at which arguments and evidence may be presented in support of
and in opposition to the settlement.

1 (Fed. Jud. Ctr., 3rd ed. 1995.)

2 Thus, the preliminary approval by the trial court is simply a conditional finding that the
3 settlement appears to be within the range of acceptable settlements. As Professor Newberg
4 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
5 concerning a tentative settlement proposal may vary. The court may find that the settlement
6 proposal contains some merit, is within the range of reasonableness required for a settlement
7 offer, or is presumptively valid subject only to any objections that may be raised at a final
8 hearing.” (Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.
9 2002).)

10 The procedures for the parties’ submission of a proposed settlement for preliminary
11 approval by the court also are discussed in *4 Newberg on Class Actions*:

12 When the parties to an action reach a monetary settlement, they will
13 usually prepare and execute a joint stipulation of settlement, which
14 is submitted to the court for preliminary approval. The stipulation
15 should set forth the central terms of the agreement, including but not
16 limited to, the amount of settlement, form of payment, manner of
determining the effective date of settlement and any recapture
clause.

17 (*Id.* § 11.24.)

18 Here, the Parties have reached such an agreement and have submitted to this Court in
19 connection with this Motion a copy of the Settlement Agreement fully setting forth all terms of
20 the agreement reached by the Parties as to settlement of the class and PAGA claims. Said terms
21 in the Settlement Agreement include, among other things, the method for calculating the Class
22 Members’ individual portions of the settlement payment.

23 The parties also may, at the preliminary approval stage, request that the court
24 provisionally approve certification of the class for settlement purposes—conditional upon final
25 approval of the settlement. “[P]re-certification settlements are routinely approved if found to be
26 fair and reasonable.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 240;
27 *accord Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1803 (although the settlement
28 was reached before any “adversary certification,” the court was satisfied that it was “fair,

adequate and reasonable”); *In re Baldwin-United Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478 (“many courts have employed this practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals”).) As further explained by Professor Newberg:

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal...may be set out in conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel’s application for fees and expenses.

(4 *Newberg on Class Actions* § 11.26.)

In addition to such terms as class identification, settlement amount, and payment procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of this settlement only. (*See* Settlement Agreement at ¶ 37.)

A. Proposed Class Definition

The current settlement is being settled on behalf of the following Class: All current and former non-exempt employees employed by Defendant in the State of California during the Class Period, who were paid non-discretionary incentives and/or different base hourly rates, and in that same workweek, either were paid overtime and/or sick pay wages (the “Class” or “Class Members”). (Stipulation at ¶ 6.) The Class Period means the period from August 15, 2019, through January 1, 2023. (*Id.* at ¶ 7.)

Pursuant to the Settlement Agreement, Defendant has represented that there are no more than 324 individuals that comprise the Class. (Stipulation at ¶ 6.)

B. Settlement Terms and Evaluation

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. (*Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962.) Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been

1 reached with the participation of experienced counsel familiar with the litigation. (*Nat’l Rural*
2 *Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry*
3 (D.D.C. 1990) 752 F. Supp. 1087; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471; *In re*
4 *Armored Car Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357; *Sommers v. Abraham Lincoln*
5 *Federal Sav. & Loan Ass’n* (E.D. Pa. 1978) 79 F.R.D. 571.)

6 While the recommendations of counsel proposing the settlement are not conclusive, the
7 Court can properly take them into account, particularly where, as here, they have been involved
8 in discovery and negotiations for some period of time, appear to be competent, have experience
9 with this type of litigation, and have exchanged substantial evidence from the opposing party.
10 (*See 4 Newberg on Class Actions, supra*, § 11.47; *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at
11 p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however,
12 a strong initial presumption of fairness attaches to the proposed settlement...[citations] and
13 ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted
14 with the facts of the underlying litigation”).)

15 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
16 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
17 number of wage and hour class actions and have extensive litigation experience. (Declaration of
18 Larry W. Lee (“Lee Decl.”) at ¶¶ 6-7; Declaration of Max W. Gavron (“Gavron Decl.”) at ¶¶ 8-
19 9; Tulyathan Decl. at ¶¶ 38-42; Declaration of William L. Marder (“Marder Decl.”) at ¶¶ 8-9.)
20 Each side has apprised the other of their respective factual contentions, legal theories, and
21 defenses, resulting in negotiations taking place between the Parties. (Tulyathan Decl. at ¶ 18.)

22 Based on the class data provided by Defendant, Plaintiff’s counsel estimated the potential
23 exposure for class claims to be at least \$1,423,094.40 if Plaintiff succeeded at trial. (Tulyathan
24 Decl. at ¶ 19.) Plaintiff was able to estimate the potential class penalties based on class data
25 provided by Defendant. (*Id.*) The following represents a breakdown of the estimated class-wide
26 damages/penalties based on data and records provided by Defendant:

27 //

28 //

- \$547,310.40 in waiting time penalties for Plaintiff's overtime regular rate claims² (calculated based on 91 former employees in the putative class and an average hourly rate of pay of \$25.06 based on sample payroll records produced by Defendant);
- \$661,584 in waiting time penalties for Plaintiff's sick pay regular rate claims (calculated based on 110 formers and an average hourly rate of pay of \$25.06 based on sample payroll records produced by Defendant);
- \$214,200 for Labor Code § 226(e) penalties resulting from deficient wage statements as a result of the underpaid wages (calculated based on 2,226 pay periods).

(*Id.*)

With respect to potential liability of Plaintiff's PAGA claims, Plaintiff's counsel estimated that Defendant could face civil penalties of at least \$790,100 if Plaintiff were successful at trial on all claims. (Tulyathan Decl. at ¶ 20.) However, even assuming Plaintiff ultimately prevails on his PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. (*Id.* at p. 517.) Upon review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

Although Plaintiff believes in the merits of the alleged claims and maintains that there is no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to

² For Plaintiff's overtime regular rate claims, the main claim and/or damages to be recovered are waiting time penalties under Labor Code § 203. The amount of underpaid overtime wages for regular rate overtime claims is typically minimal.⁵

1 the claims and further with respect to the reduction of PAGA penalties and that it could be
2 persuasive to the Court. (Tulyathan Decl. at ¶ 21.) Thus, even if Plaintiff were to successfully
3 prove his claims at trial, there is a possibility that the Court may only award a small percentage
4 of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was
5 premised with this risk in mind, associated with the possibility of the Court significantly
6 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to
7 prevail at trial. (*Id.*)

8 Further, Defendant raised several defenses that presented risk as to liability and damages
9 on the claims. (Tulyathan Decl. at ¶ 22.) With respect to the overtime regular rate claims,
10 Defendant has indicated that it has unilaterally issued payments to some of the underpaid
11 employees, which also includes payments for penalties under Section 203 and 226. (*Id.*)
12 Defendant also argues that it corrected its practices in September 2020 as to how it pays out
13 overtime. Based on that, it is Defendant's position that a portion of the employees that are part
14 of the putative class are not even owed any underpaid overtime as Defendant has corrected its
15 practices. (*Id.*) With respect to the sick pay regular rate claim, Defendant contends that its sick
16 pay policy is compliant with the law, as it has indicated that it pays sick pay based on the 90-day
17 rule for sick leave. (*Id.*) Given these defenses, it is Defendant's position that Plaintiff will not
18 prevail on liability on the regular rate claims. As another risk to prevailing on class certification,
19 there is essentially no precedent from any California courts granting class certification of a sick
20 pay regular rate claim. Thus, while Plaintiff believes that a class can be certified, there is a
21 possibility that the Court will not grant class certification on Plaintiff's sick pay regular rate
22 claim here. (*Id.*)

23 In light of the above, the settlement for each Class Member is fair, reasonable, and
24 adequate, given the inherent risks of litigation, including the substantial risks relative to class
25 certification and the merits of the claims, the costs of pursuing such litigation, and the risks
26 associated with the Court's discretion to reduce PAGA penalties. The settlement is the result of
27 extensive arm's length negotiations between the Parties and their counsel and was facilitated by
28 an experienced and neutral mediator.

1 Although Plaintiff believes that the Class can be certified, Plaintiff also believes in the
2 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
3 involved in not prevailing on one or more of the causes of action or theories alleged in the
4 operative SAC, the possibility of non-certification, and the potential for appeals. (Tulyathan
5 Decl. at ¶ 24.) These risks on class certification are compounded by the California Supreme
6 Court’s holding in *Duran v. U.S. Bank Nat’l Ass’n* (2014) 59 Cal. 4th 1. There, the plaintiffs
7 obtained class certification and subsequently prevailed at trial after eight years of litigation, but
8 the judgment and the certification ruling were reversed by the California Supreme Court after an
9 additional five years of litigation. The case was remanded back to superior court where class
10 certification was denied, and plaintiffs’ subsequent appeal also was denied.

11 Indeed, numerous courts have held that **gross** settlements approximating between only 8
12 and 25% of the defendant’s potential exposure are fair and reasonable. (*See, e.g., In re Mego*
13 *Fin. Corp. Secs. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (holding that class action settlement
14 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
15 settlement amounting to only a fraction of the potential recovery does not per se render the
16 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
17 assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
18 settlement is fair and adequate depends on the “the difficulties in proving the case”);
19 *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. Mar. 20, 2015) No. 13-CV-02377-JSC, 2015
20 WL 1289342, at p.*6 (holding that class action settlement recovering between **8.5% and 25%** of
21 the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.* (C.D. Cal.
22 2014) U.S. Dist. Ct. Case No. 8:12-cv-02161 (granting preliminary approval of wage and hour
23 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
24 litigation); *Villegas v. J.P. Morgan Chase & Co.* (N.D. Cal. Nov. 21, 2012) No. CV 09-00261
25 SBA EMC, 2012 WL 5878390, at p.*6 (holding that gross class action settlement of
26 approximately 15% of the potential recovery was fair and reasonable).)

27 Here, Plaintiff’s counsel estimated total class and PAGA penalties to be approximately
28 \$2,213,194.40, without discounting for potentially losing on any of the causes of action.

(Tulyathan Decl. at ¶ 23.) The Gross Settlement Amount is \$400,000.00, which is approximately **18.07%** of the maximum class and PAGA penalties. (*Id.*) Thus, the settlement was negotiated at arms' length and the high settlement percentage-to-recovery further supports that the settlement is fair and reasonable.

Despite the asserted fairness of the settlement terms, as set forth in the Class Notice, should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement with respect to the class claims. (*See* Class Notice, attached as **Exhibit E** to Tulyathan Decl.) Moreover, as set forth in the Class Notice, Class Members are advised of their right to object to any of the terms contained in the Settlement Agreement and attend the final approval hearing. (*Id.*)

1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive

The Settlement Agreement provides for Four Hundred Thousand Dollars (\$400,000.00) as the Gross Settlement Amount. (*See* Stipulation at ¶ 10.) The Net Settlement Amount, calculated after deduction of Plaintiff's counsel's attorneys' fees (up to \$133,333.33) and litigation costs (up to \$20,000.00), an enhancement payment to the Class Representative (up to \$10,000.00), the portion of PAGA penalties to be paid to the LWDA (\$37,500.00), and Settlement Administration costs (up to \$8,500.00), is estimated to be approximately **\$190,666.67**. (*Id.* at ¶¶ 3, 9, 18, 21, 31; Tulyathan Decl. at ¶ 25.)

Pursuant to the Settlement Agreement, the Net Settlement Amount will be apportioned among Participating Class Members on a *pro rata* basis, based on the number of pay periods worked by each respective Participating Class Member during the Class Period, as compared to the total number of pay periods worked by all Participating Class Members during the Class Period. (*See* Stipulation at ¶ 43.) Based thereon, on a raw average, each Participating Class Member may potentially recover approximately **\$588.48**. (Tulyathan Decl. at ¶ 27.) The amount actually paid to each Participating Class Member may increase or decrease depending on the actual number of pay periods he or she worked during the Class Period and the number of opt-

1 outs received. (*Id.*)

2 Finally, the terms of the settlement provide that uncashed checks (upon the expiration
3 date) shall be distributed to the California State Bar’s Justice Gap Fund, a source of funding for
4 about 100 legal aid organizations across the State of California, in accordance with California
5 Civil Procedure § 384. (*See* Stipulation at ¶ 57; *see* Tulyathan Decl. at ¶ 30.)

6 **2. Whether, and Under What Circumstances, Amounts Available for**
7 **Payment in Settlement Might Not Be Paid to Class Members or Might**
8 **Revert to the Defendant**

9 This settlement is non-reversionary, meaning that none of the settlement funds will revert
10 back to Defendant. (*See* Stipulation at ¶ 43.)

11 **3. Scope of the Release of Class Members’ Claims**

12 As a condition of participating in this settlement, Class Members who do not opt out of
13 the settlement (“Participating Class Members”) will provide a limited release of the following
14 claims against the Released Parties (“Released Claims”):

15 [A]ny and all claims that were alleged in the operative Second
16 Amended Complaint and Plaintiff’s PAGA notice to the LWDA,
17 arising from the facts set forth therein, that arose during the Class
18 Period, including without limitation claims under the California
19 Labor Code based on failure to pay overtime wages at the regular
20 rate of pay, failure to pay sick pay at the regular rate of pay, failure
21 to timely pay wages upon separation of employment, and failure to
22 provide compliant wage statements, and claims for penalties under
23 the PAGA based on the afore-referenced claims. In addition, upon
24 the Effective Date, the Class Representative and the Class Members,
25 and each member of the Class who has not submitted a valid Request
26 for Exclusion, is forever barred and enjoined from instituting or
27 accepting damages or obtaining relief against the Released Parties
28 relating to the Released Claims.

(*See* Stipulation at ¶ 26.)

Given that the release above is tailored to only claims pled in the SAC and Plaintiff’s
PAGA notice, and that accrued during the Class Period, the release is appropriately limited.

4. Tax Treatment of Settlement Amounts

The Parties have agreed that the individual settlement payment to Class Members shall be
allocated as follows: thirty percent (30%) as payment for wages, less withholdings and

1 deductions, for which an IRS Form W-2 shall issue, and seventy percent (70%) as payment of
2 penalties and interest, for which an IRS Form 1099 shall issue. (*See* Stipulation at ¶ 60.)

3 Pursuant to the Settlement Agreement, employer-side payroll taxes on the wage portion of
4 the individual settlement payments paid to Class Members shall be paid by Defendant *separate*
5 from and in addition to the Gross Settlement Amount. (*See id.* at ¶ 37.)

6 **5. Affirmative Obligations to be Undertaken by Class Members or Class**
7 **Counsel and the Reasons for Any Such Obligations**

8 As stated above, Class Members do **not** need to do anything should they wish to receive
9 their share of the settlement funds. In other words, because this is not a claims-made settlement,
10 Class Members will not be required to make a submission to participate in the settlement. No
11 claim forms are required. Thus, this substantially decreases the amount of burden each Class
12 Member must bear in order to receive their share of the settlement funds. If a Class Member
13 does not wish to take part in this Settlement or be bound by the Released Claims (with the
14 exception of claims for penalties pursuant to the PAGA), the Class Member must submit a
15 request for exclusion to be excluded from the class portion of the Settlement. (*See* Stipulation at
16 ¶¶ 28, 51; *see also* Class Notice, at p. 5.)

17 **C. Notice to Class Members**

18 Should the Court grant the instant motion, Defendant will provide the Settlement
19 Administrator with a list containing each Class Member's full name, employee number, most
20 recent mailing address, Social Security number, and number of pay periods worked during the
21 Class Period ("Class List and Data"). (*See* Stipulation at ¶ 5.) Pursuant to the Settlement
22 Agreement, Defendant will provide said Class List and Data within fourteen (14) calendar days
23 of preliminary approval. (*Id.* at ¶ 46.) Upon receipt of the information and prior to mailing the
24 Class Notice to Class Members, the Settlement Administrator shall perform a search based on
25 the National Change of Address Database for information to update and correct for any known or
26 identifiable address changes. (*Id.* at ¶ 48.)

27 Within seven (7) calendar days of receipt of the Class List and Data from Defendant, the
28 Settlement Administrator will mail the Class Notice out to Class Members using the most

1 current, known mailing address via First-Class U.S. mail. (*See* Stipulation at ¶ 47.) Any Class
2 Notices returned to the Settlement Administrator as non-deliverable on or before the response
3 deadline shall be re-sent via regular First-Class U.S. mail to the forwarding address affixed
4 thereto. (*Id.* ¶ 50.) If no forwarding address is provided, the Settlement Administrator will
5 attempt to find the correct address using a skip-trace or other comparable search to locate the
6 most current address to re-mail the Notice. (*Id.*)

7 The Class Notice will advise Class Members of what the litigation is about, their rights
8 under the settlement, a summary of the principal terms and the monetary terms of the settlement,
9 their expected settlement payment share, their opportunity to and procedures to opt out or to
10 object to the settlement, and the release of claims. (*See* Class Notice.) As set forth in the Class
11 Notice, Class Members will be allowed to opt out of or object to the Settlement by a certain
12 deadline, which is 45 calendar days after the initial mailing of the Notice Packet. (*See*
13 Stipulation at ¶ 29.) Class Members who received a re-mailed Class Notice will have that
14 deadline extended by 15 calendar days from the original response deadline. (*Id.* ¶ 50.) With
15 respect to objections, Class Members are also informed in the Notice Packet that they may object
16 in writing. (*Id.* at ¶ 53; *see* Class Notice.)

17 If Class Members need further information about the settlement and/or the lawsuit, Class
18 Counsel's contact information and the Settlement Administrator's contact information are
19 provided in the Notice Packet. (*See* Class Notice, at pp. 6-7.)

20 **D. Typicality and Adequacy of Representation**

21 **1. Class Representative's Claims are Typical of the Class**

22 The commonality requirement is met when there are questions of law and fact common to
23 the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 ("The existence of shared
24 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
25 facts couple with disparate legal remedies within the class").) Commonality requires only that
26 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
27 litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 473.)
28 Defendant's conduct is central to the commonality inquiry. (*See City of San Jose v. Superior*

1 *Court* (1974) 12 Cal. 3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 812-13.)
2 Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges
3 here, the class-wide impact of the Defendant's policies satisfies the commonality requirement.
4 (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal. App. 3d 411, 421.)

5 In the present case, Plaintiff alleges that Defendant is liable to the Class for (i) failure to
6 pay employees overtime wages at the correct regular rate of pay, in violation of Labor Code §§
7 510, 558, and 1194; (ii) failure to pay sick pay at the correct regular rate of pay, in violation of
8 Labor Code §§ 201-203 and 246; and (iii) failure to provide accurate itemized wage statements,
9 in violation of Labor Code § 226(a). Like all Class Members, Plaintiff was subjected to these
10 same policies and practices. (Declaration of Domenic Ciarlanti ("Ciarlanti Decl.") at ¶¶ 3-5.)
11 More specifically, Plaintiff alleges that Defendant miscalculated the regular rate of pay when
12 paying overtime and sick pay wages to Plaintiff during workweeks when differently hourly rates
13 of pay and/or non-discretionary incentive pay were paid to Plaintiff. (*Id.* at ¶¶ 3-4.) Plaintiff
14 also claims that he was issued inaccurate wage statements that did not comply with Labor Code §
15 226(a). (*Id.* at ¶ 5.) In other words, Plaintiff contends that he was subjected to the same policies
16 and practices as other Class Members and thus, the typicality requirement is met.

17 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
18 issues been raised or presented. (*Id.* at ¶ 6.) Plaintiff has taken all necessary steps to represent
19 the interests of the Class, including by providing information and documents to Plaintiff's
20 counsel. (*Id.* at ¶¶ 7-8.) For such reasons, Plaintiff has adequately represented the Class
21 Members and will continue to do so.

22 **2. Class Counsel Have Adequately Represented the Class and Have Experience** 23 **with Wage and Hour Class Action**

24 From the inception of the case, Class Counsel have zealously represented the interests of
25 the Class. Class Counsel have engaged in formal discovery as well as significant meet and
26 confer discussions with opposing counsel to obtain informal data and documents and to discuss
27 the merits of the claims on behalf of the Class. (Tulyathan Decl. at ¶¶ 10-16.) The settlement
28 was obtained for the benefit of the Class, as opposed to the individual Class Representative.

Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the class. (Lee Decl. at ¶¶ 6-7; Gavron Decl. at ¶¶ 8-9; Tulyathan Decl. at ¶¶ 39-42; Marder Decl. at ¶¶ 8-9.)

E. Costs and Fees

1. Attorneys' Fees and Costs

California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 ; *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*, 557 F.2d at p. 769.)

The Common Fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits, she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include:

Fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

1 (*Id.*)

2 Indeed, in 2016, the California Supreme Court has also now held that the award of
3 attorneys' fees in common fund wage and hour class action settlements should start with the
4 percentage method. (*See Laffitte v. Robert Half Int'l* (2016) 1 Cal. 5th 480, 503 ("We join the
5 overwhelming majority of federal and state courts in holding that when class action litigation
6 establishes a monetary fund for the benefit of the class members, and the trial court in its
7 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
8 of a reasonable fee by choosing an appropriate percentage of the fund created").)

9 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
10 percent of the fund. (*Laffitte*, 1 Cal. 5th at p. 506.) And this was based on a lodestar amount
11 that required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier is
12 "extraordinarily high or low [should] the trial court [] consider whether the percentage method
13 should be adjusted so as to bring the imputed multiplier within a justifiable range." (*Id.* at p.
14 505.)

15 The Parties have agreed to a payment of a maximum of one-third of the Gross
16 Settlement Amount, or \$133,333.33, for payment to Class Counsel as attorneys' fees. (*See*
17 Stipulation at ¶¶ 3, 39.) The Parties have agreed to a payment of the foregoing attorneys' fees
18 and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to
19 reimbursement of Class Counsel's litigation costs up to \$20,000.00. (*Id.*) Class Counsel has, at
20 their own risk, expended costs, for example, to file this instant action and other pleadings in the
21 case, effect service of process, participate in mediation, and advance other litigation-related
22 costs. If Class Counsel's actual costs are less than \$20,000.00, the remainder will go to the
23 Class for distribution.

24 Based on the foregoing, the Court should preliminarily approve the attorney's fees and
25 costs as requested by the Parties.

26 **2. Proposed Payment to the Class Representative**

27 Class Representative Domenic Ciarlanti requests a modest enhancement of \$10,000.00.
28 (*See* Stipulation at ¶¶ 9, 40.) The Class Representative met and conferred with his counsel on a

1 number of occasions to discuss the case, provided documents and information to his counsel, and
2 reviewed pleadings and documents, including the Settlement Agreement. (Ciarlanti Decl. at ¶¶
3 7-8.) As part of his duties as the Class Representative, Plaintiff provided invaluable information,
4 evidence, and documents that resulted in this settlement. Furthermore, in consideration for his
5 service payment, Plaintiff also executed an individual general release of all claims including a
6 California Civil Code § 1542 waiver, which other members of the Class did not have to do. (See
7 Stipulation at ¶ 66; Ciarlanti Decl. at ¶ 10.)

8 In addition to the invaluable services that he provided, Plaintiff also took a significant
9 risk, both professionally and monetarily, in acting as the Class Representative and seeking
10 benefits on behalf of the Class. Because the claims alleged by the Class Representative involved
11 the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs
12 of Defendant, had he not prevailed in this action.

13 Furthermore, given that future employers are much less likely to hire individuals who
14 have filed suit against their prior employer, particularly in cases of this nature, Plaintiff may face
15 prejudice in the future from other potential employers. Plaintiff took this risk upon himself and
16 the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to file
17 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
18 have to face the potential for retaliation and not getting future employment had they filed a
19 public lawsuit.

20 **3. Settlement Administration Costs**

21 The Parties have agreed to an estimated payment not to exceed \$8,500.00 to the
22 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
23 this settlement. (See Stipulation at ¶¶ 31, 32; Tulyathan Decl. at ¶ 31.) Phoenix Settlement
24 Administrators is a well-recognized class action settlement administrator. The Parties believe
25 that the administration fee is reasonable and should be approved.

26 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR** 27 **PRELIMINARY APPROVAL**

28 The settlement presented here is fair, adequate, and reasonable. The settlement will result

1 in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved
2 as the result of informed, extensive, and arm's length negotiations conducted by counsel for the
3 respective Parties who are experienced in wage and hour class action litigation and facilitated by
4 an experienced and neutral mediator.

5 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
6 approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of
7 the proposed Class Notice, and set a date for the Final Approval hearing.

8
9 DATED: August 7, 2023

DIVERSITY LAW GROUP, P.C.

10 By: 

11 Larry W. Lee

12 Max W. Gavron

13 Mai Tulyathan

14 Attorneys for Plaintiff, the Class, and Aggrieved
15 Employees