

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa St., Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

William L. Marder (State Bar No. 170131)
Polaris Law Group
501 San Benito Street, Suite 200
Hollister, CA 95023
(831) 531-4214
(831) 634-0333 facsimile

Attorneys for Plaintiff, the Class, and Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA

JAMIE KENNEDY, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

UNIVAR SOLUTIONS USA INC., a
Washington corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: MSC21-00272

[Assigned for all purposes to the Hon. E. Weil,
Department 39]

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

Date: TBD
Time: 9:00 a.m.
Dept: 39

Complaint Filed: February 16, 2021
Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date to be set by the Clerk, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable E. Weil, judge presiding, in Department 39 of the above referenced Court located at 725 Court Street, Martinez, California 94553, Plaintiff Jamie Kennedy (“Plaintiff”) will and hereby does move this Court for the following relief with respect to the Joint Stipulation of Class Action and Release of Claims (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant Univar Solutions USA Inc. (“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 non-union former non-exempt California employees of Defendant who were paid sick pay wages and non-discretionary incentive wages, including, but not limited to, job premium and/or shift differential wages, in the same workweek during their employment and whose employment ended at any time between August 22, 2017, and the date of preliminary approval of the Settlement (the “Class”);
3. That Plaintiff Jamie Kennedy be appointed as the Class Representative and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C., and William L. Marder of Polaris Law Group, be appointed as Class Counsel;
4. That the Court preliminarily approve the Settlement Agreement and the total Maximum Settlement Amount of Ninety-Five Thousand Dollars (\$95,000.00);
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 service payment to the Class Representative, Class Counsel award of attorneys’ fees and litigation costs, settlement administration costs, and the allocation of individual settlement payments to Class Members, that could ultimately be given final approval by this Court;
6. That the Court approve the mailing of the proposed Notice of Class Action

1 Settlement ("Class Notice") to be sent to Class Members;

2 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
3 Administrator; and

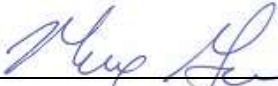
4 8. That the Court schedule the matter for a Final Fairness and Final Approval
5 hearing.

6 This motion is made pursuant to Rule 3.769 of the California Rules of Court, which
7 provides for court approval of the settlement of a purported class action and allows the Court to
8 preliminarily certify a class for settlement purposes.

9 The basis for this unopposed motion is that the proposed settlement is fair, adequate, and
10 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
11 Class Members to participate in, opt-out of, or object to the settlement. This motion is based on
12 the attached Memorandum of Points and Authorities, the Stipulation and the proposed Class
13 Notice, and the supporting Declarations of Larry W. Lee, Max W. Gavron, William L. Marder,
14 and Plaintiff Jamie Kennedy, upon the oral arguments of counsel (should there be any), and on
15 the complete records and file herein.

16
17 DATED: August 1, 2022

DIVERSITY LAW GROUP, P.C.

18 By:  _____

19 Larry W. Lee

20 Max W. Gavron

21 Attorneys for Plaintiff, the Class, and Aggrieved
22 Employees
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. PROCEDURAL HISTORY.....	8
III. DISCUSSION	10
A. Proposed Class Definition	11
B. Settlement Terms and Evaluation	12
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	16
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants	17
3. Scope of the Release of Class Members' Claims	17
4. Tax Treatment of Settlement Amounts.....	18
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.	18
C. Notice to Class Members	18
D. Typicality and Adequacy of Representation	19
1. Class Representative's Claims are Typical of the Class.....	19
2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Action	20
E. Costs and Fees	21
1. Attorneys' Fees and Costs	21
2. Proposed Payment to the Class Representative	22
3. Settlement Administration Fees.....	23
F. Notice to the LWDA.....	23
IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL	23

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Amaral v. Cintas Corp.</i> 163 Cal.App.4th 1157, 1201(2008).....	14
<i>Barnhill v. Saunders</i> 125 Cal. App. 3d 1, 7 (1981)	14
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	13, 14
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	21
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	20
<i>Dunk v. Ford Motor Co.</i> 48 Cal.App.4th 1794, 1803 (1996)	11
<i>Duran v. U.S. Bank Nat’l Ass’n</i> , 59 Cal. 4th 1 (2014).....	15
<i>Laffitte v. Robert Half Int’l</i> 1 Cal.5th 480, 503 (2016)	22
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	20
<i>Road Sprinklers Fitters Local Union No. 669 v. G & G Fire Sprinklers Inc.</i> 102 Cal. App. 4th 765, 782 (2002).....	15
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	21
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	20
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	20
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	11, 21

Federal Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	21
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	12
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011, 1019 (1998).....	19
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	12
<i>In re Baldwin-United Corp.</i> 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	11
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	12
<i>In re Mego Fin. Corp. Secs. Litig.</i> 213 F.3d 454, 459 (9th Cir. 2000)	15
<i>Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987)	12

1	<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004).....	12
2	<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	12
3	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	12
4	<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	12
5	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) 16	
6	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6	
7	(N.D. Cal. Nov. 21, 2012).....	16
8	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	21
9	Statutes	
10	8 Cal. Code Regs. § 13520.....	14
11	California Civil Code § 1542.....	23
12	California Rule of Civil Procedure § 384	17
13	Labor Code § 201.....	17
14	Labor Code § 202.....	17
15	Labor Code § 203.....	17
16	Labor Code § 226.....	7
17	Labor Code § 246.....	7, 8, 17, 20
18	Labor Code § 2698, <i>et seq.</i>	8, 17
19	Labor Code § 2699.....	8
20	Labor Code § 2699(e)(2)	13
21	Labor Code §§ 201-203	7, 8, 20
22	Other Authorities	
23	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)....	10, 11
24	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	11
25	<i>Newberg on Class Actions, supra</i> , § 11.47	12
26	Manual for Complex Litigation (Third) § 30.41.....	10

1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Jamie Kennedy (“Plaintiff”) alleges that Defendant Univar Solutions USA Inc. (“Defendant”)
5 failed to pay sick pay based on the correct regular rate of pay in violation of Labor Code §§ 201-
6 203 and 246. Based on these violations, Plaintiff asserts class and PAGA claims for violations of
7 Labor Code §§ 201-203 and 246. The Parties have reached a class action settlement, the terms of
8 which are reflected in the Parties’ Joint Stipulation of Class Action Settlement (“Stipulation” or
9 “Settlement Agreement”).

10 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
11 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
12 principles applicable to the claims asserted against Defendant. Through the exchange of informal
13 discovery in connection with mediation, Defendant provided necessary data pertaining to the
14 number of putative class members, the hourly rates of pay for the putative class, as well as
15 documents and information pertaining to Defendant’s policies and practices regarding payment
16 of sick pay wages. The information provided by Defendant allowed Plaintiff to review and
17 analyze the liability and potential exposure. Thereafter, the Parties attended a full day of
18 mediation with experienced wage-and-hour mediator Joel Grossman, Esq., after which the
19 Parties were able to reach the current settlement.

20 The terms of the Settlement Agreement provide that Defendant pay a Maximum
21 Settlement Amount of Ninety-Five Thousand Dollars (\$95,000.00) to resolve the class and
22 PAGA claims in this case. Significantly, this is a **non-reversionary settlement**, meaning that the
23 entirety of the Maximum Settlement Amount will be distributed to the class, such that **no**
24 **remaining monies will revert to Defendant**. Further, no claim forms are required. The
25 following represents the key terms of the Settlement:

- 26 • Maximum Settlement Amount of \$95,000.00;
- 27 • Estimated class size of 19 individuals in the Class at the time of mediation;
- 28 • Enhancement payment to the Class Representative of up to \$10,000.00;

- Class Counsel’s attorneys’ fees of one-third of the Maximum Settlement Amount, up to \$31,666.67;
- Class Counsel’s costs associated with prosecution and resolution of this action of up to \$15,000.00;
- Settlement administration costs of up to \$4,500.00;
- Payment to the Labor & Workforce Development Agency of \$3,750.00, representing 75% of the total PAGA penalties of \$5,000.00;
- Payment to Class Members of \$1,250.00, representing 25% of the total PAGA penalties of \$5,000.00, which will be apportioned on a per capita basis; and
- Net Settlement Fund of approximately \$30,083.33, which will be apportioned on a pro rata basis based on the individual Class Member’s Pay Rate at the time of separation of employment.

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 her 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 February 4, 2021, Plaintiff filed her written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-204 and 246 pursuant to the PAGA, Labor Code § 2699. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. Thereafter, on February 16, 2021, Plaintiff filed her class and PAGA action Complaint against Defendant in Contra Costa County Superior Court. *Id.* The Complaint alleges causes of action for (1) violation of Labor Code §§ 201-203 and (2) violation of the PAGA, Labor Code § 2698, *et seq. Id.*

1 Plaintiff's class and PAGA claims as pled in the Complaint are predicated upon the
2 allegations that Defendant failed to factor non-discretionary incentive wages, including job
3 premiums and/or shift differential wages, into the calculation of the regular rate for purposes of
4 paying sick pay wages. Thus, Plaintiff and employees were underpaid sick pay. As a result of the
5 alleged violations above, Plaintiff seeks statutory and civil penalties under the California Labor
6 Code and the PAGA, as well as attorneys' fees and costs. Gavron Decl. ¶ 3.

7 After the filing of the Complaint, counsel for the Parties met and conferred regarding
8 engaging in private mediation. Gavron Decl. ¶ 4. In connection with mediation, the Parties
9 engaged in informal discovery to allow Plaintiff to assess the claims and liability, as well as
10 analyze the maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiff's
11 counsel with informal data and information pertaining to the number of putative class members,
12 the hourly rates of pay for the putative class, as well as documents and information pertaining to
13 Defendant's policies and practices regarding payment of sick pay wages. *Id.* Based on the data
14 provided by Defendant, Plaintiff's counsel conducted an analysis of liability and potential
15 maximum exposure for the class and PAGA penalties. *Id.*

16 On October 20, 2021, the Parties engaged in a full-day mediation with mediator Joel
17 Grossman, Esq. Gavron Decl. ¶ 5. After thorough investigation and evaluation of the facts and
18 claims, and as a result of the arm's-length negotiations facilitated by Mr. Grossman, the Parties
19 and their counsel ultimately reached a settlement in principle and entered into a Memorandum of
20 Understanding. *Id.* The Parties negotiated the terms of the settlement over the course of several
21 months and ultimately entered into the Settlement Agreement in resolution of Plaintiff's class
22 and PAGA claims in this lawsuit. A true and correct copy of the Settlement Agreement is
23 attached as **Exhibit A** to the Declaration of Max W. Gavron. *Id.*

24 The Parties recognize the risk, expense, and delay in continuing litigation with the class
25 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl.
26 ¶ 6. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims
27 arising from or relating to the class and PAGA claims as set forth in the Settlement Agreement.

28 //

1 **III. DISCUSSION**

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

6 Approval of class action settlements involves a two-step process.
7 First, counsel submits the proposed terms of settlement and the court
8 makes a preliminary fairness evaluation. If the preliminary
9 evaluation of the proposed settlement does not disclose grounds to
10 doubt its fairness or other obvious deficiencies, such as unduly
11 preferential treatment of class representatives or of segments of the
12 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.

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

14 Thus, the preliminary approval by the trial court is simply a conditional finding that the
15 settlement appears to be within the range of acceptable settlements. As Professor Newberg
16 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
17 concerning a tentative settlement proposal may vary. The court may find that the settlement
18 proposal contains some merit, is within the range of reasonableness required for a settlement
19 offer, or is presumptively valid subject only to any objections that may be raised at a final
20 hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed.
21 2002).

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

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

1 *Id.* § 11.24.

2 Here, the Parties have reached such an agreement and have submitted to this Court in
3 connection with this motion a copy of the Settlement Agreement fully setting forth the agreement
4 reached by the Parties. The Settlement Agreement sets forth all terms of the agreement reached
5 by the Parties as to settlement of the class and PAGA claims. Said terms in the Settlement
6 Agreement include, among other things, the method for calculating the Class Members’
7 individual settlement payments.

8 The parties also may, at the preliminary approval stage, request that the court
9 provisionally approve certification of the class for settlement purposes—conditional upon final
10 approval of the settlement. “[P]re-certification settlements are routinely approved if found to be
11 fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001);
12 *accord Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1803 (1996) (although the settlement was
13 reached before any “adversary certification,” the court was satisfied that it was “fair, adequate
14 and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many
15 courts have employed this practice in the name of judicial efficiency in order to facilitate
16 apparently beneficial settlement proposals”). As further explained by Professor Newberg:

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

25 4 *Newberg on Class Actions* § 11.26.

26 In addition to such terms as class identification, settlement amount, and payment
27 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
28 which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of
this settlement only. *See* Stipulation ¶ II.1.

A. Proposed Class Definition

The current settlement is being settled on behalf of the Class of all non-union former non-

1 exempt California employees of Defendant who were paid sick pay wages and non-discretionary
2 incentive wages, including, but not limited to, job premium and/or shift differential wages, in the
3 same workweek during their employment and whose employment ended at any time between
4 August 22, 2017, and the date of preliminary approval of the Settlement. *See* Stipulation ¶ I.5.

5 Pursuant to the Settlement Agreement, Defendant has represented that there are
6 approximately 19 individuals that comprise the Class. *See* Stipulation ¶ III.18. If the number of
7 those individuals increases above 22, then Defendant has the option to close the class period so
8 that the class members will not exceed 22, or increase the Maximum Settlement Amount by the
9 same percentage of increase. *Id.*

10 **B. Settlement Terms and Evaluation**

11 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
12 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
13 *Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
14 *re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
15 judgment for that of the proponents, particularly where, as here, settlement has been reached
16 with the participation of experienced counsel familiar with the litigation. *Nat’l Rural Telecomms.*
17 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F.Supp.
18 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
19 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*
20 *& Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).

21 While the recommendations of counsel proposing the settlement are not conclusive, the
22 Court can properly take them into account, particularly where, as here, they have been involved
23 in informal discovery and negotiations for some period of time, appear to be competent, have
24 experience with this type of litigation, and have exchanged substantial evidence from the
25 opposing party. *See Newberg on Class Actions*, *supra* § 11.47; *Nat’l Rural Telecomms. Coop.*,
26 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is
27 preserved, however, a strong initial presumption of fairness attaches to the proposed
28 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who

1 are most closely acquainted with the facts of the underlying litigation”).

2 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
3 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
4 number of wage and hour class actions and have extensive litigation experience. Declaration of
5 Larry W. Lee (“Lee Decl.”) ¶¶ 5-8; Gavron Decl. ¶¶ 22-27; Declaration of William L. Marder
6 (“Marder Decl.”) ¶¶ 5-12. Each side has apprised the other of their respective factual
7 contentions, legal theories, and defenses, resulting in negotiations taking place between the
8 Parties. Gavron Decl. ¶ 7.

9 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
10 face potential liability of approximately \$150,000 for Plaintiff’s sick pay regular rate class claims
11 if Plaintiff succeeded at trial. Gavron Decl. ¶ 11. Plaintiff was able to estimate the potential class
12 penalties based on data provided by Defendant, including the number of employees in the
13 putative classes, and the average hourly rates of pay applicable to the putative class members. *Id.*
14 ¶ 11. Specifically, Plaintiff calculated waiting time penalties under Labor Code § 203 based on
15 19 putative class members and their average hourly rates of pay (\$143,138.40 (19 employees x
16 ((8 hours x \$31.39) x 30 days = \$7,533.60)). *Id.*

17 With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that
18 Defendant could face civil penalties of up to a maximum of \$6,700 if Plaintiff were to succeed at
19 trial, and the Court awarded a \$100 penalty per pay period where the employee was paid sick pay
20 wages and non-discretionary incentive wages during the stated time period (67 pay periods x
21 \$100), and an additional \$1,900 if the Court were to “stack” additional penalties for violation of
22 Labor Code § 203. Gavron Decl. ¶ 12. However, even assuming Plaintiff ultimately prevails on
23 her PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor
24 Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts
25 and circumstances of the particular case, to do otherwise, would result in an award that is unjust,
26 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
27 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his
28 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90

1 percent, citing the employer's good faith attempt at complying with the law. *Id.* at p. 517. Upon
2 review, the Court of Appeal found such reduction to be proper. *Id.* at p. 539.

3 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
4 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
5 the claims and further with respect to the reduction of PAGA penalties and that it could be
6 persuasive to the Court. Gavron Decl. ¶ 14. Thus, even if Plaintiff were to successfully prove her
7 claims at trial, there is a possibility that the Court may only award a small percentage of PAGA
8 penalties, as the Court has discretion to do so. The Maximum Settlement Amount was premised
9 with this risk in mind, associated with the possibility of the Court significantly reducing
10 Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to prevail at
11 trial. *Id.*

12 Further, Defendant raised several defenses that presented risk. If litigated, Defendant
13 would argue that there is no precedent from any California courts granting class certification of a
14 sick pay regular rate claim. Thus, while Plaintiff believes that a class can be certified, there is a
15 possibility that the Court will not grant class certification on Plaintiff's sick pay regular rate
16 claim here.

17 Defendant also likely would have argued that any failure to pay wages upon separation of
18 employment was not "willful" within the meaning of Section 203, and thus penalties would not
19 be appropriate. A willful failure to pay wages occurs only when "an employer intentionally fails
20 to pay wages to an employee when those wages are due." 8 Cal. Code Regs. § 13520. However,
21 when there is a "good faith dispute" as to whether an employee is entitled to additional wages, no
22 waiting time penalties can be awarded. 8 Cal. Code Regs. § 13520; *see also Barnhill v. Saunders*
23 (1981) 125 Cal. App. 3d 1, 7. "A 'good faith dispute' that any wages are due occurs when an
24 employer presents a defense, based in law or fact, which, if successful, would preclude any
25 recovery on the part of the employee"—it is irrelevant whether the defense is ultimately
26 successful. 8 Cal. Code Regs. § 13520(a); *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157,
27 1201 (the "fact that a defense is ultimately unsuccessful will not preclude a finding that a good
28 faith dispute did exist"); *Road Sprinklers Fitters Local Union No. 669 v. G & G Fire Sprinklers*

1 *Inc.* (2002) 102 Cal. App. 4th 765, 782 (employer’s good faith, yet mistaken, belief that wages
2 are not owed negates finding of willfulness).

3 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
4 inherent risks of litigation, including the substantial risks relative to class certification and the
5 merits of the claims, the costs of pursuing such litigation, and the risks associated with the
6 Court’s discretion to reduce PAGA penalties. The settlement is the result of extensive arm’s-
7 length negotiations between the Parties and their counsel and was facilitated by an experienced
8 and neutral mediator.

9 Although Plaintiff believes that the Class can be certified, Plaintiff also believes in the
10 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
11 involved in not prevailing on one or more of the causes of action or theories alleged in the
12 operative Complaint, the possibility of non-certification, and the potential for appeals. Gavron
13 Decl. ¶ 14. These risks on class certification are compounded by the California Supreme Court’s
14 holding in *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained
15 class certification and subsequently prevailed at trial after eight years of litigation, but the
16 judgment and the certification ruling were reversed by the California Supreme Court after an
17 additional five years of litigation. The case was remanded back to superior court where class
18 certification was denied and plaintiffs’ subsequent appeal also was denied.

19 Indeed, numerous courts have held that **gross** settlements approximating between only 8
20 and 25 percent of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re*
21 *Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action
22 settlement recovering 16 percent of potential exposure was fair and reasonable; “[i]t is well-
23 settled law that a cash settlement amounting to only a fraction of the potential recovery does not
24 per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the
25 settlement should be assessed relative to risks of pursuing the litigation to judgment”; noting that
26 whether the settlement is fair and adequate depends on the “the difficulties in proving the case”);
27 *Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015)
28 (holding that class action settlement recovering between **8.5 percent and 25 percent** of the

defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1 percent** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15 percent of the potential recovery was fair and reasonable).

Here, the total amount of class and PAGA penalties amount to approximately \$150,000 without discounting for potentially losing on any cause of action. Gavron Decl. ¶ 13. The Maximum Settlement Amount is \$95,000,000, which is a significant percentage of the maximum class and PAGA penalties. *Id.* Thus, the settlement was negotiated at arm’s 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 Notice of Class Action Settlement (“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. *See* Class Notice, attached as **Exhibit B** to Gavron 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 Ninety-Five Thousand Dollars (\$95,000.00) as the Maximum Settlement Amount. *See* Stipulation ¶ I.17. The Net Settlement Fund, calculated after deduction of attorneys’ fees (up to \$31,666.67), litigation costs (up to \$15,000.00), the enhancement award payment to the Class Representative (up to \$10,000.00), payment to the LWDA for PAGA penalties (\$3,750.00), and settlement administration costs (up to \$4,500.00), is estimated to be approximately **\$30,083.33**. *Id.* ¶¶ III.9.

Pursuant to the Settlement Agreement, the Net Settlement Fund, or approximately

1 \$30,083.33, will be apportioned among the Class Members on a pro rata basis, based on the
2 individual's Pay Rate. *See* Stipulation ¶ III.9.b. In addition, Class Members will be apportioned
3 25% of the PAGA Payment, or approximately \$1,250.00, on a per capita basis. *Id.* ¶ I.21.

4 Based thereon, on a raw average, each Participating Class Member may potentially
5 recover approximately \$1,583.33 (\$30,083.33 / 19 class members). Gavron Decl. ¶ 10. The
6 amount actually paid to each Participating Class Member will increase or decrease depending on
7 the Pay Rate each Class Member earned at the time of separation from employment and
8 depending on how many participate. *Id.*

9 Finally, the terms of the settlement provide that uncashed settlement payment checks
10 (upon the expiration date) shall be distributed to the *cy pres* recipient Legal Aid at Work,
11 pursuant to California Code of Civil Procedure section 384. *See* Stipulation ¶ III.10.

12 **2. Whether, and Under What Circumstances, Amounts Available for**
13 **Payment in Settlement Might Not Be Paid to Class Members or Might**
14 **Revert to the Defendants**

15 This Settlement is **non-reversionary**, meaning that none of the settlement funds will
16 revert back to Defendant. *See* Stipulation ¶ III.9.

17 **3. Scope of the Release of Class Members' Claims**

18 As a condition of participating in this settlement, Class Members who do not opt out of
19 the Settlement will provide a limited release of the following claims:

20 all claims that were or could have been alleged based on the facts
21 alleged in the Complaint by the Class, including failing to pay sick
22 pay at the regular rate of pay and for waiting time penalties incurred
23 as a result of Defendant's alleged failure to pay sick pay at the
24 regular rate of pay, pursuant to Labor Code §§ 201, 202, and 246
25 that accrued during the period from August 22, 2017, to October 20,
26 2021 and for claims for civil penalties under Labor Code § 2698 *et*
27 *seq.* (Violation of the Private Attorney General Act) premised on the
28 same facts alleged in the Complaint and Labor Code §§ 201, 202,
203, 246 that accrued during the period from August 10, 2019
through October 20, 2021. In addition, and in recognition of the fact
that an employee can only recover one set of waiting time penalties
regardless of how much he or she was underpaid at the time of
termination, the Class shall also release any claim for failure to pay
waiting time penalties under Labor Code § 203 as to any wages
allegedly unpaid at the time of that individual's separation during
the Class Period, irrespective of the nature of the underlying unpaid

wages.

See Stipulation ¶ I.28.

Given that the release is tailored to only claims pled in the operative Complaint that pertain to the settlement class, the release is appropriately limited.

4. Tax Treatment of Settlement Amounts

As this lawsuit seeks statutory and civil penalties as recovery, the Parties have agreed that the entirety of each individual settlement payment to Class Members shall be treated as a payment for penalties and shall be reported by IRS Forms 1099. *See Stipulation ¶ III.9.a.*

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

As stated above, Class Members do **not** need to do anything should they wish to receive their share of the settlement funds. In other words, because this is not a claims-made settlement, Class Members will not be required to make a submission to participate in the settlement. No claim forms are required. Thus, this substantially decreases the amount of burden each Class Member must bear in order to receive their share of the settlement funds.

However, if a Class Member does not wish to take part in this settlement or be bound by the release, the Class Member must submit a request for exclusion. *See Stipulation ¶ III.7.f.*

C. Notice to Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing all Class Members' full names, last known addresses, last known telephone numbers, Social Security numbers, and final rate of pay ("Class Information"). *See Stipulation ¶¶ I.4; III.6.a.*

Pursuant to the Settlement Agreement, Defendant will provide said Class Information within fourteen (14) calendar days of preliminary approval. *See Stipulation ¶ III.6.a.* Within fourteen (14) calendar days of receipt of the Class Information from Defendant, the Settlement Administrator will mail the Class Notice to Class Members via regular First-Class U.S. mail. *See Stipulation ¶ III.6.b.* For any Class Notices returned to the Settlement Administrator as undeliverable, the Settlement Administrator shall conduct a skip trace to locate the correct

1 address based on the National Change of Address Database. *See* Stipulation ¶ III.6.c. If an
2 updated/corrected address can be obtained through skip tracing, the Settlement Administrator
3 will re-mail the Class Notice within five (5) calendar days of receiving notice that said Class
4 Notice was undeliverable. *Id.* Class Members who receive a re-mailed Class Notice will have
5 their deadline to submit opt-outs, written objections, and/or disputes regarding information
6 pertaining to their individual settlement payments as contained in the Class Notice extended by
7 fifteen (15) calendar days. *Id.*

8 The Class Notice will advise Class Members of what the lawsuit is about, their rights
9 and/or options under the settlement, the total settlement amount and other terms of the
10 settlement, their expected individual settlement payment share, their opportunity to and
11 procedures to opt out or to object to the settlement, information pertaining to the final approval
12 hearing, and the release of claims. *See* Class Notice. As set forth in the Class Notice, Class
13 Members will be allowed to opt out of or object to the Settlement by a certain deadline, which is
14 forty-five (45) days after the initial mailing of the Class Notice. *See* Stipulation ¶ I.31. Class
15 Members who received a re-mailed Class Notice will have that deadline extended by 15 calendar
16 days from the original response deadline. *Id.* ¶ III.6.c. With respect to objections, Class Members
17 are also informed in the Class Notice that they may object in writing *or* appear at the final
18 approval hearing to present their objections to the Court. *Id.* ¶ III.6.g; *see* Class Notice.

19 If Class Members need further information about the settlement and/or the lawsuit, Class
20 Members are provided with Class Counsel’s contact information and the Settlement
21 Administrator’s contact information in the Class Notice. *See* Class Notice.

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

23 **1. Class Representative’s Claims are Typical of the Class**

24 The commonality requirement is met when there are questions of law and fact common to
25 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared
26 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
27 facts couple with disparate legal remedies within the class”). Commonality requires only that
28 some common legal or factual questions exist; the plaintiffs need not show that all issues in the

litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges here, the class-wide impact of the Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

In the present case, Plaintiff alleges that Defendant is liable to the Class for failure to pay sick pay based on the correct regular rate of pay in violation of Labor Code §§ 201-203 and 246. Like all Class Members, Plaintiff was subjected to these same policies and practices. Declaration of Jamie Kennedy ("Kennedy Decl.") ¶¶ 2, 3. In particular, Defendant underpaid sick pay to Plaintiff, as non-discretionary incentive wages were not included in the regular rate of pay for purposes of paying sick pay. *Id.* ¶ 3. In other words, Plaintiff contends that she was subjected to the same policies and practices as other Class Members and thus, the typicality requirement is met.

Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. *Id.* ¶ 4. Plaintiff has taken all necessary steps to represent the interests of the Class, including by providing information and documents to Plaintiff's counsel. *Id.* ¶¶ 5-7. For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Action

From the inception of the case, Class Counsel has zealously represented the interests of the Class. Class Counsel has engaged in significant meet and confer discussions with opposing counsel to obtain informal data and documents on behalf of the Class. Gavron Decl. ¶ 19. The Settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. *Id.* Further, Class Counsel has 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. ¶¶ 5-8; Gavron Decl. ¶¶ 22-27; Marder Decl. ¶¶ 5-12.

1 **E. Costs and Fees**

2 **1. Attorneys' Fees and Costs**

3 California state and federal courts have recognized that an appropriate method for
4 determining award of attorneys' fees is based on a percentage of the total value of benefits to
5 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
6 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
7 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of
8 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
9 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
10 burden alone." *Vincent*, 557 F.2d at p. 769.

11 The common fund doctrine is predicated on the principle of preventing unjust
12 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
13 she may require the passive beneficiaries to compensate those who created the fund. Both
14 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at p. 35;
15 *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
16 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
17 been applied "consistently in California when an action brought by one party creates a fund in
18 which other persons are entitled to share." The reasons for applying the common fund doctrine
19 include:

20 Fairness to the successful litigant, who might otherwise receive no
21 benefit because his recovery might be consumed by the expenses;
22 correlative prevention of an unfair advantage to the others who are
23 entitled to share in the fund and who should bear their share of the
24 burden of its recovery; encouragement of the attorney for the
25 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.

26 *Id.*

27 Indeed, in 2016, the California Supreme Court has also now held that the award of
28 attorneys' fees in common fund wage and hour class action settlements should start with the

percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created”).

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

The Parties have agreed to a payment of a maximum of one-third of the Maximum Settlement Amount, or \$31,666.67, for payment to Class Counsel as attorneys’ fees. *See* Stipulation ¶ III.13. The Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs of up to \$15,000.00. *Id.* Class Counsel has, at their own risk, expended costs, for example, to file this instant action and other pleadings in the case, effect service of process, participate in mediation, and advance other litigation-related costs. If Class Counsel’s actual costs are less than \$15,000.00, the remainder will become part of the Net Settlement Fund to be distributed to Class Members. *Id.*

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

2. Proposed Payment to the Class Representative

Class Representative Jamie Kennedy requests a modest enhancement of \$10,000.00. *See* Stipulation ¶ III.12. The Class Representative met and conferred with her counsel on a number of occasions to discuss the case, provided documents and information to her counsel, and reviewed pleadings and documents, including the Settlement Agreement. Kennedy Decl. ¶¶ 5-7. As part of her duties as the Class Representative, Plaintiff provided invaluable information, evidence, and

documents that resulted in this settlement. Furthermore, in consideration for her service payment, Plaintiff also executed an individual general release of all claims under California Civil Code § 1542, which other members of the Class did not have to do. *See* Stipulation ¶ III.2.

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

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

3. Settlement Administration Fees

The Parties have agreed to an estimated payment of no more than \$4,500.00 to the Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this settlement. *See* Stipulation ¶¶ I.33, III.14. Phoenix Settlement Administrators is a well-recognized class action settlement administrator. The Parties believe that the administration fee is reasonable and should be approved.

F. Notice to the LWDA

In conjunction with the filing of this motion, Plaintiff will provide notice to the Labor and Workforce Development Agency. Gavron Decl. ¶ 32.

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

The settlement presented here is fair, adequate, and reasonable. The settlement will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved

1 as the result of informed, extensive, and arm's length negotiations conducted by counsel for the
2 respective Parties who are experienced in wage and hour class action litigation and facilitated by
3 an experienced and neutral mediator.

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

7
8 DATED: August 1, 2022

DIVERSITY LAW GROUP, P.C.

9
10 By: 

Larry W. Lee

Max W. Gavron

11 Attorneys for Plaintiff, the Class, and Aggrieved
12 Employees
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2

4
57
8

9

- 0
1
2
3
4
5
6
7
8
9

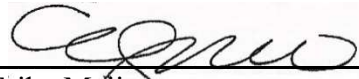
20

21
22
23
24
25

26
27
28

1 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
2 in this office.

3 I declare under penalty of perjury under the laws of the State of California that the
4 above is true and correct. Executed on August 1, 2022, at Los Angeles, California.

5 
6 Erika Mejia