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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY**

SHARON MORRIS, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

COMMUNITY HOSPITAL OF THE
MONTEREY PENINSULA, a California
nonprofit corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 21CV001953

(Assigned to the Honorable Thomas W. Wills,
Dept. 15)

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

Date: May 13, 2022

Time: 8:30 a.m.

Dept.: 15

Complaint Filed: June 16, 2021

FAC Filed: August 6, 2021

SAC Filed: January 24, 2022

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on May 13, 2022, at 8:30 a.m. before the Honorable Thomas W. Wills, judge presiding in Department 15 of the above-referenced Court, located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Sharon Morris (“Plaintiff”) will and hereby does move the Court for the following relief with respect to the Joint Stipulation of Class Action Settlement (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant Community Hospital of the Monterey Peninsula (“Defendant”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Stipulation 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 from June 16, 2017, through July 22, 2021 (the “Class Period”).
3. That Plaintiff Sharon Morris be appointed as the Class Representative, and Larry W. Lee 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 Stipulation and the total Gross Settlement Amount in the amount of One Million Four Hundred Fifty Thousand Dollars (\$1,450,000.00);
5. That the Court finds on a preliminary basis that the Stipulation 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 costs, settlement administration costs, and the allocation of individual 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 Proposed Class Action Settlement (“Class Notice”) to be sent to Class Members;
7. That the Court appoint Phoenix Settlement Administrators as the Settlement Administrator; and
8. That the Court schedule the matter for a final approval hearing.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which

1 provides for court approval of the settlement of a purported class action and allows the Court to
2 preliminarily certify a class for settlement purposes.

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

10
11 DATED: April 21, 2022

DIVERSITY LAW GROUP, P.C.

12
13 By: 

Larry W. Lee

Mai Tulyathan

Attorneys for Plaintiff, the Class, and Aggrieved
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 Sharon Morris (“Plaintiff”) alleges
4 that Defendant Community Hospital of the Monterey Peninsula (“Defendant”) failed to pay sick
5 pay wages and meal and rest period premium pay at the correct regular rate of pay, in violation
6 of Labor Code §§ 201-203, 226.7, 246, and 512. Based on these violations, Plaintiff asserts class
7 and PAGA claims for violation of Labor Code §§ 201-203, 226.7, 246, and 512, and the
8 California Business & Professions Code § 17200 (the “UCL”). The Parties have reached a class
9 and PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
10 Class Action Settlement (“Stipulation” or “Settlement Agreement”)¹.

11 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
12 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
13 principles applicable to the claims asserted against Defendant. Through the exchange of
14 informal discovery, Defendant provided necessary data pertaining to the number of putative class
15 members and aggrieved employees, number of pay periods at issue, and sample payroll and
16 timekeeping data for the putative class, as well as Defendant’s policies regarding the payment of
17 sick pay/paid time off and meal and rest period premiums. The information provided by
18 Defendant allowed Plaintiff to review and analyze the liability and potential exposure.
19 Thereafter, the Parties attended a full day of mediation with experienced mediator Mike Masuda,
20 Esq., after which the Parties were able to reach the current settlement of the class and PAGA
21 claims. The following represents the key terms of the settlement:

- 22 • Gross Settlement Amount of \$1,450,000.00, which will be paid by Defendant and
23 distributed to the class on a **non-reversionary basis, such that no monies will**
24 **revert back to Defendant** (Stipulation at ¶¶ 12, 37);

25
26
27
28 ¹ The Parties’ Joint Stipulation of Class Action Settlement is attached to the Declaration of Mai Tulyathan
as **Exhibit A**.

- Class² size of 3,017 individuals (Stipulation at ¶ 3);
- Class Members do not need to submit claim forms to participate in the settlement (Stipulation at ¶ 49);
- Class Representative Enhancement Payment of up to \$10,000, for her efforts in prosecuting this action on behalf of other Class Members and in consideration for providing a general release of all claims, including a waiver under Civil Code § 1542 (Stipulation at ¶¶ 11, 40);
- Class Counsel’s attorneys’ fees of up to 33.33% of the Gross Settlement Amount, or up to \$483,333.33 (Stipulation at ¶ 39);
- Class Counsel’s litigation costs of up to \$20,000.00 (Stipulation at ¶ 39);
- Settlement Administrator’s Costs of up to \$23,750.00 (Stipulation at ¶ 41);
- Payment to the LWDA of \$37,500.00, representing 75% of the total PAGA allocation of \$50,000.00 (Stipulation at ¶ 42);
- The remaining 25% of the PAGA allocation of \$50,000.00, or \$12,500.00, to be distributed to Aggrieved Employees³ on a *pro rata* basis, based on the number of pay periods worked during the PAGA Period (Stipulation at ¶ 42);
- Net Settlement Amount of approximately **\$862,916.67** (Stipulation at ¶¶ 20, 43); and
- Raw average of at least **\$286.02** to each Participating Class Member.

The Parties believe that this amount is fair, adequate, and reasonable, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they could prevail on class certification and on the merits of the

² Pursuant to the Settlement Agreement, the “Class Action Settlement Group” consists of all current and former non-exempt employees employed by Defendant in the State of California from June 16, 2017, through July 22, 2021. Members of the Class Action Settlement Group shall be referred to as “Class Members.”

³ Pursuant to the Settlement Agreement, the “PAGA Settlement Group” consists of all current and former non-exempt employees employed by Defendant in the State of California from June 4, 2020, through July 22, 2021. Individuals part of the PAGA Settlement Group shall be referred to as “Aggrieved Employees.”

1 claims, they recognize the inherent risks in drawn-out litigation and the specific risks that a class
2 might not be certified and/or that Plaintiff could fail to establish liability, especially given that a
3 sick pay class claim has yet to be certified by a California court at this time. Based on their own
4 independent investigation and evaluation, the Parties and their respective counsel are of the
5 opinion that the Settlement for the consideration and on the terms set forth in the Settlement
6 Agreement is fair, reasonable, and adequate and is in the best interests of the Class and
7 Defendant.

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

10 **II. PROCEDURAL HISTORY**

11 **A. The Allegations Set Forth in the PAGA Notices and the Operative** 12 **Complaint.**

13 On June 4, 2021, Plaintiff submitted her written notice to the LWDA, alleging violations
14 of Labor Code §§ 201-203 and 246, pursuant to the PAGA, Labor Code § 2699. (Declaration of
15 Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2.) On June 16, 2021, Plaintiff filed her class action
16 complaint against Defendant in the Monterey County Superior Court (the “Action”). (*Id.*)
17 Plaintiff filed her First Amended Complaint on August 6, 2021, adding claims for violations
18 under the PAGA, Labor Code § 2698, *et seq.* (*Id.* at ¶ 3.)

19 On November 15, 2021, Plaintiff submitted her supplemental PAGA notice to the LWDA
20 alleging additional violations of Labor Code §§ 226.7 and 512, based on failure to pay meal and
21 rest period premiums at the regular rate of pay. (*Id.* at ¶ 4.) On January 24, 2022, Plaintiff filed
22 the Second Amended Complaint to plead additional claims and allegations based on Defendant’s
23 alleged failure to pay meal and rest period premiums at the regular rate of pay. (*Id.* at ¶ 5.) The
24 operative Second Amended Complaint alleges claims for: (1) violation of Labor Code § 246; (2)
25 violation of Labor Code §§ 201-203; (3) violation of Labor Code § 226.7; (4) violation of Labor
26 Code §§ 226.7 and 512; (5) violation of Business & Professions Code § 17200, *et seq.*; and (6)
27 violation of the PAGA, Labor Code § 2698, *et seq.* predicated on the same violations as the class
28 claims. (*Id.*)

1 Plaintiff's class and PAGA claims as pled in the Second Amended Complaint are
2 predicated on the following allegations. Plaintiff alleges that Defendant failed to factor in non-
3 discretionary incentives, including shift differential wages (such as "PMDiff" wages) in the
4 regular rate of pay. Whenever shift differential wages and sick pay wages were paid to Plaintiff
5 and other employees in the same pay period, sick pay was solely paid at the base rate of pay, as
6 opposed to the higher, regular rate of pay. Similarly, Plaintiff also alleges that Defendant failed
7 to incorporate non-discretionary incentives into the regular rate of pay when paying meal and
8 rest period premiums. Whenever meal and rest period premiums were paid to Plaintiff and other
9 employees, it was paid based on the lower base rate of pay. As a result of these alleged
10 violations, Plaintiff seeks damages and penalties under the California Labor Code, California
11 Business & Professions Code, and the PAGA, as well as attorneys' fees and costs. (Tulyathan
12 Decl. at ¶ 6.)

13 **B. The Parties Participate in Private Mediation.**

14 After Plaintiff initiated the Action, the Parties agreed to participate in private mediation.
15 In connection with mediation, the Parties agreed to exchange informal discovery sufficient to
16 allow Plaintiff to assess the claims and liability, as well as analyze the maximum exposure of
17 damages and penalties. (Tulyathan Decl. at ¶ 7.) Defendant produced class data, including the
18 number of putative class members and aggrieved employees, number of pay periods at issue, and
19 sample payroll and timekeeping data for the putative class, as well as documents pertaining to
20 Defendant's policies regarding the payment of sick pay/paid time off and meal and rest period
21 premiums. (*Id.*) This allowed Plaintiff to conduct a full damages analysis. (*Id.*)

22 On October 18, 2021, the Parties engaged in a full-day mediation with mediator Mike
23 Masuda, Esq. (*Id.* at ¶ 8.) As a result of the mediation, the Parties reached a tentative settlement,
24 subject to Defendant providing additional confirmatory discovery, which was memorialized in
25 the Memorandum of Understanding. (*Id.*) As part of the confirmatory discovery, Defendant
26 informally produced payroll and timekeeping records of the putative class members. (*Id.*) In
27 resolution of the class and PAGA claims, the Parties subsequently executed the Joint Stipulation
28 of Class Action Settlement, a true and correct copy of which is attached as **Exhibit A** to the

1 Declaration of Mai Tulyathan.

2 The Parties recognize the risk, expense, and delay in continuing litigation with the class
3 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. (Tulyathan
4 Decl. at ¶ 10.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes
5 and claims arising from or relating to the afore-referenced claims.

6 **III. DISCUSSION**

7 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
8 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
9 review after notice has been distributed to the class members for their comment or objections.

10 The *Manual for Complex Litigation, Third* § 30.41 states:

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

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

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

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

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

8 *Id.* § 11.24.

9 Here, the Parties have reached such an agreement and have submitted to this Court in
10 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
11 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties as to
12 settlement of the class and PAGA claims. Said terms in the Stipulation include, among other
13 things, the method for calculating the Class Members' individual portions of the settlement
14 payment. (*See* Stipulation at ¶ 43.)

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

24 The strength of the findings made by a judge at a preliminary
25 hearing or conference concerning a tentative settlement
26 proposal...may be set out in conditional orders granting tentative
27 approval to the various items submitted to the court. Three basic
28 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* Stipulation at ¶ 35.)

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 from June 16, 2017, through July 22, 2021 (the “Class Action Settlement Group” or “Class Members”). (*See* Stipulation at ¶ 3.) The Class Period means the period of June 16, 2017, through July 22, 2021. *Id.* ¶ 5. Pursuant to the Stipulation, Defendant has represented that there are 3,017 individuals that comprise the Class. (Stipulation at ¶ 3.)

With respect to PAGA, employees part of the PAGA Settlement Group include: All current and former non-exempt employees employed by Defendant in the State of California from June 4, 2020, through July 22, 2021 (the “PAGA Settlement Group” or “Aggrieved Employees”). (*See* Stipulation at ¶ 4.) Pursuant to the Stipulation, Defendant has represented that there are 2,419 Aggrieved Employees. (*Id.*)

The July 22, 2021 end date of the Class and PAGA Period is based on the date that Defendant revised its policies and practices to include non-discretionary incentives into the calculation of the regular rate of pay when paying sick pay and meal and rest period premiums. (Tulyathan Decl. at ¶ 14.) Defendant has indicated that as of July 23, 2021, it began including non-discretionary incentives into the calculations for sick pay and meal and rest period premiums. (*Id.*)

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*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat’l Rural*

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

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

14 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
15 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
16 number of wage and hour class actions and have extensive litigation experience. (Declaration of
17 Larry W. Lee (“Lee Decl.”) at ¶¶ 7-8; Tulyathan Decl. at ¶¶ 39-41; Declaration of William L.
18 Marder (“Marder Decl.”) at ¶¶ 4-9.) Each side has apprised the other of their respective factual
19 contentions, legal theories and defenses, resulting in negotiations taking place between the
20 Parties. (Tulyathan Decl. at ¶ 11.)

21 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
22 face potential liability of up to approximately \$9,284,972.80 for Plaintiff’s class claims if
23 Plaintiff succeeded at trial on all class claims. (Tulyathan Decl. at ¶ 25.) Plaintiff was able to
24 estimate the potential class penalties based on class data and sample records provided by
25 Defendant. (*Id.*) Specifically, this amount was calculated based on the following breakdowns
26 for each class claim:

- 27 • \$5,903,539.20 in waiting time penalties under Labor Code § 203, resulting from the
28 underpayment of sick pay wages. This amount is calculated based on 432 former

employees who were paid sick pay wages and non-discretionary incentives in the same workweek during the applicable statute of limitations period for waiting time penalties, based on an average hourly rate of pay of \$56.94 [formula: 432 formers x (\$56.94 average hourly rate x 8 x 30)].

- \$19,696.00 in underpaid meal and rest premiums. This amount is calculated based on 19,969 instances of meal and/or rest premiums that were paid out to employees during the Class Period, based on an assumption that Defendant underpaid \$1.00 per hour for each of the instance that the meal and/or rest break premiums were paid.
- \$3,361,737.60 in waiting time penalties under Labor Code § 203, resulting from the underpayment of meal and rest premiums. This amount is calculated based on 246 former employees who were paid non-discretionary incentives and any meal/rest premiums in the same workweek that the non-discretionary incentive was earned, based on an average hourly rate of pay of \$56.94 [formula: 246 formers x (\$56.94 average hourly rate x 8 x 30)].

(See Tulyathan Decl. at ¶ 25.) This amounts to a total of approximately \$9,284,972.80, if Plaintiff were to prevail on the class claims. (*Id.*)

With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that Defendant could face civil penalties of up to \$384,800.00. (Tulyathan Decl. at ¶ 26.) The breakdown for the calculation of Plaintiff's PAGA penalties is as follows:

- \$30,100.00 for PAGA penalties with respect to the sick pay regular rate claim, based on 301 pay periods at issue during the PAGA Period, calculated based on the PAGA's initial violation penalty of \$100 per aggrieved employee per pay period [formula: 301 pay periods x \$100 initial penalty].
- \$354,700 for PAGA penalties with respect to the meal and rest period premium regular rate claims, based on 3,547 pay periods at issue during the PAGA Period, calculated based on PAGA's initial violation penalty of \$100 per aggrieved employee per pay period [formula: 3,547 x \$100 initial penalty].

(See Tulyathan Decl. at ¶ 26.) However, even assuming Plaintiff ultimately prevails on her 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.*, 30 Cal.App.5th 504 (2018), 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 the claims and further with respect to the reduction of PAGA penalties and that it could be persuasive to the Court. (Tulyathan Decl. at ¶ 28.) Thus, even if Plaintiff were to successfully prove her claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was premised with this risk in mind, associated with the possibility of the Court significantly reducing Plaintiff’s PAGA penalties, along with other attendant risks, even if Plaintiff was to prevail at trial. (*Id.*)

Further, Defendant raised several defenses that presented risk on the regular rate claims. (Tulyathan Decl. at ¶ 29.) With respect to the sick pay regular rate claim, Defendant has argued that Plaintiff cannot recover unpaid sick pay wages because there is no private right of action under the Healthy Workplace Healthy Family Act. Furthermore, it is Defendant’s position that Plaintiff will not be able to prove the “willfulness” requirement to recover waiting time penalties under Labor Code § 203, as Defendant’s computer program automatically generated rates of pay for sick leave and paid said sick leave wages. Defendant alleges that it was unaware of any alleged potential miscalculation, which was immediately corrected upon its discovery. (*Id.*) With respect to the meal and rest period premium regular rate claims, it is Defendant’s position that it is not liable because it corrected its practice to include non-discretionary incentives into

1 the meal/rest period premium regular rate immediately after the Court issued the *Ferra v. Loews*
2 (2021) 11 Cal. 5th 858 decision, holding that meal and rest period premiums must be paid at the
3 blended regular rate of pay. Furthermore, Defendant contends that waiting time penalties are not
4 available for any alleged late payment of meal and rest period premiums, as it disputes that meal
5 and rest period premiums constitutes “wages.” It is Defendant’s position that waiting time
6 penalties are only available in an action or claim to recover nonpayment of wages. (Tulyathan
7 Decl. at ¶ 30.)

8 Although Plaintiff believes that the class can be certified, Plaintiff also believes in the
9 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
10 involved in not prevailing on one or more of the causes of action or theories alleged in the
11 operative Complaint, the possibility of non-certification, and the potential for appeals.
12 (Tulyathan Decl. at ¶ 31.) These risks on class certification are compounded by the California
13 Supreme Court’s holding in *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal.4th 1 (2014). There, the
14 plaintiffs obtained class certification and subsequently prevailed at trial after eight years of
15 litigation, but the judgment and the certification ruling were reversed by the California Supreme
16 Court after an additional five years of litigation. The case was remanded back to superior court
17 where class certification was denied and plaintiffs’ subsequent appeal also was denied. As
18 another risk to prevailing on class certification, there is essentially no precedent from any
19 California courts granting class certification of a sick pay regular rate claim. Thus, while
20 Plaintiff believes that a class can be certified, there is a possibility that the Court will not grant
21 class certification on Plaintiff’s sick pay regular rate claim here.

22 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
23 inherent risks of litigation, including the substantial risks relative to class certification, the costs
24 of pursuing such litigation, and the risks associated with the Court’s discretion to reduce PAGA
25 penalties. The settlement is the result of extensive arm’s-length negotiations between the Parties
26 and their counsel and was facilitated by an experienced and neutral mediator. (Tulyathan Decl.
27 at ¶ 33.)

28 Indeed, numerous courts have held that gross settlements approximating between only 8

1 and 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
2 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement
3 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
4 settlement amounting to only a fraction of the potential recovery does not per se render the
5 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
6 be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
7 settlement is fair and adequate depends on the “the difficulties in proving the case”);
8 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D.
9 Cal. Mar. 20, 2015) (holding that class action settlement recovering between **8.5% and 25%** of
10 the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
11 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class
12 settlement which obtained **only 9.1%** of projected damages, given the risks of continued
13 litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
14 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
15 approximately 15% of the potential recovery was fair and reasonable). Here, based on the
16 amounts explained above, the total exposure for Plaintiff’s class and PAGA claims amount to
17 **\$9,669,772.80**. The Gross Settlement Amount here is **\$1,450,000.00**, and thus amounts to
18 approximately **15%** of the total estimated liability. (Tulyathan Decl. at ¶ 34.) The percentage-
19 to-recovery ratio of this settlement is within the range of fairness and reasonableness and should
20 be approved by the Court. (*Id.*)

21 Despite the asserted fairness of the settlement terms, as set forth in the Notice of
22 Proposed Class Action Settlement (“Notice Packet”), should any Class Member wish to pursue
23 his or her own case for the claims being released herein, each Class Member has the right to
24 submit a Request for Exclusion (*i.e.*, opt-out) from the settlement. (*See* Notice Packet, attached
25 as **Exhibit A** to the Settlement Agreement.) Moreover, as set forth in the Notice Packet, Class
26 Members are advised of their right to object to any of the terms contained in the Stipulation and
27 attend the final approval hearing. (*Id.*)

28 //

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

4 The Stipulation provides for One Million Four Hundred Fifty Thousand Dollars
5 (\$1,450,000.00) as the Gross Settlement Amount. (See Stipulation ¶¶ 12, 37.) The Net
6 Settlement Amount, calculated after deduction of attorneys' fees (up to \$483,333.33), litigation
7 costs (up to \$20,000.00), the enhancement payment to the Class Representative (up to
8 \$10,000.00), the PAGA Payment (\$50,000.00), and Settlement Administration costs (up to
9 \$23,750.00), is estimated to be approximately **\$862,916.67**. (*Id.* ¶¶ 20, 43; Tulyathan Decl. at ¶
10 22.) Each Participating Class Member that does not opt-out of the settlement will be awarded a
11 portion of the Net Settlement Amount on a *pro rata* basis, based upon the total number of
12 workweeks each Participating Class Member worked during the Class Period. (See Stipulation ¶
13 43.)

14 Based thereon, on a raw average, each Class Member may potentially recover
15 approximately \$286.02. (Tulyathan Decl. at ¶ 23.) The amount actually paid to each Class
16 Member may increase or decrease depending on the actual number of workweeks worked during
17 the Class Period and the number of opt-outs received. (*Id.*) To the extent that there are valid
18 opt-outs, the Settlement Administrator will proportionately increase the individual settlement
19 payments to each Participating Class Member so that the amount actually distributed to
20 Participating Class Members equals 100% of the Net Settlement Amount. (*Id.*)

21 Additionally, as part of the PAGA Payment, 25% of the PAGA Payment, or \$12,500.00,
22 will be distributed to Aggrieved Employees who worked during the PAGA Period (June 4, 2020,
23 through July 22, 2021), on a *pro rata* basis, based on the number of pay periods worked by each
24 Aggrieved Employee during the PAGA Period as compared to the total number of pay periods
25 during the PAGA Period. (Stipulation at ¶¶ 6, 42.)

26 Finally, the terms of the Settlement provide that uncashed checks (upon the expiration
27 date) shall be distributed to Watsonville Law Center as the *cy pres* beneficiary. (See Stipulation
28 at ¶ 57.) Watsonville Law Center is a non-profit organization that provides free legal services
and referral information to low-income individuals, in accordance with California Civil

1 Procedure § 384. (Tulyathan Decl. at ¶ 21.)

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

5 None of the settlement funds will revert to Defendant. (See Stipulation at ¶¶ 37, 43.)

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

7 As a condition of participating in this Settlement, Class Members who do not opt out of
8 the Settlement ("Participating Class Members") will provide a limited release of the following
9 claims against the Released Parties ("Released Claims"):

10 [A]ll claims that were alleged in the operative Complaint and
11 derivative claims related thereto arising from the facts as alleged in
12 the operative Complaint.

13 (See Stipulation at ¶¶ 28, 65.) Pursuant to the Settlement Agreement, the release of claims is as
14 follows:

15 Upon the Effective Date, all Participating Class Members and Aggrieved
16 Employees, on behalf of themselves and their heirs, executors,
17 representatives, administrators, trustees, and/or permitted assigns, hereby
18 do and shall be deemed to have fully, finally and forever released, settled,
19 compromised, relinquished and discharged any and all of the Released
20 Parties of and from any and all Released Claims that accrued during the
21 Released Claims Period.

22 (Stipulation at ¶ 65.) The Parties agreed to the Released Claims Period from June 16, 2017,
23 through December 31, 2021. (Stipulation at ¶ 29.)

24 Given that the release is tailored to only claims pled in the operative Complaint and any
25 claims arising from the facts alleged therein and nothing more, the release is appropriately
26 limited.

27 **4. Tax Treatment of Settlement Amounts**

28 The Parties have agreed that the individual settlement payment to Class Members shall be
allocated as follows: ten percent (10%) as payment for wages, less withholdings and deductions,
for which an IRS Form W-2 shall issue, and ninety percent (90%) as payment of penalties and
interest, for which an IRS Form 1099 shall issue. (Stipulation at ¶ 60.)

With respect to PAGA payments distributed to Aggrieved Employees, one hundred

1 percent (100%) of those payments shall be allocated as penalties and shall be deemed IRS Form
2 1099 income. (*Id.*)

3 Pursuant to the Stipulation, employer-side payroll taxes on the wage portion of the
4 individual settlement payments paid to Class Members will be paid by Defendant separate and in
5 addition to the Gross Settlement Amount. (Stipulation 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 on each Class
12 Member to receive their share of the settlement funds. If a Class Member does not wish to take
13 part in this settlement or be bound by the release, the Class Member must submit a Request for
14 Exclusion. (*See* Stipulation at ¶¶ 31, 51.)

15 **C. Notice to Class Members**

16 Should the Court grant the instant motion, Defendant will provide the Settlement
17 Administrator with a list containing each Class Member's full name, employee number, most
18 recent mailing address, Social Security number, number of workweeks worked by each Class
19 Member during the Class Period, and number of pay periods worked by each Aggrieved
20 Employee during the PAGA Period ("Class List and Data") within fifteen (15) calendar days of
21 preliminary approval. (Stipulation at ¶¶ 9, 46.) Upon receipt of the information and prior to
22 mailing the Notice Packet to Class Members, the Settlement Administrator shall perform a
23 search based on the National Change of Address Database for information to update and correct
24 for any known or identifiable address changes. (*Id.* at ¶ 48.) Within seven (7) calendar days of
25 receipt of the Class List and Data from Defendant, the Settlement Administrator will mail the
26 Notice Packet out to Class Members via First-Class U.S. Mail. (*Id.* at ¶ 47.) Any Notice Packets
27 returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline
28 shall be re-sent via regular first-class U.S. mail to the forwarding address affixed thereto. (*Id.* at

¶ 50.) If no forwarding address is provided, the Settlement Administrator shall perform a skip trace to locate the most current address and resend the Notice Packet. (*Id.*) Class Members who received a re-mailed Notice Packet will have their deadline to submit opt-outs or written objections extended by fifteen (15) calendar days. (*Id.*)

As set forth in the Notice Packet, Class Members will be allowed to opt out of or submit written objections to the settlement by a certain deadline. (Stipulation at ¶¶ 51, 53.) Regardless of whether a Class Member submits a written objection, Class Members may appear and make oral objections at the Final Approval Hearing. (*See* Class Notice, pp. 5-6.)

D. Typicality and Adequacy of Representation

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

The commonality requirement is met when there are questions of law and fact common to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class”). Commonality requires only that 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 classwide impact of the Defendant’s policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal.App.3d 411, 421 (1987).

Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure violated the Labor Code by failing to pay sick pay wages and meal and rest period premiums at the correct regular rate of pay. (Declaration of Sharon Morris (“Morris Decl.”) at ¶ 3.) In other words, Plaintiff contends she was subjected to the same policies and practices as other Class Members and that her claims are typical to those of the Class.

Moreover, Plaintiff does not have any interests adverse to the class, nor have any such issues been raised or presented. (Morris Decl. at ¶ 4.) Plaintiff has taken all necessary steps to

1 represent the interests of the Class, and by providing information and documents to Plaintiff's
2 counsel. (*Id.* at ¶ 5.) For such reasons, Plaintiff has adequately represented the Class Members
3 and will continue to do so.

4 **2. Class Counsel Have Adequately Represented the Class and Have Experience**
5 **with Wage and Hour Class Action**

6 From the inception of the case, Class Counsel have zealously represented the interests of
7 the Class. Class Counsel have engaged in significant meet and confer discussions with opposing
8 counsel to obtain informal data and documents and to discuss the merits of the claims on behalf
9 of the Class. (Tulyathan Decl. at ¶ 35.) The settlement was obtained for the benefit of the Class,
10 as opposed to the individual Class Representative. (*Id.*) Further, Class Counsel have been
11 approved as class counsel on a number of prior cases, have litigated numerous other class action
12 cases, and are competent to represent the class. (Lee Decl. at ¶¶ 7-8; Tulyathan Decl. at ¶¶ 38-
13 41; Marder Decl. at ¶¶ 4-9.)

14 **E. Costs and Fees**

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

16 California state and federal courts have recognized that an appropriate method for
17 determining award of attorneys' fees is based on a percentage of the total value of benefits to
18 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
19 (2001); *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
20 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this
21 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
22 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
23 burden alone." *Vincent*, 557 F.2d at p. 769.

24 The Common Fund doctrine is predicated on the principle of preventing unjust
25 enrichment. When a litigant's efforts create or preserve a fund from which others derive
26 benefits, she may require the passive beneficiaries to compensate those who created the fund.
27 Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal.3d at p.
28 35; *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12

1 Cal.4th 105, 110 (1995), the California Supreme Court recognized that the common fund
2 doctrine has been applied “consistently in California when an action brought by one party creates
3 a fund in which other persons are entitled to share.” The reasons for applying the common fund
4 doctrine include: “fairness to the successful litigant, who might otherwise receive no benefit
5 because his recovery might be consumed by the expenses; correlative prevention of an unfair
6 advantage to the others who are entitled to share in the fund and who should bear their share of
7 the burden of its recovery; encouragement of the attorney for the successful litigant who will be
8 more willing to undertake and diligently prosecute proper litigation for the protection or recovery
9 of the fund if he is assured that he will be properly and directly compensated should his efforts
10 be successful.” *Id.*

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

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

23 Here, the Parties have agreed to a payment of approximately one-third of the Gross
24 Settlement Amount, or \$483,333.33, for payment to Class Counsel as attorneys’ fees. (*See*
25 *Stipulation at ¶ 39.*) The Parties have agreed to a payment of the foregoing attorneys’ fees and,
26 thus, this payment should be presumed to be fair. Further, the Parties have agreed to
27 reimbursement of Class Counsel’s litigation costs up to \$20,000.00. (*Id.*) Class Counsel have, at
28 their own risk, expended costs, for example, to file this instant action and other pleadings in the

1 case, effect service of process, participate in mediation, and advance other litigation-related
2 costs.

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

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

6 Class Representative Sharon Morris requests a modest enhancement of \$10,000.00.
7 (Stipulation at ¶ 40.) The Class Representative discussed the lawsuit with her counsel on a
8 number of occasions, provided documents and information to her counsel, and reviewed various
9 pleadings and documents, including her PAGA letters, her complaint, the Memorandum of
10 Understanding, and the Settlement Agreement. (Morris Decl. at ¶ 5.) As part of her duties as the
11 Class Representative, Plaintiff provided invaluable information, evidence, and documents that
12 resulted in this settlement. Furthermore, in consideration for her enhancement payment, Plaintiff
13 also executed a general release of all claims including a waiver under California Civil Code §
14 1542, which other members of the Class did not have to do. (Stipulation at ¶¶ 11, 67; Morris
15 Decl. at ¶ 7.)

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

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

28 //

1 **3. Settlement Administration Fees**

2 The Parties have agreed to an estimated payment of approximately \$23,750.00 to the
3 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
4 this settlement. (Stipulation at ¶¶ 34-35, 41, 45.) Phoenix Settlement Administrators is a well-
5 recognized class action settlement administrator. The Parties believe that the administration fee
6 is reasonable and should be approved.

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

9 The settlement presented here is fair, adequate, and reasonable. The settlement will result
10 in substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
11 result of informed, extensive, and arm's-length negotiations conducted by counsel for the
12 respective Parties who are experienced in wage and hour class action litigation and facilitated by
13 an experienced and neutral mediator. For the foregoing reasons, Plaintiff respectfully requests
14 that the Court grant preliminary approval of the proposed Settlement, sign the proposed Order,
15 approve and authorize mailing of the proposed Notice Packet, and set a date for a final approval
16 hearing.

17
18 DATED: April 21, 2022

DIVERSITY LAW GROUP, P.C.

19
20 By: 
21 Larry W. Lee
22 Mai Tulyathan
23 Attorneys for Plaintiff, the Class, and Aggrieved
24 Employees

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STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los Angeles, California 90071.

On April 21, 2022, I served the following document(s) described as:

- 1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
- 2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 3. DECLARATION OF MAI TULYATHAN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 4. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 5. DECLARATION OF SHARON MORRIS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 6. [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND SETTING A SETTLEMENT FAIRNESS HEARING**

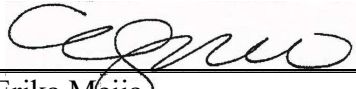
on the interested parties in this action as follows:

Elizabeth R. Leitzinger
eleitzinger@fentonkeller.com
Marco A. Lucido
MLucido@FentonKeller.com
FENTON & KELLER
2801 Monterey-Salinas Highway

1 Post Office Box 791
2 Monterey, California 93942-0791
3 *Attorneys for Defendant*
Community Hospital of the Monterey Peninsula

4 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
5 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
6 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
7 the above-entitled case. The service transmission was reported as complete and a copy of the
8 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
9 in this office.

10 I declare under penalty of perjury under the laws of the State of California that the above
11 is true and correct. Executed on April 21, 2022, at Los Angeles, California.

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Erika Mejia