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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

NICOLE MCGARITY, as an individual
and on behalf of all others similarly
situated,

Plaintiffs,

v.

THE DEMMON FAMILY
PARTNERSHIP, a California limited
partnership; The Demmon Family
Partnership II, a California limited
partnership; and Demmon Family LLC, a
California limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

CASE NO. 34-2021-00308214

[Assigned for case management purposes to the
Hon. Jill H. Talley, Dept. 27]

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

Date: March 29, 2024
Time: 9:00 a.m.
Department: 27

Reservation No.: A-308214-001

Action Filed: September 10, 2021
Trial Date: Not Set

1 **TO THE COURT, DEFENDANT, AND ITS COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 29, 2024, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard in Department 27 of the above-entitled Court located at 720 9th Street, Sacramento,
4 California 95814, Plaintiff Nicole McGarity (hereinafter “Plaintiff”), will and hereby does seek an
5 Order:

- 6 1. approving the Joint Stipulation of Class Action and PAGA Settlement and Release (the
7 “**Agreement**” or “**Settlement Agreement**”), concurrently filed herewith;
- 8 2. conditionally certifying the following Classes for settlement purposes only:
 - 9 a. All current and former non-exempt employees who have worked for Defendant in
10 California at any time from September 10, 2017, through the earlier of 60 days from
11 today, or the date of preliminary approval (“Class Period End Date,” *i.e.*, December
12 18, 2023, or the date that the Court grants preliminary approval of class action
settlement), and was paid overtime and earned non-discretionary pay covering the
same pay period (the “Regular Rate Class”); and
 - 13 b. All current and former non-exempt California employees who were paid sick pay in
14 the same workweek in which they earned any non-discretionary incentive wages from
Defendant at any time from September 10, 2017, through the Class Period End Date
(the “Sick Pay Class”)
- 15 3. appointing Plaintiff as the Class Representative and William L. Marder of Polaris Law
16 Group, and Dennis S. Hyun of Hyun Legal APC as Class Counsel;
- 17 4. approving the Agreement on a preliminary basis and finding that the Agreement, the
18 Maximum Settlement Amount in the amount of \$87,500.00, the amounts requested for the
19 Settlement Administration Costs, the Class Counsel Award for fees and costs, the Class
20 Representative Service Award, the Private Attorneys General Act (the “PAGA”) Payment to
21 the Labor Workforce Development Agency (the “LWDA”) (of \$6,250.00, which is 75% of
22 \$8,750.00 allocated to the PAGA Payment), the PAGA Payment to the PAGA-Aggrrieved
23 Employees (of \$2,187.50, which is 25% of \$8,750.00 allocated to the PAGA Payment), and
24 the allocation of the Individual Class Payments appear to be within the range of
25 reasonableness for a settlement that could ultimately be given final approval;
- 26 5. appointing ILYM Group, Inc. as the Administrator;
- 27 6. approving the distribution of the Notice of Pendency of Class Action Settlement and Final
28 Hearing attached as Exhibit 1 to the Agreement; and

1 7. scheduling a Final Approval Hearing.

2 The Motion is made pursuant to Rule 3.769 of the California Rules of Court, which allows the
3 Court to preliminarily certify a class for settlement purposes and to approve a class action settlement.
4 The basis for the Motion is that the proposed settlement is fair, adequate, and reasonable, and the
5 procedures proposed by the Parties are adequate to ensure class members are able to participate in, opt
6 out of, or object to the settlement.

7 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
8 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the
9 department may be downloaded off the court's website. If the party does not have online access, they
10 may call the dedicated phone number for the department as referenced in the local telephone directory
11 between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the
12 tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the
13 hearing, no hearing will be held.

14 The Motion is based on this notice, the memorandum of points and authorities, the Agreement
15 and proposed Notice of Class Action Settlement, the supporting Declarations of William L. Marder,
16 Dennis S. Hyun, and Plaintiff, all pleadings and papers on file herein, and any further oral and
17 documentary evidence as may be presented before or at the hearing of this matter.

18 DATED: January 10, 2024

POLARIS LAW GROUP
HYUN LEGAL APC

19 By: William L. Marder
20 William L. Marder
21 Dennis S. Hyun
22 Attorneys for Plaintiff
23 NICOLE McGARITY
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SUMMARY OF MOTION

This class action alleges Defendants The Demmon Family Partnership, The Demmon Family Partnership II, and Demmon Family LLC (“Demmon” or “Defendant”) failed to pay all sick pay and overtime wages by not paying said wages at the regular rate of pay to Plaintiff Nicole McGarity (“Plaintiff”) and Class Members; Defendant derivatively failed to furnish accurate, itemized wage statements to all Class Members in accordance with Labor Code section 226; and Defendant is liable to the Class Members for derivative waiting time penalties pursuant to Labor Code section 203. Plaintiff sues both on a class-wide basis and as a proxy for the State of California pursuant to the Labor Code Private Attorneys General Act (“PAGA”) for alleged violations of Business & Professions Code § 17200, *et seq.* Defendant denies the allegations.

Based on their own independent investigations and evaluations, the Parties have agreed to a class-wide resolution. The Joint Stipulation of Class Action and PAGA Settlement and Release (“Agreement”), concurrently filed herewith, requires Defendant to pay \$87,500.00 for the class-wide settlement of claims from September 10, 2017, through the earlier of December 18, 2023, or preliminary approval. Agreement ¶¶ B, J. Defendant is also required to pay its employer’s share of payroll taxes. Agreement ¶ 8. Plaintiff and her counsel believe the settlement is fair, adequate and reasonable, in that it provides a raw average payment of \$1,276.11 per Class Member (based on the 60-member class). Here, Plaintiff’s claim is not that Defendant failed to pay or provide sick pay and overtime wages altogether, but that Defendant did not pay the said wages at the higher regular rate of pay by not including additional non-discretionary remuneration into the rate calculation. Plaintiff’s expert calculated the actual principal damages for the underpaid sick pay and overtime wages at \$7,067. Declaration of Dennis S. Hyun (“Hyun Decl.”) ¶ 9. Thus, the Maximum Settlement Amount equates 12x greater than the actual damages. Moreover, the entire settlement amount is non-reversionary; none of the settlement amount will revert back to Defendant.

Although Plaintiff and her counsel are confident that litigation of the claims would result in a class-wide judgment against Defendant, they recognize the inherent risks in litigation, including the specific risks that class certification could be denied, liability could not be

1 established at trial, or the applicable law could change. The Parties and their counsel are of the
2 opinion that the settlement on the terms set forth in the Agreement would be fair, reasonable, and
3 adequate.

4 As the settlement would be in the best interests of the Class, Plaintiff respectfully requests
5 that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

6 **RELEVANT BACKGROUND**

7 Plaintiff worked for Defendant from on or about November 4, 2020, until on or about July
8 1, 2021. Plaintiff's job title was non-exempt leasing consultant. On or about July 8, 2021,
9 Plaintiff sent written notice to Defendant and to the California Labor & Workforce Development
10 Agency ("LWDA") of Defendants' violations of Labor Code §§ 201-204, 226, 233, 246, 510,
11 558, 1194, and 1197.1, pursuant to Labor Code § 2698, *et seq.* Hyun Decl. ¶ 7. On that basis, on
12 September 10, 2021, Plaintiff filed her Class Action and Representative Complaint in this Action
13 in the Sacramento County Superior Court alleging Violation of Labor Code § 201-203, 233, 246;
14 Violation of Labor Code §§ 201-204, 510, 558, 1194, and 1197; Violation of Labor Code § 226;
15 Violation of Labor Code § 2698, *et seq.* and Violation of Business & Professions Code § 17200,
16 *et seq. Id.*

17 On October 18, 2023, the Parties participated in a full-day, arms-length mediation before
18 Christopher M. Panetta, Esq., of Fenton & Keller. Hyun Decl. ¶ 8. With the assistance of the
19 mediator, the Parties were able to come to a settlement of the claims in the Action, subject to the
20 Court's approval. *Id.* The settlement was memorialized in a Memorandum of Understanding,
21 subject to later completion of this long-form Agreement. *Id.*

22 Plaintiff propounded Special Interrogatories and Requests for Production of Documents,
23 to which Defendant responded. Hyun Decl. ¶ 9. The Parties thereafter agreed to place a hold on
24 further formal litigation and complete private mediation. *Id.* The Parties engaged in a thorough
25 study of the legal principles and facts applicable to the claims Plaintiff alleged and defenses
26 Defendant might assert. *Id.* Defendant provided payroll data for 45 class members. *Id.* Plaintiff's
27 counsel then retained Berger Consulting, a damages expert, to calculate damages. *Id.* Plaintiff's
28 expert calculated the underlying damages at \$7,067, Labor Code wage statement and waiting

1 penalties at \$186,980, PAGA penalties at \$50,700, and prejudgment interest at \$2,095, for a total
2 exposure of \$246,841. *Id.* The \$87,500 Maximum Settlement Amount therefore represents 35%
3 of the total exposure. *Id.* This, however, presupposes that Plaintiff will prevail and that the Court
4 would find willfulness and knowing and intentional violations, as well as award 100% of PAGA
5 penalties. *Id.* Significantly, the Maximum Settlement Amount is 12.4 times higher than the actual
6 underlying damages. *Id.* Ultimately, the Parties were able to negotiate settlement terms as
7 memorialized in the Memorandum of Understanding executed on October 18, 2023.

8 SUMMARY OF PROPOSED SETTLEMENT

9 I. Class Definition

10 The proposed settlement classes include the following individuals:

- 11 a. All current and former non-exempt employees who have worked for Defendant
12 in California at any time from September 10, 2017, through the earlier of 60
13 days from today, or the date of preliminary approval (“Class Period End Date,”
14 *i.e.*, December 18, 2023, or the date that the Court grants preliminary approval
of class action settlement), and was paid overtime and earned non-
discretionary pay covering the same pay period (the “Regular Rate Class”);
and
- 15 b. All current and former non-exempt California employees who were paid sick
16 pay in the same workweek in which they earned any non-discretionary
incentive wages from Defendant at any time from September 10, 2017, through
17 the Class Period End Date (the “Sick Pay Class”)

18 Agreement ¶¶ 5. The Class Period is from September 10, 2017 through the Class Period End
19 Date, or December 18, 2023. *Id.* ¶¶ J. Defendant has estimated that the Class consisted of
20 approximately 60 unique employees covering the period from September 10, 2017, through
21 December 18, 2023. Hyun Decl. ¶ 10.

22 II. Settlement Payments

23 The Agreement requires Defendants to pay a non-reversionary Maximum Settlement
24 Amount of \$87,500.00. Agreement ¶¶ 8, Z. From the Maximum Settlement Amount, the Parties
25 will request that the Court approve allocations for Individual Class Payments, Individual PAGA
26 Payments, the LWDA PAGA Payment, Settlement Administration Costs, Attorneys’ Fees and
27 Costs Award, and the Class Representative Service Award. *Id.* Except for these allocations
28 requiring Court approval, the entirety of the remainder of the Maximum Settlement Amount will

1 be allocated to Class Members. *Id.* ¶ 42. It is expected that, on average, each Class Member
2 would be allocated \$1,276.11 (*after* all requested payments from the Maximum Settlement
3 Amount). Hyun Decl. ¶ 10.

4 **III. Released Claims**

5 Plaintiff is subject to a general release. Agreement ¶ 19. Settlement Class Members are
6 subject to a release of claims for violations during the Class Period (from September 10, 2017
7 through the Class Period End Date (December 18, 2023) that were alleged in the Action or that
8 reasonably could have been alleged based on the facts alleged in the Action:

9 Upon the Effective Date and Defendant's funding of the Maximum Settlement
10 Amount and its share of employer-side payroll taxes, Plaintiff and each member of
11 the Settlement Class other than those who submit a timely request to opt out of the
12 Settlement will release and discharge the Released Parties, from any and all
13 claims, rights, demands, liabilities, and causes of action of every nature and
14 description, arising from September 10, 2017, through the Class Period End Date,
15 including statutory, contractual, or common law claims for damages, penalties,
16 liquidated damages, interest, attorneys' fees, litigation costs, restitution, or
17 equitable relief – whether asserted under the California Labor Code, Business and
18 Professions Code §§ 17200 et seq., the applicable wage orders at California Code
19 of Regulations, Title 8, Section 11000 et seq., or otherwise – that arise out of or
20 are reasonably related to the factual allegations that were alleged or could have
21 been alleged in Plaintiff's Complaint herein, i.e.,: (a) any and all claims for failure
22 to pay sick leave at the correct regular rate of pay; (b) any and all claims for
23 unpaid overtime wages at the correct regular rate of pay; (c) any and all derivative
24 claims for failure to furnish accurate itemized wage statements in accordance with
25 Labor Code section 226 based on alleged failures to pay sick pay and overtime
26 wages at the correct regular rate of pay; (d) any and all derivative claims for failure
27 to provide wages when due upon separation of employment under Labor Code §§
28 201-203 based on alleged failures to pay sick pay and overtime wages at the
correct regular rate of pay; (e) any and all derivative claims for "late payment"
penalties under Labor Code §§ 204 and 210 based on alleged failures to pay sick
pay and overtime wages at the correct regular rate of pay; and (f) any and all
claims for attorneys' fees and costs arising from alleged failures to pay sick pay
and overtime wages at the correct regular rate of pay.

22 *Id.* ¶ 17.

23 Aggrieved Employees are subject to a release of claims for civil penalties for violations
24 during the PAGA Period (from July 8, 2020, through the Class Period End Date (December 18,
25 2023) that were alleged in the Action or that reasonably could have been alleged based on the
26 facts alleged in the Action:

27 Upon the Effective Date and Defendant's funding of the Maximum Settlement
28 Amount and its share of employer-side payroll taxes, Plaintiff, the State of
California and all PAGA-Aggrieved Employees shall release the Released Parties
from any and all claims for PAGA civil penalties arising during the PAGA Period,

1 that were alleged or reasonably could have been alleged based on the facts
2 contained in Plaintiff's operative Complaint, as enumerated in Paragraph 17
3 above, and/or in Plaintiff's LWDA Notice. It is understood and agreed that
PAGA-Aggravated Employees will not have the opportunity to opt out of this
PAGA Release.

4 *Id.* ¶¶ GG, 17-18.

5 **LEGAL STANDARD**

6 Any settlement of a class action lawsuit must be reviewed and approved by the trial court.
7 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
8 review after notice has been distributed to class members for their comment or objections. As the
9 Manual for Complex Litigation (Third) explains, in the first step "counsel submits the proposed
10 terms of settlement and the court makes a preliminary fairness evaluation":

11 If the preliminary evaluation of the proposed settlement does not disclose grounds to
12 doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of
13 class representatives or of segments of the class, or excessive compensation for attorneys,
14 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.

15 Manual for Complex Litigation (Third) § 30.41.

16 A preliminary approval by the trial court thus is a conditional finding that the settlement
17 does not appear to be unfair. As Professor Newberg comments, "[t]he strength of the findings
18 made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal
19 may vary. The court may find that the settlement proposal contains some merit, is within the
20 range of reasonableness required for a settlement offer, or is presumptively valid subject only to
21 any objections that may be raised at a final hearing." 4 Alba Conte & Herbert B. Newberg,
22 Newberg on Class Actions, § 11.26 (4th ed. 2002).

23 The parties also may, at the preliminary approval stage, request that the court
24 provisionally approve certification of the class—conditioned upon final approval of the
25 settlement. As further explained by Professor Newberg:

26 The strength of the findings made by a judge at a preliminary hearing or conference
27 concerning a tentative settlement proposal ... may be set out in conditional orders granting
tentative approval to the various items submitted to the court. Three basic rulings are often
28 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, at § 11.26. Indeed, "pre-certification settlements are routinely approved if found to be fair and reasonable." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (explaining that a settlement before any "adversary certification" may still be approved if a court is satisfied that it is "fair, adequate and reasonable").

DISCUSSION

I. THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.

A. The Settlement Is Entitled to a Presumption of Fairness.

A trial court must determine and approve a class action settlement is fair to "prevent fraud, collusion or unfairness to the class" through settlement and dismissal of the class action." *Consumer Advocacy Grp., Inc. v. Kintetsu Enters. of America*, 141 Cal. App. 4th 46, 60 (2006). Courts presume the absence of fraud or collusion in the negotiation of settlement unless there is evidence to the contrary. *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). Indeed, a presumption of fairness exists where (i) the settlement is reached through arm's length bargaining; (ii) investigation is sufficient to allow counsel and the court to act intelligently, (iii) counsel is experienced in similar litigation, and (iv) the percentage of objectors is small. *Wershba*, 91 Cal. App. 4th at 245 (citing *Dunk*, 48 Cal. App. 4th at 1802).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in thorough investigation, are experienced with this type of litigation, and agreed to a resolution through arm's length negotiation. *See* Newberg on Class Actions, *supra*, at § 11.47; *National Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("So long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement ... and 'great weight' is accorded to the recommendations of counsel, who

are most closely acquainted with the facts of the underlying litigation.”) (citations omitted). In such circumstances, as here, courts do not substitute their judgment for that of the proponents. *National Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); accord *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).

Here, both Plaintiff’s counsel and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel have extensive class action and litigation experience and have been approved as class counsel in numerous wage and hour class actions. Declaration of William L. Marder (“Marder Decl.”) ¶¶ 8-14; Hyun Decl. ¶¶ 3-6. Each side has apprised the other of their respective factual contentions and legal theories, and each side has considered the other’s contentions and theories. Hyun Decl. ¶ 11. Additionally, Defendant produced payroll data for 45 class members. *Id.* ¶ 9. Plaintiff’s counsel then retained Berger Consulting, a damages expert, to calculate damages. *Id.* Plaintiff’s expert calculated the underlying damages at \$7,067, Labor Code wage statement and waiting penalties at \$186,980, PAGA penalties at \$50,700, and prejudgment interest at \$2,095, for a total exposure of \$246,841. *Id.* The \$87,500 Maximum Settlement Amount therefore represents 35% of the total exposure. *Id.* This, however, presupposes that Plaintiff will prevail and that the Court would find willfulness and knowing and intentional violations, as well as award 100% of PAGA penalties. As further discussed below, the settlement is the result of extensive arm’s length negotiations between the Parties and their counsel. *Id.* ¶¶ 7-9.

B. The Settlement Obtains an Excellent Result for Class Members.

1. The Settlement Amount Is Reasonable.

The Agreement requires Defendant to pay \$87,500. Again, this amount far exceeds the actual underlying underpaid sick pay and overtime wages, which Plaintiff’s expert calculated at \$7,067. Hyun Decl. ¶ 9. Plaintiff’s expert then calculated Labor Code wage statement and waiting penalties at \$186,980 and PAGA penalties at \$50,700. This means that the Maximum Settlement Amount is 12.4 times greater than the actual principal damages. *Id.* As the Court can

1 see, the vast majority of recovery would arise from waiting time and PAGA penalties. *Id.* There
2 is a possibility that this Court may refuse to award waiting time penalties and significantly reduce
3 the PAGA penalties. *Id.* At any rate, the settlement is consistent with settlements approved by
4 numerous courts. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)
5 (holding that class action settlement recovering 16% of potential exposure was fair and
6 reasonable; “It is well-settled law that a cash settlement amounting to only a fraction of the
7 potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness
8 and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to
9 judgment.”); *Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20,
10 2015) (holding that class action settlement recovering between 8.5% and 25% of the defendant’s
11 potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, 2014 WL 2472316, at *3
12 (C.D. Cal. May 30, 2014) (acknowledging risks of continued litigation and granting preliminary
13 approval of wage and hour class action settlement obtaining 9.1% of projected damages); *Villegas*
14 *v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that
15 gross class action settlement of approximately 15% of the potential recovery was fair and
16 reasonable).

17 Moreover, Defendant would have contested the merits and denied it was liable for any
18 penalties. Hyun Decl. ¶ 11. Defendant would have argued that it did not act willfully. Defendant
19 would have further argued that Plaintiff could not have recovered Labor Code § 226 penalties
20 pursuant to *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018).

21 While the Parties disagree on the application of the law to the facts, each Party recognized
22 in negotiations that, if taken to trial, the other Party would at least have reasonable arguments,
23 such that the Maximum Settlement Amount to which the Parties ultimately agreed was
24 reasonable. Hyun Decl. ¶ 11. Ultimately, the Maximum Settlement Amount secures \$1,276.11 per
25 class member. *Id.* ¶ 10.

26 Although Plaintiff and her counsel are confident that litigation of the claims would result
27 in a class-wide judgment against Defendant, they recognize the inherent risks in litigation,
28 including the specific risks that class certification could be denied, liability could not be

1 established at trial, or the applicable law could change. Hyun Decl. ¶ 11. The settlement for each
2 participating Class Member is fair, reasonable, and adequate, given the inherent risks of litigation,
3 as well as the potential for appeals and the costs of pursuing litigation. *Id.*

4 Class Members would not need to do anything to receive their share of settlement funds.
5 This eliminates any burden to Class Members who wish to participate in the class action
6 settlement. Despite the fairness of the settlement terms, should any Class Member wish to pursue
7 his or her own case for the claims proposed to be settled and released, each Class Member has the
8 right to object or to submit a request for exclusion (i.e., opt out) from the settlement.

9 **C. The Settlement Releases Are Appropriate.**

10 As discussed above, Settlement Class Members are only subject to a release of claims for
11 sick pay and overtime violations, and for any and all derivative claims for violation of California
12 Business and Professions Code § 17200 *et seq.*, and any and all claims for violation of the Private
13 Attorneys General Act of 2004, Labor Code § 2698 *et seq.* during the Class Period that were
14 alleged in the Action or that reasonably could have been alleged based on the facts alleged in the
15 Action. Agreement ¶¶ 17-18. Finally, only Plaintiff is subject to a general release. *Id.* ¶ 19.

16 The settlement releases are thus appropriate. *E.g., Carter v. City of Los Angeles*, 224 Cal.
17 App. 4th 808, 820 (2014) (“A general release—covering ‘all claims’ that were or could have been
18 raised in the suit—is common in class action settlements.”). In sum, because Plaintiff alleged
19 targeted claims in the Action, any settlement releases also are specifically tailored.

20 **D. The Class Notice Is Adequate.**

21 A court has broad discretion in approving appropriate class notice. Code Civ. Proc. §
22 1781; *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 973-74 (1975). Here, the Agreement requires
23 Defendant to provide to the Administrator each Class Member’s name and last known address,
24 among other information (the “Class Data”), within 21 calendar days of a Preliminary Approval
25 Order. Agreement ¶ 25. Within twenty-one (21) calendar days of receiving the Class Data from
26 Defendant, the Administrator would mail the Notice of Pendency of Class Action Settlement and
27 Final Hearing (“Class Notice”) to each Class Member to provide notice of settlement via First
28 Class U.S. Mail, using the last known address for each Class Member, based on Class Data. *Id.* ¶

1 26. Any Class Notice returned to the Administrator as undeliverable would be sent promptly via
2 First Class U.S. Mail to the forwarding address affixed thereto within five (5) calendar days. *Id.* ¶

3 27. If no forwarding address is provided, the Administrator would promptly attempt to determine
4 the correct address using a single skip-trace search and then promptly send a single re-mailing. *Id.*

5 The deadlines for Class Members to submit written Objections, Requests or Exclusion, or
6 challenges to Compensable Workweeks will be extended an additional 7 calendar days from the
7 date of the re-mailing, even if this results in an extension of the otherwise-applicable 45-day
8 Response Deadline. If these procedures are followed, notice to Class Members shall be deemed
9 to have been fully satisfied, and if the intended recipient of the Settlement Notice does not receive
10 the Class Notice, the intended recipient shall nevertheless remain a Class Member and shall be
11 bound by all terms of the Settlement and the Final Order and Judgment. *Id.*

12 The Class Notice accurately informs Class Members of the settlement and their rights.
13 Agreement, Ex. 1. For example, Class Members are informed of their rights to object or to opt
14 out. The Class Notice is adequate as it “present[s] a fair recital of the subject matter and proposed
15 terms” of the settlement. *E.g., Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980)
16 (quoting *Marshall v. Holiday Magic*, 550 F.2d 1173, 1177 (9th Cir. 1977)). Additionally, the
17 Class Notice explains that even if class members exclude themselves from the class settlement
18 payment, they will still be bound to the PAGA release and received payment for the same PAGA
19 release. Agreement, Ex. 1 at p. 6. Lastly, counsel for Defendant has performed diligence and
20 informed counsel for Plaintiff that the Class Members in this matter do not require a Class Notice
21 interpreted in Spanish as they can read and understand English due to their required job duties.
22 Hyun Decl. ¶ 13.

23 **II. The Requested Payments and Allocations Are Reasonable.**

24 The Agreement provides for a Maximum Settlement Amount of \$87,500.00. Agreement ¶
25 8. From the Maximum Settlement Amount, attorneys’ fees will be no more than 1/3 of the
26 Maximum Settlement Amount (or \$29,166.67) and litigation costs are not expected to exceed
27 \$25,000.00. *Id.* ¶ 9. The Class Representative Award will be no more than \$10,000.00. *Id.* ¶ 10.
28 Settlement Administration Costs are estimated at \$3,650.00. *Id.* ¶ 11. Pursuant to statute, 75% of

1 the \$8,750.00 PAGA Payment will be allocated to PAGA civil penalties and would constitute the
2 LWDA PAGA Payment (*i.e.*, \$6,562.50). The remaining 25%, in the amount of \$2,187.50, shall
3 be allocated as Individual PAGA Payments and will be distributed to the PAGA-Aggravated
4 Employees. *Id.*¹ ¶¶ 12.

5 **A. Each Class Member, on Average, Would Receive Approximately \$1,276.11.**

6 Based on an estimated current class size of 60 individuals, each Class Member would
7 receive a raw average of \$1,276.11 (*after* all requested payments from the Maximum Settlement
8 Amount). Hyun Decl. ¶ 10. The amount paid on average to each Class Member may increase,
9 depending on how many Class Members opt out of the class action settlement. *Id.* The amount
10 actually paid to any Class Member may increase or decrease depending on his or her number of
11 Compensable Workweeks during the Class Period. *Id.* After deducting any approved payments
12 for Class Counsels' fees and costs, Class Representative Service Award, Settlement
13 Administration Costs, and the PAGA Payment from the Maximum Settlement Amount, the entire
14 remainder would be allocated among Settlement Class Members based on the number of
15 Compensable Workweeks for each Settlement Class Member. Agreement ¶ 13; *see also* Class
16 Notice.² The Individual PAGA Payments would also be calculated based on the Compensable
17 Workweeks worked by Aggravated Employees. *Id.* ¶ 14.

18 Individual Settlement Awards shall be allocated as follows: 20% as alleged unpaid wages
19 subject to all applicable tax withholdings; and 80% as alleged unpaid interest and penalties. *Id.* ¶
20 15. The Settlement Administrator shall issue an IRS Form W-2 to each Participating Class
21 Member for the portion of each Individual Settlement Award allocated as alleged unpaid wages
22 and subject to all applicable tax withholdings. *Id.* The Settlement Administrator shall issue an
23 IRS Form 1099 to each Participating Class Member for the remaining portion of each Individual
24

25 ¹ Plaintiff files this motion with the Court and with the LWDA via online submission. Hyun Decl.
26 ¶ 17.

27 ² 25% of the PAGA Payment would be distributed to the PAGA-Aggravated Employees on a pro
28 rata basis based on the number of Compensable Workweeks worked during the PAGA Period.
Agreement ¶ 14.

1 Settlement Award. *Id.* The Settlement Administrator shall also issue an IRS Form 1099 for the
2 Individual PAGA Payments. *Id.* The non-wage portions of the Individual Settlement Awards
3 and the entirety of the Individual PAGA Payments will be allocated as non-wage penalties and
4 interest and not be subject to payroll tax withholdings. *Id.* Defendant shall be responsible for
5 paying the employer's share of payroll taxes on the portion of the Individual Settlement Awards
6 that constitute wages. Defendant will pay these taxes, as calculated by the Settlement
7 Administrator, in addition to the Maximum Settlement Amount. *Id.* ¶ 16.

8 None of the settlement funds will revert to Defendant. *Id.* ¶ 42. The principal for any
9 uncashed checks (upon the expiration date of 180 calendar days from issuance) would be paid as
10 a *cypres* to Legal Aid at Work. *Id.* ¶ 43.

11 **B. The Requested Attorneys' Fees and Costs Award Is Reasonable.**

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

19 Under California law, the award of attorneys' fees in common fund wage and hour class
20 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal.
21 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding
22 that when class action litigation establishes a monetary fund for the benefit of the class members,
23 and the trial court in its equitable powers awards class counsel a fee out of that fund, the court
24 may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
25 created"). Under the percentage of the fund method, a court's objective remains to "mimic the
26 market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
27 (Posner, J.) ("When a fee is set by a court rather than by contract, the object is to set it at a level
28

1 that will approximate what the market will set The judge, in other words, is trying to mimic
2 the market in legal services.”).

3 Attorneys’ fees awards of 35% of the fund are within the expected range in the “market in
4 legal services. See Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee*
5 *Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and
6 concluding that “[m]ost fee awards were between 25 percent and 35 percent”). An attorneys’ fees
7 award of 35% of the fund mimics the market and “is supported by the fact that typical
8 contingency fee agreements provide that class counsel will recover 33% if the case is resolved
9 before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL
10 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of*
11 *Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U.
12 L. Q. 653, 659 n. 11). Indeed, an attorneys’ fees award of 35% of the fund is consistent with
13 “empirical studies [that] show that ... fee awards in class actions average around one-third of the
14 recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

15 Here, Plaintiff will request an attorneys’ fees award of 1/3 of the Maximum Settlement
16 Amount. Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs.
17 Class Counsel have incurred costs at their own risk, for example, for filing the lawsuit, service of
18 process, mediation fees, and payment of other litigation related costs.

19 **C. The Proposed Class Representative Service Award Is Reasonable.**

20 Plaintiff and proposed Class Representative Nicole McGarity requests a modest Class
21 Representative Service Award of \$10,000.00. The request is quite reasonable in light of the
22 general release that the Agreement requires of her but not of any other Class Member.
23 Independently, the request is appropriate in recognition of Plaintiff’s efforts on behalf of the
24 Class. Declaration of Nicole McGarity (“McGarity Decl.”) ¶¶ 2-3.

25 As part of her duties as the Class Representative, Plaintiff provided all necessary
26 information and evidence that resulted in this settlement. McGarity Decl. ¶¶ 2-3. Plaintiff met
27 and conferred with Class Counsel on a number of occasions to discuss the case. *Id.* ¶ 3. She
28 provided information and documents to Class Counsel and made herself available to answer any

1 questions during litigation. *Id.* Ultimately, Plaintiff's efforts secured an exceptional result for the
2 Class.

3 In addition to the invaluable services that Plaintiff provided, she also took a significant
4 risk, both professionally and monetarily. McGarity Decl. ¶ 4. Because the alleged claims involve
5 the payment of costs to the prevailing party, Plaintiff could have possibly faced paying
6 Defendant's costs had Defendant prevailed in the action. Furthermore, Plaintiff risks prejudice in
7 the future from other potential employers that may be less willing to hire an individual who has
8 filed suit against a prior employer. Plaintiff took this risk upon herself and the whole class
9 benefited. Class Members did not have to file individual lawsuits and bear the risks of payment
10 of costs if they did not prevail, nor did they have to face potential prejudice in future employment.

11 **D. The Administration Costs Are Reasonable.**

12 ILYM Group, Inc., a well-recognized class action settlement administrator, has quoted
13 Settlement Administration Costs for \$3,650.00, to send notices and administer the settlement.
14 Hyun Decl. ¶ 14. ILYM Group, Inc. was the lowest quote received after obtaining quotes from
15 two other established administrators Xpand Legal (\$6,500) and Phoenix Settlement
16 Administrators (\$5,250). *Id.* The Administration Costs are therefore reasonable and should be
17 approved.

18 **III. The Class Meets All Requirements for Certification.³**

19 For purposes of settlement approval, a detailed analysis of the elements required for class
20 certification is not required. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 620, 622-27 (1997). The
21 trial court can appropriately utilize a lesser standard of scrutiny to determine the propriety of a
22 settlement class as opposed to a litigation class. *Dunk*, 48 Cal. App. 4th at 1807 n.19; *see also*
23 *Wershba*, 91 Cal. App. 4th at 240 (explaining there is no "ironclad requirement" to conduct an
24 evidentiary hearing to satisfy the prerequisites for class certification). Because a settlement
25 eliminates the need for a trial, when considering whether to certify a settlement class, the court is

26
27 ³ Defendant expressly reserves its objections and does not agree that class certification of any of
28 the claims would be appropriate outside of the settlement context. Plaintiff disagrees but has
considered the inherent risk of class certification motion practice.

1 not faced with the case management issues present in certification of a litigation class. *Global*
2 *Mins. & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003) (“[I]t is well
3 established that trial courts should use different standards to determine the propriety of a
4 settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of
5 scrutiny is used for settlement cases.”) (citing *Dunk*, 48 Cal. App. 4th at 1807 n.19).

6 Even under the standard applicable to litigation classes, the allegations in this lawsuit
7 present paradigmatic class action claims that satisfy the elements of class certification.

8 **A. The Class Is Ascertainable and Sufficiently Numerous.**

9 Class Members are identifiable from Defendant’s records. The class definition “is
10 precise, objective and presently ascertainable.” *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905,
11 919 (2010). Indeed, for the time period of September 10, 2017, through December 18, 2023, there
12 were approximately 60 Class Members. Hyun Decl. ¶ 10. Numerosity thus is sufficiently
13 established. *E.g.*, *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (stating that “[n]o
14 set number is required as a matter of law for the maintenance of a class action” and citing
15 examples in which classes of 10—*Bowles v. Superior Court*, 44 Cal. 2d 574 (1955)—and of 28—
16 *Hebbard v. Colgrove*, 28 Cal. App. 3d 1017 (1972)—were upheld).

17 **B. The Class Establishes a Community of Interest.**

18 “The community of interest requirement involves three factors: ‘(1) predominant common
19 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
20 (3) class representatives who can adequately represent the class.’” *Linder v. Thrifty Oil Co.*, 23
21 Cal. 4th 429, 435 (2000).

22 **C. Plaintiff’s Claims Are Typical of Those of the Class.**

23 Plaintiff alleges that Defendant failed to pay sick pay and overtime wages at the regular
24 rate of pay by not including non-discretionary remuneration into the rate. With respect to
25 typicality, Plaintiff—exactly like other members of the Class—alleges that she was not paid all
26 sick pay and overtime at the regular rate of pay. McGarity Decl. ¶ 2.

1 **D. Plaintiff's Claims Raise Common Questions of Law and Fact.**

2 The typical claims raise questions of law and fact common to the class. *See Hanlon v.*
3 *Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal issues with divergent
4 legal factual predicates is sufficient, as is a common core of salient facts couple with disparate
5 legal remedies within the class”). Commonality requires only that some common legal or factual
6 questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See*
7 *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s conduct is central to the
8 commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974);
9 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s conduct is
10 uniformly directed at a class of employees, as it is here, the class wide impact of the Defendant’s
11 policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193
12 Cal. App. 3d 411, 421 (1987).

13 **E. Plaintiff and Her Counsel Adequately Represent the Class.**

14 With respect to adequate representation, Plaintiff does not have any interests adverse to
15 the Class, and no such issues been raised or presented. McGarity Decl. ¶ 3. Plaintiff has taken all
16 necessary steps to represent the interests of the Class, including by providing information and
17 documents to Class Counsel, making herself available to discuss the claims, and responding to
18 her attorneys’ questions. *Id.* For such reasons, Plaintiff has adequately represented the Class
19 Members and will continue to do so.

20 From the inception of the case, Class Counsel has zealously represented the interests of
21 the Class. The settlement was obtained for the benefit of the Class, as opposed to the individual
22 Class Representative. Class Counsel have been approved as class counsel in a number of prior
23 cases, have litigated numerous other class action cases, and are competent to represent the Class.
24 Marder Decl. ¶¶ 8-14; Hyun Decl. ¶¶ 3-6.

25 **CONCLUSION**

26 The proposed settlement would result in substantial monetary benefits to class members. It
27 was the result of informed, arm’s length negotiations conducted by counsel experienced in wage
28 and hour class action litigation. Its terms appear to be fair, adequate, and reasonable, and there is

1 no reason to believe the proposal is outside the range of reasonableness for such a settlement.
2 Accordingly, for the benefit of the Class, Plaintiff respectfully requests that the Court (i) grant
3 preliminary approval of the settlement, (ii) approve and authorize the mailing of the proposed
4 Class Notice, and (iii) schedule a Final Approval Hearing.

5
6 DATED: January 10, 2024

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7
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