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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

BRENDA GARCIA an individual, on behalf
of herself and others similarly situated

PLAINTIFF,

v.

TITANIUM ALARM, LLC; and DOES 1
thru 50, inclusive,

DEFENDANTS.

CASE NO. CIVDS2013199

[Case Assigned for All Purposes to Hon. David
Cohn in Dept. S-26]

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

*[Filed concurrently with Declaration of Kelsey
M. Szamet and Proposed Order]*

Date: November 8, 2021

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: May 29, 2020

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 8, 2021 at 10:00 a.m. in Department S-26
3 of the above-entitled court, Plaintiff BRENDA GARCIA will move the Court for an Order of
4 Preliminary Approval of the Class Action Settlement in this case.

5 By this Motion, Plaintiff requests that the Court:

6 (1) Grant preliminary approval of the fully executed Class Action Stipulation and
7 Agreement for Class Action Settlement and Release of Claims (“Settlement” or “Agreement”) and
8 conditionally grant certification of the proposed Settlement Class solely for the purposes of
9 settlement. A true and correct copy of the Agreement is attached to the Declaration of Kelsey M.
10 Szamet as Exhibit “1”;

11 (2) Approve the proposed Notice of Class Action Settlement, a copy of which is
12 attached to the Settlement Agreement as Exhibit “A,” and direct that the Notice be sent to Class
13 Members in the manner set forth in the Agreement;

14 (3) Preliminarily appoint Plaintiff as the Class Representative and Plaintiff’s Counsel
15 as Class Counsel;

16 (4) Approve the appointment of ILYM Group, Inc. as the Settlement Administrator;
17 and

18 (5) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
19 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
20 may be heard (“Final Approval Hearing”).

21 The Motion will be made on the grounds that the proposed Agreement is fair, adequate,
22 reasonable, and in the best interest of the Class and the Parties. The Motion will be based on this
23 Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Kelsey
24 M. Szamet, the Agreement and Release, all other papers and records on file in this action, and on
25 such oral and documentary evidence as may be presented at the hearing on this Motion.
26
27
28

DATED: October 15, 2021

KINGSLEY & KINGSLEY, APC

By:

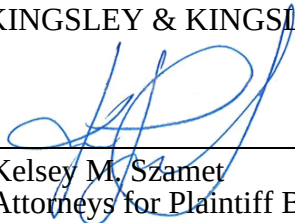

Kelsey M. Szamet
Attorneys for Plaintiff Brenda Garcia and the
Proposed Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff BRENDA GARCIA (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class Action
5 Stipulation and Agreement for Class Action Settlement and Release of Claims reached between
6 Plaintiff and Defendant TITANIUM ALARM, LLC (“Defendant”) (Plaintiff and Defendant
7 together, the “Parties”).

8 By this Motion, Plaintiff requests that the Court:

9 (1) Grant preliminary approval of the fully executed Class Action Stipulation and
10 Agreement for Class Action Settlement and Release of Claims (“Settlement” or “Agreement”) and
11 conditionally grant certification of the proposed Settlement Class solely for the purposes of
12 settlement. A true and correct copy of the Agreement is attached to the Declaration of Kelsey M.
13 Szamet as Exhibit “1”;

14 (2) Approve the proposed Notice of Class Action Settlement, a copy of which is
15 attached to the Settlement Agreement as Exhibit “A,” and direct that the Notice be sent to Class
16 Members in the manner set forth in the Agreement;

17 (3) Preliminarily appoint Plaintiff as the Class Representative and Plaintiff’s Counsel
18 as Class Counsel;

19 (4) Approve the appointment of ILYM Group, Inc. as the Settlement Administrator;
20 and

21 (5) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
22 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
23 may be heard (“Final Approval Hearing”).

24 **II. FACTUAL BACKGROUND**

25 A. Litigation Overview and Procedural History

26 On May 29, 2020, Plaintiff filed a Class Action Complaint and provided notice to
27 California’s Labor and Workforce Development Agency (“LWDA”) regarding her intent to file
28 an action seeking civil penalties under PAGA. (Declaration of Kelsey M. Szamet (“Szamet Decl.”))

¶4.) On July 23, 2020, Plaintiff filed a First Amended Complaint (“FAC”), adding the PAGA claim based on the facts previously alleged in the Complaint. (Szamet Decl. ¶5.)

The operative Complaint alleges claims for: (1) Failure to Pay Wages and/or Overtime; (2) Failure to Pay Timely Wages; (3) Failure to Pay Wages Upon Termination; (4) Violation of Business and Professions Code; and (5) Penalties Pursuant to the California Labor Code Private Attorneys General Act.

B. The Discovery Process

Although the Court stayed formal discovery and the Parties continued the discovery stay pending mediation, the Parties engaged in extensive informal discovery to arrive at the proposed settlement. (Szamet Decl. ¶6.) Defendant informally produced multiple documents and provided other information necessary to evaluate settlement. (Szamet Decl. ¶7.) This includes the Class Representative’s personnel file and time and pay records; relevant employee handbooks and written policies; data reflecting the total number of non-exempt employees working for Defendant during the liability period and the total number of former full-time non-exempt employees; the average hourly rate and shift length for non-exempt employees during the liability period; the total number of pay periods at issue during the relevant liability period; and a random sample of time and pay records. (Szamet Decl. ¶8.)

Careful review and analysis of this confirmatory discovery confirmed that Plaintiff’s Counsel believes the proposed Settlement is adequate, fair, and reasonable, and is appropriate for approval by the Court. (Szamet Decl. ¶9.)

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or representative action treatment. (Szamet Decl. ¶10.) Defendant contends, among other things, that, at all times, it has complied with the California Labor Code, and the Industrial Wage Commission Orders. (*Id.*)

Based on their own independent investigation and evaluation, Class Counsel is of the opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest

of the settlement classes in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl. ¶11.) Although Defendant denies any liability, Defendant is agreeing to this Agreement solely to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and their counsel desire to fully, finally, and forever settle, compromise and discharge all disputes and claims arising from or relating to the Action on the terms set forth here. (*Id.*)

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever “the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an important function by “establishing a technique whereby the claims of many individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

The California Supreme Court has identified three certification requirements: (1) “the existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior

1 to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)
2 The “community of interest” requirement includes three additional requirements: (1) common
3 questions of law or fact predominant over individual questions; (2) the class representatives have
4 claims or defenses typical of the class; and (3) the class representatives can adequately represent
5 the class. (*Ibid*, citing *Fireside Bank*, *supra*, 40 Cal.4th at 1089.)

6 Class certification for settlement purposes is proper in this case as the proposed Settlement
7 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this
8 Court should certify the putative settlement class.

9 A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

10 1. Ascertainability

11 Putative class members are deemed “ascertainable” when they may be “readily identified
12 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
13 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
14 scrutinizes the class definition, the size of the class and the means of identifying class members.
15 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

16 Here, Plaintiff maintains that the proposed Settlement Class is ascertainable for several
17 reasons: First, Defendant has agreed in the Agreement to provide a class list to the Settlement
18 Administrator containing the name, last known mailing address, last known telephone number,
19 social security number, and number of work weeks worked during the Class Period for all putative
20 class members within fifteen (15) days after issuance of the preliminary approval order. (Szamet
21 Decl. ¶12; Ex. 1 at §D, ¶1.) Second, Class Members consist of Defendant’s non-exempt
22 employees, and Defendant is required to keep records of its non-exempt employees’ names, home
23 addresses, and social security numbers. (See Wage Order 4-2001; Szamet Decl. ¶13.) Third and
24 finally, Defendant informally produced Plaintiff’s personnel file and pay statements, relevant
25 commission policies, sampling shift data, pay data, and wage statements for Class Members
26 containing class member contact information, which confirms that all Class Member may be
27 readily identified based on Defendant’s records. (Szamet Decl. ¶14.)

28 2. Numerosity

1 There is no set number that is required as a matter of law to maintain a class action. (See,
2 *e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement
3 Class contains, based upon information and belief, approximately 65 non-exempt employees in
4 the State of California. (Ex. 1 at §D, ¶7.) Therefore, Plaintiff is confident she will be able to
5 establish that the proposed Settlement Class is ascertainable and sufficiently numerous. (Szamet
6 Decl. ¶15.)

7 B. There Is a Well-Defined Community of Interest

8 1. There Are Predominant Questions of Law and Fact

9 In deciding whether questions of common or general interest predominate, a court must
10 determine whether “the issues which may be jointly tried, when compared with those requiring
11 separate adjudication, are so numerous or substantial that the maintenance of a class action would
12 be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d
13 232, 238; *accord*, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
14 general matter, if the defendant’s liability can be determined by facts common to all members of
15 the class, a class will be certified even if the members must individually prove their damages.”
16 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord*, *Knapp v.*
17 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

18 Here, Plaintiff argues that there are questions of law and fact common to the proposed
19 Settlement Class that predominate over any questions affecting only individual Class Members.
20 (Szamet Decl. ¶16.) These common questions include:

- 21 1) Whether Defendant properly blended commission pay into the regular rate of pay
22 for the purposes of calculating the applicable overtime rate during pay periods when
23 the Proposed Class Members worked overtime and also earned commission pay;
- 24 2) Whether Defendant failed to pay timely wages at the conclusion of the pay period;
- 25 3) Whether Defendant failed to pay compensation due and owing upon termination
26 of employment;
- 27 4) Whether Defendant engaged in unfair competition and business practices; and,
- 28 5) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the
 acts previously alleged.

1 (Szamet Decl. ¶17.)

2 Plaintiff's challenge to Defendant's uniform policies and practices involves common
3 factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶18.) As the California
4 Supreme Court has emphasized, "[c]laims alleging that a uniform policy consistently applied to a
5 group of employees is in violation of the wage and hour laws are of the sort routinely, and properly,
6 found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v.*
7 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of
8 similarly situated employees may be certified based on common questions of fact or law, even if
9 each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.*
10 (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th
11 at 340.)

12 Here, Plaintiff maintains that the proposed Class Members suffered the same injuries, in
13 the same manner: (1) Class Members were not paid overtime pay at the appropriate rate of pay
14 because Defendant failed to blend commission pay into the regular rate of pay for the purposes of
15 calculating the applicable overtime rate during pay periods when the Proposed Class Members
16 worked overtime and also earned commission pay; (2) Class Members did not receive timely
17 wages; and (3) Class Members were not paid all wages owed upon termination/resignation.
18 (Szamet Decl. ¶19.) Plaintiff alleges that Class Members worked in the same capacity for the same
19 employer and were subject to the same employment policies and practices, the questions of fact
20 and claims regarding the status of these employees are the same for each of the Class Members.
21 (Szamet Decl. ¶20.) Accordingly, for purposes of settlement, the evidence reviewed by Class
22 Counsel demonstrates that common policies and practices were applied to the proposed Class
23 Members and certification for settlement purposes is appropriate. (Szamet Decl. ¶21.)

24 2. The Class Representative Has Claims Typical of the Proposed Class

25 A putative class representative's claim must be "typical," but not necessarily identical, to
26 the claims of other class members. The test of typicality "is whether other members have the same
27 or similar injury, whether the action is based on conduct which is not unique to the Class
28 Representatives, and whether other class members have been injured by the same course of

conduct.” (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) It is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.)

Plaintiff worked as a non-exempt, “hourly employee” for Defendant in Security, earning \$13.50 per hour, plus commissions. (Szamet Decl. ¶22.) Plaintiff alleges that she: (1) was not paid overtime pay at the appropriate rate of pay because Defendant failed to blend commission pay into the regular rate of pay for the purposes of calculating the applicable overtime rate during pay periods when the Proposed Class Members worked overtime and also earned commission pay; (2) did not receive timely wages; and (3) worked without being paid all wages due upon separation. She also alleges that she experienced derivative claims for unfair business competition (B&P Code §17200) and Labor Code §2699, et seq. (Szamet Decl. ¶23.) Plaintiff also contends that her claims are typical of those of the Settlement Class. (Szamet Decl. ¶24.)

3. Plaintiff Contends That As The Class Representative He Has and Will Fairly Represent the Interests of the Class Members

A putative class representative must show that she can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative, through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

Plaintiff believes that she is capable of fairly representing and adequately protecting the interests of the proposed Class Members. (Szamet Decl. ¶25.) Plaintiff’s interests in this litigation are coextensive with the interests of the proposed Class Members. The members of the proposed Settlement Class all worked for Defendant during the relevant time period and incurred the same type of alleged damages with regard to Defendant’s alleged violations of the law. (Szamet Decl.

¶26.) Moreover, Plaintiff has agreed to serve as Class Representative and has retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Szamet Decl. ¶27.) This demonstrates her commitment to bringing about the best possible results for the benefit of the proposed Settlement Class. (Szamet Decl. ¶28.) Plaintiff has provided her Counsel with all necessary and pertinent information. (Szamet Decl. ¶29.) She has been an active participant in the litigation including identifying and retaining competent Counsel, having frequent contact with Counsel and Class Members, and working closely with Class Counsel to develop the theories of liability. (Szamet Decl. ¶30.) Plaintiff has provided her Counsel with all necessary and pertinent information. (Szamet Decl. ¶31.) She also was available via Zoom for the full-day mediation in this matter and was informed of and involved in all of the Settlement negotiations. (Szamet Decl. ¶32.) Therefore, Plaintiff believes that she has and will continue to adequately represent the proposed Class Members. (Szamet Decl. ¶33.) Plaintiff has provided her Counsel with all necessary and pertinent information. (Szamet Decl. ¶34.)

C. The Class Action Vehicle Is Superior to the Alternatives

“The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California Supreme Court has directed the courts to utilize the class action device to fashion “an effective and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.) Normally, in making its class certification decision, the Court must determine that a class action would be superior to alternate means for a fair and efficient adjudication. If the causes of action may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need as there would be in an ordinary motion for class certification for the Court to determine that the case can be manageably tried.

1 Plaintiff maintains that class treatment would be the superior method of managing this case.
2 A class action is superior to individual litigation “when numerous parties suffer injury of
3 insufficient size to warrant individual action and when denial of class relief would result in unjust
4 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
5 cases such as this, where individual damages may be small, the class action device is the most
6 feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
7 the superiority of class treatment is evident here because individual pursuit of class members’
8 claims may not be economically viable. (Szamet Decl. ¶35.) The only alternative to certification
9 would be to force over 65 employees to join this action, file individual, uniform actions, or abandon
10 their legal rights altogether. (Szamet Decl. ¶36.) Plaintiff maintains that this economic reality
11 would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶37.)

12 **IV. THE PROPOSED SETTLEMENT**

13 A. The Settlement Class

14 For purposes of Agreement, the settlement class is defined as: “all persons who worked as
15 a non-exempt employee for Defendant Titanium Alarm, LLC in the State of California at any time
16 since May 29, 2016 through August 31, 2021.” (Szamet Decl. ¶38; Agreement, Ex. 1 at §A, ¶¶3-
17 4.) Class Members who submit a timely and valid request for exclusion will not be bound by the
18 release provisions of the Settlement and will not be entitled to receive any settlement benefits
19 under the Settlement. (Szamet Decl. ¶39; Agreement, Ex. 1 at §D, ¶5.)

20 The Class Period is May 29, 2016 through the date of preliminary approval. (Szamet Decl.
21 ¶40; Ex. 1 at §A, ¶4.) As of June 24, 2021 (the date of mediation) and based on documents and
22 other information produced by Defendant, there are approximately 65 Class Members. (Szamet
23 Decl. ¶41; Ex. 1 at §D, ¶7.)

24 B. Gross Settlement Amount

25 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
26 Settlement Amount of \$95,000.00, which includes the sum of the Individual Settlement Payments,
27 the Class Representative service award, the Class Counsel Award, PAGA Payment, and the
28 Settlement Administration Costs. (Szamet Decl. ¶42; Ex. 1 at §C, ¶1.)

1 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
2 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs.
3 (Szamet Decl. ¶43; Ex. 1 at §C, ¶1.)

4 The Parties estimate the amount of the Net Settlement Amount as follows:

5	Gross Settlement Amount:	\$	95,000.00
6	Less Class Representative Enhancement:	\$	5,000.00
7	Less Class Counsel's Fees:	\$	31,666.67
8	Less Class Counsel's Costs:	\$	12,000.00
9	Less PAGA Payment:	\$	7,500.00
			<i>(\$5,625 to the LWDA and \$1,875 to remain in the Net Settlement Amount)</i>
	<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>6,000.00</u>

10 Anticipated Net Settlement Amount \$ 34,708.33
11 (Ex. 1 at §C, ¶¶1-5; §A, ¶8.)

12 C. Individual Settlement Payments

13 The amount of each Participating Class Member's Individual Settlement Payment is an
14 individualized amount that is calculated on a pro rata basis and based upon the number of
15 compensable workweeks worked by the Participating Class Member during the Class Period. (Ex.
16 1 at §C, ¶6; *see also* Ex. A to the Agreement at pp. 3 [Class Notice].) This individual amount shall
17 be determined according to the settlement payment formula set forth in the Agreement. (*See* Ex. 1
18 at §C, ¶6; Ex. A to the Agreement at pp.3 [Class Notice].)

19 Based on the anticipated number of Settlement Class Members and the anticipated Net
20 Settlement Amount, the average Individual Settlement Payment is approximately \$533.97.
21 (Szamet Decl. ¶44.)

22 D. Process for Administering Settlement after Preliminary Approval

23 The detailed Notice Procedure established by the Agreement will efficiently and accurately
24 ensure that Notice is provided to the Class Members. (Ex. 1 at §D, ¶¶1-8.) The Parties have agreed
25 to use a reputable third-party claims administrator, ILYM Group, Inc., to administer the
26 Agreement. (Ex. 1 at § A, ¶13.)

27 E. Process for Class Members to Respond to Class Notice

28 As detailed in the Agreement, Class Members will have an opportunity to request exclusion
from the Agreement (i.e. opt out) and to object to the Agreement at the Final Approval Hearing.

(See Ex. 1 at §D, ¶¶1-8; see also Ex. A to the Agreement at pp. 1-4 [Class Notice].) The Agreement and Class Notice contain details about the process to request exclusion or object. (*Id* at Ex. 1; see also Ex. A to the Agreement at pp. 1-4 [Class Notice].)

F. The Release

The Released Claims are defined as: “any and all claims, rights, demands, liabilities and causes of action under California law that Class Members have had or now have against the Released parties for any acts occurring during the Release Period that were pled in the Complaints or that could have been pled based on the identical factual predicate for the allegations in the Complaints, specifically including any such claims for failure to pay minimum wages, failure to pay overtime wages, failure to provide accurate wage statements, unfair competition, and failure to pay all wages upon termination, and any claims in connection therewith for damages, restitution, interest, penalties, costs and attorneys’ fees.” (Ex. 1 at §E, ¶1.)

V. **ARGUMENT**

A. Plaintiff Requests Approval of This Class Action Settlement

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

The proposed settlement satisfies each of these factors. Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at Szamet Decl. ¶¶6-9.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet Decl. ¶45.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Szamet Decl. ¶46.)

1. The Strength of Plaintiff’s Case

1 a) The Risks Associated with Minimum Wage/Overtime Claim

2 “Under state and federal law, overtime compensation is based on an employee’s ‘regular
3 rate’” of pay. (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902.)
4 “California Labor Code section 510, subdivision (a) provides, as relevant here, [that] an employee
5 is entitled to overtime pay at one and one-half times the ‘regular rate’ for work in excess of eight
6 hours in one day and twice the ‘regular rate’ for work in excess of 12 hours in one day.” (*Ibid.*)
7 For hourly employees, the regular rate is generally the employee’s straight-time hourly rate.
8 (*Huntington, supra*, 131 Cal.App.4th at p. 905.) However, in any pay period where an hourly
9 employee earns other includable compensation in addition to hourly wages—such as a non-
10 discretionary bonus, commission, or shift differential—her regular rate is computed by dividing
11 the employee’s total compensation in the period in which the other compensation is earned by the
12 total hours worked in that period. (*Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804,
13 807.)

14 Plaintiff alleges that she and the Class Members were non-exempt, hourly employees and
15 were not paid overtime pay at the appropriate rate of pay because Defendant failed to blend
16 commission pay into the regular rate of pay for the purposes of calculating the applicable overtime
17 rate during pay periods when the Proposed Class Members worked overtime and also earned
18 commission pay. (Szamet Decl. ¶47.) As a result, Plaintiff alleges that she and the Proposed Class
19 worked on a regular and consistent basis without receiving compensation for all hours worked at
20 the proper rate. (Szamet Decl. ¶48.) Specifically, Plaintiff and the Proposed Class were not paid
21 at the proper overtime rate when they were working more than eight (8) hours in one day or forty
22 (40) hours in one week because Defendant failed to blend commission pay into the regular rate of
23 pay for the purpose of determining the correct overtime rate. (Szamet Decl. ¶49.)

24 Plaintiff felt confident that this claim would be certified based on Defendant’s alleged
25 class-wide failure to blend commission pay into the regular rate of pay for the purposes of
26 calculating the applicable overtime rate during pay periods when the Proposed Class Members
27 worked overtime and also earned commission pay. (Szamet Decl. ¶50.) However, Counsel did
28 acknowledge that the underlying amount of underpaid wages was relatively low. (Szamet Decl.

¶51.) Since the allegations relate to a failure to properly blend for the purposes of determining the correct overtime rate, this means that even if Plaintiff were to prevail, the alleged underpayment is generally a matter of a few dollars or even cents per Class Member. (Szamet Decl. ¶52.)

b) The Risks Associated with Plaintiff's Failure to Timely Pay Wages
Claim

Section 204 imposes an obligation of timely payment of wages upon California employers and provides rules for scheduling wage payments. Specifically, for most employees, section 204 requires payment of wages twice during a calendar month, and an employer is subject to penalties for violating section 204." *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 904 (2012) (citing to Labor Code §§ 204(a); 210).

Labor Code § 204(a) provides:

All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month.

Labor Code § 204(d) provides:

The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than **seven** calendar days following the close of the payroll period (emphasis added).

Here, Plaintiff alleged that Defendant's practices are defective in that they fail to timely pay Class Members their wages in accordance with California law. (Szamet Decl. ¶53.) Based upon the allegedly faulty commission practices discussed above, Plaintiff contends that she and Class Members were paid wages well outside the seven-day period prescribed by Labor Code § 204. (Szamet Decl. ¶54.) Specifically, Plaintiff maintained that on the face of the wage statement it was clear that Plaintiff and the Proposed Class are issued their wages twelve (12) days after the close of each weekly payroll period in violation of Labor Code § 204. (Szamet Decl. ¶55.)

Defendant argued that any error on the timing of payment was the result of a clerical error and that Plaintiff and the Proposed Class were not actually paid wages more than seven days

1 following the close of the pay period. (Szamet Decl. ¶56.) After learning of this potential defense,
2 Counsel further investigated and it seemed that this defense of clerical error was plausible.
3 (Szamet Decl. ¶57.) If Defendant was able to prove that Plaintiff and the Proposed Class were
4 actually timely paid their wages and that itemized wage statements were simply reflecting an
5 incorrect date of pay, then Counsel had to acknowledge that the likelihood of success on this claim
6 was not strong. (Szamet Decl. ¶58.)

7 Based on this acute risk, Counsel believed it was appropriate to significantly discount this
8 claim. (Szamet Decl. ¶59.)

9 c) The Risks Associated with the Waiting Time Penalty Claim

10 This claim alleges that Defendant failed to pay all wages due and owing upon termination
11 or resignation. Labor Code § 203(a) provides:

12 If an employer willfully fails to pay ... any wages of an employee
13 who is discharged or who quits, the wages of the employee shall
14 continue as a penalty from the due date thereof at the same rate until
paid or until an action therefor is commenced; but the wages shall
not continue for more than 30 days.

15 Under Labor Code § 203, a “‘willful’ failure to pay wages ... occurs when an employer
16 intentionally fails to pay wages to an employee when those wages are due.” Cal. Code Regs., tit.
17 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 (“willful”
18 simply means that “the employer intentionally failed or refused to perform an act which was
19 required to be done[.] Willful ... does not necessarily imply anything blameable, or any malice or
20 wrong toward the other party”).

21 Here, as discussed in detail above, Plaintiff contends that Defendant failed to pay the proper
22 overtime rate of pay for work in excess of eight (8) hours per day and/or any work in excess of
23 forty (40) hours per week as a result of its alleged failure to blend. (Szamet Decl. ¶60.) The risk
24 analysis for the section 203 claim flows from the risk analysis for the underlying wage claims
25 discussed above. (Szamet Decl. ¶61.)

26 As with the underlying wage claim, Plaintiff is confident about the recovery of these
27 penalties. (Szamet Decl. ¶62.)

28 d) The Risks Associated with the PAGA Claim

1 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, permits
2 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
3 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
4 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
5 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

6 Of course, the risk analysis for PAGA flows from the risk analysis for each underlying
7 alleged Labor Code violation. (Szamet Decl. ¶63.)

8 Plaintiff discounted the PAGA claim for two main reasons. (Szamet Decl. ¶64.) First, the
9 aggrieved employees' PAGA claims are derivative of all the foregoing class claims in this matter.
10 (Szamet Decl. ¶65.) As such, arguably the Settlement Class is being compensated for these
11 violations under the proposed Agreement thus any PAGA recovery for these same violations could
12 be construed as duplicative. (Szamet Decl. ¶66.) Second, a court has discretion to award less than
13 the maximum penalty. Labor Code § 2699(e)(2) ("a court may award a lesser amount than the
14 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
15 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
16 or confiscatory"). *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241
17 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). At a minimum, this
18 would be a highly contested issue. (Szamet Decl. ¶67.) The significant uncertainty associated with
19 the PAGA claim required a discount of the claim's settlement value. (Szamet Decl. ¶68.) As such,
20 Plaintiff maintains that the Settlement's contemplated PAGA payment of \$7,500.00 appropriate.
21 (Szamet Decl. ¶69.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010)
22 (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

23 2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

24 There is significant expense associated with the class certification process, which the
25 Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶70.) If the
26 Court did eventually certify various Settlement Classes, trial of a case involving approximately 65
27 Class Members would require the retention of expensive expert witnesses, the accrual of extensive
28 litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶71.) Moreover, given

1 the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial
2 would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶72.) An appeal would result
3 in further delay for the Class Members who are waiting for a resolution in this matter. (*Id.*)

4 3. The Risk of Maintaining Class Action Status through Trial

5 This case has not been certified to be tried as a class action. (Szamet Decl. ¶73.) While
6 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
7 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
8 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
9 to conduct multiple depositions, including of the Class Representative and of several person(s)
10 most knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what
11 these depositions will reveal and whether they will support class certification to the extent
12 expected. (*Id.*)

13 4. The Amount Offered in Settlement

14 It was very difficult for the Parties to reach this Settlement of \$95,000.00. (Szamet Decl.
15 ¶74.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
16 (Szamet Decl. ¶75.) The Parties arrived at it only after extensive investigation and discovery,
17 careful evaluation of the law, risks, and all information substantiating the amount of penalties
18 reasonably likely to be awarded to the class were the trier of fact to find Defendant liable, and the
19 assistance of a highly experienced mediator, Jeffrey Krivis. (*Id.*)

20 a) Plaintiff's Assessment of Defendant's Maximum Exposure

21 Plaintiff assessed full value of the unpaid overtime wages claim, without any discount, at
22 approximately \$11,550.00. (Szamet Decl. ¶76.) This calculation assumed that Class Members
23 had an average amount of \$15 of unpaid wages per pay period based on Defendant's alleged failure
24 to blend commissions and that there was a total of 770 pay periods at issue. (Szamet Decl. ¶77.)

25 As discussed above, during the investigation and exchange of information, Plaintiff learned
26 that Defendant had a strong potential defense to the Labor Code § 204 claim. (Szamet Decl. ¶78.)
27 As a result of learning that Defendant believed it could prove that Plaintiff and the Proposed Class
28 were not paid more than 7 seven days after the close of the pay period and there was a clerical

error resulting in the wrong date showing on the itemized wage statements, Counsel did not attribute any value to this claim. (Szamet Decl. ¶79.)

Plaintiff valued the Waiting Time Claim, tied to the underlying Wage/Overtime claim, at \$232,560.00. (Szamet Decl. ¶80.)

Finally, Plaintiff calculated the value of the PAGA claim at \$202,950.00 for Class Members (using \$100 per pay period). (Szamet Decl. ¶81.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl. ¶82.) A judge can award the statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶83.) While there is a dearth of available authority, in Plaintiff’s view, were she to succeed on any of the underlying Labor Code violations, it is not likely that a Judge would also award a large amount of penalties of top of any damages recovered. (Szamet Decl. ¶84.)

Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the Class Members’ claims was approximately \$447,060.00. (Szamet Decl. ¶85.) However, as a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$95,000.00 is fair and reasonable. (Szamet Decl. ¶86.)

b) Defendant’s Financial Status

One of the main factors affecting settlement of this action was Defendant’s financial status. (Szamet Decl. ¶87.) Defendant is a security company and lacks the financial resources of bigger security companies to pay a sizeable settlement or judgement against it. (Szamet Decl. ¶88.) Moreover, Defendant’s business was greatly impacted by the pandemic as a large portion of its sales occur through door to door marketing. (Szamet Decl. ¶89.) Class Counsel worked closely with mediator Jeffrey Krivis to verify the information regarding the impact to Defendant’s financial status. (Szamet Decl. ¶90.) Class Counsel determined that obtaining a settlement on behalf of the Settlement Class now, as opposed to protracted litigation with the uncertainty of Defendant’s ability to pay a sizeable judgment made the most practical sense. (Szamet Decl. ¶91.)

5. The Experience and Views of Counsel

Finally, counsel’s experience and success in similar class actions also weigh in favor of

preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶92-94.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶95.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Class Members pro rata basis. (Ex. 1 at §C, ¶6.) This allocation distributes Agreement funds proportionally to each class member’s potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶96.)

7. The Proposed Notice Fairly Apprises the Class Members of the Terms of the Settlement and of the Class Members’ Rights under the Settlement

Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address of all Class Members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at §D, ¶¶1-3). If any Notices are returned as undeliverable, the Settlement Administrator will undertake another reasonable address verification measure to locate a valid mailing address and will promptly send the Notice to the new address. (*Id.*) As such, the Notice is likely to reach most, if not all, Class Members.

With respect to the contents of the Notice, the “notice given to the class must fairly apprise

1 the class members of the terms of the proposed compromise and of the options open to dissenting
2 class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.)
3 The purpose of a class notice is to give class members sufficient information to decide whether
4 they should accept the benefits offered, opt out and pursue their own remedies, or object to the
5 settlement. (*Ibid.*)

6 Here, the Notice clearly explains the proposed Agreement and the options to opt out of the
7 Settlement or object to it at the Final Approval Hearing. (Ex. 1 at §D, ¶4, 8; *see also* Ex. A to the
8 Agreement at pp. 1-4 [Class Notice].) In short, the Court should approve the proposed Class
9 Notice because it describes the proposed settlement with enough specificity to allow Class
10 Members to make an informed choice regarding whether to participate.

11 **VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF**

12 The Class Representative is entitled to an enhancement for her valiant effort and time
13 expended in this matter. (Szamet Decl. ¶97.) The time spent by Brenda Garcia is significant and
14 includes researching and retaining competent counsel with expertise in this area; providing
15 information to Class Counsel regarding the nature of the work at Defendant; compiling all relevant
16 employment documents; working closely with Class Counsel to develop the theories of liability
17 and martial relevant evidence; regularly discussing the status of the case with Class Counsel;
18 discussing the case via telephone with many Class Members as needed; being available for a
19 remote, full-day of mediation; and responding promptly to Class Counsel’s communications
20 regarding settlement. (*Id.*) Thus, in addition to the sums paid to Class Members, Plaintiff requests
21 a proposed litigation enhancement in the amount of \$5,000.00, to be paid from the Gross
22 Settlement Amount. (Ex. 1 at §C, ¶4.) As set forth in the Agreement, Plaintiff will also be entering
23 into a general release of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶98; Ex. 1 at
24 §E, ¶3.)

25 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶99.)
26 The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in
27 coming forward to litigate this matter on behalf of all Class Members. (*Id.*) Plaintiff will provide
28 a detailed declaration with the Final Approval Motion detailing her participation and further

1 justification for the enhancement. (*Id.*)

2 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

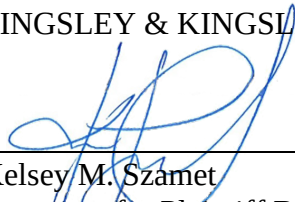
3 As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action
4 Settlement ("Motion") will be concurrently uploaded to the LWDA website on the date this Motion
5 is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents,
6 and copy of the email from the LWDA confirming receipt is attached to the Declaration of Kelsey
7 M. Szamet as Exhibit "2." (Szamet Decl. ¶100.)

8 **VIII. CONCLUSION**

9 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
10 and in the best interest of the Class Members. Therefore, the Parties respectfully request that the
11 Court (1) grant preliminary approval of the Class Action Stipulation and Agreement for Class
12 Action Settlement and Release of Claims, and all of its terms; (2) approve the proposed form of
13 notice, and direct that the Notice be sent to Class Members in the manner set forth in the Class
14 Action Stipulation and Agreement for Class Action Settlement and Release of Claims; and (3)
15 schedule a hearing on final approval of the Agreement and Class Counsel's application for an
16 award of attorney's fees and litigation costs.

17
18 DATED: October 15, 2021

KINGSLEY & KINGSLEY, APC

19
20 By: 

21 Kelsey M. Szamet
22 Attorneys for Plaintiff Brenda Garcia and the
23 Proposed Class
24
25
26
27
28

(PROOF OF SERVICE)

[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On October 15, 2021, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

John K. Rubiner Michelle T. Harrington Matthew S. Jones jrubiner@fmglaw.com mharrington@fmglaw.com mjones@fmglaw.com Freeman Mathis & Gary, LLP 550 South Hope Street, 22nd Floor Los Angeles, CA 90071-2627	Walter L. Haines admin@uelglaw.com UNITED EMPLOYEES LAW GROUP, PC 5500 Bolsa Avenue, Suite 201 Huntington Beach, CA 92649
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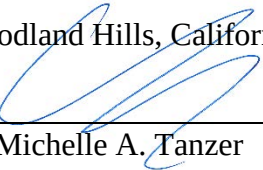
☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC MAIL TRANSMISSION:** I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

☒ **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 15, 2021, at Woodland Hills, California.


Michelle A. Tanzer