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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

JORGE LEYVA, individually and on behalf
of all others similarly situated,

Plaintiff,

vs.

FRESHPOINT CENTRAL CALIFORNIA,
INC., a Delaware corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. CV-20-002633

ASSIGNED FOR ALL PURPOSES TO:
JUDGE JOHN R. MAYNE
DEPARTMENT 21

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

Date: February 15, 2023

Time: 8:30 a.m.

Dept.: 21

Action Filed: June 12, 2020

Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2023, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable John R. Mayne, judge presiding, in Department 21 of the above-referenced Court located at 801 10th Street, Modesto, CA 95354, Plaintiff Jorge Leyva (“Plaintiff” or “Leyva”) will seek an Order: (1) preliminarily approving the Joint Stipulation of Class Action and PAGA Settlement and Release (hereinafter “Stipulation of Settlement”); (2) conditionally certifying the following Class for settlement purposes only: “all persons who are employed or have been employed by Defendant in California as non-exempt employees who worked overtime and earned non-discretionary incentive pay from March 29, 2016 through preliminary approval of the Settlement”; (3) appointing Plaintiff as the Class Representative and William L. Marder of Polaris Law Group, and Dennis Hyun of Hyun Legal, APC as Class Counsel; (4) preliminarily approving the Settlement and the Maximum Settlement Amount of \$170,000.00; (5) finding on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the Class Representative Service Award, Class Counsel’s fees and costs, the settlement administration fees, and the allocation of individual Settlement Awards to Settlement Class Members, that could ultimately be given final approval by this Court; (6) approving the Notice To Class Members Re: Pendency of a Class Action and Notice of Class Action Settlement and Hearing Date for Final Approval of Settlement (“Class Notice” or “Notice of Settlement”) to be sent to Class Members, which is attached as an exhibit to the Settlement Agreement; (7) approving the distribution of the Class Notice to Class Members substantially in the manner and form set forth in the Settlement Agreement; (8) appointing ILYM Group, Inc. as the Settlement Administrator; and (9) setting the matter for a Final Fairness and Final Approval hearing.

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

The basis for this Motion, filed without any opposition from Defendant FreshPoint Central California, Inc. (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and

1 the procedures proposed by the Parties are adequate to ensure the opportunity of class members to
2 participate in, opt-out of, or object to the settlement.

3 This Motion will be based on the attached Memorandum of Points and Authorities, the
4 Settlement Agreement, the proposed Notice to Class Members, and the supporting Declarations of
5 William L. Marder, Dennis S. Hyun and Plaintiff, and upon the oral arguments of counsel (should
6 there be any) and on the complete records and file herein.

7
8 DATED: December 15, 2022

POLARIS LAW GROUP

9 By: William L. Marder
10 William L. Marder
11 Attorneys for Plaintiff and the Class
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TABLE OF CONTENTS

I.	INTRODUCTION.....	7
II.	DISCUSSION	8
A.	PROPOSED CLASS DEFINITION.....	9
B.	NUMEROSITY	9
C.	ASCERTAINABILITY	10
D.	TYPICALITY AND ADEQUACY OF REPRESENTATION	10
	1. Class Representative’s Claims are Typical of the Class	10
	2. Class Counsel Have Adequately Represented the Class and Has Experience with Wage and Hour Class Actions.....	11
E.	SUPERIORITY	12
F.	SUMMARY OF THE CASE, INVESTIGATION AND DISCOVERY AND REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF RECOVERY	12
G.	SETTLEMENT WAS NEGOTIATED AT ARMS-LENGTH AND IS NOT COLLUSIVE	14
H.	SETTLEMENT TERMS AND EVALUATION	15
	1. Proposed Terms of the Settlement.....	15
	2. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive.....	16
	3. Whether, and Under What Circumstances, Amounts May Revert to Defendant	17
	4. Scope of the Release of Class Members’ Claims	17
	5. Tax Treatment of Settlement Amounts.....	18
	6. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.....	18
I.	SUBMISSION OF CLAIMS/EXCLUSIONS/OBJECTIONS	18
J.	UNCASHED FUNDS	19
K.	NOTICE TO CLASS MEMBERS.....	19

1	L. COSTS AND FEES	19
2	1. Attorneys' Fees and Costs	19
3	2. Proposed Payment to Class Representative.....	21
4	3. Class Administration Fees	22
5	III. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTION, OPT OUT	
6	AND MOTION FOR APPROVAL, ATTORNEY'S FEES AND FINAL	
	ACCOUNTING	22
7	IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION	
8	FOR PRELIMINARY APPROVAL	23
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

CASES

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015)	14
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	19
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001).....	22
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43, 66 n.11 (2008)	20
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974).....	10
<i>Cook v. Niedert</i> , 142 F.3d 1004, 1016 (7th Cir. 1998)	22
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1803 (1996)	9
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<i>Faulkinbury v. Boyd & Associates, Inc.</i> , 216 Cal. App. 4th 220, 238 (2013).....	10, 11
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<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)	22
<i>Hammon v. Barry</i> , 752 F. Supp. 1087 (D.D.C. 1990)	14
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	10
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	14
<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	9
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	14
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374	22
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000)	13
<i>In re Paine Webber Ltd. P'ships Litig.</i> , 171 F.R.D. 104, 125 (S.D.N.Y. 1997)	15
<i>Jaimez v. DAIOHS USA, Inc.</i> (2010) 181 Cal. App. 4th 1286, 1308.....	12

1	<i>Jordan v. L.A. County</i> (9th Cir. 1982) 669 F.2d 1311, 1320	10
2	<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130, 133 (2008).....	13
3	<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	20
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5	<i>Lee v. Dynamex, Inc.</i> , 166 Cal. App. 4th 1325, 1334 (2008).....	10
6	<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund</i> , 244 F.3d 1152, 1163 (9th Cir. 2001)	12
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9	<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004)	14, 15
10	<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	14
11	<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	10
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14	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	14
15	<i>Steinberg v. Carey</i> , 470 F. Supp. 471 (S.D.N.Y. 1979).....	14
16	<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	10
17	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014).....	14
18	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	22
19	<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	10
20	<i>Villalpando v. Excel Direct Inc.</i> (N.D. Cal. 2014) 303 F.R.D. 588, 605-606.....	10
21	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	19
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23	<u>STATUTES</u>	
24	Civil Code §1542	17

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On June 12, 2020, Plaintiff Jorge Leyva (“Plaintiff”) filed a putative class action complaint
4 in Stanislaus County Superior Court against Defendant FreshPoint Central California, Inc.
5 (“Defendant”) (Plaintiff and Defendant collectively, the “Parties”). The Complaint alleges claims
6 of failure to pay wages pursuant to Labor Code §§ 201-203, 510, 1194, failure to provide accurate
7 wage statements pursuant to Labor Code § 226, for civil penalties under the California Private
8 Attorneys’ General Act (“PAGA”), and violation of the Unfair Competition Law (the “UCL”),
9 Business and Professions Code § 17200 against Defendant.

10 Defendant denies all claims and contentions alleged in the Operative Complaint.
11 Defendant maintains that at all times relevant, it properly compensated employees and provided
12 employees with accurate and legally compliant wage statements and all other records as mandated
13 by law, and has otherwise complied with federal and California law in all aspects.

14 Since the filing of this case, the Parties conducted informal discovery and investigation,
15 including the production of documents and class payroll data. (Declaration of Dennis S. Hyun
16 (“Hyun Decl.”) ¶ 7). Plaintiff’s counsel retained expert, EconOne, to calculate damages and
17 penalties. (*Id.*) Thereafter, the Parties scheduled private mediation with Russ Wunderli, Esq., for
18 July 27, 2022. (*Id.*) However, the Parties’ counsel engaged in pre-mediation arms’ length
19 negotiations, which resulted in this settlement. (*Id.*)

20 The settlement is for a Maximum Settlement Amount of \$170,000. (Joint Stipulation of
21 Class Action and PAGA Settlement and Release (“Settlement Agreement” or “Stipulation”) ¶
22 13(c)). Class members need not do anything to participate in the settlement and will be
23 automatically included in the Settlement unless he/she opts out of the Settlement. (*Id.* ¶ 13(c)(i),
24 Exh. 1).

25 Although Plaintiff and the representing counsel have always believed that they can prevail
26 on class certification, as well as on the merits, they recognize the inherent risk in further drawn-out
27 litigation and the specific risks that a class might not be certified. Based on their own independent
28 investigation and evaluation, the Parties and their respective counsel are of the opinion that

1 settlement for the consideration and on the terms set forth in the Settlement Agreement is fair,
2 reasonable, and adequate and is in the best interests of the Class in light of all known facts and
3 circumstances and the expenses and risks inherent in litigation.

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

6 **II. DISCUSSION**

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

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

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

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

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

1 *Id.* at § 11.24.

2 Here, the Parties have reached such an agreement and have concurrently filed the Settlement
3 Agreement fully setting forth the agreement reached among the Parties. The Settlement Agreement
4 sets forth all terms of the agreement reached by the Parties, which include, among other things, the
5 method for calculating the Class Members' Individual Settlement Awards.

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

14 As further explained by Professor Newberg:

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

21 4 Newberg on Class Actions, at §11.26.

22 In addition to such terms as class identification, settlement amount and payment procedures,
23 the Settlement Agreement reached among the Parties contains a provision pursuant to which the
24 Parties stipulate to the Court's provisional certification of the Class, but do so for the purposes of
25 this settlement only.

26 **A. PROPOSED CLASS DEFINITION**

27 The current settlement is being settled on behalf of “all persons who are employed or have
28 been employed by Defendant in California as non-exempt employees who worked overtime and
earned non-discretionary incentive pay from March 29, 2016 through preliminary approval of the
Settlement.” (Settlement Agreement ¶ 4).

B. NUMEROSITY

1 Courts generally find that numerosity is satisfied if the class includes forty or more
2 members. (*See Villalpando v. Excel Direct Inc.* (N.D. Cal. 2014) 303 F.R.D. 588, 605-606; *see also*
3 *Jordan v. L.A. County* (9th Cir. 1982) 669 F.2d 1311, 1320 (noting, in dicta, that the court “would
4 be inclined to find the numerosity requirement...satisfied solely on the basis of [39] ascertained
5 class members”), *vacated on other grounds*, 459 U.S. 810 (1982).

6 In this case, Defendant represented that the class includes approximately 275 Settlement
7 Class members, from March 29, 2016, through September 23, 2022 (when the last class count was
8 pulled by Defendant, therefore, numerosity is satisfied. (Hyun Decl. ¶ 7).

9 C. ASCERTAINABILITY

10 Class members are ascertainable where they may be “readily identified without
11 unreasonable expense or time by reference to official records.” (*Lee v. Dynamex, Inc.* (2008) 166
12 Cal. App. 4th 1325, 1334; *see also Faulkinbury v. Boyd & Assocs., Inc.* (2013) 216 Cal. App. 4th
13 220, 240.)

14 Here, the identity of class members is clearly ascertainable from Defendant’s payroll
15 records and have already been identified.

16 D. TYPICALITY AND ADEQUACY OF REPRESENTATION

17 1. Class Representative’s Claims are Typical of the Class

18 The commonality requirement is met when there are questions of law and fact common to
19 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared
20 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
21 couple with disparate legal remedies within the class”). Commonality requires only that some
22 common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation
23 are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s
24 conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d
25 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s
26 conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the
27 Defendant’s policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward &*
28 *Co.*, 193 Cal. App. 3d 411, 421 (1987).

1 Plaintiff alleges that Defendant, as a matter of corporate policy, practice or procedure
2 violated the Labor Code by failing to pay overtime wages based on the regular rate of pay by not
3 including all non-discretionary remuneration into the rate, as well as failing to provide accurate
4 itemized wage statements based on said violation. Courts have held that such claims are aptly
5 suited for class certification. *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220, 238
6 (2013) (“whether the work uniform maintenance allowance and gasoline reimbursement must be
7 included in calculating the overtime rate of pay can be decided on a class-wide basis as a legal
8 matter based on common proof”).

9 Plaintiff alleges that he was subjected to the same alleged violations, in that he believes he
10 was not paid all overtime wages due. (Declaration of Jorge Leyva (“Leyva Decl.”) ¶ 2).

11 Plaintiff does not have any interests adverse to the class, nor has any such issues been raised
12 or presented. (Leyva Decl. ¶ 4). Plaintiff has taken all necessary steps to represent the interests of
13 the Class, by providing information and documents. (Leyva Decl. ¶¶ 3-5). For such reasons,
14 Plaintiff has adequately represented the class members and will continue to do so.

15 **2. Class Counsel Have Adequately Represented the Class and Has** 16 **Experience with Wage and Hour Class Actions**

17 From the inception of the case, Class Counsel have solely represented the interest of the
18 class. For example, the informal discovery exchanged by the parties was directed towards class
19 issues. (Hyun Decl. ¶ 7). Class counsel also engaged in numerous written and verbal
20 communications with opposing counsel to obtain sufficient class data in order to evaluate that class
21 claims at issue. (*Id.*). The Parties initially scheduled private mediation with Russ Wunderli, Esq.,
22 on July 27, 2022. (*Id.*). In connection with the mediation, Defendant produced a sample of 10%
23 of the class at that time, or the payroll data of 24 individuals. (*Id.*). Plaintiff’s counsel retained
24 expert, EconOne, who reviewed the data and extrapolated it to calculate maximum exposure at
25 \$523,118.00. (*Id.*). EconOne has been approved to provide expert testimony, including in *Alberts*
26 *v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 416 (2015), and *Magadia v. Wal-Mart*
27 *Assocs., Inc.*, 384 F. Supp. 3d 1058 (N.D. Cal. 2019), in which the District Court relied on
28 EconOne’s testimony/report to award \$102 million in damages/penalties. (*Id.*) Finally, Class

counsel have been approved as class counsel on a number of prior cases and are competent to represent the class, including in *Magadia*, which was reversed by the Ninth Circuit. (Hyun Decl. ¶¶ 3-6).

E. SUPERIORITY

Class treatment is clearly superior to any other method of resolving Plaintiff's claims. (*Sav-on Drug Stores, Inc.*, *supra*, 34 Cal. 4th 319 at p. 326.) In employment actions, class actions are in fact encouraged. (*Jaimez v. DAIOWS USA, Inc.* (2010) 181 Cal. App. 4th 1286, 1308 ("In light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication. Doing so would further judicial economy by avoiding repetitious suits, would unify what would otherwise be a series of small claims so as to enhance the class members' access to redress...").)

Here, Plaintiff's claims are based on system-wide policies, procedures, and practices that apply to all class members and can be most efficiently litigated on a class-wide basis. The alternative would be the unrealistic filing of numerous individual claims. Since the putative class members are employees with relatively modest individual claims and limited resources, there is a strong likelihood that individual claims would never be brought. (*See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund* (9th Cir. 2001) 244 F.3d 1152, 1163; *see also Gentry v. Sup. Ct.* (2007) 42 Cal. 4th 443, 462.)

F. SUMMARY OF THE CASE, INVESTIGATION AND DISCOVERY AND REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF RECOVERY

As set forth above, the Operative Complaint alleges (1) Violation of Labor Code § 226; (2) Violation of Labor Code §§ 510, 1194; (3) Violation of Labor Code § 2698, *et seq.* (the "PAGA"); and (4) Violation of the UCL, Bus. & Prof. Code § 17200, *et seq.* Plaintiff alleged that Defendant did not include all non-discretionary remuneration into the regular rate of pay for purposes of paying overtime. Plaintiff also sought derivative wage statement and waiting time penalties based on said violations. Plaintiff also sought PAGA penalties for the foregoing violations.

Plaintiff engaged in informal discovery, engaged in extensive communications regarding

1 the data and documents to be produced by Defendant for mediation, including a sampling of the
2 putative class members' payroll data. (Hyun Decl. ¶ 7). The Parties initially scheduled private
3 mediation with Russ Wunderli, Esq., on July 27, 2022. (*Id.*). In connection with the mediation,
4 Defendant produced a sample of 10% of the class at that time, or the payroll data of 24 individuals.
5 (*Id.*). Plaintiff's counsel retained expert, EconOne, who reviewed the data and extrapolated it to
6 calculate maximum exposure at \$523,118.00. (*Id.*). The Parties' counsel engaged in pre-mediation
7 arms' length negotiations and were able to reach this settlement on the day before the scheduled
8 mediation, *i.e.*, July 26, 2022. (*Id.*)

9 Accordingly, based on their own independent investigations and evaluations, the Parties
10 and their respective counsel are of the opinion that settlement for the consideration and on the
11 terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best
12 interests of the Class and Defendants in light of all known facts and circumstances and the
13 expenses and risks inherent in litigation. (Hyun Decl. ¶ 8).

14 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
15 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has
16 conducted sufficient investigation and the settlement is reasonable in light of the strengths of the
17 plaintiff's claims. As discussed herein, Plaintiff's counsel has conducted extensive investigation
18 and, in light of the strength and weaknesses of Plaintiff's claims, Plaintiff's attorneys submit that
19 this settlement is fair pursuant to *Kullar*.

20 In the present case, the gross settlement of \$170,000.00. (Settlement Agreement ¶ 13(c)).
21 Prior to the mediation, Plaintiff received payroll data from Defendant which was analyzed by an
22 expert witness. (Hyun Decl. ¶ 7). Plaintiff's expert calculated the unpaid wages at \$23,709, waiting
23 time penalties at \$389,035, wage statement penalties at \$15,563, PAGA penalties at \$86,425, and
24 prejudgment interest at \$8,387. (*Id.*). Thus, the total exposure amounted to \$523,118. (*Id.*). Thus,
25 the Maximum Settlement Amount is approximately 32% of the total potential exposure.

26 Numerous courts have held that gross settlements approximating between only 8 and 25%
27 of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs.*
28 *Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement recovering 16% of

1 potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement amounting
2 to only a fraction of the potential recovery does not per se render the settlement inadequate or
3 unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks
4 of pursuing the litigation to judgment”; noting that whether the settlement is fair and adequate
5 depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor Supply Co.*, No. 13-
6 CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action
7 settlement recovering between 8.5% and 25% of the defendant’s potential exposure was fair); *Van*
8 *Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court
9 granted preliminary approval of wage and hour class settlement which obtained **only 9.1%** of
10 projected damages, given the risks of continued litigation).

11 Based on the above, the settlement amount is fair and reasonable.

12 **G. SETTLEMENT WAS NEGOTIATED AT ARMS-LENGTH AND IS NOT**
13 **COLLUSIVE**

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

24 While the recommendations of counsel proposing the settlement are not conclusive, the
25 Court can properly take them into account, particularly where, as here, they have been involved in
26 formal and informal discovery and negotiations for some period of time, appear to be competent,
27 have experience with this type of litigation, and have exchanged substantial evidence from the
28 opposing party. *See Newberg on Class Actions, supra*, at § 11.47; *Nat’l Rural Telecomms. Coop.*,

221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“[s]o 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 . . . [citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”)).

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. (Declaration of William L. Marder (“Marder Decl.”) at ¶¶ 8-14; Hyun Decl. at ¶¶ 3-6). As discussed above, Plaintiff’s counsel conducted a thorough investigation of the allegations involved in this case since the inception. Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in extensive arms’ length negotiations taking place among the Parties.

The settlement for each participating Class Member is fair, reasonable and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, and the costs of pursuing such litigation. The settlement is the result of extensive arms’ length negotiations between the Parties and their counsel.

Although Plaintiff believes that a class can be certified, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the Complaint, the possibility of non-certification and potential for appeals. (Hyun Decl. at ¶ 8).

Despite the asserted fairness of the settlement terms, as set forth in the Class Notice, should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, Opt-Out) from the settlement. Moreover, as set forth in the Class Notice, Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the proposed Settlement Agreement, provided that they give proper notice to the Parties and the Court.

H. SETTLEMENT TERMS AND EVALUATION

1. Proposed Terms of the Settlement

1 This is a non-reversionary settlement wherein Class Members will be automatically paid
2 out of the settlement if he/she does not opt-out of the settlement. The key terms of the settlement
3 are as follows.

4 The Settlement Agreement provides for a Maximum Settlement Amount of \$170,000.00.
5 (Settlement Agreement ¶ 13(c)). Attorney's fees of up to 33 1/3% or \$56,666.67 of the Maximum
6 Settlement Amount will be paid to Class Counsel along with costs of up to \$30,000.00. (*Id.* at ¶
7 15). Plaintiff will seek up to \$7,500.00 for his Enhancement Award. (*Id.* at ¶ 13(c)(vi)). The
8 allocation for PAGA Penalties is \$10,000.00, of which \$7,500.00 (75%) will be paid to the LWDA
9 and \$2,500 distributed proportionally to the PAGA Members regardless of whether they request to
10 be excluded from the class settlement. (*Id.* at ¶¶ 5, 13(c)(ii)). The Administrator will be paid up to
11 \$9,000.00 for costs of administering this settlement. (*Id.* at ¶ 13(c)(vii)). After these deductions,
12 the remainder will be distributed to the Class Members who do not timely request an opt-out. (*Id.*
13 at ¶ 13(c)(i)).

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

17 The Net Settlement Amount (calculated after deduction of attorneys' fees, costs, the
18 Enhancement Award, the LWDA's penalties and administration costs) shall be paid to all
19 Settlement Class Members who do not opt out of the settlement. (Settlement Agreement ¶ 13(c)(i)).
20 The amount allocated to each Settlement Class Member will be based on each individual's number
21 of underpaid workweeks during the Class Period. (*Id.* at ¶¶ 13(c)(i), 14). The reason for such
22 allocation is so that the Settlement Class Members who suffered greater damages will be allocated
23 greater recovery. Settlement Class Members may opt-out of the Settlement if they so choose. (*Id.*
24 at ¶ 20). Based on the Net Settlement Amount, on a pure raw average, each class member will
25 receive approximately \$197.78. (Hyun Decl. ¶ 7). Such amounts for each person could increase
26 or decrease depending on a number of factors, including the amount of wage statements received
27 by each Settlement Class Member. The approximate amount each person will be entitled to will
28 not be known until the class data is transferred to the Settlement Administrator for processing.

1 **3. Whether, and Under What Circumstances, Amounts May Revert to**
2 **Defendant**

3 In no event shall any portion of the Maximum Settlement Amount revert to Defendant.
4 (Settlement Agreement ¶ 19). Rather, any uncashed residue will be distributed 50/50 to the
5 designated *cy pres* recipients, Koinonia Family Services, a non-profit 501(c)(3) organization with
6 child advocacy programs in the State of California, and Legal Aid at Work, a pro bono legal agency
7 which assists low-income workers in the Bay Area. (*Id.*)

8 **4. Scope of the Release of Class Members' Claims**

9 Class Members who do not opt out of the Settlement will release the following:

10 Effective upon the date of final approval by the Court of this Stipulation of
11 Settlement, and except as to such rights or claims as may be created by this
12 Stipulation of Settlement, the Settlement Class and each member of the Class who
13 has not submitted a valid Request for Exclusion fully release and discharge the
14 Released Parties from all claims under state, federal and local law that were or could
15 have been asserted based on the facts and allegations made in the Action, and any
16 amendments thereto, as to the Class Members, including without limitation,
17 California Labor Code sections 201-204, 218.5, 226, 226.3, 510, 558, 1194, 1197.1,
18 2698, et seq., California Industrial Commission Wage Orders, Cal. Code Regs.,
19 Title. 8, section 11040, et seq., and Business and Professions Code sections 17200,
20 et seq., California Code of Civil Procedure section 1021.5, and including all claims
21 for or related to alleged unpaid wages, overtime or double time wages, regular rate
22 of pay, timely payment of wages during employment, timely payment of wages at
23 separation, wage statements, payroll records and recordkeeping, failure to pay
24 additional 401(k) benefits and/or deferred compensation benefits and/or matching
benefits for payments received under the Settlement, unfair competition, unfair
business practices, unlawful business practices, or fraudulent business practices,
conversion, class actions, representative actions, aggrieved party claims, declaratory
relief, penalties of any nature (including but not limited to civil penalties, waiting-
time penalties, and PAGA penalties), interest, fees, costs, as well as all other claims
and allegations alleged in the Action (collectively "Released Class Claims"), from
March 29, 2016 through the date the Court finally approves the Settlement.
Expressly excluded from the release are claims for retaliation, discrimination,
unemployment insurance, disability, workers compensation, and claims outside the
Released Class Claims.

25 (Settlement Agreement ¶ 22).

26 As shown, the scope of the release is limited by the claims and based upon the factual
27 allegations asserted in the Complaint. Further, the Release does not waive Civil Code §1542 for
28 Settlement Class Members.

1 **5. Tax Treatment of Settlement Amounts**

2 75% of each individual Settlement Award shall be deemed payment for wages and subject
3 to tax withholdings and 25% shall be deemed penalties from which there will be no deductions
4 and subject to an IRS Form 1099. (Settlement Agreement ¶ 13(c)(iii)). Each Class Member shall
5 be issued any applicable IRS Form 1099 in connection with the payment of the penalty portion,
6 and W-2 in connection with the payment of the wage portion. (*Id.*) Individual PAGA Shares for
7 the PAGA Members will be paid from the Net PAGA Settlement Amount as alleged penalties for
8 which IRS Form 1099-MISC will issue. (*Id.*) The Maximum Settlement Amount shall not
9 include employer-side payroll taxes, which shall be paid by Defendant in addition to and separate
10 from the Maximum Settlement Amount. (*Id.* ¶ 12).

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

13 As stated above, Settlement Class Members do not need to do anything should they wish to
14 receive their share of the settlement funds. Thus, this substantially decreases the amount of burden
15 each Settlement Class Member must bear in order to receive their settlement share. If a Settlement
16 Class Member does not wish to take part in this settlement and be bound by the release, he/she must
17 submit an exclusion request. Such obligations are thoroughly identified in each class member's
18 Class Notice. (Settlement Agreement, Exh. 1).

19 **I. SUBMISSION OF CLAIMS/EXCLUSIONS/OBJECTIONS**

20 Class Members will not be required to submit a claim form to receive compensation.
21 Instead, this is a non-reversionary Settlement Agreement. (Settlement Agreement, Exhibit A).
22 Settlement Class Members will be provided 45 calendar days to opt out of, or object to the
23 settlement. (Settlement Agreement ¶¶ 18, 21). Any Class Member who does not opt-out of the
24 settlement will be automatically issued his/her share of the settlement proceeds. Given that this is
25 a non-reversionary settlement, the parties believe that 45 calendar days is sufficient time for class
26 members to object or opt-out of the settlement. Further, Settlement Class Members will be notified
27 of the Fairness/Final Approval hearing and will have an opportunity to appear at the Fairness
28 hearing.

1 **J. UNCASHED FUNDS**

2 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
3 paid out. Checks issued pursuant to this Agreement shall remain negotiable for a period of at least
4 one-hundred eighty (180) days from the date of mailing. (Settlement Agreement ¶ 19). Any
5 uncashed residue shall be distributed to the designated *cy pres* recipients, Koinonia and Legal Aid
6 at Work. (*Id.*).

7 **K. NOTICE TO CLASS MEMBERS**

8 Defendant shall provide the Settlement Administrator with the Class Members' names,
9 last-known addresses, last-known telephone numbers, Social Security numbers ("Class Member
10 Information"), and workweek data from the Class Period. (Settlement Agreement ¶ 17(a)). Within
11 thirty (30) calendar days of preliminary approval of this Settlement, the Settlement Administrator
12 will mail the Class Notice to Class Members. (*Id.*) Class Notices returned to the Settlement
13 Administrator as non-delivered shall be resent to the forwarding address, if any, on the returned
14 envelope. (*Id.* ¶ 17(b)). If there is no forwarding address, the Settlement Administrator will do an
15 NCOA check and will skip-trace return mail and re-mail within three (3) calendar days of receipt
16 using the Class Member's Social Security Number; this search will be performed only once per
17 Class Member by the Settlement Administrator. (*Id.*) Class Members will have a maximum of
18 fifteen (15) calendar days from the date of the re-mailing due to an undeliverable notice, or until
19 the end of the opt out deadline, whichever is later, to opt-out, object and/or dispute his/her
20 estimated Settlement Award. (*Id.*)

21 **L. COSTS AND FEES**

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

23 California state and federal courts have recognized that an appropriate method for
24 determining award of attorneys' fees is based on a percentage of the total value of benefits to Class
25 Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001);
26 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S.
27 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose
28 of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs

1 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
2 burden alone.” *Vincent*, 557 F. 2d at 769.

3 Under California law, the award of attorneys’ fees in common fund wage and hour class
4 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal.
5 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in
6 holding that when class action litigation establishes a monetary fund for the benefit of the class
7 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
8 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
9 fund created.”). Under the percentage of the fund method, the Court’s objective remains to “mimic
10 the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
11 (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level that
12 will approximate what the market will set... The judge, in other words, is trying to mimic the market
13 in legal services.”).

14 An award of 33% of the fund in attorneys’ fees mimics the marketplace as it “is supported
15 by the fact that typical contingency fee agreements provide that class counsel will recover 33% if
16 the case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores*
17 *LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly*
18 *Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81
19 Wash U. L. Q. 653, 659 n. 11). Indeed, “empirical studies [that] show that . . . fee awards in class
20 actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66
21 n.11 (2008).

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

27 Moreover, in the *Laffitte* intermediate court decision, the court observed that “35 percent of
28 the common fund is consistent with, and in the range of, awards in other class action lawsuits.”

1 *Laffitte v. Robert Half Int'l*, 231 Cal. App. 4th 860, 871 (2014).

2 Here, the fee award representing 33 1/3% of the fund clearly falls within that range, and is
3 consistent with other comprehensive surveys of class action settlements and fee awards. See
4 Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical
5 Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost
6 fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent.”);
7 Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7
8 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation
9 nationwide conclude that fees representing one-third of the total recovery is consistent with market
10 rates).

11 The results delivered by Plaintiff’s Counsel also support the requested percentage of the
12 fund. Here, the Parties have agreed to a payment of a maximum of 33 1/3% of the settlement
13 (\$56,666.67) for payment to Class Counsel as attorneys’ fees. (Settlement Agreement ¶ 15). The
14 Parties have agreed to a payment of the foregoing attorney’s fees and, thus, this payment should be
15 presumed to be fair.

16 Further, the parties have agreed to reimbursement of class counsel’s litigation costs of up
17 to \$30,000.00. (Settlement Agreement ¶ 15). Class counsel have, at their own risk, expended costs,
18 for example, to file this instant action, service of process, payment of mediation fees, expert witness
19 fees and other litigation related costs and will be submitting detailed cost sheets for the respective
20 costs incurred prior to the Motion for Final Approval. Based on the foregoing, the court should
21 preliminarily approve the attorney’s fees and costs being requested by the parties.

22 **2. Proposed Payment to Class Representative**

23 Plaintiff requests a modest enhancement of \$7,500.00. (Settlement Agreement ¶ 13(c)(vi)).
24 Plaintiff spent a very significant amount of time discussing this matter with his attorneys on many
25 occasions. (Leyva Decl. ¶ 3). Plaintiff always made himself available to answer questions, gather
26 documents, reviewing/executing the memorandum of understanding, reviewing/executing the
27 settlement agreement and pleadings. (*Id.*)

28 Given that future employers are much less likely to hire individuals who have filed suit

1 against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in the
2 future from other potential employers. Plaintiff assumed these risks and the whole class benefited
3 from these risks taken by Plaintiff. Class members did not have to file individual lawsuits and bear
4 the risks of payment of fees and costs if they did not prevail, nor did they have to face the potential
5 for retaliation and not getting future employment had they filed a public lawsuit.

6 Notably, courts have routinely granted approval of representative enhancements for far
7 greater amounts than the \$7,500.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v.*
8 *Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000);
9 *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990 (two
10 incentive awards of \$ 55,000, and three incentive awards of \$ 35,000); *Brotherton v. Cleveland*,
11 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy*
12 *Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
13 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist.
14 LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA
15 overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming
16 \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests a modest
17 enhancement of \$10,000.00, which is “presumptively reasonable” and consistent with case law.

18 **3. Class Administration Fees**

19 The parties have agreed to payment of a maximum of \$9,000.00 to the Settlement
20 Administrator, ILYM Group, Inc., for administering this Settlement, including, but not limited to,
21 printing, distributing, and tracking documents for this Settlement, tax reporting, distributing the
22 Maximum Settlement Amount, and providing necessary reports and declarations, as requested by
23 the Parties. (Settlement Agreement ¶¶ 13(c)(vii), 17). ILYM Group is a well-recognized class
24 action settlement administrator. The parties believe that the administration fee is reasonable and
25 should be approved.

26 **III. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTION, OPT OUT AND** 27 **MOTION FOR APPROVAL, ATTORNEY’S FEES AND FINAL ACCOUNTING**

28 Plaintiff requests that a final fairness/approval hearing be set for approximately 4 months

1 after the hearing on Plaintiff's Motion for Preliminary Approval.

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

4 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
5 substantial monetary benefits to class members; it is non-collusive; and it was achieved as the result
6 of informed, extensive, and arms' length negotiations conducted by counsel for respective parties
7 who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff
8 respectfully request that the Court grant preliminary approval of the proposed settlement, sign the
9 proposed Order, approve and authorize mailing of the proposed Notice Packet, and set a date for a
10 final approval hearing on or after June 15, 2023.

11 Dated: December 15, 2022

POLARIS LAW GROUP

13 By: William L. Marder
14 William L. Marder
Attorneys for Plaintiff and the Class