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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

JULIO TESCHERA, individually and on behalf
of all others similarly situated,

Plaintiff,

vs.

GAWFCO ENTERPRISES, INC., a California
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 21CV376213

[Assigned for all purposes of the Hon. Sunil
R. Kulkarni, Dept. 1]

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

Date: April 28, 2022
Time: 1:30 p.m.
Dept.: 1

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

2 **PLEASE TAKE NOTICE** that, on April 28, 2022, at 1:30 p.m., or as soon thereafter as the
3 matter may be heard before the Hon. Sunil R. Kulkarni, Judge presiding in Department 1 of the
4 above-referenced Court located at 191 N. First St., San Jose, California 95113, Plaintiff Julio
5 Teschera (“Plaintiff”) will and hereby does move the Court for an Order:

6 1. Preliminarily approving the Joint Stipulation of Class Action Settlement (“Settlement
7 Agreement,” or “Joint Stipulation”);

8 2. Provisionally certifying the Settlement Class, which is defined as: all current and
9 former non-exempt employees of Defendant who worked at any time during the period of time from
10 August 25, 2016, through August 30, 2021, who received overtime pay and non-discretionary
11 incentive pay covering the same time period, including without limitation, commissions and shift
12 differentials;

13 3. Appointing William L. Marder of Polaris Law Group, and Dennis S. Hyun of Hyun
14 Legal, APC as Class Counsel;

15 4. Approving the proposed “Notice of Proposed Class Action Settlement,” or “Notice
16 Packet” attached to the Joint Stipulation as Exhibit A;

17 5. Approving ILYM Group, Inc. as the settlement administrator (“Administrator”) jointly
18 selected by the Parties for the purposes of this settlement, and approving and directing distribution to
19 the Notice Packet; and

20 6. Setting a final fairness and approval hearing.

21 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides
22 for court approval of the settlement of a purported class action.

23 The basis for this Motion, filed without any opposition from Defendant, is that the proposed
24 settlement is fair, adequate, and reasonable and the procedures proposed by the Parties are adequate
25 to ensure the opportunity of class members to participate in, opt out of, or object to the settlement.

26 This Motion will be based on the Memorandum of Points and Authorities included herein, the
27 Joint Stipulation of Class Action Settlement (hereinafter, as amended by the Addendum, referred to
28 as “Stipulation” or “Settlement Agreement”), the Addendum to Joint Stipulation of Class Action

1 Settlement (“Addendum”) and the proposed Notice Packet, and the supporting Declarations of
2 William L. Marder, Dennis S. Hyun, and Plaintiff, upon the oral arguments of counsel (should there
3 be any) and on the complete records and file herein.

4
5 DATED: March 24, 2022

POLARIS LAW GROUP, LLP

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7 By: William L. Marder
8 William L. Marder
9 Attorney for Plaintiff and the Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Julio Teschera (“Named Plaintiff” or “Plaintiff”) seeks preliminary approval of this
4 class action settlement. As set forth in the Joint Stipulation of Class Action Settlement (“Joint
5 Stipulation” or “Agreement”), , as amended by the Addendum to Joint Stipulation of Class Action
6 Settlement (“Addendum”), the Settlement provides for a gross fund of \$170,000.00, and, more
7 importantly, is **non-reversionary**, such that no funds will revert back to Defendant Gawfco
8 Enterprises, Inc. (“Defendant”). Moreover, the Settlement does not require class members to
9 complete claim forms to participate. Rather, the class members will simply receive checks so long as
10 they do not opt-out.

11 This case arises from Defendant’s wage and hour practices. Specifically, Plaintiff alleged that
12 Defendant failed to pay all overtime. Plaintiff worked as a non-exempt employee. Defendant also
13 paid Plaintiff non-discretionary remuneration, including without limitation, commissions. When
14 Plaintiff worked overtime during pay periods when he was paid said items of non-discretionary
15 remuneration, the overtime rate should have been based on the straight time rate plus the
16 remuneration. However, Plaintiff received overtime pay at only 1.5 times Plaintiff’s base rate. In
17 other words, Defendants did not take into account the commissions into the overtime rate, which
18 should have increased the regular rate of pay for purposes of paying overtime in pay periods in which
19 Plaintiff was paid commissions. Based on these allegations, Plaintiff asserts class and representative
20 claims under the Private Attorneys General Act (the “PAGA”) and seeks damages and penalties. The
21 Parties further engaged in formal and informal discovery, including depositions of Plaintiff and
22 Defendant’s person most knowledgeable (“PMK”), production of Defendant’s policies and payroll
23 data for 53 class members, and expert analysis which permitted Plaintiff to calculate the damages and
24 penalties at issue. The Parties agreed to mediate the case with Michael Loeb, Esq., on December 20,
25 2021. After a full day of negotiations, the Parties were able to reach a global settlement.

26 Significantly, Defendant fixed its overtime formula to include non-discretionary remuneration
27 as of August 30, 2021. Therefore, the Parties cut off the settlement class and release period on
28 August 30, 2021.

1 The total exposure at the time of mediation was \$381,724.00. (Declaration of Dennis S. Hyun
2 (“Hyun Decl.”) ¶ 7). Thus, the \$170,000.00 represents approximately 45% of the total exposure at
3 the time of mediation. Moreover, the settlement class is narrowly defined as: all current and former
4 non-exempt employees of Defendant who worked at any time during the period of time from August
5 25, 2016, through August 30, 2021, who received overtime pay and non-discretionary incentive pay
6 covering the same time period, including without limitation, commissions and shift differentials.

7 (Agreement at § 3). And, more importantly, the release is narrowly tailored to claims alleged:

8 [A]ll class and representative claims contained in the Complaint for violation of Labor
9 Code §§ 201-203, 226, 510, 1194, the Private Attorneys General Act (the “PAGA”),
10 and Business & Professions Code § 17200, *et seq.*, arising from the factual allegations
contained in the Complaint, *i.e.*, the alleged failure to pay overtime and/or double time
wages based on the regular rate of pay that arose during the Class Period [August 25,
2016, to August 30, 2021].

11 (Agreement at § 26).

12 The Parties and their respective counsel are of the opinion that settlement for the
13 consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate and is in
14 the best interests of the Class and Defendants in light of all known facts and circumstances and the
15 expenses and risks inherent in litigation. (Hyun Decl. ¶¶ 7-9). Therefore, the Parties respectfully
16 request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

17 **II. BACKGROUND OF THE SETTLEMENT**

18 **A. Investigative Background**

19 On December 16, 2020, Plaintiff submitted his written notice to the Labor Workforce
20 Development Agency (the “LWDA”) alleging violations of Labor Code §§ 201-204, 226, 510 and
21 1194 (“PAGA Notice”). On or about February 19, 2021, Plaintiff filed this class action in Santa
22 Clara County Superior Court alleging four causes of action for: (1) Violation of Labor Code § 226(a);
23 (2) Violation of Labor Code §§ 510 and 1194; (3) Violation of Labor Code § Labor Code § 2698, *et*
24 *seq.* (the Private Attorneys General Act, or the “PAGA”); and (4) Violation of Business &
25 Professions Code § 17200, *et seq.* The Parties exchanged informal discovery and payroll data from
26 which Plaintiff was able to calculate damages. The Parties also completed the deposition of Plaintiff
27 and Defendant’s person most knowledgeable. The Parties then attended mediation with Michael
28 Loeb on December 20, 2021, which resulted in this settlement.

1 Since the inception of this case, the Parties have diligently litigated this case, including
2 completing the depositions of Plaintiff and Defendant's PMK, production of Defendant's policies and
3 payroll data for 53 class members, and expert analysis which permitted Plaintiff to calculate the
4 damages and penalties at issue. (Hyun Decl. ¶ 7). After the completion of adequate discovery and
5 informal exchange, the Parties agreed to attend mediation with Michael Loeb, Esq. on December 20,
6 2021. (*Id.*) The total exposure at the time of mediation was \$381,724.00. (*Id.*) Thus, the
7 \$170,000.00 represents approximately 45% of the total exposure at the time of mediation. (*Id.*) The
8 Parties were able to reach this settlement with Mr. Loeb's help after a full day of mediation. (*Id.*)

9 **B. Summary of the Current Settlement**

10 The Stipulation provides for \$170,000.00 as the gross settlement amount. This amount is
11 completely non-reversionary (*i.e.*, every single dollar will be paid out without any money reverting
12 back to Defendants). Participating Class Members' payments shall be allocated based on the number
13 of pay periods worked by Class Members in which he/she was paid non-discretionary remuneration
14 (including without limitation, shift differentials and commissions) which covered a pay period in
15 which the Class Member was also paid overtime and/or double-time wages ("Pay Period").
16 (Agreement at § 43). All pay periods worked by Class Members in which he/she was paid non-
17 discretionary remuneration (including without limitation, shift differentials and commissions) which
18 covered a pay period in which the Class Member was also paid overtime and/or double-time wages
19 will be totaled ("Total Pay Period Number") and then each class member's share shall be calculated
20 by dividing his/her number of Pay Periods during the Class Period by the Total Pay Period Number
21 and multiplied against the Net Settlement Amount. (*Id.*) Participating Class Members are entitled to
22 100% of the Net Settlement Amount. (*Id.*) All Individual Settlement Payments shall be allocated as
23 follows: 80% as penalties and interest and 20% as wages. (Agreement at § 59).¹
24
25

26 ¹ The Parties' counsel have also executed the Addendum to the Agreement, which corrected an
27 inadvertent error for the Settlement Administrator to issue an IRS Form 1099 for the Individual
28 Settlement Payments. The Addendum corrects this mistake by stating that an IRS Form W2 shall be
issued for the wage portion, and an IRS Form 1099 will be issued for the penalty/interest portion.

1 Additionally, the Settlement Agreement provides for an appropriately tailored release. The
2 Settlement Agreement provides a release only for claims arising out of or related to the factual
3 allegations set forth in the Action and only during the limited Class Period:

4 7. “Class Period” means the period from August 25, 2016, through August 30,
5 2021.

6 26. “Released Claims” means all class and representative claims contained in the
7 Complaint for violation of Labor Code §§ 201-203, 226, 510, 1194, the Private
8 Attorneys General Act (the “PAGA”), and Business & Professions Code § 17200, *et*
9 *seq.*, arising from the factual allegations contained in the Complaint, *i.e.*, the alleged
10 failure to pay overtime and/or double time wages based on the regular rate of pay that
11 arose during the Class Period [August 25, 2016, to August 30, 2021].

12 (Agreement at §§ 7, 26, 27).

13 Based upon Defendants’ records, the estimated number of Settlement Class Members is now
14 approximately 100 individuals. Class Members may opt-out of the Settlement if they so choose.

15 As part of the Stipulation, Defendant does not object to Plaintiffs’ Counsel’s request for
16 attorney’s fees up to one-third (1/3) of the total settlement sum, or \$56,666.67, plus up to \$30,000.00
17 for reimbursement of litigation costs. Also, as part of the Settlement Agreement, Defendant does not
18 object to Named Plaintiff’s request for an enhancement of \$7,500.00. Additionally, the Settlement
19 Agreement calls for \$25,000 payment for PAGA penalties – 75% of which, or \$18,750.00, of the
20 PAGA Payment shall be paid to the California Labor and Workforce Development Agency
21 (“LWDA”), and 25%, or \$6,250.00, of the PAGA Payment shall be part of the Net Settlement
22 Amount to be distributed to Participating Class Members. Finally, the Settlement Agreement also
23 provides for the payment of the settlement administrator for the administration of this current
24 settlement, which is capped at a maximum of \$5,000.00.

25 **C. The Settlement is Fair, Reasonable, and Adequate**

26 Based on their own respective independent investigations and evaluations, the Parties and
27 their respective counsel are of the opinion that settlement for the consideration and on the terms set
28 forth in their Agreement is fair, reasonable, and adequate and is in the best interests of the Class and
the Defendants in light of all known facts and circumstances and the expenses and risks inherent in
litigation. (Hyun Decl. at ¶¶ 7-9). Defendants deny any liability or wrongdoing of any kind
associated with the claims alleged by Plaintiff.

1 Based on a class size of approximately 100 Class Members and the \$170,000.00 recovery,
2 Class Members will each get a raw average of approximately \$520.83, after deducting the PAGA
3 payment to the LWDA, Plaintiff's enhancement, attorneys' fees and costs, and administration costs.
4 (Hyun Decl. at ¶ 7). This amount will be greater or lower based on the number of exclusions, *i.e.*, the
5 amounts allocated to the class members who exclude themselves will be reallocated to the net
6 settlement fund available to participating class members. Further, Class Members may choose to
7 exclude themselves from this settlement and not participate in the settlement.

8 **III. LEGAL ANALYSIS**

9 **A. The Class at Issue Can Be Certified by the Court Pursuant to the Parties'** 10 **Stipulation**

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

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

26 4 Newberg on Class Actions, at §11.26.

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

Moreover, Plaintiff believes that this regular rate of pay class action can be certified. *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220, 238 (2013) (“whether the work uniform maintenance allowance and gasoline reimbursement must be included in calculating the overtime rate of pay can be decided on a class-wide basis as a legal matter based on common proof”)

Plaintiff alleges that he was paid commissions covering pay periods in which he was also paid overtime, but that the overtime was paid at 1.5x his base rate of pay. (Declaration of Julio Teschera (“Teschera Decl.”) ¶ 2). Thus, Plaintiff’s claims are typical of other class members. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1347 (1987).

Further, Plaintiff and his counsel are adequate representatives in that they have no conflicts with the class and will adequately represent the class. (Teschera Decl. ¶¶ 4-6; Declaration of William L. Marder (“Marder Decl.”) ¶ 6; Hyun Decl. ¶ 10). Plaintiff’s counsel has also been certified in a number of class actions, including for purposes of class certification and settlement. (Marder Decl. ¶¶ 13-14; Hyun Decl. ¶ 6).

Lastly, the class is numerous, as indicated by the approximately 100 class members. *See, e.g., Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978); *Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir.) (noting, in dicta, that the court “would be inclined to find the numerosity requirement ... satisfied solely on the basis of [39] ascertained class members”), *vacated on other grounds*, 459 U.S. 810 (1982).

B. Two-Step Approval Process

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

Approval of class action settlements involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice ... be given to the class members of a formal

1 fairness hearing, at which arguments and evidence may be presented in support of and
2 in opposition to the settlement.

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

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

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

17 *Id.* at § 11.24. Here, the Parties have reached such an agreement and have submitted to this Court in
18 connection with this Motion a copy of the Joint Stipulation fully setting forth the agreement reached
19 among the Parties. The Joint Stipulation sets forth all terms of the agreement reached by the Parties,
20 which include, among other things, the method for calculating the Class Members' individual
21 settlement payments.

22 **C. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion**

23 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
24 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel*
25 *Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re*
26 *Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
27 judgment for that of the proponents, particularly where, as here, settlement has been reached with the
28 participation of experienced counsel familiar with the litigation. *Nat’l Rural Telecomms. Coop. v.*
DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C.
1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979).

1 While the recommendations of counsel proposing the settlement are not conclusive, the Court
2 can properly take them into account, particularly where, as here, they have been involved in
3 significant discovery and negotiations for some period of time, appear to be competent, have
4 experience with this type of litigation, and have exchanged substantial evidence from the opposing
5 party. *See Newberg on Class Actions, supra*, §11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at
6 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“[s]o long
7 as the integrity of the arm's length negotiation process is preserved, however, a strong initial
8 presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great weight’ is
9 accorded to the recommendations of counsel, who are most closely acquainted with the facts of the
10 underlying litigation”)).

11 Here, Plaintiff’s attorneys have a great deal of experience in wage and hour class action
12 litigation. (Hyun Decl. at ¶¶ 3-6; Marder Decl. ¶¶ 8-14). Plaintiff’s counsel has been approved as
13 class counsel in a number of wage and hour class actions. (Hyun Decl. at ¶ 6; Marder Decl. ¶¶ 13-
14 14). Moreover, Plaintiff’s counsel conducted an extensive investigation of the factual allegations
15 involved in this case since the inception, including engaging in informal and formal discovery and
16 expert analysis. (Hyun Decl. at ¶ 7). Each side has apprised the other of their respective factual
17 contentions, legal theories and defenses, resulting in extensive arms-length negotiations taking place
18 among the Parties. Plaintiff obtained the payroll data for 53 class members, from which Plaintiff’s
19 expert was able to perform a damage analysis. (*Id.*) Further, this settlement was reached only after
20 extensive arms’-length negotiations between highly experienced counsel and well-respected mediator,
21 Michael Loeb, Esq. (*Id.*) The settlement for each participating Class Member is fair, reasonable and
22 adequate, given the inherent risk of litigation, the risk relative to class certification and the costs of
23 pursuing such litigation. It is the result of extensive arms’ length negotiations between counsel for
24 the Parties.

25 Plaintiff believes that he could prevail on the merits; however, Plaintiff also believes in the
26 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in
27 not prevailing on class certification and/or one or more of the causes of action or theories alleged in
28

1 the Complaint and in the possibility of losing at trial or on summary judgment. (Hyun Decl. at ¶¶ 7-
2 9). Defendant adamantly disputes liability as well.

3 The settlement is a compromise for the alleged damages of Class Members for the claims
4 asserted in the Complaint through the date of preliminary approval. The settlement also compensates
5 the Named Plaintiff for his claims and provides Plaintiff with an additional incentive payment for
6 Plaintiff's involvement in this Action, which included meeting with counsel, providing documents,
7 attending mediation, and reviewing the pleadings in this lawsuit. This incentive payment also takes
8 into consideration the risks, time, effort and expenses incurred by Plaintiff in coming forward to
9 provide invaluable information, negotiate and litigate this matter on behalf of all Class Members.

10 Despite the asserted fairness of the settlement terms, should any potential Class Member,
11 upon reviewing the Notice of Class Action Settlement, object to the terms of the settlement as set
12 forth in the Stipulation, each has the right to submit a request for exclusion (*i.e.*, opt out) from the
13 settlement, pursuant to which the Class Member would retain any claim he or she may have against
14 Defendant. Moreover, potential Class Members, upon providing proper notice to the Parties and the
15 Court, may attend the final fairness and approval hearing for the purpose of objecting to one or more
16 of the settlement terms set forth in the Stipulation.

17 Further, the settlement provides a fair amount. Based on the sample payroll and time data,
18 Plaintiff's counsel calculated potential exposure at \$381,724.00. (Hyun Decl. ¶ 7). Thus, the gross
19 settlement recovers approximately 45% of the total exposure. (*Id.*) This amount meets the recovery
20 approved by numerous courts in other class action settlements. *See, e.g., In re Mego Fin. Corp. Secs.*
21 *Litig.*, 213 F.3d 454, 459 (9th Cir.2000); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-
22 JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015); *Van Ba Ma v. Covidien Holding Inc.*, U.S.
Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014).

23 **D. The Proposed Class Settlement Meets the *Kullar* Factors**

24 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th
25 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has conducted
26 sufficient discovery and the settlement is reasonable in light of the strengths of the plaintiff's claims.
27 As discussed herein, Plaintiff's counsel has conducted sufficient discovery and investigation and, in
28

1 light of the strengths and weaknesses of Plaintiff's claims, Plaintiff's attorneys submit that this
2 settlement is fair pursuant to *Kullar*.

3 **1. Plaintiff's Counsel Conducted Adequate Investigation**

4 Since the inception of this case, the Parties have engaged in formal and informal discovery,
5 including completing the depositions of Plaintiff and Defendant's PMK, production of Defendant's
6 policies and payroll data for 53 class members. (Hyun Decl. ¶ 7). The Parties then mediated the case
7 with Mr. Loeb and reached this settlement through arms' length negotiations. (*Id.*)

8 **2. Strengths and Weaknesses of Plaintiff's Claims**

9 Here, Defendant may have prevailed on class certification and on liability as well, including
10 as to whether it acted willfully to support waiting time penalties, which forms the bulk of the
11 exposure. Indeed, the actual unpaid wages comprises only \$64,294.00. (Hyun Decl. ¶ 7). Further,
12 Defendant disputes that it violated any laws, in that it believes that its overtime regular rate formula
13 was and is lawful. Thus, Defendant strongly believes that it would have prevailed. In light of this
14 uncertainty, Plaintiff and his counsel have obtained a concrete monetary remedy to Class Members.

15 **E. The Proposed Class Representative Enhancement and Attorneys' Fees and Costs
16 Sought in the Settlement**

17 Named Plaintiff and Class Counsel will seek approval of the enhancement, attorneys' fees and
18 costs at final approval. Class Counsel will submit detailed records and declarations in connection
19 with the final approval motion.

20 With respect to the class representative enhancement, Named Plaintiff asserts that this amount
21 is particularly justified in this case given the amount of time the Named Plaintiff has expended.
22 Specifically, the Named Plaintiff has invested approximately 60 hours into the prosecution of this
23 matter. In particular, Plaintiff has met and/or conferred with counsel in connection with the
24 assistance of the class claims, such as providing information and various documents, and preparing
25 and sitting for his deposition. (Teschera Decl. ¶ 3). In addition to the above, the risks and
26 consequences involved in the filing of this lawsuit further justify the requested enhancement amount.
27 Indeed, the filing of a class action lawsuit against a former employer can result in unintended
28 consequences of retaliation by future potential employers.

1 Moreover, while other class members will be reaping the benefits of the current settlement,
2 such individuals did not have to put up their personal stakes in the prosecution of this case. Indeed,
3 had Plaintiff failed to prevail on the wage/hour class claims, Plaintiff may have been solely
4 responsible for the costs incurred by Plaintiff's counsel, as well as those of Defendant. Nevertheless,
5 Plaintiff assumed such burdens and risks for the benefit of the various class members.

6 Notably, courts have routinely granted approval of representative enhancements for far greater
7 amounts. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal.
8 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130
9 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$
10 35,000); Here, Plaintiff simply requests a modest enhancement of \$7,500.00 for Plaintiff's extensive
11 services and investment of time and efforts into this case.

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

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

1 set by a court rather than by contract, the object is to set it at a level that will approximate what the
2 market will set... The judge, in other words, is trying to mimic the market in legal services.”).

3 An award of 33% of the fund in attorneys’ fees mimics the marketplace as it “is supported by
4 the fact that typical contingency fee agreements provide that class counsel will recover 33% if the
5 case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*,
6 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of*
7 *Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U. L. Q.
8 653, 659 n. 11). Indeed, “empirical studies [that] show that . . . fee awards in class actions average
9 around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

10 At final approval, Plaintiff’s counsel will respectfully request a modest 33 1/3% of the Gross
11 Settlement Amount, or \$56,666.67 for attorneys’ fees, and reimbursement for actual litigation costs
12 up to \$30,000.00. Plaintiff’s counsel will submit their time records in support of their motion for
13 final approval.

14 **IV. PROPOSED SCHEDULE OF SETTLEMENT ADMINISTRATION**

15 Plaintiff proposes the following schedule for the fairness hearing and final proceedings:

16 1. Defendants shall provide the Administrator, in electronic format and within 15
17 calendar days upon granting of the preliminary approval Order by this Court, the Class List and Data
18 necessary to mail the Notice of Proposed Class Action Settlement to the Class. Within 10 calendar
19 days of receipt of the Class List and Data from Defendant, the Settlement Administrator shall mail the
20 Class Notice by first-class United States mail, postage prepaid, to the last known address(es) of each
21 Plaintiff Class Member.

22 2. Deadline for Objection: within forty-five (45) calendar days after first mailing of
23 notice to class.

24 3. Deadline for Exclusion: within forty-five (45) calendar days after first mailing of
25 notice to class.

26 4. Filing date for Motion for Final Approval of Class Action Settlement, Attorneys’ Fees
27 and Costs, Representative Enhancement and Administration Costs: 16 court days before final
28 approval hearing.

1 5. Fairness Hearing and Final Approval Hearing: to be determined by the Court.

2 **V. CONCLUSION**

3 Based on the foregoing, Plaintiff respectfully requests that the Court grant preliminary
4 approval of the class action settlement.

5 Dated: March 24, 2022

POLARIS LAW GROUP, LLP

6 By: 

7 William L. Marder
8 Attorneys for Plaintiff and the Class
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