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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

NICHOLAS JONES, WAYNE
PAMPALONI, BRANDON
MCCORMICK, DIMITRI TREMBOIS,
CLAYTON RABER, AND GEORGE
SUAREZ, and COURTNEY CLARKE, as
individuals and on behalf of all others
similarly situated,

Plaintiffs,

v.

MEMORYBLUE, INC.; and DOES 1
through 50, inclusive,

Defendant.

Case No. 34-2022-00319308-CU-OR-GDS

**NOTICE OF MOTION AND UNOPPOSED
MOTION FOR ORDER PROVISIONALLY
CERTIFYING SETTLEMENT CLASS,
PRELIMINARILY APPROVING CLASS
SETTLEMENT, AND APPROVING FLSA
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Hearing Date: August 5, 2022
Hearing Time: 9:00 a.m.
Dept: 25
Judge: Hon. Jill Talley

Reservation Number: 2650662

Complaint Filed: May 4, 2022
Trial Date: not yet set

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on August 5, 2022 at 9:00 a.m., or as soon thereafter as the
4 matter may be heard, in Department 25 of the above-entitled Court, Plaintiffs Nicholas Jones, Clayton
5 Raber, Dimitri Trembois, George Suarez, Wayne Pampaloni, Brandon McCormick, and Courtney
6 Clarke (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, will and
7 hereby move this Court for an order provisionally certifying the California Settlement Class and FLSA
8 Collective and granting preliminary approval of the class and collective action Settlement.

9 This motion is based upon this Notice of Motion; the accompanying Memorandum of Points
10 and Authorities; the Declarations of Sally J. Abrahamson and Jennifer Liu filed herewith; and oral
11 argument on the motion.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT**

3 Plaintiffs Nicholas Jones, Clayton Raber, Dimitri Trembois, George Suarez, Wayne Pampaloni,
4 Brandon McCormick, and Courtney Clarke (collectively, “Plaintiffs”) and Defendant memoryBlue, Inc.
5 (“Defendant”) have entered into a classwide settlement (“Settlement”) of \$2,550,000 on behalf of
6 approximately 1,650 California Settlement Class Members and FLSA Collective Members (together
7 with California Settlement Class Members, “Settlement Class Members”). The Court should grant
8 preliminary approval of the Settlement because it provides an excellent monetary result for the
9 California Settlement Class and FLSA Collective, particularly in light of Defendant’s financial
10 condition.¹ Because the Settlement satisfies each of the applicable *Kullar* factors and certification of the
11 California Settlement Class for settlement purposes is appropriate, the Court should grant Plaintiffs’
12 unopposed motion and approve issuance of notice of the Settlement to Settlement Class Members in the
13 form attached as Exhibit A to the Parties’ Settlement Agreement.

14 **II. INTRODUCTION**

15 Plaintiffs seek preliminary approval of a \$2,550,000 class and collective action settlement (the
16 “Settlement”) on behalf of approximately 1,650 Sales Development Representatives (“SDRs”) who were
17 employed by Defendant. Defendant classified Plaintiffs and other SDRs as exempt from the overtime
18 provisions of the Fair Labor Standards Act (“FLSA”) and the California Labor Code. Plaintiffs allege
19 that Defendant violated the FLSA and California law by misclassifying Plaintiffs and other SDRs as
20 exempt and failing to pay them overtime when they worked more than 40 hours per week or 8 hours per
21

22 ¹ On March 25, 2022, Defendant produced a list of 1,370 eligible California Settlement Class
23 Members and FLSA Collective Members employed through February 28, 2022. Because the end of the
24 class period is June 30, 2022 and the release period for Settlement Class Members will be the date of the
25 Court’s order granting preliminary approval, it is not yet possible to provide an exact number of
26 Settlement Class Members. Abrahamson Decl. ¶ 22. The Parties estimate 280 additional FLSA
27 Collective Members and California Settlement Class Members will be added, who were hired or are
28 anticipated to be hired between March 1, 2022 and June 30, 2022. *Id.* Plaintiffs will provide the precise
number of California Settlement Class Members and FLSA Collective Members when they file for final
approval. *Id.*

1 day. Plaintiffs also allege that Defendant violated California law by failing to provide Plaintiffs and
2 other SDRs who worked in California with: (1) all wages owed, including overtime wages, at the time of
3 separation; (2) timely, accurate and itemized wage statements; (3) meal and rest breaks; and (4)
4 reimbursement for necessary business expenses. Plaintiffs also allege that Defendant's conduct resulted
5 in a cost savings to Defendant and gave Defendant an unlawful and unfair business advantage in
6 violation of California's Unfair Competition Law ("UCL"). Finally, Plaintiffs allege that Defendant's
7 conduct resulted in violations of California's Private Attorneys General Act ("PAGA").

8 After over a year and a half of informal discovery and settlement negotiations, Plaintiffs and
9 Defendant (the "Parties") agreed to settle this class and collective action for \$2,550,000. The Settlement
10 represents an excellent outcome for the Settlement Class Members and satisfies all criteria for
11 preliminary approval. Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the
12 Joint Stipulation of Class Action Settlement and Release ("Settlement Agreement"), attached as
13 **Attachment A** to the Declaration of Sally J. Abrahamson ("Abrahamson Decl."); (2) provisionally
14 certify the proposed class for settlement purposes; (3) appoint Liu Peterson-Fisher LLP and Werman
15 Salas P.C. as Class Counsel; (4) approve the Notice of Proposed Class Action Settlement ("Notice") and
16 direct its distribution to the Settlement Class Members; and (5) approve the settlement of the FLSA
17 claims as fair and reasonable. Defendant does not oppose this Motion.

18 **III. FACTUAL AND PROCEDURAL BACKGROUND**

19 **A. Summary of the Case**

20 Plaintiffs' Class Action Complaint asserted nine causes of action: (1) unpaid overtime wages
21 pursuant to the FLSA, 29 U.S.C. § 201, *et seq.*; (2) unpaid minimum wages pursuant to Labor Code
22 Sections 1194, 1194.2, and 1197; (3) unpaid overtime wages pursuant to Labor Code Sections 510 and
23 1194 and IWC Wage Order No. 4-2001; (4) failure to pay earned wages upon separation under Labor
24 Code Sections 201-204; (5) failure to provide timely and accurate wage statements under Labor Code
25 Section 226; (6) failure to provide meal and rest breaks under Labor Code Sections 226.7, and 512 and
26 IWC Wage Order No. 4-2001; (7) failure to reimburse business expenses under Labor Code Section

2802; (8) violations of the UCL pursuant to the Business and Professions Code Section 17200, *et seq.*; and (9) violations of PAGA, Labor Code Section 2698, *et seq.*

Plaintiffs allege that Defendant misclassified Plaintiffs and other SDRs as exempt from the overtime requirements of federal and state law, that SDRs regularly worked more than 40 hours per week and 8 hours per day, and that Defendant did not pay SDRs overtime premium pay for overtime hours worked in violation of the FLSA, 29 U.S.C. § 201 *et seq.*, Labor Code Sections 510 and 1194, and IWC Wage Order No. 4-2001 or even minimum wages for all hours worked. Compl. ¶¶ 1-2, 95-111, filed May 4, 2022. Plaintiffs also allege that Defendant did not provide California SDRs with legally compliant meal and rest periods in violation of Labor Code Sections 226.7 and 512 and IWC Wage Order No. 4-2001. Compl. ¶¶ 2, 120-24, filed May 4, 2022.

Additionally, Plaintiffs allege that Defendant's improper misclassification of SDRs as exempt resulted in Defendant failing to pay SDRs owed overtime pay upon their separation from employment, in violation of Labor Code Sections 201 through 204 (Compl. ¶¶ 2, 112-16, filed May 4, 2022); and failing to provide them with timely, accurate, and itemized wage statements that included their actual hours worked in violation of Labor Code Section 226 (Compl. ¶¶ 2, 117-19, filed May 4, 2022).

Plaintiffs further allege that Defendant failed to reimburse SDRs for business expenses, because Defendant required California Plaintiffs and Class Members to pay back Defendant up to \$5,000 for on-the-job training if they left Defendant's employment in under 12-15 months, in violation of Labor Code Section 2802. Compl. ¶¶ 2, 125-29, filed May 4, 2022.

Plaintiffs also allege that the above violations serve as predicates for a claim under Business and Professions Code Section 17200, *et seq.* Compl. ¶¶ 130-37, filed May 4, 2022. Finally, Plaintiffs allege that the above violations are also violations of PAGA. Compl. ¶¶ 138-47, filed May 4, 2022.

Defendant, however, has denied and continues to deny any wrongdoing and denies that it committed, threatened, or attempted to commit any of the wrongful acts or violation of law or duty that are alleged herein, and instead contends that Defendant has acted properly at all times. Defendant also denies that Plaintiffs or any SDRs are entitled to any form of damages, penalties, or any relief whatsoever (at law or at equity) based on the conduct alleged herein and in the Complaint.

1 **B. Overview of the Investigation and Discovery Conducted**

2 Before initiating this Action,² Class Counsel conducted a thorough investigation into the merits
3 of the potential claims and defenses, as well as legal research into the underlying merits of the
4 Settlement Class Members' claims, the damages to which they were entitled, and the likelihood of
5 certifying a class. Abrahamson Decl. ¶ 6. As part of their investigation, Class Counsel interviewed
6 Plaintiffs and 12 other witnesses at length and conducted in-depth background research on Defendant
7 and Defendant's pay practices, including reviewing Defendant's website, job postings, and statements of
8 SDRs posted on websites like Glassdoor.com. *Id.*

9 On November 20, 2020, Class Counsel sent a letter to Defendant outlining Plaintiffs' claims and
10 inviting Defendant to discuss resolution of those claims on a class-wide basis for all SDRs. *Id.* ¶ 7. On
11 December 2, 2020, counsel for the Parties entered into a tolling agreement to allow for pre-litigation
12 discussion of the claims alleged in Plaintiffs' letter. *Id.* ¶ 8.

13 Defendant's counsel produced semi-monthly payroll data for 1,370 SDRs who worked for
14 Defendant, as well as records reflecting the employment status and last date of employment (if
15 applicable) for employees. Abrahamson Decl. ¶ 9.

16 **C. Estimate of the Nature and Amount of Potential Recovery**

17 Class Counsel used the pay data and employment information Defendant produced to construct a
18 damages model. Abrahamson Decl. ¶ 10. To date, Defendant's data included 34,662 total workweeks
19 for the employees who worked outside of California and 6,969 total workweeks for the California
20 employees. *Id.* Based on the pay data produced by Defendant and Class Counsel's investigation, Class
21 Counsel estimated that Plaintiffs and other SDRs typically worked four (4) hours of overtime in two-
22 thirds (66%) of the workweeks. *Id.* ¶ 11. Additionally, Class Counsel estimated that California SDRs
23 missed one-third (33%) of their meal and rest breaks. *Id.* ¶ 12. Based on these estimates, a breakdown of
24 the maximum theoretical damages and penalties for each claim is reflected in the chart below:

25
26
27 ² The capitalized terms used herein have the same definitions as set forth in the Settlement
28 Agreement, unless specifically noted.

Claim	Damages/Penalties Owed
Overtime Damages	\$2,945,669.19
Unlawful Deductions	\$138,186.27
Wage Statement	\$533,800.00
Earned Wages Upon Separation Penalties	\$1,699,009.39
Meal Break Penalties	\$403,720.32
Rest Break Penalties	\$403,720.32
TOTAL	\$6,124,105.48

Abrahamson Decl. ¶ 13.³

D. The Settlement Negotiations

On August 4, 2021, the Parties engaged in a mediation with Dina Jansenson, Esq., an experienced mediator with JAMs who has substantial experience mediating wage-and-hour class actions, but were unable to settle the case because Plaintiffs needed additional information regarding Defendant's claims it had financial hardships that limited its settlement ability. Abrahamson Decl. ¶ 14.

As part of further settlement negotiations, Defendant produced financial records and Class Counsel hired Joseph Orbach, an experienced bankruptcy attorney, to do an independent analysis of Defendant's financial ability to settle. Abrahamson Decl. ¶ 15. Based on his analysis, Mr. Orbach found that Defendant would have difficulties paying a judgment in the coming year of more than the Maximum Settlement Amount. *Id.*

On November 9, 2021, the Parties participated in a second day-long Zoom mediation with Ms. Jansenson. Abrahamson Decl. ¶ 16. The Parties did not settle but agreed to consider a mediator's monetary proposal, which they ultimately accepted. *Id.* During the next six months, the Parties vigorously negotiated the details of the Settlement Agreement and ultimately executed it on May 26,

³ The Parties negotiated the FLSA Collective as "all persons who are current or former employees of Defendant who worked outside of California as Sales Development Representatives at any time between December 2, 2017 and June 30, 2022" and the California Settlement Class as "all persons who are current or former employees of Defendant who worked in California as Sales Development Representatives at any time between December 2, 2016 and June 30, 2022." Abrahamson Decl., Attach. A (Settlement Agreement) §§ I(D), I(P). The estimated damages herein are based on the numbers of employees and weeks worked as of March 25, 2022. Because the end date for the Settlement Class falls after the filing of the preliminary approval motion, some additional Settlement Class Members will be added after June 30, 2022. Plaintiffs will provide an updated analysis when they file for final approval.

2022. *Id.* ¶ 17. At all times, the settlement negotiations were conducted vigorously on an arm’s-length basis. *Id.*

E. PAGA Compliance

On July 12, 2022, contemporaneously with the filing of this Motion with the Court, Plaintiffs filed a copy of the Settlement Agreement and this Motion with the LWDA. Abrahamson Decl. ¶ 18.

IV. SUMMARY OF THE SETTLEMENT TERMS

A. The Maximum Settlement Amount

The Settlement Agreement creates a common fund of \$2,550,000 to settle the claims against Defendant (the “Maximum Settlement Amount”). Abrahamson Decl., Attach. A (Settlement Agreement) § I(S). The Maximum Settlement Amount allocated to California Settlement Class Members is non-reversionary. *Id.* § X(B). The Maximum Settlement Amount allocated to FLSA Collective Members will be paid out to all FLSA Collective Members who cash their checks; uncashed checks to FLSA Collective Members will revert to Defendant. *Id.* The Parties estimate that 23% of the Maximum Settlement Amount will be allocated to California Settlement Class Members and 77% to FLSA Collective Members. Abrahamson Decl. ¶ 19. Based on their experience in similar cases, the Parties expect the majority of FLSA Collective Members to cash their checks. *Id.* ¶ 20.

The Maximum Settlement Amount covers Net Settlement Payments to Participating Class Members (California Settlement Class Members who do not exclude themselves from the Settlement) and the FLSA Collective, the employee portion of the payroll taxes on the Net Settlement Payment, Administrative Costs, Litigation Enhancement Awards to Named Plaintiffs, attorneys’ fees and litigation costs, and payment of PAGA penalties to the California Labor and Workforce Development Agency (“LWDA”). *Id.* § I(S). The Maximum Settlement Amount does not include the employer’s share of payroll taxes, which Defendant shall pay separately and apart from the Maximum Settlement Amount. *Id.*

B. California Settlement Class Members

California Settlement Class Members include all persons who are current or former employees of Defendant who worked in California as Sales Development Representatives at any time between

December 2, 2016 and June 30, 2022. Abrahamson Decl., Attach. A (Settlement Agreement) § I(D). Based on the data produced by Defendant on March 25, 2022, there are currently 255 California Settlement Class Members, although Defendant hired and plans to hire additional SDRs between March 1, 2022 and June 30, 2022, who will be included in the California Settlement Class. Abrahamson Decl. ¶ 21.

C. FLSA Collective

The FLSA Collective includes all persons who are current or former employees of Defendant who worked outside of California as Sales Development Representatives at any time between December 2, 2017 and June 30, 2022. Abrahamson Decl., Attach. A (Settlement Agreement) § I(P). Based on the data produced by Defendant on March 25, 2022, there are currently 1,197 FLSA Collective Members, 1,115 of whom worked outside of California. Abrahamson Decl. ¶ 22. Defendant hired and plans to hire additional SDRs between March 25, 2022 and June 30, 2022, who will be included in the FLSA Collective. Abrahamson Decl. ¶ 23.

D. Allocation of the Net Settlement Amount

The Net Settlement Amount available for distribution to the California Settlement Class Members who do not exclude themselves from the Settlement (“Participating Class Members”) and the FLSA Collective Members who opt in to this Action by negotiating their settlement payment (“Participating Collective Members”) is the Maximum Settlement Amount less the Administrative Costs, Litigation Enhancement Awards to Named Plaintiffs, attorneys’ fees and litigation costs, payment of PAGA penalties to the LWDA, and employee share of taxes. Abrahamson Decl., Attach. A (Settlement Agreement) § I(U). The Net Settlement Amount shall be allocated to Participating Class Members and FLSA Collective Members on a pro rata basis. The Claims Administrator shall determine the number of workweeks each Qualified Settlement Participant worked during the Class Period. Abrahamson Decl., Attach. A (Settlement Agreement) § X(A). For each FLSA Collective Member employed outside of California, the Claims Administrator shall assign one point for each workweek the individual worked during the Class Period. For each California Settlement Class Member, the Claims Administrator shall assign 1.5 points for each workweek the individual worked during the Class Period

1 to account for the value of the additional California state law claims they are releasing. *Id.* To calculate
2 the proportionate share of the Net Settlement Amount for each member of the California Settlement
3 Class and the FLSA Collective, the Claims Administrator shall:

4 a. Add all points for each member of the California Settlement Class and FLSA Collective
5 together to obtain the “Total Denominator”;

6 b. Divide the number of points for each member of the California Settlement Class and the
7 FLSA Collective by the Total Denominator to obtain the “Portion of the Net Settlement Amount” for
8 each member of the California Settlement Class and the FLSA Collective;

9 c. Multiply the Portion of the Net Settlement Amount for each member of the California
10 Settlement Class and the FLSA Collective by the total Net Settlement Amount to determine the
11 estimated individual lump-sum payment to each member of the California Settlement Class and FLSA
12 Collective. *Id.*

13 There is no claims process. Abrahamson Decl. ¶ 24; *Id.*, Attach. A (Settlement Agreement) §
14 VIII, Attach. A, Exhibit A (Notice). The California Settlement Class Members and FLSA Collective
15 Members do not need to take any action to participate in the Settlement and will automatically receive a
16 check for their settlement payment if they do not exclude themselves from the Settlement. Abrahamson
17 Decl. ¶ 25. Participating Class Members and FLSA Collective Members will have 180 days to cash their
18 settlement checks after the Claims Administrator mails them. Abrahamson Decl., Attach. A (Settlement
19 Agreement) § X(B). Any funds from the distribution of payments to Participating Class Members that
20 remain uncashed after 180 Days from the date the settlement checks are issued shall be transmitted to
21 the unclaimed property fund consistent with Code of Civil Procedure section 384. *Id.* Uncashed
22 settlement checks from the payments to members of the FLSA Collective will not be re-issued and the
23 monies, and Employer Payroll Taxes on those amounts, will revert back to Defendant after 180 Days
24 from their date of issue. *Id.*

25 **E. Tax Characterization**

26 For tax purposes, for Participating Class Members, 33% of each settlement payment shall be
27 allocated as wages subject to applicable employer and employee tax withholdings and will be reported
28

1 to taxing authorities and to the payee on an IRS Form W-2. Abrahamson Decl., Attach. A (Settlement
2 Agreement) § XVII. The remaining 67% of each settlement payment shall be treated as liquidated
3 damages and penalties, shall be made without withholdings, and shall be reported to the IRS and the
4 payee, to the extent required by law, on an IRS Form 1099. *Id.* This allocation is proper because it
5 approximates the proportion of the Settlement Class Members' total recovery due to wages versus
6 liquidated damages and penalties under California law. Abrahamson Decl. ¶ 26.

7 For FLSA Collective Members, 50% of each settlement payment shall be allocated as wages
8 subject to applicable employer and employee tax withholdings and will be reported to taxing authorities
9 and to the payee on an IRS Form W-2. Abrahamson Decl., Attach. A (Settlement Agreement) § XVII.
10 The remaining 50% of each settlement payment shall be treated as liquidated damages and penalties,
11 shall be made without withholdings, and shall be reported to the IRS and the payee, to the extent
12 required by law, on an IRS Form 1099. *Id.* These allocations are proper because they approximate the
13 proportion of the Settlement Class Members' total recovery due to wages versus liquidated damages and
14 penalties under federal law. Abrahamson Decl. ¶ 27.

15 The Claims Administrator shall be responsible for calculating the payroll tax and withholdings
16 on the Individual Settlement Payments. Abrahamson Decl., Attach. A (Settlement Agreement) § X(B).

17 **F. The Settlement Class Members' Release**

18 The releases for Participating Settlement Class Members and FLSA Collective Members are
19 congruent with the allegations in the Complaint. Abrahamson Decl. ¶ 28. The Settlement Agreement
20 provides that all California Settlement Class Members who do not timely file a Request for Exclusion
21 from the Settlement will release:

22 Released Parties from any and all claims under state, federal, or local law, whether
23 statutory, common law, or administrative law, arising out of or related to the
24 allegations set forth in the operative Complaint in the Action, including but not limited
25 to unpaid wages, statutory penalties, civil penalties, including PAGA penalties,
26 injunctive relief, punitive damages, liquidated damages, penalties of any nature,
27 interest, fees, and costs, that arose during the California Released Claims Period. The
28 allegations set forth in the operative Complaint in the Action for violations of
California law include, but are not limited to, unpaid wages; unpaid overtime;
violations of meal and rest period requirements; failure to timely pay wages during

employment and upon separation; unlawful deductions for training costs; failure to reimburse for necessary business expenses; failure to provide accurate wage statements; failure to keep accurate records; violations of California's Unfair Competition Law; and violations of the PAGA.

Abrahamson Decl., Attach. A (Settlement Agreement) § VII(A).

The Settlement Agreement provides that all FLSA Collective Members who endorse their settlement payment will release:

Released Parties from any and all claims under state, federal, or local law arising out of or related to the allegations set forth in the operative Complaint in the Action, including but not limited to unpaid wages, unpaid overtime, liquidated damages, penalties of any nature, interest, fees, and costs that arose during the FLSA Released Claims Period.

Id. § VII(B).

G. The Named Plaintiffs' General Release

In exchange for their Class Representative Litigation Enhancement Payments, Plaintiffs, individually and on behalf of Named Plaintiffs' respective heirs, executors, administrators, representatives, attorneys, and successors, will release the Released Parties from the Released Claims identified above, to the full extent permitted by law, of and from any and all claims, known and unknown, asserted and unasserted, which Named Plaintiffs have or may have against the Released Parties as of the date of execution of the Settlement Agreement. Abrahamson Decl., Attach. C (General Release) § 5. In addition, Plaintiffs expressly waive and relinquish the provisions, rights and benefits under California Civil Code 1542, or any other similar provision under federal or state law. *Id.* § 6.

H. Attorneys' Fees and Litigation Costs; Class Representative Enhancement Payment

At the Fairness Hearing, Class Counsel will apply for up to one-third (33.33%) of the Maximum Settlement Amount for attorneys' fees (\$850,000.00). Abrahamson Decl. ¶ 29; *Id.*, Attach. A (Settlement Agreement) § XV. Class Counsel's representation agreements with Plaintiffs provide that Class Counsel may apply for up to one-third of the total recovery as attorneys' fees. Abrahamson Decl. ¶ 30. Plaintiffs have reviewed and approved in writing the fee splitting arrangement between Class Counsel Werman Salas P.C. and Liu Peterson-Fisher LLP. *Id.* ¶ 31. The requested percentage of fees is appropriate under the percentage-of-the-fund method. *Lafitte v. Robert Hal Int'l, Inc.* (2016) 1 Cal. 5th

1 480, 503 (affirming an award of attorneys’ fees equal to one-third of the common fund); *Chavez v.*
2 *Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, fn. 11 (“Empirical studies show that, regardless whether
3 the percentage method or the lodestar method is used, fee awards in class actions average around one-
4 third of the recovery.”) (quoting *Shaw v. Toshiba Am. Information Sys., Inc.* (E.D. Tex. 2000) 91 F.
5 Supp. 2d 942, 972). Class Counsel will further address the justifications for their fee request when they
6 file their motion for final approval of the Settlement.

7 Additionally, Class Counsel will seek reimbursement from the Maximum Settlement Amount of
8 their reasonable and actual litigation costs and expenses, not to exceed \$15,000. Abrahamson Decl. ¶ 32;
9 *Id.*, Attach. A (Settlement Agreement) § XV.

10 Class Counsel will also move the Court for approval of Class Representative Enhancement
11 Payments of \$10,000 for each Plaintiff, in recognition of (1) their services on behalf of the Settlement
12 Class Members, (2) the risk of potential discrimination by future employers they incurred by filing the
13 Action in their name, and (3) the release they are providing as part of the Settlement, which is broader
14 than the release given by the other Settlement Class Members. Abrahamson Decl. ¶ 33; *Id.*, Attach. A
15 (Settlement Agreement), §§ VII(C), XIV. This enhancement is reasonable in light of the time and effort
16 Plaintiffs spent conferring with Class Counsel, the documents and information they provided to Class
17 Counsel, and the risks they took by filing the Action in their name. Abrahamson Decl. ¶ 34. Class
18 Counsel will further address the justification for the requested Class Representative Enhancement
19 Awards when they file their motion for Final Approval, which shall be supported by Declarations from
20 Plaintiffs. *Id.* ¶ 35. Pursuant to the Settlement Agreement, any amount requested for Class Counsel’s
21 fees or costs or the Class Representative Enhancement Awards that are not approved shall be allocated
22 to the Participating Class Members and the FLSA Collective Members. Abrahamson Decl., Attach. A.
23 (Settlement Agreement) §§ XIV, XV.

24 **I. The Claims Administrator**

25 The Parties mutually agreed that Analytics Consulting LLC (“Analytics”) should serve as the
26 Claims Administrator responsible for administering the Settlement. Abrahamson Decl. ¶ 36. Analytics is
27 a well-established class action settlement administrator and has substantial experience administering
28

wage-and-hour class action settlements. *Id.* Analytics has agreed to administer the Settlement for an amount not to exceed \$24,053. *Id.* ¶ 37. The Claims Administrator's Costs shall be paid from the Maximum Settlement Amount. Abrahamson Decl., Attach. A. (Settlement Agreement) § I(S).

The Claims Administrator shall be responsible for: (1) preparing, issuing, mailing and emailing the Notice of Proposed Class Action Settlement to the Settlement Class Members; (2) processing any Requests for Exclusion or Objections to the Settlement; (3) reviewing any workweek disputes and resolving any related disputes; (4) computing, processing, reviewing, and paying the individual settlement payments to Participating Class Members and FLSA Collective Members; (5) establishing and maintaining a Qualified Settlement Fund, including all associated tax document preparation, and paying all custodial and accounting fees; (6) calculating tax withholdings and payroll taxes, making related payments to the appropriate state and federal taxing authorities, and issuing tax forms relating to payments made under the Settlement; (7) remitting the funds from any Participating Class Members' uncashed checks to the applicable unclaimed property funds; and (8) any other tasks the Court may assign. *Id.* §§ VIII-X, XIII, XVII.

J. Settlement Approval and the Settlement Administration Schedule

The following schedule sets forth a proposed sequence of the relevant dates and deadlines as specified in the Settlement Agreement. This schedule is also incorporated in the Proposed Order contemporaneously filed herewith.

Seven days after the Court grants Preliminary Approval of Settlement	Defendant shall wire the first installment payment of One Million Five Hundred Fifty Thousand Dollars and Zero Cents (\$1,550,000.00) to the Claims Administrator. Abrahamson Decl., Attach. A (Settlement Agreement) § X(B).
30 days after the Court grants Preliminary Approval of Settlement	Defendant provides the Class Data to the Claims Administrator and Class Counsel. <i>Id.</i> § VIII(A)(b).
21 days after receiving the Class Data from Defendant	Claims Administrator shall mail and email the Notice of Proposed Class Action Settlement materials to all the Settlement Class Members via regular First-Class U.S. Mail and email. <i>Id.</i>

1 2 3 4 5 6 7 8	Within five days of receiving any Notices of Class Action Settlement that are returned as undeliverable before the Response Deadline	Claims Administrator will forward any Notices of Class Action Settlement returned as non-deliverable with a forwarding address to the forwarding address provided. For any Notices returned as undeliverable without a forwarding address, the Claims Administrator shall attempt to locate an address by way of skip-trace and promptly re-mail the returned Notice. <i>Id.</i> If a Notice is re-mailed to a member of the California Settlement Class or FLSA Collective within 21 Days of the deadline date, that individual shall have 21 Days from the date the Notice is re-mailed to respond. <i>Id.</i>
9 10	45 days after the initial mailing of the Notice of Proposed Class Action Settlement materials are mailed by the Claims Administrator	The Settlement Class Members must submit Requests for Exclusion from or Objections to the Settlement or workweek disputes to the Claims Administrator. <i>Id.</i>
11 12 13 14 15 16	24 calendar days prior to the Final Approval Hearing	The Claims Administrator shall provide Class Counsel and Defense Counsel with a declaration attesting to the completion of the notice process, including the number of attempts to obtain valid mailing addresses for and re-sending of any returned Notices, as well as the number of valid disputes submitted, Requests to be Excluded, and deficiencies that the Claims Administrator received. <i>Id.</i>
17 18 19	16 Court days prior to the Final Approval Hearing	Class Counsel shall file a Motion for Final Approval of the terms of the Settlement Agreement and a Motion for Attorneys' Fees, Costs, and Litigation Enhancements. <i>Id.</i> § XVIII.
20	Final Approval Hearing	Determined by the Court
21 22 23 24 25 26 27	20 days after the Court enters a final Order and Judgment certifying the California Settlement Class, dismissing the Action with prejudice, and approving the Settlement Agreement; or, in the event there are written objections filed prior to the final fairness hearing that are not later withdrawn or denied, the later of the following events: seven days after the period for filing any appeal, writ, or other appellate proceeding opposing the Court's Final Approval has elapsed without any appeal, writ,	The Effective Date. <i>Id.</i> § I(L).

1 2 3 4 5	or other appellate proceeding having been filed; or, if any appeal, writ, or other appellate proceeding opposing the Court's Final Approval has been filed, seven days after any appeal, writ, or other appellate proceedings opposing the Settlement Agreement has been finally and conclusively dismissed with no right to pursue further remedies or relief	
6 7	14 days after the Court enters its Final Approval Order	The Claims Administrator shall determine the Employer Payroll Taxes and shall communicate such amount to Defendant with a detailed explanation of the calculations. <i>Id.</i> § X(B).
8 9	Seven days after the Effective Date	Defendant shall wire the second installment payment of One Million Dollars and Zero Cents (\$1,000,000.00) and Employer Payroll Taxes to the Claims Administrator. <i>Id.</i> § X(B).
10 11 12 13 14 15 16	30 days after receipt of the second installment of the Maximum Settlement Amount	The Claims Administrator shall mail the payment checks to all (a) Participating Class Members and FLSA Collective Members; (b) the Court-approved litigation enhancements to Named Plaintiffs; (c) the Court-approved attorneys' fees and litigation costs to Class Counsel; and (d) the civil penalties due to the LWDA. The Claims Administrator will also issue payment to itself for Court-approved services performed in connection with the settlement. <i>Id.</i>
17 18 19 20 21 22 23 24 25 26	180 days after the Claims Administrator mails settlement payment checks	The deadline for Participating Class Members and FLSA Collective Members to cash their Individual Settlement Payment checks. Any funds from the distribution of payments to Participating Class Members that remain uncashed after 180 days from the date the settlement checks are issued shall be transmitted to the unclaimed property fund consistent with Code of Civil Procedure section 384. Uncashed settlement checks from the payments to members of the FLSA Collective will not be re-issued and the monies, and Employer Payroll Taxes on those amounts, will revert back to Defendant after 180 days from their date of issue. <i>Id.</i>

1 **V. ARGUMENT**

2 **A. The Settlement Meets the Requirements for Preliminary Approval**

3 The Court should preliminarily approve the Settlement, which meets all relevant criteria for
4 approval. “A trial court may approve only a settlement of a class action that is fair, adequate, and
5 reasonable.” *Roos v. Honeywell Int’l, Inc.* (2018) 241 Cal. App. 4th 1472, 1482, *disapproved of on*
6 *other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260. In reviewing a class
7 action settlement for fairness, ““due regard should be given to what is otherwise a private consensual
8 agreement between the parties”” and the inquiry ““must be limited to the extent necessary to reach a
9 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
10 between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
11 adequate to all concerned.”” *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1389,
12 quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1145.

13 When evaluating the reasonableness of a class action settlement, the Court should consider (1)
14 the strength of the plaintiff’s case; (2) the risk, expense, complexity and likely duration of further
15 litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in
16 settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience
17 and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class
18 members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116,
19 128, *citing Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801 (the “*Kullar Factors*”). A
20 presumption of fairness exists where “(1) the settlement is reached through arm’s-length bargaining; (2)
21 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel
22 is experienced in similar litigation; and (4) the percentage of objectors is small.” *Id.*, quoting *Dunk*, 48
23 Cal. App. 4th at 1802.

1 **1. The Strength of Plaintiffs' Case Balanced Against the Amount Offered in**
2 **Settlement**

3 In determining whether a class action settlement is fair, adequate, and reasonable, the most
4 important factor is the strength of the plaintiff's case on the merits, balanced against the settlement
5 amount offered. *Kullar*, 168 Cal. App. 4th at 130. While Class Counsel believe Plaintiffs' claims are
6 strong, they recognize the risks involved in continued litigation, which include failing to successfully
7 certify a California class and/or a nationwide FLSA collective, having a class and/or FLSA collective
8 decertified before trial, losing on the merits, and proving damages.

9 First, Defendant argued that all SDRs were paid correctly for overtime worked. Abrahamson
10 Decl. ¶ 38. Defendant argued that any exempt classification was proper and that it paid many SDRs a set
11 daily amount, that included 10.36 hours per day, even if SDRs did not work all overtime hours for which
12 it compensated them. *Id.* ¶ 39. Defendant argued if SDRs' hours exceeded 10.36 in a day, they would be
13 paid additional overtime. *Id.* ¶ 40. Furthermore, some California courts have refused to certify classes of
14 employees who allege they were misclassified pursuant to California's commissioned salesperson
15 exemption, finding that the applicability of the exemption requires individualized determinations as to
16 each employee's day-to-day job activities and therefore plaintiffs cannot establish commonality or
17 predominance. *See, e.g., Alokzai v. Chase Inv. Servs. Corp.* (C.D. Cal. Oct. 6, 2014) No. CV 11-09178
18 SJO (JCx), 2014 WL 5660697, at *10 (whether the California salesperson exemption applies requires
19 individualized determinations into each employee's job duties, precluding a finding of commonality);
20 *Maddock v. KB Homes, Inc.* (C.D. Cal. 2007) 248 F.R.D. 229, 246 (denying class certification because
21 applicability of commissioned salesperson exemption as well as meal and rest break claims turned on
22 individual issues); *Perry v. U.S. Bank* (N.D. Cal. Oct. 16, 2001) No. C-00-1799-PJH, 2001 WL
23 34920473, at *7 (denying plaintiff's motion to certify a class of personal bankers allegedly misclassified
24 under the commissioned salesperson exemption because individual factual issues related to their job
25 duties predominated over common factual questions). As the California Supreme Court noted in *Duran*
26 *v. U.S. Bank Nat'l Assn.*, "a misclassification claim has the potential to raise numerous individual
27
28

1 questions that may be difficult, or even impossible, to litigate on a classwide basis.” (2014) 59 Cal. 4th
2 1, 27.

3 Second, even if Plaintiffs successfully certified their class claims, Defendant could move to
4 decertify such claims at any time before trial. *See Vasquez v. Super. Ct.* (1971) 4 Cal. 3d 800, 821
5 (“[R]ule 23 provides that the trial court’s initial determination [on class certification] may be conditional
6 and may be altered or amended before a decision on the merits.”); *see, e.g., Cole v. CRST, Inc.* (C.D.
7 Cal. 2016) 317 F.R.D. 141, 145-46 (decertifying a Rule 23 meal and rest period class because the
8 plaintiff could not show that the defendant had a policy of preventing employees from taking meal and
9 rest breaks and therefore individualized questions predominated).

10 Third, even if the SDRs were misclassified, Defendant disputed that they worked any overtime at
11 all and disputed that they worked from home or on the weekends. Abrahamson Decl. ¶ 41.

12 And finally, even if Plaintiffs successfully certified their class claims, survived a motion for
13 decertification, and prevailed on the merits, Plaintiffs and the Settlement Class Members still would
14 have had to prove the extent of their damages. Abrahamson Decl. ¶ 42. Attempting to prove the amount
15 of unpaid overtime wages owed to Plaintiffs and the Settlement Class Members would have required
16 extensive analysis of activity logs and timestamp records, call and email histories, and testimonial
17 evidence. *Id.* Thus, this factor weighs in favor of granting preliminary approval.

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

19 The Settlement provides the Settlement Class Members with a substantial monetary benefit in
20 exchange for a limited release, while further litigation would expose the Settlement Class Members to
21 significant risk as well as substantial expense and delay. First, as part of the settlement negotiations,
22 Defendant produced financial records and Class Counsel hired Joseph Orbach, an experienced
23 bankruptcy attorney, to do an independent analysis of Defendant’s financial ability to settle.
24 Abrahamson Decl. ¶ 43. Based on his analysis, Mr. Orbach found that Defendant would have difficulties
25 paying a judgment in the coming year of more than the Maximum Settlement Amount. *Id.* The risk that
26 Plaintiffs may not have been able to collect on a larger judgment was substantial. *Id.*

1 Second, if this case were to go to litigation, Plaintiffs would move for conditional certification of
2 a collective under the FLSA, which would require additional briefing. *Id.* ¶ 44. If Plaintiffs’ motion was
3 granted, notice of the case would be issued and SDRs would be given the opportunity to join the case as
4 opt-in plaintiffs. *Id.* Litigating the case would also involve extensive discovery, including substantial
5 discovery of electronically stored information and, most likely, numerous motions to compel. *Id.* ¶ 45.
6 After discovery, Plaintiffs would move for class certification of the California claims, and the Parties
7 would expend further time and resources briefing that motion, along with a likely motion for summary
8 judgment and a potential motion to decertify the FLSA Collective and California class. *Id.* ¶ 46. The
9 litigation could drag on for years before the case proceeded to trial, which, if tried on a class-wide basis,
10 would be lengthy and complex. *Id.* ¶ 47. Even if Plaintiffs prevailed at trial, an appeal could further
11 prolong the proceedings (and delay recovery for the Class). *Id.*

12 Given the risk, delay, and complexity associated with further litigation, approval of the
13 Settlement is appropriate. *See Bayat v. Bank of the West* (N.D. Cal. Apr. 15, 2015) No. 13 Civ. 2376
14 EMC, 2015 WL 1744342, at *4 (“Absent settlement, the costs and complexity of this case will certainly
15 increase as motions to dismiss, summary judgment motions, and class certification motions (along with
16 associated discovery) will need to be litigated.”).

17 **3. The Risk of Obtaining and Maintaining Class Action Status Through Trial**

18 The fact that Plaintiffs have not yet obtained class certification in this case also weighs in favor
19 of preliminary approval. Plaintiffs face numerous obstacles to obtaining class certification of their
20 California claims; *see supra* at Section V.A.1. Even if Plaintiffs had obtained certification on all or some
21 of their California claims, Defendant could have sought decertification of the class or subclasses before
22 trial. *See Vasquez* (1971) 4 Cal. 3d at 821; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal. App.
23 4th 1440, 1444, *as modified* (Mar. 28, 2007) (appeal from an order decertifying one of several
24 subclasses). Given the substantial risks Plaintiffs would face in both obtaining and subsequently
25 maintaining class certification, this factor weighs in favor of preliminary approval.

26 **4. The Amount Offered in Settlement**

27 The Settlement of \$2,550,000 offers substantial relief to the Settlement Class Members, and is
28

1 fair, adequate, and reasonable. Based on Defendant’s pay data and Class Counsel’s investigation,
2 Plaintiffs and the Settlement Class Members worked approximately 4 hours of unpaid overtime in two-
3 thirds (66%) of their workweeks. Abrahamson Decl. ¶ 48. Based on these estimates, Class Counsel
4 calculated that the Settlement Class Members are owed approximately \$3,347,351.35 in unpaid overtime
5 and as outlined above, in total they are owed \$6,124,105.48. Abrahamson Decl. ¶ 49. The \$2,550,000
6 settlement represents forty-two percent (42%) of the Settlement Class Members’ maximum potential
7 recovery. *Id.* ¶ 50.

8 The value of the Settlement in light of the potential maximum recovery compares favorably to
9 other wage and hour class action settlements that have been approved.⁴ While the Settlement Class
10 Members’ potential maximum recovery is greater than the settlement amount, “the tangible, immediate
11 benefits of . . . [s]ettlement outweigh continued litigation and the uncertainty of a trial.” *Ebarle v.*
12 *Lifelock, Inc.* (N.D. Cal. Jan. 20, 2016) No. 15 Civ. 258, 2016 WL 234364, at *8 (internal quotation
13 marks omitted) (citing *In re LinkedIn User Privacy Litig.* (N.D. Cal. 2015) 309 F.R.D. 573, 587
14 (“Immediate receipt of money through settlement, even if lower than what could potentially be achieved
15

16 ⁴ See, e.g., *Ferrell v. Buckingham Property Mgmt.* (E.D. Cal. Jan. 21, 2020) Case No. 1:19-cv-
17 00332-LJO-SAB, 2020 WL 291042, *17-20 (granting preliminary approval of \$600,000 wage and hour
18 class and collective action settlement that represented 5.2% of the original valuation of the claims);
19 *Cooley v. Indian River Transp. Co.* (E.D. Cal. Jan. 24, 2019) No. 1:18- CV-00491, 2019 WL 316634, at
20 *8 (granting preliminary approval of \$1.4 million wage and hour class settlement representing 11% of
21 potential liability); *Saleh v. Valbin Corp.* (N.D. Cal. Nov. 15, 2018) No. 17-CV-00593-LHK, 2018 WL
22 6002320, at *3 (approving FLSA settlement that equaled 37.74% of the total possible recovery without
23 liquidated damages and 18.87% of the total possible recovery with liquidated damages); *Singh v.*
24 *Roadrunner Intermodal Servs., LLC* (E.D. Cal. May 29, 2018) No. 115CV01497DADBAM, 2018 WL
25 2412325, at *7 (granting preliminary approval of \$9.25 million wage and hour class settlement
26 representing approximately 12% of potential liability, excluding the value of the PAGA claims),
27 *modified*, No. 115CV01497DADBAM, 2018 WL 4382202 (E.D. Cal. Sept. 13, 2018); *Thompson v.*
28 *Costco Wholesale Corp.* (S.D. Cal. May 11, 2017) No. 14-CV-2778-CAB-WVG, 2017 WL 1957552, at
*8 (granting preliminary approval of \$2 million wage and hour class settlement reflecting approximately
10% of exposure); *Ma v. Covidien Holding, Inc.* (C.D. Cal. Jan. 31, 2014) No. SACV 12-02161-DOC,
2014 WL 360196, at *5 (granting preliminary approval of \$2.5 million wage and hour class settlement
that represented 9.1% of total exposure as within “range of reasonableness”); *Thomas v. Cognizant*
Tech. Sols. U.S. Corp. (C.D. Cal. June 24, 2013) No. SACV111123JSTANX, 2013 WL 12371622, at *6
(granting final approval of \$4 million wage and hour class settlement that encompassed between 4.4%
and 5% of the maximum estimated liability).

1 through ultimate success on the merits, has value to a class, especially when compared to risky and
2 costly continued litigation.”)). The significant recovery obtained here, weighed against the potential
3 impediments to recovery if litigation continued, is well within “the ‘ballpark’ of reasonableness.”
4 *Kullar*, 168 Cal. App. 4th at 133 (the court should not substitute its own evaluation of the most
5 appropriate settlement for that of the attorneys). Thus, this factor weighs heavily in favor of granting
6 preliminary approval.

7 **5. The Extent of Discovery Completed and Stage of the Proceedings**

8 This factor examines “the extent of discovery the parties have completed and the current stage of
9 the litigation to evaluate whether ‘the parties have sufficient information to make an informed decision
10 about settlement.’” *Betancourt v. Advantage Human Resourcing, Inc.* (N.D. Cal. Jan. 28, 2016) No.
11 14-cv-1788, 2016 WL 344532, at *5, quoting *Linner v. Cellular Alaska P’ship* (9th Cir. 1998) 151 F.3d
12 1234, 1239). While the Parties did not engage in formal discovery, they participated in targeted pre-
13 mediation discovery. Abrahamson Decl. ¶ 51. Defendant produced payroll records and/or salary
14 information for all SDRs within the Class Period, as well as employment records showing the current
15 employment status and last date of employment (if applicable). Defendant also produced employee
16 handbooks, Plaintiffs’ personnel files, relevant pay policy documents, and documents related to
17 Defendant’s financial condition. *Id.* ¶ 52. Additionally, Class Counsel performed a detailed
18 investigation of the claims and defenses at issue which involved: interviews with Plaintiffs, as well as
19 12 other former employee witnesses; reviewing SDRs’ documents including offer letters, pay scales,
20 paystubs, and handbooks; and conducting extensive online research into Defendant’s pay practices,
21 including reviewing job announcements and employment reviews online. Abrahamson Decl. ¶ 53. This
22 information was more than sufficient for the Parties’ counsel to adequately determine the risks of
23 litigation, calculate the potential class-wide damages, and evaluate the Settlement. *Id.* ¶ 54. Therefore,
24 this factor supports preliminary approval.

25 **6. The Experience and Views of Counsel**

26 The Settlement was reached between highly experienced counsel well-versed in wage-and-hour
27 class and collective action litigation with the help of a highly regarded mediator. Abrahamson Decl. ¶
28

55. Numerous courts have described Class Counsel as leaders in class and collective action wage-and-hour litigation. *See Osman v. Grube, Inc.* (N.D. Ohio May 4, 2018) No. 3:16-cv-00802-JJH, 2018 WL 2095172, at * 4 (“Plaintiffs’ Counsel are known and recognized lawyers in wage and hour litigation and have an excellent national reputation in representing [] employees in this type of case. Courts recognized Plaintiffs’ Counsel as leaders in advocating the rights of such workers throughout the United States.”); *Sanchez v. Roka Akor Chicago LLC* (N.D. Ill. Apr. 20, 2017) No. 14 CV 4645, 2017 WL 1425837, at *5-7 (Werman Salas P.C. are “national leaders in advocating the rights of working people in wage and hour litigation” and describing Douglas Werman as a “highly respected and experienced lawyer[.]...”); *Knox v. Jones Grp.* (S.D. Ind. Aug. 31, 2017) No. 15-CV-1738 SEB-TAB, 2017 WL 3834929, at *5 (Werman Salas are “....national leaders in advocating the rights of working people in wage and hour litigation.”); *see also* Decl. of Jennifer Liu (“Liu Decl.”) ¶¶ 4-10 (discussing Liu Peterson-Fisher’s experience and recognition). The Court should give “considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm’s length transaction entered without self-dealing or potential misconduct.” *Kullar*, 168 Cal. App. 4th at 129. Based on their experience and their informed analysis of the claims here, Class Counsel believe the Settlement represents an excellent monetary result for the Settlement Class Members, particularly in light of the risks and delay inherent in continued litigation. Abrahamson Decl. ¶ 56; Liu Decl. ¶ 11. Accordingly, this factor also supports preliminary approval.

7. The Presence of a Governmental Participant

The Settlement does not involve a governmental participant. Abrahamson Decl. ¶ 57. Therefore, this factor is neutral and does not weigh in favor of or against preliminary approval.

8. The Reaction of Class Members to the Proposed Settlement

Since the Settlement Class Members have not yet been notified of the Settlement, the Court cannot yet evaluate their response, including the number and substance of objections, if any, or the number of exclusion requests. The Court can evaluate this factor after notice of the Settlement has been issued to the Settlement Class Members.

1 Because all the applicable *Kullar* factors support a finding that the Settlement is fair, adequate,
2 and reasonable, the Court should grant preliminary approval.

3 **B. Certification of the California Settlement Class for Settlement Purposes Is**
4 **Appropriate**

5 Plaintiffs seek certification pursuant to California Rule of Court 3.769(d) of a provisional
6 settlement class, defined as:

7 all persons who are current or former employees of Defendant who worked in
8 California as Sales Development Representatives at any time between December 2,
2016 and June 30, 2022.

9 The California Settlement Class should be provisionally certified for purposes of settlement only
10 because (1) the California Settlement Class is ascertainable and sufficiently numerous; (2) there exists a
11 well-defined community of interest; and (3) a class action settlement is a superior method of resolving
12 this case. Code Civ. Proc. § 382; *Brinker*, 53 Cal. 4th at 1021; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.
13 4th 429, 435.

14 **1. The California Settlement Class Is Ascertainable and Sufficiently Numerous**

15 **a. The California Settlement Class Is Sufficiently Numerous**

16 The numerosity requirement is satisfied because the California Settlement Class is of such a size
17 that “it is impracticable to bring them all before the court.” Cal. Code Civ. Proc. § 382. While no set
18 number is required by law, courts generally presume the numerosity requirement is satisfied when the
19 class exceeds 40 members. *See, e.g., Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 934 (finding
20 numerosity requirement satisfied with class of 42). Based on information produced by Defendant, the
21 Parties believe that the California Settlement Class includes at least 255 members. Abrahamson Decl. ¶
22 21. This is sufficient to meet the presumptive 40-member threshold.

23 **b. The California Settlement Class Is Ascertainable**

24 A class is ascertainable when it is defined “‘in terms of objective characteristics and common
25 transactional facts’ that make ‘the ultimate identification of class members possible when that
26 identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal. 5th 955, 980 (quoting
27 *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 915). The California Settlement
28

1 Class Members may be easily ascertained in this case by using Defendant's employment records to
2 identify individuals who worked for Defendant as a SDR during the relevant time period. Abrahamson
3 Decl. ¶ 21; *see, e.g. Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121, 136. The class
4 definition is neither vague nor subjective; it is sufficiently clear for a member of the California
5 Settlement Class to understand whether he or she is included within it; and it clearly specifies who will
6 be bound by a judgment. *Noel*, 7 Cal. 5th at 987. Therefore, the California Settlement Class is
7 ascertainable.

8 **2. There is a Well-Defined Community of Interest**

9 A well-defined community of interest exists when there are "(1) predominant common questions
10 of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
11 representatives who can adequately represent the class." *Fireside Bank v. Super. Ct.* (2006) 40 Cal. 4th
12 1069, 1089. Common questions predominate where the legal theory of recovery "is, as an analytical
13 matter, likely to prove amenable to class treatment," such that the resolution of claims "in a single class
14 proceeding would be both desirable and feasible." *Brinker*, 53 Cal. 4th at 1021-22 (quoting *Sav-on*
15 *Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal. 4th 319, 327). A legal challenge to an employer's uniform
16 policy is "eminently suited for class treatment." *Id.* at 1034.

17 This case involves numerous common factual and legal issues that go to the core of Plaintiffs'
18 allegations that Defendant misclassified them and the California Settlement Class Members as exempt
19 employees and failed to pay them overtime wages. Plaintiffs allege that they and the California
20 Settlement Class Members performed common job duties and that these common job duties rendered
21 them ineligible for the commissioned sales exemption under California law and the FLSA. Other
22 common issues include, but are not limited to: whether Plaintiffs and the California Settlement Class
23 Members worked more than 40 hours per week; whether Defendant's non-exempt pay structure for
24 some SDRs was proper; whether Plaintiffs and the California Settlement Class Members worked more
25 than eight (8) hours per day; whether Defendant had a practice of failing to provide meal and rest
26 periods to Plaintiffs and the California Settlement Class Members; and whether Defendant had a practice
27 of failing to timely pay Plaintiffs and the California Settlement Class Members all owed wages,

1 including overtime wages, upon separation. *See, e.g., Stemple v. RingCentral, Inc.* (N.D. Cal. Aug. 15,
2 2019) No. 18-cv-04909-LB, 2019 WL 3842091, at *4 (granting preliminary approval of a class and
3 collective action settlement for inside sales representatives who alleged they were misclassified where
4 the common question was whether the class members were exempt); *McGrath v. Wyndham Resort*
5 *Development Corp.* (S.D. Cal. Jan. 30, 2018) No. 15cv1631 JM (KSC), 2018 WL 637858, at *4
6 (granting final approval of a wage-and-hour class and collective action settlement on behalf of
7 California commissioned sales representatives when the plaintiffs had alleged that the defendants
8 applied uniform policies to all California sales representatives).

9 Plaintiffs and the California Settlement Class Members' claims are predicated on Defendant's
10 alleged common policy of misclassifying Plaintiffs and the California Settlement Class Members as
11 exempt employees, and therefore raise the same common questions of law and fact.

12 **a. The Named Plaintiffs' Claims Are Typical of the California**
13 **Settlement Class**

14 Plaintiffs' claims are typical of the California Settlement Class Members they seek to represent.
15 "The test of typicality 'is whether other members have the same or similar injury, whether the action is
16 based on conduct which is not unique to the named plaintiffs, and whether other class members have
17 been injured by the same course of conduct.'" *Franchise Tax Bd. Limited Liab. Corp. Tax Refund Cases*
18 (2018) 25 Cal. App. 5th 369, 395 (quoting *Seastrom v. Neways, Inc.* (2007) 149 Cal. App. 4th 1496,
19 1502). Here, Plaintiffs performed the same job duties as the other California Settlement Class Members.
20 Abrahamson Decl. ¶ 58. Plaintiffs allege Defendant misclassified Plaintiffs and other California
21 Settlement Class Members as exempt from overtime pursuant to the same company policy. Plaintiffs
22 allegedly suffered the same damages as the California Settlement Class Members who have claims for
23 overtime and other penalties under the Labor Code and the UCL. *Id.* ¶ 59. Therefore, Plaintiffs' claims
24 are typical of those of the California Settlement Class Members, and their interests are aligned with the
25 interests of the California Settlement Class. *See also Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976
26 F.2d 497, 508 (purpose of the typicality requirement is to ensure that interest of named plaintiff aligns
27 with interests of the class).

1 **b. The Named Plaintiffs and Their Counsel Will Fairly and Adequately**
2 **Represent the California Settlement Class**

3 The adequacy requirement serves to ensure there are not conflicts of interest between named
4 plaintiffs and class members that go to the ““very subject matter of the litigation.”” *J.P. Morgan & Co.,*
5 *Inc. v. Super. Ct.* (2003) 113 Cal. App. 4th 195, 212 (quoting *Richmond v. Dart Indus., Inc.* (1981) 29
6 Cal. 3d 462, 470). A named plaintiff is an adequate class representative so long as the named plaintiff’s
7 claim is not “inconsistent with the claims of other members of the class,” and the named plaintiff’s
8 attorneys are qualified to conduct the litigation. *J.P. Morgan & Co.*, 113 Cal. App. 4th at 212; *McGhee*
9 *v. Bank of Am.* (1976) 60 Cal. App. 3d 442, 450.

10 Here, Plaintiffs are adequate class representatives because they have no known conflicts of
11 interest with the California Settlement Class and their claims are consistent with the claims of other
12 California Settlement Class Members. Abrahamson Decl. ¶ 60. Likewise, Class Counsel are skilled and
13 experienced in wage-and-hour class action litigation and have been appointed class counsel in
14 numerous other wage-and-hour class actions. *Id.* ¶ 61, Attachment B (Werman Salas Firm Resume);
15 Liu Decl. ¶¶ 5-7; *see Osman*, 2018 WL 2095172, at * 4; *Sanchez*, 2017 WL 1425837, at *5-7; *Knox*,
16 2017 WL 3834929, at *5.

17 **3. A Class Action Is Superior to Other Available Methods**

18 Class treatment is superior to individual adjudication of class members’ claims when it
19 eliminates the possibility of repetitious litigation and “provides small claimants with a method of
20 obtaining redress for claims which would otherwise be too small to warrant individual litigation.”
21 *Richmond*, 29 Cal. 3d at 469 (internal quotation marks and citation omitted). While each California
22 Settlement Class Member’s claim in this Action is relatively small, litigating each California Settlement
23 Class Member’s claim on an individual basis would consume substantial judicial resources and run the
24 risk of inconsistent rulings on the legality of Defendant’s employee classification. *See Bufil v. Dollar*
25 *Fin. Grp., Inc.* (2008) 162 Cal. App. 4th 1193, 1208. Resolving the claims on a class-wide basis creates
26 efficiencies and promotes consistency.

27 Courts do not apply as much scrutiny to the question of superiority when class certification is

sought for settlement purposes because the case will not proceed to trial, thereby avoiding case management issues related to trial. *Global Minerals & Metals Corp. v. Super. Ct.* (2003) 113 Cal. App. 4th 836, 859. In any event, class treatment of this case for settlement purposes is eminently manageable. Individual variation in the quantity of damages incurred will be managed by allocating the Net Settlement Amount based upon the workweek formula described *supra* in Section III.C. *See Sav-on Drug Stores*, 34 Cal. 4th at 334 (“Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.”).

C. The Proposed Notice and Notice Process are Appropriate

“When the court approves the settlement or compromise of a class action, it must give notice to the class of its preliminary approval and the opportunity for class members to object and, in appropriate cases, opt out of the class.” *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 746 (citing Cal. Rules of Court, Rules 3.766(d), 3.769). Constitutional due process requires the notice to class members to provide sufficient information to make an informed decision to accept or object to a proposed settlement and an opportunity to be heard in the proceedings. *See Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 251-52, *disapproved of on another ground in Hernandez*, 4 Cal. 5th 260.

The proposed Notice, attached as Exhibit A to the Settlement Agreement, satisfies these requirements. Abrahamson Decl., Attach. A (Settlement Agreement) Ex. A. It informs the Settlement Class Members of the nature of the case and the Parties’ positions, explains the scope of the releases, and provides each Settlement Class Member with an estimate of their Individual Settlement Payment along with an explanation for how that amount was calculated. *Id.* It includes instructions for submitting a workweek dispute to the Claims Administrator in the event a Settlement Class Member disputes their Eligible Workweeks. *Id.* The Notice also explains how the California Settlement Class Members can object to or exclude themselves from the Settlement and provides instructions for doing so; explains that California Settlement Class Members who do not exclude themselves from the Settlement will be bound by it; and provides the Settlement Class Members with contact information for Class Counsel and the Claims Administrator to obtain additional information. *Id.* Further, the

1 Notice informs the Settlement Class Members of the date and time of the Fairness Hearing and their
2 ability to attend and states that California Settlement Class Members can hire personal counsel, at their
3 own expense, to object to the Settlement. *Id.* The Notice provides the Settlement Class Members with
4 all relevant information they need to make an informed decision about the Settlement and “strike[s] a
5 balance between thoroughness and the need to avoid unduly complicating the content of the notice and
6 confusing class members.” *Wershba*, 91 Cal. App. 4th at 252.

7 Likewise, the proposed notice process, outlined in Section IV.I above, is robust and provides
8 more than “a reasonable chance of [the notice] reaching a substantial percentage of the class members.”
9 *Id.* at 251. The Claims Administrator will send the Notice to Settlement Class Members via both First-
10 Class U.S. Mail and email and will update the Settlement Class Members’ mailing addresses prior to
11 mailing the Notice. Abrahamson Decl., Attach. A (Settlement Agreement) § VIII(A)(b). The Settlement
12 Class Members will have 45 days to object to or request exclusion from the Settlement or to submit a
13 Workweek Dispute to the Claims Administrator. *Id.* The Claims Administrator will re-mail any Notices
14 returned as undeliverable to a forwarding address, if provided, and will use skip-tracing to find and re-
15 mail Notices that are returned without forwarding addresses. *Id.* The proposed Notice and notice
16 process meet the requirements of Rules 3.766(d) and 3.769 as well as constitutional due process and
17 should therefore be approved.

18 **D. The Settlement Meets the Standard for Approval Under the FLSA**

19 The Settlement not only resolves California state law claims, but also claims under the FLSA. To
20 determine whether an agreement is fair and reasonable under the FLSA, the Court must determine
21 whether the settlement is a fair and reasonable resolution of a bona fide dispute. *Campanelli v. Image*
22 *First Healthcare Laundry Specialists, Inc.* (N.D. Cal. Apr. 30, 2019) No. 15-cv-04456-PJH, 2019 WL
23 1925494, at *1. Once the existence of a bona fide dispute has been established, many California courts
24 apply the same standards used to assess a class action settlement (the *Kullar* factors) to determine
25 whether a proposed FLSA settlement is fair and reasonable. *See Talavera v. Sun-Maid Growers of*
26 *California* (E.D. Cal. May 6, 2020) No. 1:15-cv-00842-DAD-SAB, 2020 WL 2195115, at *6 (citing
27 *Khanna v. Intercon Sec. Systems, Inc.* (E.D. Cal. Apr. 8, 2014) No. 2:09-CV-2214 KJM EFB, 2014 WL
28

1 1379861, at *6); *Pataky v. Brigantine, Inc.* (S.D. Cal. Jan. 4, 2019) No. 3:17-cv-352 GPC (AGS), 2019
2 WL 183583, at *6.

3 Here, as set forth in Section V.A.1 above, Defendant disputes Plaintiffs' claims that they and the
4 Settlement Class Members were misclassified and denies that Plaintiffs and the Settlement Class
5 Members are owed overtime wages. Defendant argues that the Settlement Class Members were properly
6 paid for all overtime hours worked. Abrahamson Decl. ¶ 62. Even if they were misclassified, Defendant
7 contends that the Settlement Class Members did not work uncompensated overtime. *Id.* ¶ 63. Therefore,
8 a bona fide dispute exists. *See Talavera*, 2020 WL 2195115, at *7 (finding existence of a bona fide
9 dispute when defendant contested liability under the FLSA). Additionally, as set forth in Sections
10 V.A.1-8, *supra*, the applicable *Kullar* factors support approval of the Settlement. For these reasons, the
11 Settlement also meets the standard for FLSA approval, and the Court should approve the settlement of
12 the FLSA claims as fair and reasonable.

13 **VI. CONCLUSION**

14 For the reasons set forth above, Plaintiffs respectfully request that the Court grant their
15 Unopposed Motion for Order Provisionally Certifying Settlement Class, Preliminarily Approving Class
16 Settlement, and Approving FLSA Settlement and enter the proposed Order filed contemporaneously
17 herewith.

1 DATED: July 12, 2022

Respectfully submitted,

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