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16
17 **ARBITRATION**
18 **BEFORE HUNTER R HUGHES III, ARBITRATOR**
19 **HUNTER HUGHES ADR**

20 EDRIAN BIALA, AMBER GLEASON,
21 and DEBBIE TRINH, individually and on
22 behalf of all others similarly situated,

23 Claimants,

24 v.

25 JFROG, INC.,

26 Respondent.

27 **CLAIMANTS' UNOPPOSED MOTION**
28 **FOR PRELIMINARY APPROVAL OF**
CLASS AND COLLECTIVE ACTION
SETTLEMENT

1 **I. INTRODUCTION**

2 Claimants Edrian Biala, Amber Gleason, and Debbie Trinh (“Claimants”) and Respondent
3 JFrog, Inc. (“JFrog” or “Respondent”) (collectively with Claimants, the “Parties”), have settled
4 this class and collective action subject to Arbitrator approval.

5 The proposed Settlement¹ provides significant monetary relief to the Settlement Class²—
6 the average net settlement award per Settlement Class Member is approximately \$15,400—and
7 satisfies all the criteria for preliminary approval, including the requirements of Federal Rule of
8 Civil Procedure 23 and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b).

9 Accordingly, the Parties respectfully request that Arbitrator Hunter R. Hughes III, Esq.
10 preliminarily approve the Settlement, preliminarily certify the California Class, and conditionally
11 certify the Putative Collective; approve the form, content, and method of distributing the Notices;
12 and schedule a hearing for final approval of the Settlement, as set forth in greater detail below.³

13 **II. FACTUAL AND PROCEDURAL BACKGROUND**

14 **A. The Parties**

15 JFrog is a software company with U.S. offices in California, Georgia, and Washington,
16 that sells its software platform to business clients. Demand ¶¶ 2-3.⁴ Claimants and Settlement
17 Class Members worked for JFrog as Sales Representatives.⁵

18 ¹ The Settlement Agreement and accompanying exhibits are attached as Exhibit 1.

19 ² “Settlement Class” means all Settlement Class Members, which is defined as all Putative
20 Collective Members, California Class Members, and PAGA Members. Settlement ¶ 1.11.

21 ³ A Proposed Preliminary Approval Award is attached as Exhibit 2.

22 ⁴ The Demand and accompanying exhibits are attached as Exhibit 3.

23 ⁵ “Sales Representatives” means: individuals employed by JFrog in the exempt-classified
24 job titles of Account Manager; Account Manager - Major Accounts; Account Manager New
25 Business – Sales; Account Manager, Enterprise; Business Development Representative; Cloud
26 Account Executive; Cloud Account Manager; Cloud Account Manager, New Business (NB);
27 Cloud Account Manager, SMB; Cloud Account Manager, Portfolio; Cloud Account Manager –
28 CS; Cloud Inside Sales Representative; Cloud Sales Development Representative; Community
 Advocate; Community Relations Specialist; Customer Success Specialist; Enterprise Account
 Executive, Enterprise Accts.; Enterprise Account Manager; Enterprise Customer Success
 Specialist; Sales Account Representative; Sales Development Representative; Sales Development
 Representative, NA; Sales Representative; Senior Account Executive; Senior Community
 Relationship Specialist; Senior Sales Representative; SMB Customer Success Specialist; SMB
 New Business Account Manager; SMB, Customer Success Specialist; Sr. Account Manager -
 New Business; and Strategic Account Executive; and/or any exempt-classified job titles that the
 Parties agree are comparable to the foregoing job titles and should be included in the definition of
 Sales Representatives.

1 Claimants allege that JFrog misclassified them and other similarly situated Sales
2 Representatives as exempt from overtime under the FLSA. Claimants Biala and Trinh
3 (“California Claimants”) allege that JFrog also misclassified Sales Representatives under
4 California law and violated various related California state law provisions. *Id.* ¶¶ 34-50.

5 **B. Investigation**

6 Before approaching JFrog regarding these claims, Claimants’ Counsel conducted a
7 thorough investigation which included corporate research regarding Respondent’s business
8 locations, corporate ownership, and past federal and state litigation; and factual and legal research
9 into the underlying merits of Claimants’ claims, possible defenses, the proper measure of
10 damages, and the likelihood of class and collective certification. Stewart Decl. ¶ 12. Claimants’
11 Counsel conducted in-depth interviews with Claimants and several other Sales Representatives
12 that helped Claimants’ Counsel determine the hours that Sales Representatives worked and the
13 nature of their duties, and reviewed Sales Representatives’ job descriptions. *Id.* ¶ 13.

14 **C. Settlement Discussions**

15 On April 1, 2021, Claimants’ Counsel contacted JFrog and invited the company to engage
16 in pre-litigation settlement discussions. Stewart Decl. ¶ 14. The Parties subsequently agreed to
17 explore a pre-suit mediation and to that end, executed an agreement to toll the statute of
18 limitations on behalf of Claimants and similarly situated Sales Representatives on May 3, 2021.
19 *Id.*

20 In advance of mediation, JFrog provided Claimants’ Counsel with payroll data for each
21 Settlement Class Member as well as Claimants’ personnel files, Sales Representatives’ job
22 descriptions, and company compensation plans. *Id.* ¶ 15. The Parties exchanged detailed
23 mediation statements which outlined the key arguments they would make in the course of the
24 litigation. *Id.* Claimants’ Counsel provided JFrog with Claimants’ detailed declarations, which
25 described their job responsibilities and hours worked and the similarities they shared with other
26 Sales Representatives. *Id.*

27 On November 17, 2021, the Parties participated in a full-day mediation session with the
28 assistance of experienced wage and hour class and collective action mediator Timothy Long Esq.,

1 and were unable to reach a resolution of the claims but agreed to continue settlement discussions
2 with the assistance of Mr. Long. *Id.* ¶ 16.

3 At all times, the Parties' settlement negotiations were highly adversarial, non-collusive,
4 and conducted at arm's length. *Id.* ¶ 17. During the day-long session, the Parties discussed their
5 relative views of the law and the facts and potential relief for the proposed Settlement Class. *Id.* ¶
6 18. For weeks after the mediation, the mediator continued to work closely with the Parties to
7 explore the possibility of settlement in a series of email and telephone conversations. *Id.* ¶ 18.
8 On January 10, 2022, following nearly two months of additional negotiations, the Parties agreed
9 to a settlement in principle and executed a memorandum of understanding. *Id.* ¶ 19. The Parties
10 then negotiated the final Settlement Agreement and executed it on March 10, 2022. *Id.*

11 **III. TERMS OF THE PROPOSED SETTLEMENT**

12 **A. Eligible Employees**

13 California Class Members are individuals employed by JFrog in California as Sales
14 Representatives between May 3, 2017 through March 1, 2022. Settlement ¶ 1.6.

15 Putative Collective Members are individuals employed by JFrog nationwide as Sales
16 Representatives between May 3, 2018 through March 1, 2022. *Id.* ¶ 1.33.

17 Private Attorneys General Act ("PAGA") Members are individuals employed by JFrog in
18 California as Sales Representatives between May 3, 2020 and March 1, 2022. *Id.* ¶ 1.26.

19 **B. Settlement Amount**

20 The Settlement creates a Total Settlement Amount of \$2,550,000.00. Settlement ¶
21 11.1(A). The Total Settlement Amount covers: (1) settlement awards for Class Members,
22 covering no more than 6,000 workweeks⁶; (2) Service Awards of up to \$15,000 each to Claimant
23 Biala, Claimant Gleason, and Claimant Trinh; (3) Claimants' Counsel's attorneys' fees of up to
24 one-third of the Total Settlement Amount; (4) reimbursement of Claimants' Counsels' actual out-
25 of-pocket litigation expenses of up to \$10,000; (5) the Settlement Administrator's fees and costs
26 not to exceed \$20,000; (6) a Private Attorneys General Act Fund ("PAGA Fund") of \$60,000

27 ⁶ The Settlement provides that if the number of workweeks increases by more than 10%,
28 JFrog will fund an additional amount in order to increase the Net Fund by a proportionate
additional amount. Settlement ¶ 11.1(B).

(allocated 25% to PAGA Members and 75% to the California Labor and Workforce Development Agency (“LWDA”)); and (7) arbitration fees and costs. *Id.* ¶¶ 2(D), 4(B), 11.1, 11.2, 11.3, 11.4, 11.5(A), 11.5(B). JFrog will separately pay employer-side payroll taxes, in addition to the Total Settlement Amount. *Id.* ¶ 1.16.

C. Release of Claims

California Class Members who do not opt out (“Participating California Class Members”) will receive a Settlement Check without having to submit a claim form or take any action. *Id.* ¶¶ 1.29, 1.44. Participating California Class Members will release all “Released California Claims.”⁷ *Id.* ¶ 12.1(A).

Participating Collective Members and California Class Members who cash or sign a Settlement Check will release the “Released Collective Claims.”⁸ *Id.* ¶ 12.1(B).

Additionally, PAGA Members will release the “Released PAGA Claims.”⁹ *Id.* ¶ 12.1(c).

⁷ “Released California Claims” means the California wage and hour claims pled in the operative demand(s) or that could have been pled based on the facts alleged in the demand by Claimants on behalf of themselves and California Class Members, and that accrued during their employment with JFrog in an exempt-classified covered position, relating back to the full extent of the applicable statutes of limitations, including any period tolled by the Parties’ tolling agreement, and continuing through March 1, 2022, including, without limitations, claims for unpaid minimum wage, unpaid overtime wages, premium pay, inadequate meal and rest breaks, failure to timely pay wages during and/or at the end of employment, and failure to provide adequate wage statements, including but not limited to California Business and Professions Code section 17200, California Labor Code sections 201, 202, 203, 204, 218.5, 226, 226.3, 226.7, 510, 512, 1194, 1198, 2699, and the applicable California Industrial Commission Wage Order, and related claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and expenses. Settlement ¶ 1.35.

⁸ “Released Collective Claims” means the wage and hour claims pled in the operative demand(s) or that could have been pled based on the facts alleged in the demand by Claimants on behalf of themselves and Putative Collective Members, and that accrued during their employment with JFrog in an exempt-classified covered position, relating back to the full extent of the statutes of limitations, including any period tolled by the Parties’ tolling agreement, and continuing through March 1, 2022, including, without limitations, federal claims pursuant to the Fair Labor Standards Act for unpaid minimum wage, unpaid overtime wages, premium pay, and related claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and expenses. Settlement ¶ 1.36.

⁹ “Released PAGA Claims” means the claims relating to penalties under California’s Private Attorney General Act pled in the operative demand(s) or that could have been pled based on the facts alleged in the demand by Claimants on behalf of themselves, PAGA Members, and the LWDA, and that accrued during their employment with JFrog in an exempt-classified covered

Footnote continued on next page

1 The proposed Notice describes the Released Class, Collective, and PAGA Claims, and the
2 Settlement Checks will include an acknowledgement of the release of the Released Collective
3 Claims. *Id.* ¶ 5(B), 12.1(B); Ex. A-1 (California Class Notice) ¶ 10; Ex. A-2 (Collective Notice)
4 ¶ 10; Ex. D (PAGA Check Enclosure Letter).

5 Additionally, in consideration of the Service Awards, the named Claimants will agree to a
6 general release. Settlement ¶ 11.3(C), Ex. E.

7 **D. Notice**

8 To facilitate the notice process, JFrog will produce the Class List seven days after the date
9 of the Preliminary Approval Award. Settlement ¶ 5(A).

10 Within 21 days after the Preliminary Approval Award, the Settlement Administrator will
11 disseminate the Notices via First Class United States Mail, e-mail, and text message. *Id.* ¶ 5(C).
12 The e-mail and text notifications will include a link to a website where Settlement Class Members
13 may review information about the Settlement and Putative Collective Members who are not also
14 California Class Members may submit claim forms. *Id.* ¶¶ 5(B)-(C). Any physical mailing to
15 Collective Members who are not also California Class Members will include a postage pre-paid
16 return envelope. *Id.* ¶ 5(C). The Notices will include a description of the claims and the
17 Settlement Agreement; information about the arbitration process; the estimated amount of each
18 Settlement Class Member's Settlement Check; and the opportunity (and consequences) of
19 objecting or opting out (for California Class Members), participating by filing a Claim Form
20 and/or by cashing or otherwise negotiating a Settlement Check (for Collective Members who are
21 not also California Class Members), and appearing at the Fairness Hearing, as applicable. *Id.* ¶
22 5(B) & Ex. A-1, Ex. A-2.

23 The Settlement Administrator will use all commercially reasonable means to confirm
24 Settlement Class Members' addresses and obtain new addresses and e-mail addresses, as
25 necessary. *Id.* ¶ 5(D). In the event that a Notice is returned as undeliverable, physically or
26 electronically, the Settlement Administrator will attempt to obtain the correct address (or e-mail
27 position, relating back to the full extent of the applicable statutes of limitations, including any
28 period tolled by the Parties' tolling agreement, and continuing through March 1, 2022.
Settlement ¶ 1.37.

1 address) of such person, including up to two skip traces, and shall attempt a re-mailing provided it
2 obtains a more recent address. *Id.*

3 The Settlement Administrator will send a reminder via e-mail, text, and First Class United
4 States Mail postcard to each Putative Collective Member who is not also a California Class
5 Member who has not opted in after the initial dissemination of the Notice. *Id.* ¶ 5(E) & Ex. C.

6 California Class Members will have 60 days from the date of the initial mailing to submit
7 an opt-out form (the “Bar Date”), except for California Class Members to whom Notice was re-
8 mailed, who will have the later of the following: 60 days from the initial mailing or 45 days from
9 the date of re-mailing, whichever is later, provided that no remailings will be completed after the
10 60th day. *Id.* ¶ 1.4. Putative Collective Members who are not also California Class Members
11 will have the same amount of time to file a Claim Form. *Id.* Putative Collective Members who
12 are not also California Class Members who return their Claim Forms by the Bar Date will be
13 deemed Participating Collective Members. *Id.*

14 To be effective for the purposes of becoming a Participating Collective Member, a Claim
15 Form must be post-marked, faxed, emailed, submitted/completed online, or otherwise received by
16 the Settlement Administrator by the Bar Date and include a signature in the designated area. *Id.* ¶
17 5(F). To the extent a mailed Claim Form does not bear a post-mark, the Claim Form will be
18 deemed timely if the Settlement Administrator receives it within three days of the Bar Date. *Id.*
19 Putative Collective Members who were unable to file the Claim Form by the Bar Date due to
20 good cause, such as change of address, military service, hospitalization, or other extraordinary
21 circumstances, as determined by the Settlement Administrator, shall have until three days before
22 the Fairness Hearing in which to return their Claim Form and become a Participating Collective
23 Member. *Id.*

24 **E. Distribution of Settlement Class Member Funds**

25 California Class Members do not need to take any action to participate in the Settlement
26 and will automatically receive a Settlement Check if they do not opt out. *Id.* ¶¶ 1.29, 1.44.

27 Putative Collective Members who are not also California Class Members will be eligible
28 to participate in the settlement and receive a Settlement Check if they submit a timely and valid

1 Claim Form.¹⁰ *Id.* ¶¶ 1.30, 1.44.

2 PAGA Members will be entitled to an additional PAGA Amount based on weeks worked
3 in the PAGA Period. *Id.* ¶ 11.5(B).

4 The portion of the Total Settlement Amount allocated to California Class Members will
5 not revert to JFrog. *Id.* ¶ 11.1(D)(1). Rather, if there are amounts allocated to Participating
6 California Class Members remaining in the Net Fund after the 120-day check-cashing deadline
7 expires, the Settlement Administrator will redistribute the remaining funds to Participating
8 California Class Members who cashed their checks unless a redistribution would be impractical
9 on the basis that the amount remaining is less than the cost of a second distribution. *Id.* In that
10 case, any remaining amounts will be donated to Bet Tzedek Legal Services (“Bet Tzedek”) as a
11 *cy pres* recipient.¹¹ *Id.*

12 The portion of the Net Fund allocated to Putative Collective Members who do not
13 become Participating Collective Members and who are not also Participating California Class
14 Members, as well as the portion of the Net Fund allocated to Participating Collective Members
15 who do not timely cash their checks after the 120-day deadline, will revert to Respondent. *Id.* ¶
16 11.1(D)(2).

17 Any PAGA payment check not cashed shall revert to the California unclaimed property
18 fund under the name of the PAGA Member. *Id.* ¶ 11.1(D)(3).

19 The Parties have agreed to use robust efforts to ensure that checks are received by all
20 eligible Settlement Class Members. The Settlement commits the Parties and the Settlement
21 Administrator to engage in extensive outreach to accomplish this goal. *Id.* ¶¶ 4(E), 5(C)-(E),
22 11.5(F).

23
24
25 ¹⁰ Putative Collective Members who elect not to participate in the Settlement will not
26 become Participating Collective Members and therefore will not release any FLSA claims.
Settlement ¶ 12.1(B).

27 ¹¹ Bet Tzedek is a proper *cy pres* beneficiary because it provides legal services to low-
28 income communities and workers, including services related to their employment rights, which is
work that is closely aligned with the claims at issue in this case. Stewart Decl. ¶ 22; *see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

1 **F. Arbitration Process**

2 The Parties have agreed to this post-dispute class and collective action arbitration process
3 for the sole purpose of obtaining approval of the Settlement in order to avoid Court congestion in
4 the wake of the global pandemic and expedite payments to Settlement Class Members. *Id.* ¶
5 2(A). The Parties have stipulated to the appointment of the Mr. Hughes to act as the Arbitrator
6 and have agreed to waive their right to appeal from any decision of Arbitrator Hughes. *Id.* ¶¶
7 2(A), (C).

8 All Notices, Claim Forms, Settlement Checks, and related communications to Settlement
9 Class Members will include clear and conspicuous language regarding the arbitration of the
10 action, and explain how Participating Collective Members, Participating Class Members, and
11 PAGA Members consent to and are bound by such process. *Id.* ¶ 5(B) & Ex. A-1, Ex. A-2, Ex.
12 B, Ex. C, Ex. D.

13 The Arbitration fees and costs will be paid from the Total Settlement Amount. Settlement
14 ¶ 2(D).

15 **G. Plan of Allocation**

16 The Settlement Administrator will determine the settlement amount for each Settlement
17 Class Member pursuant to a formula which allocates one point for each Eligible Workweek
18 worked outside of California and one and one-sixth (1.1667) points for each Eligible Workweek
19 worked in California, to reflect the relative value of each claim. *Id.* ¶¶ 11.5(A)(1)-(2).

20 PAGA Members will be entitled to an additional PAGA Amount based on weeks worked
21 in the PAGA Period. *Id.* ¶ 11.5(B).

22 **H. Tax Characterization**

23 One-half of the individual settlement payments to Participating California Class and
24 Collective Members will be treated as wages subject to normal tax withholdings and reported to
25 taxing authorities on an IRS Form W-2. *Id.* ¶ 11.6(A). The other half of each Participating
26 California Class and Collective Member's individual settlement Payment will be treated as
27 liquidated damages, statutory penalties, and interest, and will not be subject to tax withholding;
28 an IRS Form 1099 shall be issued for this portion. *Id.* JFrog will pay the employer's portion of

1 payroll taxes separately from the Total Settlement Amount. *Id.* ¶¶ 1.16, 11.6(C)-(E).

2 **I. Settlement Administrator**

3 The Parties have selected Rust Consulting, Inc. (“Rust”) as the settlement claims
4 administrator (“Settlement Administrator”). Settlement ¶¶ 1.43, 4(A). Rust has agreed to
5 administer the settlement for an amount not to exceed \$20,000.00, which includes all service
6 fees, costs, and expenses. *Id.* ¶ 4(B).

7 **J. Service Awards and Attorneys’ Fees and Costs**

8 Subject to Arbitrator approval at the Final Approval stage, Claimants’ Counsel will
9 request a Service Award of \$15,000.00 for each Claimant as compensation for their services
10 rendered to the Class Members. Settlement ¶ 11.3(A). These amounts will be separate and apart
11 from any other recovery to which Claimants will be entitled under the Settlement as Settlement
12 Class Members. *Id.* ¶ 11.3(B). These payments are intended to recognize (a) the time and effort
13 that Claimants have expended on behalf of the Class in assisting Claimants’ Counsel with the
14 investigation and settlement of their and the Settlement Class Members’ claims, and the
15 consequent value they have conferred to the Settlement Class Members, (b) the broader releases
16 they are agreeing to in the Settlement, and (c) the risk they undertook in associating their name
17 with a lawsuit against a former employer in the tight-knit technology sales industry. *see id.*, Ex.
18 E.

19 At the Final Approval stage Claimants’ Counsel will also request an award of not more
20 than one-third of the settlement fund for attorneys’ fees¹² plus not more than \$10,000.00 for costs
21 and expenses. Settlement ¶ 11.2(A).

22 ¹² Courts have routinely awarded fees in this range. *See, e.g., In re Pacific Enter. Sec. Litig.*,
23 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of the common fund);
24 *Moreno v. Beacon Roofing Supply, Inc.*, No. 19 Civ. 185, 2020 WL 3960481, at *8-9 (S.D. Cal.
25 July 13, 2020) (approving \$100,000 in attorneys’ fees or 43% of the common fund and noting
26 that “[i]n cases where the common fund is under \$10 million, fees are often above 25%”);
27 *Contreras v. Worldwide Flight Servs., Inc.*, No. 18 Civ. 036, 2020 WL 2083017, at *8 (C.D. Cal.
28 Apr. 1, 2020) (awarding one-third of the settlement fund); *Puglisi v. TD Bank., N.A.*, No. 13 Civ.
637, 2015 WL 4608655, at *1 (E.D.N.Y. July 30, 2015) (same); *Behzadi v. Int’l Creative Mgmt.*
Partners, LLC, No. 14 Civ. 4382, 2015 WL 4210906, at *2 (S.D.N.Y. July 9, 2015) (same);
Garcia v. Gordon Trucking, Inc., No. 10 Civ. 0324, 2012 WL 5364575, at *10 (E.D. Cal. Oct. 31,
2012) (same).

1 **IV. ARGUMENT**

2 **A. Class Action Settlement Procedure**

3 The class action settlement approval process includes three steps: (1) preliminary approval
4 of the proposed settlement after submission to the Arbitrator of a written motion for preliminary
5 approval; (2) dissemination of notice of settlement to class members; and (3) a written motion for
6 final approval followed by a final settlement approval hearing at which class members may be
7 heard regarding the settlement and argument concerning the fairness, adequacy, and
8 reasonableness of the settlement may be presented. Herbert B. Newberg & Alba Conte, Newberg
9 on Class Actions (“Newberg”), § 13.1 (5th ed.); *Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.*,
10 221 F.R.D. 523, 525 (C.D. Cal. 2004) (describing settlement approval process in which “the
11 [c]ourt first determines whether a proposed class action settlement deserves preliminary approval
12 and then, after notice is given to class members, whether final approval is warranted”).

13 Preliminary approval requires two elements. First, the Arbitrator must determine that the
14 California Class meets the requirements for class certification, pursuant to Federal Rule of Civil
15 Procedure 23(a) and (b); and second, the Arbitrator must make a preliminary determination that
16 the settlement is fair, reasonable, and adequate. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025-
17 26 (9th Cir. 1998).

18 **B. Certification of the California Class Is Appropriate.**

19 For settlement purposes, the parties have agreed to certification of the California Class.
20 “The validity of use of a temporary settlement class is not usually questioned.” Alba Conte &
21 Herbert B. Newberg, 4 Newberg on Class Actions § 11:22 (4th ed. 2002).

22 **1. The Prerequisites of Fed. R. Civ. P. 23(a) Are Satisfied.**

23 **a. The California Class is Sufficiently Numerous.**

24 Federal Rule of Civil Procedure 23(a)(1) requires that the class be so numerous that
25 joinder of all members would be “impracticable.” Fed. R. Civ. P. 23(a)(1). Here, the California
26 Class meets this requirement because it is estimated to include approximately 64 individuals who
27 worked in California. Stewart Decl. ¶ 25; *Whiteway v. FedEx Kinko’s Office & Print Servs., Inc.*,
28 No. 05 Civ. 2320, 2006 WL 2642528, at *4 & n.3 (N.D. Cal. Sept. 14, 2006) (explaining that

1 “numerosity may be *presumed* at a level of forty members”) (emphasis in original).

2 **b. There Are Common Questions of Law and Fact.**

3 Commonality is satisfied where that there are “questions of law or fact common to the
4 class.” Fed. R. Civ. P. 23(a)(2). In examining the commonality factor, the Supreme Court has
5 stated that the focus is on whether there are common issues of fact among class members and
6 whether class treatment will “generate common *answers* apt to drive the resolution of
7 the litigation.” *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (citing *Wal-Mart*
8 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original)).

9 Here, commonality is satisfied because California Claimants have alleged a single policy
10 of classifying all Sales Representatives as exempt from overtime protections, and the other
11 claims—meal and rest breaks, wage statements, and timely pay claims—are largely derivative of
12 the misclassification question. Commonality is therefore satisfied.

13 **c. The Typicality Requirement is Met.**

14 Federal Rule of Civil Procedure 23(a)(3) requires that the “claims or defenses of the
15 representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).
16 Typicality “focuses on the similarity between the lead plaintiff’s legal theories and those of the
17 people he or she purports to represent.” *Whiteway*, 2006 WL 2642528, at *6. Typicality is
18 established if “representative claims are . . . reasonably co-extensive with those of absent class
19 members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

20 Here, California Claimants’ claims are typical of the California Class’s claims because
21 they worked as Sales Representatives in California and were subject to the same policy of exempt
22 classification and related violations. California Claimants’ claims, therefore, arise from the same
23 set of facts and legal theories and the typicality requirement is satisfied.

24 **d. The Adequacy Requirement is Satisfied.**

25 Federal Rule of Civil Procedure 23(a)(4) requires that class representatives fairly and
26 adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The adequacy requirement
27 is met where class representatives: (1) have common, and not antagonistic, interests with
28 unnamed class members, and (2) will vigorously prosecute the interests of the class through

1 qualified counsel. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Hanlon*, 150
2 F.3d at 1020.

3 Here, California Claimants possess the same type of interests and suffered the same type
4 of injury as the other California Class Members, and have no known conflicts with the California
5 Class. Stewart Decl. ¶ 26. California Claimants have hired adequate counsel who have extensive
6 experience in employment class action litigation and arbitration and have prosecuted the case
7 vigorously on behalf of the California Class. *Id.* ¶ 27.

8 **2. The Prerequisites of Fed. R. Civ. P. 23(b)(3) Are Satisfied.**

9 **a. Common Questions Predominate Over Any Individual Issues.**

10 “The Rule 23(a)(3) predominance inquiry tests whether proposed classes are sufficiently
11 cohesive to warrant adjudication by representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*,
12 521 U.S. at 623). “The predominance inquiry asks whether the common, aggregation-enabling,
13 issues in the case are more prevalent or important than the non-common, aggregation-defeating,
14 individual issues.” *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation
15 marks omitted). Common questions predominate when “resolution of some of the legal or factual
16 questions that qualify each class member’s case as a genuine controversy can be achieved through
17 generalized proof, and if these particular issues are more substantial than the issues subject only
18 to individualized proof.” *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). In a
19 misclassification action like this one, courts certify class claims where there is evidence that class
20 members share “similarities” with respect to their duties and other considerations “relevant to the
21 misclassification question.” *Greko v. Diesel U.S.A., Inc.*, 277 F.R.D. 419, 428 (N.D. Cal. 2011).

22 Here, several pieces of common evidence demonstrate that the misclassification question
23 predominates over any individual issues. First, JFrog’s uniform classification supports
24 certification, confirming “that the employer believes some degree of homogeneity exists among
25 the employees.” *Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir.
26 2009). Second, JFrog’s corporate policies define what class members primarily do (inside sales).
27 Third, JFrog’s payroll data demonstrates that class members do not meet the commission earnings
28 prong of the commissioned sales exemption, without the need for any individualized inquiry.

1 This evidence, taken together, reveals that common questions of fact and law predominate.

2 **b. Superiority is Satisfied.**

3 Federal Rule of Civil Procedure 23(a)(3)'s final requirement is that "resolution of the
4 issues on a class wide basis [be] superior to other available methods available for the fair and
5 efficient adjudication of the controversy." *Tierno v. Rite Aid Corp.*, No. 05 Civ. 2520, 2006 WL
6 2535056, at *11 (N.D. Cal. Aug. 31, 2006). This requirement is satisfied here because "there is
7 no indication[] that class members seek to individually control their cases, that individual
8 litigation is already pending in other forums, or that this particular forum is undesirable for any
9 reason." *Id.* Furthermore, California Class Members likely lack the resources or incentives to
10 secure experienced, qualified counsel or to see litigation through to completion on their own. In
11 addition, individual lawsuits from dozens of individuals would be wasteful and inefficient. *See*
12 *Whiteway*, 2006 WL 2642528 at *11 ("A class action is superior to multiple individual lawsuits.
13 The needless expenditure of additional time, effort and money that would be attendant to
14 numerous individual suits is greatly reduced, and the potential for differing outcomes is avoided
15 as well."). Accordingly, certification of the California Class is superior to any other method of
16 resolving this matter, as it will promote economy, expediency, and efficiency.

17 **3. Claimants' Counsel Should be Appointed as Class Counsel.**

18 Federal Rule of Civil Procedure 23(g) provides that in certifying a class, a court should
19 appoint class counsel, taking into consideration four factors: (i) the work counsel has done in
20 identifying or investigating potential claims in the action; (ii) counsel's experience in handling
21 class actions, other complex litigation, and the types of claims asserted in the action;
22 (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to
23 representing the class. Fed. R. Civ. P. 23(g)(1)(A).

24 The proposed Class Counsel easily satisfy these criteria. Claimants' Counsel have
25 conducted extensive investigation of this case; have vast experience in prosecuting and litigating
26 large-scale wage and hour collective and class actions such as this; have extensive knowledge of
27 this area of the law; have prosecuted numerous misclassification actions on behalf of workers in
28 the past; and have the resources to effectively prosecute this case. Stewart Decl. ¶¶ 3-11, 27.

1 **C. Conditional Certification of the Putative Collective is Appropriate.**

2 Employees alleging violation of their rights under the FLSA may bring a claim seeking
3 relief on their own behalf and on behalf of “other employees similarly situated.” 29 U.S.C. §
4 216(b). At the conditional certification stage, courts determine whether the proposed collective
5 should be given notice. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018).
6 This stage is lenient; loosely akin to a plausibility standard. *Hernandez v. Dutton Ranch Corp.*,
7 No. 19 Civ. 817, 2020 WL 1274908, at *1 (N.D. Cal. Mar. 17, 2020) (quoting *Campbell*, 903
8 F.3d at 1109). Plaintiffs are similarly situated when they share “a similar issue of law or fact
9 material to the disposition of their FLSA claims.” *Campbell*, 903 F.3d at 1117.

10 Here, Claimants have demonstrated that conditional certification is appropriate by
11 identifying a common policy that classifies them as exempt from overtime under the FLSA. *See*
12 *Karl v. Zimmer Biomet Holdings, Inc.*, No. 18 Civ. 4176, 2019 WL 2775567, at *2 (N.D. Cal.
13 July 2, 2019) (sales representatives similarly situated where they alleged they were victims of a
14 common misclassification policy).

15 **D. The Settlement Meets the Requirements for Preliminary Approval.**

16 Once the Arbitrator has found class and collective certification proper, the next step of the
17 preliminary approval process is to assess whether the settlement is “fundamentally fair, adequate,
18 and reasonable.” *Hanlon*, 150 F.3d at 1026.

19 At the preliminary approval stage, the Arbitrator “need only determine whether the
20 proposed settlement is within the range of possible approval such that there is a reason to notify
21 the class members of the proposed settlement and to proceed with a fairness hearing.” *Palacios v.*
22 *Penny Newman Grain, Inc.*, No. 14 Civ. 1804, 2015 WL 4078135, at *7 (E.D. Cal. July 6, 2015)
23 (citation and quotation marks omitted). Typically, the first-stage analysis considers only
24 “obvious deficiencies,” with preliminary approval granted if the settlement is non-collusive and
25 within the range of possible final approval. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
26 1078, 1079 (N.D. Cal. 2007); *see also Ruch v. AM Retail Grp., Inc.*, No. 14 Civ. 5352, 2016 WL
27 1161453, at *11 (N.D. Cal. Mar. 24, 2016) (“Preliminary approval of a settlement is appropriate
28 if the proposed settlement appears to be the product of serious, informed, non-collusive

1 negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to
2 class representatives or segments of the class, and falls within the range of possible approval.”)
3 (internal quotation omitted); Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions*, §
4 11.41 (4th ed. 2006).

5 When considering whether to grant approval, courts often “put a good deal of stock in the
6 product of an arms-length, non-collusive, negotiated resolution.” *Rodriguez v. W. Publ’g Corp.*,
7 563 F.3d 948, 965 (9th Cir. 2009). Approval is appropriate here because the proposed
8 Settlement was reached through vigorous, hard-fought, arm’s-length negotiation between
9 lawyers with significant experience. Stewart Decl. ¶ 20.

10 Courts may also assess the following factors, which are assessed in greater detail at final
11 approval. These factors are addressed below: “the extent of discovery completed and the stage of
12 the proceedings,” “the amount offered in settlement,” “the strength of the plaintiffs’ case,” “the
13 risk, expense, complexity, and likely duration of further litigation,” “the risk of maintaining class
14 action status throughout the trial,” and “the experience and views of counsel.” *Hanlon*, 150 F.3d
15 at 1026. In addition, courts review “the presence of a governmental participant” and “the reaction
16 of the class members to the proposed settlement.” *Id.* The former is not relevant, and the latter
17 cannot be gauged at this stage.

18 **1. The Settlement Provides Substantial Relief for Settlement Class**
19 **Members.**

20 “[P]erhaps the most important factor” courts consider in determining whether to grant
21 preliminary approval is “plaintiffs’ expected recovery balanced against the value of the
22 settlement offer.” *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (citations and
23 internal quotation marks omitted).

24 Here, the proposed Settlement provides substantial relief to the Settlement Class relative
25 to the theoretical maximum recovery. Stewart Decl. ¶ 28. The average net award (after
26 deduction for attorneys’ fees, costs, service awards, and administration) Settlement Class
27 Members stand to recover is approximately \$244 per California workweek and approximately
28 \$209 per Collective workweek, with an estimated average net total payment of \$15,400 per

1 Settlement Class Member if all of the approximately 90 to 100 Settlement Class Members
2 participate. *Id.* ¶ 28. By Claimants' Counsel's estimation, the Total Settlement Amount
3 represents approximately 42% of Settlement Class Members' unpaid wages—not including
4 liquidated damages or California Labor Code and PAGA penalties—based on an estimate that
5 Settlement Class Members worked 15 hours of overtime in 90% of workweeks (to account for
6 periods of vacations, leave, and other days off). *Id.* This recovery is substantial given the
7 litigation risks and the risks in recovering the full extent of possible damages and penalties, as
8 described further below. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.
9 2000) (gross recovery of approximately 16.67% of potential recovery adequate in light of
10 litigation risks); *Villegas v. J.P. Morgan Chase & Co.*, No. 09 Civ. 261, 2012 WL 5878390, at
11 *6 (N.D. Cal. Nov. 21, 2012) (preliminarily approving a settlement where the gross amount
12 represented approximately 15% of the potential recovery).

13 The Settlement provides that \$60,000 of the Total Settlement Amount will be allocated to
14 the Settlement of the PAGA Group's claims,¹³ which represents approximately 2.4% of the Total
15 Settlement Award.¹⁴ Ex. 1 (Settlement Agreement) § 1.23; Stewart Decl. ¶ 29. Claimants
16 estimated maximum PAGA penalties at approximately \$273,200 based on the above Labor Code
17 violations. *Id.* The PAGA Fund therefore represents approximately 21.96% of Claimants'
18 maximum theoretical PAGA recovery. *Id.* This recovery is reasonable because of courts'
19 discretion to reduce PAGA penalties (Cal. Lab. Code § 2699(e)(2)) and well within the range that
20 courts routinely approve. *See, e.g., Ruch v. AM Retail Grp., Inc.*, No. 14 Civ. 05352, 2016 WL

21
22 ¹³ Claimant Biala gave notice to the LWDA of his intent to pursue PAGA penalties as
23 required by Cal. Lab. Code § 2699.3. Stewart Decl. ¶ 30. Claimant will amend the demand after
24 the 65-day exhaustion period expires on May 15, 2022, to allege PAGA claims, per Cal. Lab.
25 Code § 2699.3(a)(2)(A), and at that time submit the arbitration demand to the LWDA as required
26 by Cal. Lab. Code § 2699(l)(1). *Id.* Contemporaneously with filing this motion, Claimants'
27 Counsel submitted a copy of the proposed settlement to the LWDA, as required by Cal. Lab.
28 Code § 2699(l)(2). *Id.*

26 ¹⁴ Courts that look at the proportion of the PAGA settlement to the overall settlement
27 recovery have approved proportionate recoveries in and below this range. *See, e.g., Van Kempen*
28 *v. Matheson Tri-Gas, Inc.*, No. 15 Civ. 660, 2017 WL 3670787, at *10 (N.D. Cal. Aug. 25, 2017)
(1.4 percent); *Chu v. Wells Fargo Investments, LLC*, Nos. 05 Civ. 4526, 06 Civ. 7924, 2011 WL
672645, at *1 (N.D. Cal. Feb. 16, 2011) (less than 1 percent).

1 5462451, at *7 (N.D. Cal. Sept. 28, 2016) (approving PAGA recovery that represented less than
2 2% of maximum potential recovery); *McLeod v. Bank of Am., N.A.*, No. 16 Civ. 03294, 2018 WL
3 5982863, at *2, *4 (N.D. Cal. Nov. 14, 2018) (same).

4 In sum, the \$2,550,000.00 common fund constitutes fair, reasonable, and adequate
5 compensation for Settlement Class Members, in light of potential value of their claims.

6 **2. Claimants Faced Significant Risks in the Absence of Settlement.**

7 “Approval of a class settlement is appropriate when ‘there are significant barriers
8 plaintiffs must overcome in making their case.’” *Betancourt v. Advantage Human Resourcing,*
9 *Inc.*, No. 14 Civ. 1788, 2016 WL 344532, at *4 (N.D. Cal. Jan. 28, 2016) (citation omitted).
10 Claimants face substantial obstacles to a full and timely recovery here. Stewart Decl. ¶ 32.

11 First, there was a risk that Claimants would not succeed in certifying or maintaining the
12 class and collective through trial. *Id.* ¶ 34. JFrog would likely argue that differences among
13 Sales Representatives’ job titles, job duties, or compensation levels preclude class certification
14 or warrant decertification of a collective, if certified. Although Claimants disagree, Claimants
15 recognize that obtaining and maintaining class certification is always a significant obstacle. *Id.*
16 JFrog would also likely argue that certain class and collective members signed pre-dispute
17 arbitration agreements foreclosing class and collective litigation of their claims. Although
18 Claimants believe that at least some of the arbitration agreements may be unenforceable, this
19 injects additional certification risk. *Id.*

20 Second, a trial on the merits would involve significant risks for Claimants on liability
21 issues. JFrog would argue that Sales Representatives were properly classified as overtime-
22 exempt (as administrative, executive, or highly compensated employees). *Id.* ¶ 35. Although
23 Claimants believe that Sales Representatives do not qualify them for any of the relevant
24 exemptions, Claimants’ Counsel recognizes that each exemption inquiry is highly contextual,
25 and litigation of exemption defenses inherently poses significant risks. *Id.*

26 Third, a trial on the merits would entail various risks for Claimants in establishing
27 damages. JFrog would claim that Settlement Class Members did not miss meal or rest breaks
28 and dispute the number of hours Sales Representatives claim to have worked. *Id.* ¶ 36.

1 Without contemporaneous records of time worked and breaks taken (which JFrog did not
2 maintain), proving the existence and extent of overtime hours worked and breaks missed would
3 be an evidentiary challenge. *Id.*

4 To establish a third year of liability and liquidated damages under the FLSA, as well as
5 waiting time and wage statement penalties, Claimants faced risk to overcome JFrog's various
6 state of mind defenses—that any violations were not willful, knowing, or intentional, and that
7 compliance was attempted in good faith. *Id.* ¶ 37.

8 To recover maximum PAGA penalties, Claimants would need to establish that penalties
9 should be stacked, and defeat JFrog's likely argument that a court or arbitrator should use its
10 discretion to reduce PAGA penalties. *See* Cal. Lab. Code § 2699(e)(2); *see also* Stewart Decl. ¶
11 38.

12 Although Claimants would dispute each of JFrog's arguments, a class trial and the formal
13 discovery process to prepare for it likely would be long, arduous, and risky; and even if Claimants
14 prevailed on each of their claims, they might face a lengthy post-trial damages phase and appeals
15 process. Stewart Decl. ¶ 39. In light of the myriad risks and delay that litigation would entail, the
16 proposed Settlement is in the best interests of the Settlement Class Members. *Id.*

17 **3. The Extent of Discovery Supports Settlement.**

18 A settlement requires adequate discovery. The touchstone of the analysis is whether “the
19 parties have sufficient information to make an informed decision about settlement[,]” including
20 formal or informal discovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459.

21 Here, the Parties engaged in sufficient mediation discovery to recommend settlement,
22 including the exchange of substantial data, documents, and witness statements. Stewart Decl. ¶
23 15. The Parties also exchanged extensive mediation statements which outlined the evidence
24 and the key arguments they would make in the course of the litigation. *Id.* This information
25 exchanged was more than sufficient to create an understanding of the amount that is in
26 controversy and the realistic range of outcomes of the litigation.

27 **4. Counsel's Experience and Views Support Approval.**

28 “Great weight is accorded to the recommendation of counsel, who are most closely

1 acquainted with the facts of the underlying litigation.” *Nat’l Rural Telecomms. Coop.*, 221
2 F.R.D. at 528 (citations and internal quotations omitted). “Parties represented by competent
3 counsel are better positioned than courts to produce a settlement that fairly reflects each party’s
4 expected outcome in litigation.” *Rodriguez*, 563 F.3d at 967 (citations, internal quotations and
5 modifications omitted).

6 Here, Claimants’ Counsel Outten & Golden LLP are some of the most experienced and
7 sophisticated plaintiffs’ employment lawyers in the area of class action employment litigation in
8 the country. Stewart Decl. ¶ 31. Based on their extensive experience and expertise in this
9 particular area of the law, Claimants’ Counsel believe that the Settlement is fair, reasonable, and
10 adequate. *Id.* ¶¶ 32-33. Claimants’ Counsel specialize in prosecuting nationwide employment
11 class actions, and over the past many years have successfully—and unsuccessfully—litigated
12 many such cases, putting them in a strong position to weigh the strengths and weaknesses of
13 Claimants’ claims. *Id.* ¶ 32.

14 * * *

15 Because all of the considerations indicate that the Settlement is fair, adequate, and
16 reasonable, the Arbitrator should grant preliminary approval of the Settlement.

17 **E. The Proposed Notice Is Clear and Adequate.**

18 Federal Rule of Civil Procedure 23(c)(2)(B) provides that class members must be
19 provided “the best notice that is practicable under the circumstances,” and the notice must include
20 details such as the nature of the action; the claims, issues, or defenses; and the binding effect of
21 the judgment on class members. Class members should be afforded an opportunity to request
22 exclusion or object to the settlement. *Id.* Rule 23(e)(1)(B) requires parties issue “notice in a
23 reasonable manner to all class members who would be bound by the proposal.”

24 Notice of a class settlement is generally satisfactory if it “describes the terms of the
25 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
26 forward and be heard.” *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir.
27 2004) (citation and internal quotations omitted). Notice sent to “each class member who can be
28 identified through reasonable effort” generally constitutes reasonable notice. *Eisen v. Carlisle &*

1 *Jacquelin*, 417 U.S. 156, 176 (1974).

2 Here, the Notices provide the required information and are clear and concise. *See*
3 Settlement, Ex. A-1, Ex. A-2. The Notices include a description of the claims and the Settlement;
4 information about the arbitration process; the allocation of the Settlement fund, including the
5 calculation of each Settlement Class Member's settlement share, the requests for the Service
6 Awards and Claimants' Counsel's attorneys' fees and costs, and the other payments that will be
7 deducted from the Settlement fund; the opportunity (and consequences) of objecting, opting out,
8 or participating in the Settlement; and the opportunity to appear at the Fairness Hearing
9 (including through one's own counsel). *Id.* ¶ 5(B) & Ex. A-1, Ex. A-2. The Notices are written
10 in plain English and are organized and formatted so as to be as clear as possible. They are based
11 on one of the model notice forms provided by the Federal Judicial Center on its website. The
12 Notices encourage Settlement Class Members to contact Class Counsel or the Settlement
13 Administrator with any questions, and provides their telephone, mail, and e-mail contact
14 information. *Id.* Ex. A-1, Ex. A-2.

15 The manner of dissemination of the Notices is also consistent with modern best practices
16 set forth by the Federal Judicial Center and negotiated and agreed upon by all counsel. The
17 Settlement Administrator will use all commercially reasonable means to confirm Settlement Class
18 Members' addresses and obtain new addresses as necessary, including electronic mail addresses,
19 *id.* ¶ 5(D); disseminate the Notices via physical mailings, e-mail, text message, and a website, *id.*
20 ¶ 5(C); and disseminate reminder notices, *id.* ¶ 5(E), Ex. C.

21 The foregoing notice plan provides the best notice practicable under the circumstances
22 and will provide Settlement Class Members with a full and fair opportunity to consider the terms
23 of the proposed Agreement and make a fully informed decision on whether to participate, object,
24 or opt out of the Settlement.

25 **F. A Final Approval Hearing Should Be Scheduled.**

26 The last step in the settlement approval process is the fairness hearing, after which the
27 Arbitrator will make a final determination that the settlement is fair, reasonable, and adequate.
28

The following schedule sets forth a proposed sequence for the relevant dates, assuming the Arbitrator grants preliminary approval of the Settlement:

<u>Event</u>	<u>Date</u>
Preliminary Approval of Settlement	_____
Deadline for Respondents to Provide Class List to JND and Claimants' Counsel	[7 days from Preliminary Approval Award]
Deadline to Mail Class Notice to Settlement Class	[21 days from Preliminary Approval Award]
Deadline for California Class Members to Submit Opt-Out Form and for Collective Members to Submit Claim Form	[60 days from date of initial mailing or 45 days from date of remailing]
Deadline to file Motions for Final Approval, Attorneys' Counsel Costs & Fees, and Class Representative Service Awards ("Application for Final Approval")	[130 days from Preliminary Approval Award] ¹⁵
Fairness hearing	[137 days from Preliminary Approval Award]

V. CONCLUSION

Claimants' motion is filed in connection with the Parties' Settlement Agreement. Therefore, Respondent JFrog is not opposed to the relief sought for settlement purposes.

For the foregoing reasons, Claimants respectfully request that the Arbitrator:¹⁶

(1) determine that this approval process may proceed on behalf of a class pursuant to Federal Rule of Civil Procedure 23(b) and 29 U.S.C. § 216(b); (2) conditionally certify the proposed Rule 23 class solely for purposes of effectuating this Settlement; (3) designate the action as a collective action under the FLSA; (4) appoint Claimants as Class Representatives; (5) appoint Claimants'

¹⁵ To avoid undue delay, the Parties agreed that means the Bar Date is 60 Days from the date of the initial mailing of Notices, and 45 Days from the date of re-mailing, provided that no remailings will be completed after the 60th day. See Settlement ¶ 1.4. The longest potential period for receipt of materials following re-mailings will be 126 days after the Preliminary Approval Award.

¹⁶ A Proposed Preliminary Approval Award is attached as Exhibit 2 to the Stewart Declaration.

1 counsel as Class Counsel; (6) grant preliminary approval of the Parties' Settlement; (7) approve
2 the dissemination of the proposed Notices pursuant to Federal Rule 23(c) and (e); and
3 (8) schedule a final approval hearing.
4

5 Dated: New York, New York
6 March 21, 2022

Respectfully submitted,

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