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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

HARRISON BOMTEMPO, individually, and on behalf of other members of the general public similarly situated and on behalf of other aggrieved employees pursuant to the California Private Attorneys General Act;

Plaintiff,

vs.

K1 SPEED, INC., a California corporation; and DOES 1 through 100, inclusive,

Defendant.

Case No. 22-CIV-03134

Honorable Nicole S. Healy
Department 28

CLASS ACTION

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

Date:	September 11, 2024
Time:	2:00 p.m.
Department:	28
Complaint Filed:	August 2, 2022
FAC Filed:	June 28, 2024
Trial Date:	None Set

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TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 11, 2024, at 2:00 p.m. or as soon thereafter as the matter may be heard before the Honorable Nicole S. Healy in Department 28 of the Superior Court of California for the County of San Mateo, located at 800 North Humboldt Street, San Mateo, California 94401, Plaintiff Harrison Bomtempo ("Plaintiff" or "Class Representative") will, and hereby does, move for an order:

- Granting preliminary approval of the proposed class action settlement described herein and as set forth in the Joint Stipulation of Class Action and PAGA Settlement Agreement and Release ("Settlement"), attached as "**EXHIBIT 1**" to the Declaration of Elizabeth Parker-Fawley, including, but not limited to, the means of allocation and distribution of funds, including and not limited to, the allocations for penalties under the California Labor Code Private Attorneys General Act of 2004, Class Counsel Fees and Expenses to Class Counsel, Class Representative Service Award to Plaintiff, and Settlement Administration Costs to the Settlement Administrator;
- Conditionally certifying the Class for settlement purposes;
- Preliminarily appointing Plaintiff Harrison Bomtempo as Class Representative;
- Preliminarily appointing Arby Aiwazian, Joanna Ghosh, Elizabeth Parker-Fawley, and Ryan Slinger of Lawyers *for* Justice, PC as Class Counsel;
- Approving the proposed Notice of Class Action Settlement ("Class Notice"), attached as "**EXHIBIT A**" to the [Proposed] Order Granting Preliminary Approval of Class Action and PAGA Settlement;
- Directing the mailing of the Class Notice to the Class Members;
- Approving the proposed deadlines for the notice and settlement administration process;
- Approving ILYM Group, Inc. as the Settlement Administrator; and

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- Scheduling a hearing to consider whether to grant final approval of the Settlement, at which time the Court will also consider whether to grant final approval of the requests for the Class Counsel Fees and Expenses to Class Counsel, Class Representative Service Award to Plaintiff, and Settlement Administration Costs to the Settlement Administrator.

This Motion is made pursuant to Rule 3.769, Rule 3.764, and Rule 3.1113(e) of the California Rules of Court, which require approval by the Court of a class action settlement and permit the Court to extend the page limit for memoranda.

This motion is based upon the following memorandum of points and authorities, the Settlement Agreement, the Declarations of Proposed Class Counsel (Elizabeth Parker-Fawley) and Proposed Class Representative (Harrison Bomtempo) in support thereof, the pleadings and other records on file with the Court in this matter, and such evidence and oral argument as may be presented at the hearing on this motion.

Dated: August 19, 2024

LAWYERS *for* JUSTICE, PC

By: ______________________________
Elizabeth Parker-Fawley
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF MOTION

Plaintiff Harrison Bomtempo ("Plaintiff" or "Class Representative") seeks preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement Agreement and Release ("Settlement") entered into by and between Plaintiff, individually and on behalf of all others similarly situated and other PAGA Employees, on the one hand, and Defendant K1 Speed, Inc. ("Defendant") on the other hand. Subject to approval by the Court, Plaintiff and Defendant (together, the "Parties") have agreed to settle this lawsuit for a Maximum Settlement Amount of $1,495,000.00.[1] The Maximum Settlement Amount includes the following: (1) Individual Settlement Payments to Participating Class Members which will be distributed from the Net Settlement Amount;[2] (2) the Class Representative Service Award of $17,500.00 to Plaintiff;[3] (3) Class Counsel Fees and Expenses, consisting of attorneys' fees in the amount of thirty-five percent (35%) of the Maximum Settlement Amount, (i.e. $523,250.00, if the Maximum Settlement Amount remains $1,495,000.00), and reimbursement of litigation costs and expenses, in an amount not to exceed $19,000.00;[4] (4) the Settlement Administration Costs in the amount not to exceed $22,000.00;[5] and (5) PAGA Penalties of $150,000.00 allocated to penalties under the Private Attorneys General Act ("PAGA"), of which 75% (i.e., $112,500.00) will be distributed to the Labor and Workforce Development Agency ("LWDA") ("LWDA Payment") and 25% (i.e., $37,500.00) ("PAGA Employee Fund") will be distributed to all current and former non-exempt employees of Defendant in the State of California employed at any time during the PAGA Period ("PAGA Employees").[6]

Plaintiff also seeks to provisionally certify the following Class for settlement purposes, which Defendant does not oppose: all current and former non-exempt employees in California of

[1] Settlement Agreement, attached as "**EXHIBIT 1**" to Declaration of Elizabeth Parker-Fawley ("Parker-Fawley Decl."), ¶ I(P).
[2] *Id.*, ¶ III(F).
[3] *Id.*, ¶ III(D).
[4] *Id.*, ¶ III(B).
[5] *Id.*, ¶ III(E).
[6] *Id.*, ¶ III(C). "PAGA Period" is the time period from May 26, 2021 through February 24, 2024. ¶ I(V).

Defendant during the Class Period ("Class" or "Class Member").[7] Class Members who do not submit a timely and valid request to opt-out of the Settlement ("Participating Class Members") will receive a share of the Net Settlement Amount ("Settlement Share") on a *pro rata* basis based upon the number of Pay Periods each Class Member was issued a paycheck during the Class Period ("Pay Periods").[8]

In order to efficiently present the Court with adequate information to determine whether to grant preliminary approval of the Settlement, Plaintiff also moves for an order permitting the filing of this single consolidated memorandum, although it exceeds the page limit established by California Rules of Court, Rule 3.1113(d), instead of filing several separate motions.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Defendant operates indoor Go Kart Racing Tracks around the world. Plaintiff Bomtempo is a former employee of Defendant, at the San Francisco location, who worked from approximately September 2021 to approximately November 2021.

On May 26, 2022, Plaintiff provided notice by electronic upload to the LWDA and written notice by certified mail to Defendant of his intent to pursue civil penalties against Defendant under PAGA for multiple alleged violations of California Labor Code ("PAGA Notice").

On August 2, 2022, Plaintiff filed his Class Action Complaint for Damages against Defendant in San Mateo County Superior Court ("Court"), thereby commencing the above-captioned lawsuit ("Action").

On August 2, 2022, Plaintiff filed his Complaint for Enforcement Under the Private Attorneys General Act, California Labor Code § 2698, Et Seq. against Defendant in San Mateo County Superior Court, Case No. 22-CIV-03135 ("PAGA Action").

On June 21, 2024, the Parties filed a Joint Stipulation for Leave to File a First Amended Complaint in the Action, which the Court granted on June 28, 2024. On June 28, 2024, Plaintiff filed the First Amended Complaint. The First Amended Class Action Complaint for Damages &

[7] Settlement Agreement, ¶ I(D). "Class Period" means from August 2, 2018 through February 24, 2024. ¶ I(E).
[8] *Id.*, ¶¶ I(R), I(X), I(FF), & III(F).

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Enforcement Under the Private Attorneys General Act, California Labor Code § 2698, Et Seq. will be considered the "Operative Complaint."

Plaintiff's core allegation is that Defendant has violated the California Labor Code by engaging in a uniform practice and procedure, with respect to Plaintiff and the Class Members, of, *inter alia*, failing to pay all overtime and minimum wages**,** failing to provide compliant meal and rest periods and associated premium pay, failing to timely pay wages during employment and upon termination of employment, failing to provide compliant wage statements, failing to maintain requisite payroll records, and failing to reimburse necessary business expenses, and thereby engaged in unfair business practices in violation of California Business and Professions Code section 17200, *et seq.* and conduct that gives rise to penalties pursuant to PAGA. Plaintiff contends that he and the Class Members and PAGA Employees, are entitled to, *inter alia*, unpaid wages, penalties (including and not limited to, penalties pursuant to PAGA), and attorneys' fees.

Defendant has denied, and continues to deny, any liability and wrongdoing of any kind associated with any of the allegations in the Action, and further denies that the Action is appropriate for class treatment or representative adjudication for any purpose other than for settlement purposes only.

Class Counsel has actively litigated the Action since it was commenced on August 2, 2022. On August 7, 2023, counsel for the Parties participated in a formal, full-day mediation conducted by Jeffery Krivis, Esq., a well-regarded mediator experienced in mediating complex labor and employment matters. With the aid of the mediator's evaluations, the Parties agreed on monetary terms and some key elements of the Settlement described herein.

III. <u>SUMMARY OF THE SETTLEMENT TERMS</u>

Under the terms of the Settlement, Defendant will pay a Maximum Settlement Amount to resolve the Released Class Claims of Plaintiff and the Class Members who do not submit a timely and valid Opt-Out Notice (i.e., Participating Class Members) and the Released PAGA Claims of the State of California and the PAGA Employees with respect to the Released Parties.[9] Subject to approval by the Court, the Net Settlement Amount will be calculated by deducting the following

[9] Settlement Agreement, ¶ I(CC).

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amounts from the Maximum Settlement Amount: (1) the Class Counsel Fees and Expenses, consisting of attorneys' fees in the amount of 35% of the Maximum Settlement Amount (i.e. $523,250.00, if the Total Settlement Amount remains $1,495,000.00), and reimbursement of actual costs and expenses in an amount not to exceed $19,000.00 ("Class Counsel Fees and Expenses")[10]; (2) Settlement Administration Costs, which are currently estimated not to exceed $22,000.00 to the Settlement Administrator ("Settlement Administration Costs")[11]; (3) $150,000.00 allocated to penalties under PAGA ("PAGA Penalties")[12]; and (4) payment in the amount of up to $17,500.00 to Plaintiff ("Class Representative Service Award").[13] The Parties have agreed to retain ILYM Group, Inc. ("ILYM" or "Settlement Administrator") to handle the notice and settlement administration process.

The Parties have agreed that the Settlement Administrator will determine each Participating Class Member's *pro rata* share of the available Net Settlement Amount ("Settlement Share"), in accordance with the Settlement Agreement and as follows:

> The Pay Period Value will be established by dividing the Net Settlement Amount by all Pay Periods for the Participating Class Members based on paychecks issued during the Class Period. The Individual Settlement Share for each Participating Class Member will be determined by multiplying the Pay Period Value by each Participating Class Member's individual number of Pay Periods.[14]

The Parties have agreed that the Settlement Administrator will determine each PAGA Employee's *pro rata* share of the PAGA Employee Fund ("Individual PAGA Payment"), in accordance with the Settlement Agreement and as follows:

> The PAGA Pay Period Value will be established by dividing the PAGA Employee Fund by all PAGA Pay Periods for the PAGA Employees. The Individual PAGA Settlement Share for each PAGA Employee will be determined by multiplying the PAGA Pay Period Value by each PAGA Employee's individual PAGA Pay Periods.[15]

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[10] Settlement Agreement, ¶ III(B).
[11] *Id.*, ¶ III(E).
[12] *Id.*, ¶ III(C).
[13] *Id.*, ¶ III(D).
[14] *Id.*, ¶ III(F)(1).
[15] *Id.*, ¶ III(F)(3).

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Each Settlement Share will be allocated as follows: fifteen percent (15%) as wages, which will be reported on an IRS Form W-2; and eighty-five percent (85%) as penalties, interest, and non-wage damages, which will be reported on an IRS Form 1099.[16] The Settlement Administrator will withhold the employee's share of taxes and withholdings with respect to the wages portion of the Settlement Shares, and issue checks to Participating Class Members for their Individual Settlement Payments.[17] The Employer Taxes will be paid separately and in addition to the Maximum Settlement Amount.[18] Any payment for an Individual PAGA Settlement Share will be allocated as one hundred percent (100%) penalties, will not be subject to taxes or withholdings, and will be reported on an IRS Form-1099, if necessary.[19]

Each Individual Settlement Payment and Individual PAGA Settlement Share check will be valid and negotiable for one hundred twenty (120) calendar days from the date the checks are issued, and thereafter, shall be cancelled.[20] Uncashed checks will be sent to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Code of Civil Procedure Section 1500 et seq. in the name of the individual to whom the uncashed check was addressed, and in the same amount as each such individual's uncashed check, for the benefit of those individuals who did not cash their checks until such time as they claim their property .[21]

Any Class Member wishing to be excluded from the Class Settlement must submit a written letter ("Opt-Out Notice") to the Settlement Administrator, by mail, postmarked on or before the date that is 60 calendar days from the initial mailing of the Class Notice by the Settlement Administrator ("Response Deadline").[22] In the event that the Class Notice is re-mailed to a Class Member, the Response Deadline for that Class Member will be 15 calendar days after the remailing of a Class Notice or the original Response Deadline, whichever is later.[23] An Opt-Out Notice is a written letter indicating a request to be excluded from the Class Settlement, which must: (a) contain

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[16] Settlement Agreement, ¶ III(F)(2).
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] *Id.*, ¶ III(G)(4).
[21] Ibid.
[22] *Id.*, ¶ III(L)(1).
[23] *Id.*, ¶ III(K)(3).

the full name, address, and the last four (4) digits of the Social Security number of the person requesting to opt-out; (b) be signed by the person requesting to opt-out, (c) reference the Action by its name; and (d) contain a statement clearly indicating that the person submitting the request seeks to be excluded from the Settlement.[24] If the Opt-Out Notice does not contain the information listed in (a)-(d) or is not returned to the Settlement Administrator postmarked by the Response Deadline, it shall not be deemed timely and valid.[25] Any Class Member who submits a timely and valid Opt-Out Notice will not be bound by the Class Settlement and will not be issued an Individual Settlement Payment.[26] Notwithstanding the above, all PAGA Employees will be bound to the PAGA Settlement and will be issued their Individual PAGA Settlement Share, irrespective of whether they submit an Opt-Out Notice.[27]

To object to the Class Settlement, Class Members who have not opted out of the Class Settlement (i.e., Participating Class Members) must submit a written objection to the Settlement Administrator ("Objection"), which must: (a) contain the full name, address, and the last four (4) digits of the Social Security number of the person objecting; (b) be signed by the person objecting, (c) reference the Action by its name; and (d) contain a statement clearly indicating that the person objects to the Settlement.[28] If the Objection does not contain the information listed in (a)-(d) or is not returned to the Settlement Administrator postmarked by the Response Deadline, it shall not be deemed timely and valid.[29] In the alternative, Participating Class Members may appear in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval Hearing.

The Class Notice will include a procedure by which a Class Member may dispute the number of Pay Periods allocated to the Class Member by submitting a written dispute to the Settlement Administrator postmarked no later than the Response Deadline.[30] To be valid, the dispute must contain the following: (a) contain the full name, address, and the last four (4) digits of the Social Security number of the Class Member; (b) be signed by the Class Member, (c)

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[24] Settlement Agreement, ¶ III(L)(1)
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] *Id.*, ¶ III(L)(2).
[29] Ibid.
[30] *Id.*, ¶ III(M)(1).

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reference the Action by its name and case number; (d) contain a statement clearly indicating that the Class Member disputes the number of Pay Periods that are credited to him or her and the number of Pay Periods that the Class Member claims should be credited to him or her; and (e) attach supporting documentation, if any, that they may have.[31] Absent evidence rebutting the accuracy of Defendant's records and data as they pertain to the number of Pay Periods to be credited to a disputing Class Member, Defendant's records will be presumed correct and determinative of the dispute. However, if a Class Member produces information and/or documents to the contrary, the Settlement Administrator and Defendant will jointly evaluate the materials submitted by the Class Member and determine the number of eligible Pay Periods that the disputing Class Member should be credited with under the Settlement. The decision on such disputes will be final and non-appealable.[32]

IV. <u>LEGAL STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS</u>

The settlement of a class action requires approval by the court. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800; Cal. Code Civ. Proc. § 1781(f). California courts look to federal authority for guidance with class action settlements. *Dunk*, *supra*, 48 Cal.App.4th at 1801, fn.7 (citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821). The decision to approve or reject a proposed settlement is within the court's discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35 ("In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion."). Accordingly, a court's decision to approve a class action settlement may be reversed only upon a strong showing of "clear abuse of discretion." *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026; *Class Plaintiff v. City of Seattle* (9th Cir. 1982) 955 F.2d 1268, 1276.

Courts review class action settlements in a two-step process: (1) an earlier conditional review by the court; and (2) a later detailed review after the period during which notice is

[31] Settlement Agreement, III(M)(1).
[32] Ibid.

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distributed to class members for their comments or objections. Conte & Newberg, *Newberg on Class Actions* § 11.24 (4th Ed. 2002). This procedure, which is commonly utilized by both federal and state courts, assures class members of the protection of procedural due process safeguards and enables a court to fulfill its role as the guardian of the interest of the settlement class.

Preliminary approval of a settlement does not require a court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. Cal. R. Ct. 3.769(g).

In considering a potential class settlement, a court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute and need not engage in a trial on the merits. See *City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 456; *Officers for Justice v. Civil Service Commission of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 625. Neither formal notice nor a hearing is required for the trial court to grant provisional class certification and preliminary approval; the court may grant such relief upon an informal application by the settling parties and may conduct any necessary hearing in court or in chambers, at the court's discretion. *Newberg,* § 11.25.

V. <u>THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT</u>

The trial court has broad powers to determine whether a proposed settlement is fair under the circumstances of the case. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794. To make this fairness determination, courts must consider several relevant factors, including "the strength of the plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and view of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Dunk*, *supra,* 48 Cal.App.4th at 1801. "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba*, *supra*, 91 Cal.App.4th at 245. Furthermore, courts give "proper deference

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to the private consensual decision of the parties." *Hanlon*, *supra*, 150 F.3d at 1027 (citation omitted).

The proponent of the settlement has the burden to show that it is fair and reasonable. *Wershba*, *supra*, 91 Cal.App.4th at 245. "A presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Id*.; *Dunk*, *supra*, 48 Cal.App.4th at 1802; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151.

A. <u>The Settlement Resulted from Arm's-Length Negotiations Based Upon Extensive Investigation and Discovery.</u>

Class Counsel has actively litigated the Action since it was commenced on August 2, 2022. Both sides used the pre-mediation time period to investigate the veracity, strength, and scope of the claims, and Class Counsel was actively preparing the case for class certification and trial.[33]

Prior to reaching the Settlement, Class Counsel conducted significant investigation and formal and informal discovery regarding the facts of the case, including and not limited to, the exchange, review, and analysis a large volume of documents and data obtained from Defendant, Plaintiff and other sources.[34] The documents and data that Class Counsel reviewed and analyzed included and was not limited to: Plaintiff's employment records, Plaintiff's time and pay data, time and pay data for a sampling of approximately 75% of other Class Members, company policy acknowledgments, forms, procedures and policies (including, but not limited to, Employee Handbook, Meal Break Waiver, Meal Expense Policy, Meal and Rest Break Policy, Expense Reimbursement Request Form, Track Associate Training Manual, Cashier Commission Agreement, Bonus Program Definitions, K1 Race Gear – Sales Commission Agreement, Corporate Customer Service/Sales Representative Commission Agreement, Sales Manager Commission Agreement, and Corrective Action Form) among other information and documents.[35] Class Counsel had the opportunity to interview Plaintiff and to gather facts and to identify potential

[33] Parker-Fawley Decl., ¶ 12.
[34] Ibid.
[35] Ibid.

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witnesses.[36] Counsel for the Parties also met and conferred on numerous occasions, e.g., to discuss issues relating to the pleadings, formal and informal discovery, and the production of documents and data prior to the mediation.[37] Class Counsel also drafted Plaintiff's pleadings and the mediation brief, and prepared for and attended court proceedings, settlement negotiations, and the mediation, among other tasks.[38]

The Parties engaged in extensive settlement negotiations and participated in a formal, full-day mediation conducted by Jeffery Krivis, Esq. (the "Mediator"), a well-respected mediator experienced in mediating complex labor and employment matters.[39] In the course of mediation and settlement discussions, counsel for the Parties exchanged extensive information and engaged in discussions regarding their evaluations of the case and various aspects of the case, including but not limited to, the risks and delays of further litigation, the risks to the Parties of proceeding with class certification and/or representative adjudication, the law relating to off-the-clock theory, meal and rest periods, regular rate of pay, PAGA representative actions, and wage-and-hour law and enforcement, as well as the evidence produced and analyzed, and the possibility of appeals, among other things.[40] During all settlement discussions, both sides conducted their negotiations at arm's length in an adversarial position.[41] Arriving at a settlement that was acceptable to both sides was not easy. Defendant and its counsel felt strongly about their ability to prevail on the merits and at certification, and Plaintiff and Class Counsel believed that they would be able to obtain class certification and prevail at trial.[42] After conducting extensive investigations, formal and informal discovery, exchange of information, and settlement negotiations, and with the aid of the Mediator's evaluation, the Parties have agreed that the matter is well-suited for settlement given the legal issues relating to Plaintiff's principal claims, as well as the costs and risks to both sides that would attend further litigation.[43]

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[36] Parker-Fawley Decl., ¶ 12.
[37] Ibid.
[38] Ibid.
[39] *Id.*, ¶ 11.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.

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The Settlement takes into account the strengths and weaknesses of each side's position and the uncertainty of how the case might have concluded at certification, trial, and/or appeals.[44] Counsel for the Parties have also reviewed documents and information relating to Plaintiff's and the Class Members' employment with Defendant and performed significant research into the law concerning class certification, PAGA representative actions, off-the-clock theory, regular rate of pay, meal and rest periods, wage-and-hour law and enforcement, Plaintiff's claims, and Defendant's defenses thereto, as well as facts discovered.[45] The Settlement was based on this large volume of facts, evidence, and investigation. In addition, Class Counsel has extensive experience in employment class actions, including significant experience in California wage-and-hour litigation.[46]

B. <u>The Settlement Is Fair, Reasonable, and Adequate.</u>

The Settlement, which provides for a Maximum Settlement Amount of $1,495,000.00, represents a fair, adequate, and reasonable resolution of the matter.[47] The Settlement was calculated using the information and data uncovered during litigation, case investigation, as well as the informal exchange of information.[48] The Settlement takes into account the potential risks and rewards inherent in any case and, in particular, in the case at issue.[49] Moreover, considering all of the facts and circumstances of the lawsuit, the Settlement represents a fair, reasonable, and adequate recovery for the Class, PAGA Employees, and the State of California.[50]

Assuming that the Class Counsel Fees and Expenses, Class Representative Service Award, Settlement Administration Costs, and PAGA Penalties are approved by the Court and paid in the full amounts provided for by the Settlement, the Settlement provides for a Net Settlement Amount that is currently estimated to be $763,250.00.[51] Additionally, 75% of PAGA Penalties (i.e., the LWDA Payment), which is $112,500.00 out of $150,000.00, will be distributed to the LWDA and

[44] Parker-Fawley Decl., ¶ 18.
[45] *Id.*, ¶ 12-13.
[46] *Id.*, ¶¶ 2-7.
[47] *Id.*, ¶ 14.
[48] *Id.*, ¶ 18.
[49] *Id.*, ¶ 11.
[50] *Id.*, ¶¶ 11, 13, & 22.
[51] *Id.*, ¶ 14.

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25% of PAGA Penalties, which is $37,500.00 out of $150,000.00, ("PAGA Employee Fund") will be distributed to PAGA Employees on a *pro rata* basis, based on Pay Periods during the PAGA Period (i.e., Individual PAGA Settlement Share). As discussed in Part III, *supra*, the entire Net Settlement Amount will be fully paid out to the Participating Class Members and the PAGA Penalties will be fully paid out to the LWDA and PAGA Employees, in accordance with the Settlement. The amount of each Participating Class Member's Settlement Share will be calculated based on his or her Pay Periods, and the amount of each PAGA Employees Individual PAGA Settlement Share will be calculated based on his or her PAGA Pay Periods.[52] There is no reason to doubt the fairness of the proposed plan of allocation of the settlement funds for purposes of preliminary approval. Even at the final approval stage, "[a]n allocation formula need only have a reasonable, rational basis [to warrant approval], particularly if recommended by experienced and competent class counsel." *In re American Bank Note Holographics, Inc., Securities Litigation* (S.D.N.Y. 2001) 127 F.Supp.2d 418, 429-30.

In light of the foregoing considerations, Class Counsel believes that the Settlement as a whole is fair, reasonable, and adequate, and is in the best interest of the Class Members, the State of California, and PAGA Employees.[53] Although the recommendations of Class Counsel are not conclusive, the Court can properly take the recommendations into account, particularly if Class Counsel appears to be competent, and has experience with this type of litigation, and investigation have been completed, as is the case here. *Newberg*, §11.47. Accordingly, the Court should grant preliminary approval of the Settlement.

C. The Settlement Is of Significant Value.

Pursuant to *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, the Parties conducted extensive formal and informal discovery and exchanged a large volume of documents, data, and information prior to mediation.[54] The discovery and information that Class Counsel obtained from Defendant and through other sources allowed Class Counsel to develop valuation models in order to evaluate the potential value and merit of the claims, and perform a complete

[52] Settlement Agreement, ¶¶ III(F)(1) & III(F)(3)
[53] Parker-Fawley Decl., ¶¶ 11, 13, & 22.
[54] *Id.*, ¶ 12.

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evaluation of Defendant's defenses thereto.[55] As outlined in the Declaration of Elizabeth Parker-Fawley, Class Counsel performed an extensive analysis of each and every claim pursuant to *Kullar* prior to entering into the Settlement.[56]

VI. CERTIFICATION OF THE CLASS IS APPROPRIATE

For settlement purposes, the requisites for establishing class certification are met, and the Parties have stipulated to conditional certification of the Class for settlement purposes only. California Code of Civil Procedure Section 382 "authorizes class actions when the question is one of a common or general interest, of many persons, or when the Parties are numerous, and it is impracticable to bring them all before the court." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326. California courts certify class actions where the plaintiff identifies "both [1] an ascertainable class and [2] a well-defined community of interest among class members." *Id.*

The Class is ascertainable and so numerous as to make it impracticable to join all Class Members, and there are common questions of law and fact that predominate over any questions affecting any individual Class Member. Further, Plaintiff's claims are typical of the claims of the Class Members, and Class Counsel will fairly and adequately protect the interests of the Class. Finally, prosecution of separate actions by individual Class Members would create the risk of inconsistent or varying adjudications, and a class action is superior to other available means for the fair and efficient adjudication of the case. The Class is amenable to class certification for settlement purposes as discussed below.

A. The Class Is Ascertainable and Sufficiently Numerous.

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be *res judicata*." *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914. "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." *Bartold v. Glendale*

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[55] Parker-Fawley Decl., ¶ 18.
[56] *Id.*, ¶¶ 12 & 18.

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Federal Bank (2000) 81 Cal.App.4th 816, 828. The proposed class must also be sufficiently numerous. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

This action involves a class of approximately 2,381 individuals.[57] This class is sufficiently numerous. *See Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934-35. Further, all Class Members can and will be identified by Defendant to the Settlement Administrator through a review of Defendant's employment records regarding hourly-paid or non-exempt employees in California during the Class Period. As such, the Class is ascertainable and sufficiently numerous.

B. The Class Members Share a Well-Defined Community of Interest.

The community of interest requirement "embodies three factors: (1) predominant common questions of law or fact; (2) class representative with claims or defenses typical of the class; and (3) class representative who can adequately represent the class." *Sav-On, supra*, 34 Cal.4th at 326. "[T]he community of interest requirement for certification *does not mandate that class members have uniform or identical claims*." *Capitol People First v. Dep't of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original). Rather, courts focus on the Defendant's internal policies and "pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiff renders class certification appropriate." *Id.* (citing *Sav-On, supra*, 34 Cal.4th at 333).

The "common issues" requirement "involves analysis of whether the proponent's 'theory of recovery' is likely to prove compatible with class treatment." *Capitol People, supra*, 155 Cal.App.4th at 690 (emphasis added) (citing *Sav-On, supra*, 34 Cal.4th at 327). Furthermore, the commonality inquiry centers on the "reasonableness" of the defendant's labor policies as applied to the potential class. *Ghazaryan, supra*, 169 Cal.App.4th at 1534.

Here, common issues of fact and law predominate as to each of the claims alleged and asserted in the Operative Complaint. Based on the documents and information obtained through formal and informal discovery and exchange of information in this case, Plaintiff contends that Class Members were subject to the same or similar job duties and uniform operations and employment practices, policies, and procedures during the time period at issue.[58] Plaintiff's claims

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[57] Parker-Fawley Decl., ¶ 9.
[58] *Id.*, ¶ 16.

arise from Defendant's alleged uniform policy and systematic scheme, with respect to Plaintiff and the Class Members, of, *inter alia*, failing to properly pay overtime and minimum wages for all hours worked, failing to provide compliant meal and rest periods and associated premium pay, failing to timely pay wages during employment and upon termination of employment, failing to provide complaint wage statements, failing to keep requisite payroll records, and failing to reimburse necessary business-related expenses.[59]

Plaintiff also contends that Defendant's payroll and recordkeeping practices with respect to Plaintiff and the Class Members were substantially the same during the time period at issue.[60] As a result, Plaintiff claims that all of the Class Members were uniformly not paid all compensation due to them from Defendant during the time period at issue.[61]

Plaintiff maintains that the outcome of this litigation would be determined by Defendant's alleged uniform operations and employment policies and procedures that applied across its hourly-paid or non-exempt employees employed by Defendant in California during the Class Period. Accordingly, the Court should certify the Class for settlement purposes only.

VII. APPOINTMENT OF CLASS COUNSEL AND ALLOCATION FOR CLASS COUNSEL FEES AND EXPENSES

Class Counsel has litigated the matter for 2 years and was actively preparing for class certification and trial.[62] The ongoing work has been extensive, demanding, and ultimately successful in achieving a substantial settlement resolution. Class Counsel conducted extensive investigations into the facts of the case and formal and informal discovery. Class Counsel reviewed a large volume of documents and data and also had the opportunity to interview and obtain information from Plaintiff and other Class Members, researched applicable law, undertook damages/valuation calculations, and met and conferred with Defendant's counsel regarding the pleadings and the production of documents and data prior to mediation.[63] Counsel for the Parties also undertook extensive settlement discussions, which included participating in a formal, full-day

[59] Parker-Fawley Decl., ¶ 16.
[60] Ibid.
[61] Ibid.
[62] *Id.*, ¶ 11.
[63] *Id.*, ¶ 12.

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mediation.[64] Class Counsel is well-experienced in wage-and-hour class action litigation and used that experience to obtain a great result for the Class.[65]

The Settlement establishes a Maximum Settlement Amount of $1,495,000.00, and provides for Class Counsel to apply to the Court for Class Counsel Fees and Expenses, consisting of attorneys' fees in an amount not to exceed thirty-five percent (35%) of the Maximum Settlement Amount (i.e., $523,250.00) and reimbursement of litigation costs in an amount not to exceed $19,000.00 for costs and expenses.[66] The attorneys' fees provided for by the Settlement are commensurate with: (1) the risk that Class Counsel took in bringing and litigating the case, (2) the extensive time, effort and expense that Class Counsel dedicated to the case, (3) the skill and determination that Class Counsel has shown, (4) the results that Class Counsel has achieved throughout the litigation, (5) the value of the Settlement that Class Counsel has achieved for the Class Members, State of California, and PAGA Employees, and (6) the other cases that Class Counsel had to turn down in order to devote their time and efforts to this matter. The proposed Class Notice provides Class Members with information about the amount allocated toward the Class Counsel Fees and Expenses, and that an award of the Class Counsel Fees and Expenses will be sought, as provided for by the Settlement.[67]

Trial courts have "wide latitude" in assessing the value of attorneys' fees and their decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 41. Indeed, it is long settled that the "experienced trial judge is the best judge of the value of professional services rendered in his court." *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132. California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503 (citing *Lealao*, *supra*, 82 Cal.App.4th at 48-49). In *Lealao*, the court held that when an action leads to a recovery that can be "monetized" with a reasonable degree of certainty, the trial court should "ensure that the fee

[64] Parker-Fawley Decl., ¶ 11.
[65] *Id.*, ¶¶ 2-7.
[66] Settlement Agreement, ¶ II(B).
[67] Settlement Agreement, Exh. A.

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awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Id.* at 50. In cases where class members present claims against a settlement fund and the settlement agreement provides that the defendant agrees to paying the attorneys a percentage of the same, use of that percentage method is appropriate. *Id.* at 32.

The propriety of calculating and awarding attorneys' fees as a percentage of a settlement that has, by litigation, been preserved or recovered for the benefit of others, has been confirmed by the California Supreme Court. *Laffitte*, *supra*, 1 Cal.5th 480 at 486 & 506. The California Supreme Court has taken the position that "[t]rial courts have discretion to conduct a lodestar cross-check on a percentage fee," "they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee[,]" and "[t]he percentage of fund method survives in California." *Id*. (internal quotation marks omitted).

Historically, courts have awarded fees as high as fifty percent (50%) of the settlement, depending on the circumstances of the case. *Newberg*, § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494 (awarding attorneys' fees in the amount of 45% of the $7.3 million settlement); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195 (awarding approximately 53% of the settlement as attorneys' fees). California courts routinely approve class action attorneys' fee awards "averag[ing] around one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court found 20 to 40 percent range of contingency fee in marketplace was appropriate in class actions); see also *Estrada v. Dr. Pepper/Seven-Up*, Los Angeles County Superior Court Case No. BC262247 (May 2005) (wage and hour); *Moore v. IKEA*, Los Angeles County Superior Court Case No. BC263646 (Sept. 2006) (wage and hour).

Class Counsel has borne all of the risks and costs of litigation and will not receive any compensation until recovery is obtained.[68] Class Counsel will provide extensive evidence as to the time worked, litigation efforts, and further argument at the time of filing Plaintiff's Motion for Final Approval of the Settlement. Considering the work performed and the risks incurred, the

[68] Parker-Fawley Decl., ¶ 19.

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attorneys' fees provided for by the Settlement and to be requested by Class Counsel are well within the range of reasonableness.

VIII. THE PROPOSED CLASS NOTICE IS ADEQUATE

California statutory and case law vests the Court with broad discretion in fashioning appropriate class notice. See Cal. Code Civ. Proc. § 1781; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973-74. A class notice is adequate if it "present[s] a fair recital of the subject matter and proposed terms" of the Settlement. *Mendoza v. United States* (9th Cir. 1980) 623 F.2d 1338, 1351 (quoting *Marshall v. Holiday Magic* (9th Cir. 1977) 550 F.2d 1173, 1177).

The proposed Class Notice describes the Settlement, the deadlines and procedures to submit an Objection, Opt-Out Notice, and/or dispute regarding Pay Periods, and the date and time set for the Final Approval Hearing.[69]

The proposed Class Notice fulfills the requirement of neutrality in notice procedure. *Newberg,* at § 8.39. "Sufficient information about the case should be provided to enable class members to make an informed decision about their participation." *Manual for Complex Litigation* § 21.311 at 413 (4th ed. 2004). The proposed Class Notice summarizes the proceedings to date and the terms and conditions of the Settlement in an informative and coherent manner.[70] The proposed Class Notice recognizes that the Court has not yet granted final approval of the settlement.[71] The proposed Class Notice also apprises the Class Members and PAGA Employees of, *inter alia*, how their Settlement Share and Individual PAGA Settlement Share is calculated and the number of Pay Periods credited to them.[72]

The proposed Class Notice satisfies all due process requirements and complies with the standards of fairness, completeness, and neutrality. Fed. R. Civ. P. 23(c)(2) and 23(e); *Newberg*, §§ 8.21, 8.39; *Manual*, §§ 21.311, 21.312; see also *Cartt*, *supra*, 50 Cal.App.3d at 960 ("The essentials of due process of law in class suits would appear to be afforded by fair representation in

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[69] Settlement Agreement, Exh. A
[70] Ibid.
[71] Ibid.
[72] Ibid.

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the assertion of claims of class members against the opposing parties in any lawsuit, and notice of the pending suit.”). Accordingly, the Court should approve the proposed Class Notice.

IX. APPOINTMENT OF ILYM AS THE SETTLEMENT ADMINISTRATOR

The Parties have selected ILYM to administer the Settlement. The Settlement Administrator will mail the Class Notice to each Class Member by First-Class U.S. mail in English and Spanish.[73] For any Class Notice returned prior to the Response Deadline as undeliverable within 30 days of the mailing of the Class Notice, the Settlement Administrator shall perform a search for an alternate address by way of skip-trace and re-mail the Class Notice within 5 calendar days.[74]

The Settlement Administrator will calculate the amounts of the Settlement Shares and Individual PAGA Settlement Shares; deduct and transmit applicable state and/or federal taxes in connection with the wage portion of Settlement Shares; mail the Individual Settlement Payment checks to Participating Class Members and Individual PAGA Settlement Share checks to PAGA Employees; issue W-2 and 1099 forms; calculate and disburse the Class Counsel Fees and Expenses, Class Representative Service Award, and PAGA Penalties; and perform such other tasks necessary to effectuate the terms of the Settlement Agreement.[75] The Settlement Administration Costs are currently estimated not to exceed $22,000.00 and will be paid out of the Maximum Settlement Amount, subject to approval by the Court.[76]

Plaintiff respectfully requests that the Court appoint ILYM as the Settlement Administrator and direct the mailing of the Class Notice to the Class Members in the manner outlined and based on the proposed deadlines as described herein and set forth in the Settlement Agreement.

X. PROPOSED DEADLINES FOR THE NOTICE PROCESS

At this preliminary approval stage, Plaintiff seeks approval of the proposed deadlines for the notice and settlement administration process. *Newberg*, at § 11.26. The notice process entails mailing of the Class Notice, in the form approved by the Court, to all known and reasonably

[73] Settlement Agreement, ¶ III(J)(1).
[74] *Id.*, ¶ III(K)(3).
[75] *Id.*, ¶ III(A-G).
[76] *Id.*, ¶ III(E).

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ascertainable Class Members based on Defendant's records.[77]

Within 14 calendar days of Preliminary Approval, Defendant will provide the Class Data List to the Settlement Administrator.[78] Within 14 calendar days after receiving the Class List from Defendant, the Settlement Administrator will perform a search based on the National Change of Address Database, for information to update and correct for any known or identifiable address changes, and will mail a Class Notice in English and Spanish (in the form attached as Exhibit A to this Settlement Agreement) to all Class Members via First-Class U.S. Mail, using the most current, known mailing addresses identified by the Settlement Administrator.[79] With respect to Class Notices that are returned as undeliverable within 30 calendar days of mailing the Class Notice, the Settlement Administrator will perform a search for an alternate address by way of skip-trace and re-mail the Class Notice within 5 calendar days.[80] The Response Deadline for individuals who have Class Notices re-mailed to them will be either the original Response Deadline or 15 calendar days after the date of re-mailing of the Class Notice, whichever is later.[81]

Within 30 calendar days of the Effective Date, the Settlement Administrator will provide the Parties with the account information so Defendant can wire the payment.[82]

Within 45 calendar days after the Effective Date or May 31, 2025, whichever is later, Defendant will pay the Maximum Settlement Amount and associated employer-side taxes into the settlement account established by the Settlement Administrator.[83]

Within 14 calendar days of the funding of the Maximum Settlement Amount, the Settlement Administrator will issue payments due under the Settlement and approved by the Court.[84]

Each Individual Settlement Payment and Individual PAGA Settlement Share check will be valid and negotiable for one hundred twenty (120) calendar days from the date the checks are

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[77] *Id.*, ¶ III(K) & Exh. A.
[78] *Id.*, ¶ III(K)(1).
[79] *Id.*, ¶ III(K)(2).
[80] *Id.*, ¶ III(K)(3).
[81] Ibid.
[82] *Id.*, ¶ III(G)(2).
[83] *Id.*, ¶ III(G)(1).
[84] *Id.*, ¶ III(G)(3).

issued, and thereafter, shall be cancelled.[85] Uncashed checks will be sent to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Code of Civil Procedure Section 1500 et seq. in the name of the individual to whom the uncashed check was addressed, and in the same amount as each such individual's uncashed check, for the benefit of those individuals who did not cash their checks until such time as they claim their property.[86]

XI. APPOINTMENT OF CLASS REPRESENTATIVE AND ALLOCATION FOR THE CLASS REPRESENTATIVE SERVICE AWARD

Plaintiff respectfully requests that the Court appoint him as the Class Representative and preliminarily approve the Enhancement Award in an amount up to $17,500.00.[87] It is within the Court's discretion to award payment to a class representative for their efforts and work. *Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299 (approving $50,000 participation award to a single class representative). The factors that courts may consider in determining whether to make an Class Representative Service Award include: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Id*.

The Class Representative Service Award is fair and appropriate. Plaintiff spent time and effort in producing relevant documents and past employment records and providing the facts and evidence necessary to attempt to prove the allegations.[88] Plaintiff was available whenever Class Counsel needed him and actively tried to obtain and provide information that would facilitate the pursuit of the class and PAGA claims.[89] Additionally, Plaintiff provided a broader individual waiver and release of claims with a California Civil Code Section 1542 waiver.[90] Accordingly, it is appropriate and just for Plaintiff to receive an Class Representative Service Award for his

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[85] Settlement Agreement, ¶ III(G)(4).
[86] Ibid.
[87] *Id.*, ¶ III(E).
[88] Parker-Fawley Decl., ¶ 20; Declaration of Harrison Bomtempo in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Bomtempo Decl."), ¶¶ 3-5.
[89] Parker-Fawley Decl., ¶ 20; Bomtempo Decl., ¶ 3-5.
[90] Bomtempo Decl., ¶ 7.

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services on behalf of the Class, PAGA Employees, and the State of California, in addition to his Individual Settlement Payment and Individual PAGA Settlement Share.

XII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement; conditionally certify the Class for settlement purposes; preliminary appoint and designate Arby Aiwazian, Elizabeth Parker-Fawley and Ryan Slinger of Lawyers *for* Justice, PC as Class Counsel; preliminary appoint and designate Plaintiff Harrison Bomtempo as Class Representative; appoint ILYM as the Settlement Administrator; preliminarily approve the allocations for Class Counsel Fees and Expenses, Class Representative Service Award, Settlement Administration Costs, and PAGA Penalties; approve the proposed Class Notice; direct the Settlement Administrator to undertake the notice and settlement administration process in conformity with the deadlines and procedures provided by the Settlement Agreement; schedule a Final Approval Hearing to take place in approximately three (3) months; and permit the filing of a memorandum that exceeds the page limit.

Dated: August 19, 2024

LAWYERS *for* JUSTICE, PC

By: ______________________
Elizabeth Parker-Fawley
Attorneys for Plaintiff

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