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10 **SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY**
11 **OF SACRAMENTO**

12 BRANDON WORTHY and RANDI
13 RIZZARI, Individually and on Behalf
of All Others Similarly Situated,

14 Plaintiffs,

15 v.

16 MALWAREBYTES, Inc.,

17 Defendant.

Case No. 25CV006631

**PLAINTIFFS' NOTICE OF MOTION AND
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND COLLECTIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS & AUTHORITIES IN SUPPORT
THEREOF**

Judge: Hon. Lauri A. Damrell

Dept.: 22

Hearing Date: May 30, 2025

Hearing Time: 9:00 AM

Reservation Number: A-006631-001

Complaint Filed: March 19, 2025

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on May 30, 2025 at 9:00 AM, or as soon thereafter as the matter
3 may be heard, in Department 22 of this Court, or such other Department to which Judge Lauri A.
4 Damrell may be reassigned, located at the Gordon D. Schaber Sacramento County Courthouse,
5 720 9th Street, Sacramento, CA 95814, Plaintiffs Brandon Worthy and Randi Rizzari
6 (“Plaintiffs”), on behalf of themselves and all others similarly situated (“Settlement Class
7 Members”), will and hereby do move this Court for an order provisionally certifying the
8 proposed settlement class, PAGA group, and FLSA collective and granting preliminary approval
9 of the settlement.¹

10 This unopposed motion is based upon this Notice of Motion and Unopposed Motion; the
11 accompanying Memorandum of Points and Authorities; the Declaration of Adam Koshkin and
12 the attached exhibits, including the executed settlement agreement; the pleadings, papers, and
13 other records on file in this action; and oral argument on the motion.

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27 ¹ All capitalized terms have the meaning set forth in the Settlement Agreement unless
28 indicated otherwise.

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1 **I. INTRODUCTION**

2 Plaintiffs Brandon Worthy and Randi Rizarri, individually and on behalf of all others
3 similarly situated (“Plaintiffs”), respectfully submit for the Court’s preliminary approval a
4 proposed settlement reached with Defendant Malwarebytes, Inc. (“Defendant” or
5 “Malwarebytes”). The proposed settlement provides a non-reversionary fund of \$1,610,000
6 which covers no more than 16,350 Sales Representative workweeks. It resolves Plaintiffs’
7 claims that Defendant failed to pay them proper overtime for all hours worked, including
8 because Defendant misclassified its Exempt Sales Representatives and permitted its Nonexempt
9 Sales Representatives to work off the clock and when it did pay overtime, it paid an improper
10 overtime rate because it did not include the value of commissions in the calculation.² The
11 Settlement resolves the claims of Malwarebytes Sales Representatives who worked up to 16,350
12 workweeks and provides a substantial estimated net per-week recovery of \$57.76, or
13 approximately \$3,918.62 on average per person if there are 241 Sales Representatives, as the
14 Parties estimate. Class Members will not need to submit a Claim Form or take any other action
15 to receive a Settlement Check.

16 This proposed settlement is the product of extensive arm’s-length negotiation between
17 the Parties over the course of three mediations before two independent mediators, and warrants
18 approval because the terms are fair, reasonable, and adequate. Accordingly, Plaintiffs
19 respectfully request that the Court: (1) grant preliminary approval of the settlement; (2)
20 conditionally certify the California Class and the Collective, as defined herein, for settlement
21 purposes only and appoint Outten & Golden LLP (“O&G”) as Class Counsel; (4) appoint ILYM
22 as the Settlement Administrator chosen by the Plaintiff, to which Malwarebytes did not object;
23 (5) approve the parties’ agreed Notice of Proposed Class Action Settlement and Notice of
24 Proposed Collective Action Settlement, and direct their distribution; and (6) set a date for the
25

26 ² All terms used in this brief have the same meaning as in the Settlement Agreement and
27 Release, attached as Exhibit 1 to the Declaration of Adam Koshkin in Support of Plaintiffs’
28 Unopposed Motion for Approval of Class Action, Collective Action, and PAGA Settlement
 (“Koshkin Decl.”). Unless otherwise indicated, all exhibits are attached to the Koshkin Decl.

1 final fairness hearing. Undersigned counsel has reviewed the Court’s Checklist for Approval of
2 Class Action and/or PAGA Settlements (the “Checklist”) and this briefing complies with the
3 Checklist. Koshkin Decl. ¶ 2.

4 **II. FACTUAL AND PROCEDURAL BACKGROUND³**

5 Malwarebytes is a corporation that sells anti-malware software. Compl. ¶ 26, Koshkin
6 Decl. ¶ 17. Plaintiffs and Class Members worked for Malwarebytes as Sales Representatives
7 selling their anti-malware software. Compl. ¶¶ 18, 23, 37, 41. Plaintiff Worthy worked out of
8 Defendant’s Santa Clara, California office as an Exempt Sales Representative from
9 approximately April 2019 through February 2021. *Id.* ¶ 18. Plaintiff Rizzari worked for
10 Defendant in its Santa Clara office from approximately February 2020 through February 2022.
11 *Id.* ¶ 22. She was initially a Nonexempt Sales Representative but was converted to an Exempt
12 Sales Representative after the COVID-19 pandemic. *Id.* ¶ 23.

13 Plaintiffs’ counsel initiated an investigation into allegations that Malwarebytes Sales
14 Representatives worked overtime without being paid for all hours worked, whether because they
15 were misclassified as exempt or worked off the clock. Over the course of this investigation,
16 Plaintiffs’ counsel spoke with several Malwarebytes employees, including Plaintiffs, across
17 various job titles whose duties focused primarily on sales. Koshkin Decl. ¶ 20. Plaintiffs’
18 counsel also conducted an investigation regarding Defendants’ business locations, business
19 entities, and past federal and state litigation as well as legal research regarding the underlying
20 merits of Plaintiffs’ claims, possible defenses, the proper measure of damages, and the likelihood
21 of class certification. *Id.*

22 On February 17, 2022, Plaintiff Worthy sent Defendant a letter in which he asserted that
23 Malwarebytes improperly classified its Exempt Sales Representatives as overtime exempt and
24 permitted its Nonexempt Sales Representatives to perform uncompensated work off-the-clock,
25 thereby denying both groups proper overtime pay in violation of the Fair Labor Standards Act
26

27
28 ³ Checklist ¶ 1.

1 (“FLSA”) and the California Labor Code, and invited Defendant to engage in settlement
2 negotiations. *Id.* ¶ 21. Plaintiff Rizzari later joined as an additional plaintiff. *Id.*

3 Plaintiffs requested that Defendant provide certain documents and data so that Plaintiffs
4 could evaluate the strength of their claims, litigation risks, and the extent of available damages
5 and penalties. Defendants produced Plaintiffs’ complete personnel files, as well as class-wide
6 data including job titles, regular compensation, bonus compensation, work locations,
7 reimbursements, and other data points. *Id.* at ¶ 22.

8 Following the exchange of data and documents, the Parties participated in three
9 mediation sessions before two experienced wage and hour class and collective action mediators,
10 on October 3, 2022 with Gail A. Glick, Esq. and on July 11, 2023 and February 26, 2024 with
11 Stephen P. Sonnenberg, Esq. *Id.* at ¶ 23. Following the third mediation the Parties continued
12 discussions with the assistance of Mediator Sonnenberg and ultimately accepted a mediator’s
13 proposal on March 13, 2024, and following additional negotiations executed a term sheet on
14 September 5, 2024. *Id.* Following continued negotiations over terms not memorialized in the
15 term sheet, the parties finalized and executed a settlement agreement on March 18, 2025.

16 On March 26, 2025, Plaintiffs filed the Complaint and on May 6, 2025 filed this
17 unopposed Motion.

18 **III. SETTLEMENT TERMS**

19 **A. The Settlement Fund**

20 The Settlement Agreement establishes a non-reversionary Total Settlement Amount of
21 \$1,610,000.00. Ex. 1 (“Settlement Agreement”) at ¶ 8.⁴ The final Total Settlement Amount is
22 subject to an escalator, which increases the amount Defendant will pay should the total number
23 of workweeks identified pre-mediation (14,730⁵) increase by more than eleven percent when
24 calculated for purposes of settlement distribution. *Id.* at ¶ 8(b).

25 The Total Settlement Amount covers: (1) individual payments for Participating
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27 ⁴ Checklist ¶¶ 2-4.

28 ⁵ Checklist ¶ 9.

Collective Class Members and Participating California Class Members; (2) Service Awards of up to \$10,000 to each Plaintiff; (3) Plaintiffs' Counsel's attorneys' fees of up to one-third of the Total Settlement Amount, approximately \$536,666.67; (4) the reimbursement of Plaintiffs' Counsel's actual out-of-pocket costs, approximately \$18,010.02 at the time of filing plus estimated additional costs of \$1,000 through final approval;⁶ (5) the Settlement Administrator's fees and costs not to exceed \$8,000; and (6) a Private Attorneys General Act Fund ("PAGA Fund") of \$80,500.00 (allocated 25% to PAGA Members and 75% to the California Labor and Workforce Development Agency ("LWDA")). *Id.* at ¶¶ 1.31, 1.32, 8.1(a), 8.1(b), 8.2, 8.5, 8.7, 8.8. The following table lists the key financial terms:⁷

Total Settlement Amount	\$1,610,000.00
<i>Total Service Awards to Two Named Plaintiffs</i>	<i>- \$20,000.00</i>
<i>Plaintiffs' Counsel's Attorneys' Fees</i>	<i>- \$536,666.67</i>
<i>Plaintiffs' Counsel's Estimated Costs, including costs expected to be incurred after preliminary approval</i>	<i>- \$20,445.02</i>
<i>Settlement Administrator's Fees and Costs (not to exceed)</i>	<i>- \$8,000.00</i>
<i>PAGA Fund</i>	<i>- \$80,500.00</i>
<i>Net Fund</i>	<i>= \$944,388.31</i>

The Total Settlement Amount does not include Malwarebytes' portion of payroll taxes, which it will pay separately. *Id.* at ¶ 8.1.

B. Eligible Employees and Definition of Class⁸

The proposed Settlement provides recovery for three different groups of current and former Malwarebytes employees:

⁶ The amount of these costs will increase during the period between the filing of this motion and when Plaintiffs file their motion for attorneys' fees and costs, as Plaintiffs anticipate incurring filing fees for the motions, legal research fees, and other incidental costs.

⁷ Checklist ¶ 6.

⁸ Checklist ¶ 9.

1 First, California Class Members are Exempt and Nonexempt Sales Representatives
2 employed by Defendant in California from April 4, 2018 through the Release Date. *Id.* at ¶¶ 1.4,
3 1.8.

4 Second, Putative Collective Class Members are Exempt and Nonexempt Sales
5 Representatives employed by Defendant outside of California from April 4, 2019 through the
6 Release Date. *Id.* at ¶¶ 1.44, 1.6.

7 Third, PAGA Members are Exempt and Nonexempt Sales Representatives employed by
8 Defendant in California during the period April 4, 2021 through the Release Date.

9 Members of these groups who signed separation agreements are not included in the
10 Settlement. Based on the data produced at mediation, there are approximately 80 Putative
11 Collective Class Members, 161 California Class Members and 56 PAGA Members. Koshkin
12 Decl. at ¶¶ 37.

13 C. Release of Claims⁹

14 The Settlement Agreement provides for a release tailored to each proposed group. In
15 each release, the Released Parties are Defendant and any of its past, present, and future direct or
16 indirect parents, subsidiaries, predecessors, successors, and affiliates; past, present, and future
17 officers, directors, employees, partners, members, owners, shareholders, agents, attorneys,
18 insurers, reinsurers; and any individual or entity which could be jointly liable with Defendant.
19 Each release runs through April 16, 2023 for Exempt Sales Representatives. Ex. 1 (Settlement
20 Agreement) ¶ 1.46. For Nonexempt Sales Representatives the release date is no later than the
21 date of preliminary approval and corresponds to the number of accrued workweeks covered by
22 the Total Settlement Amount pursuant to the Escalator Clause. *Id.*

23 By operation of the judgment in this action, Participating California Class Members (i.e.
24 those who do not opt out) will release all California state wage and hour claims pled in the
25 operative Complaint that accrued during the Class Period as well as any claims under the
26 California Labor Code, California Industrial Welfare Commission's Wage Orders, or the

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28 ⁹ Checklist ¶ 11.

1 California Code of Regulations, that were alleged or which could have been alleged under the
2 same or similar facts, allegations, or claims in the operative Complaint. *Id.* at ¶¶ 1.47, 9.2.

3 By cashing a check and thereby opting into the Settlement, Collective Class Members
4 will release all wage and hour claims under the Fair Labor Standards Act (“FLSA”) (29 U.S.C. §
5 201 *et seq.*) pled in the operative Complaint, that accrued during the Collective Class Period,
6 including without limitations, any and all state and federal claims for unpaid overtime wages,
7 and all related claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and
8 expenses that were alleged or which could have been alleged under the same or similar facts,
9 allegations, or claims in the operative Complaint. *Id.* at ¶¶ 1.50, 9.2.

10 By operation of the judgment in this action PAGA Members will release all claims under
11 PAGA pled in the PAGA Letter and/or the operative Complaint, that accrued during the PAGA
12 Class Period, including without limitations, all claims for penalties (including but not limited to
13 claims deriving from unpaid wages, unpaid overtime, alleged meal and rest break violations,
14 waiting time penalties, wage statement penalties), interest, attorneys’ fees, costs and expenses,
15 and other remedies available under PAGA. *Id.* at ¶¶ 1.49, 9.3.

16 The proposed Notice describes the Released Class, Collective, and PAGA Claims, and
17 the Settlement Checks sent to Collective Class Members will include an acknowledgement of the
18 release of the Released Collective Claims. Ex. A-1 (Class Notice) at 5; Ex. A-2 (Collective
19 Notice at 4-5.

20 **D. Allocation Formula**

21 The Settlement Amount paid to each Participating California Class Member and
22 Participating Collective Class Member will be determined proportionally on a points system that
23 takes into account workweeks, exempt status and the corresponding claims alleged for that
24 group, and location. Each workweek worked as a Nonexempt Sales Representative outside of
25 California counts for one (1) point, each workweek as an Exempt Sales Representative outside of
26 California counts for one and a half (1.5) points, each work week as a Nonexempt Sales
27 Representative in California counts for three (3) points, and each workweek worked as an
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1 Exempt Sales Representative in California counts for four (4) points. This allocation reflects the
2 relative strength of each group's claims. Each Participating Class Member's individual share is
3 determined by summing their individual points and dividing that number by the total number of
4 points for all Participating Class Members, which is then multiplied by the Net Fund. Ex. 1
5 (Settlement Agreement) ¶ 8.3.

6 The allocation to PAGA Members will operate in the same fashion, except that each
7 workweek within the PAGA period will be worth one (1) point, regardless of exempt status. *Id.*
8 ¶ 8.4.

9 The Settlement Administrator will mail checks to Participating Class Members and
10 Putative Collective Class Members reflecting these calculations 14 days after the Funding Date,
11 which occurs 15 days after the Final Approval Order and Judgment becomes final.¹⁰ *Id.* ¶¶ 1.15,
12 1.20, 8.10.

13 None of the Total Settlement Amount will revert to Malwarebytes. Any unclaimed funds
14 will be transferred to the California Unclaimed Property Fund in the name of the intended
15 recipient.¹¹ *Id.* ¶ 8.9.

16 **E. Tax Characterization of Settlement Payments¹²**

17 For Participating Collective Class Members, the Settlement Administrator shall allocate
18 50% of the payment as W-2 wage payments and 50% of the payment as 1099 non-wage
19 compensation as liquidated damages, statutory penalties, and interest. *Id.* at ¶ 8.6(a). For
20 Participating California Class Members, the Settlement Administrator shall allocate 33.33% of
21 the payment as W-2 wage payments and 66.67% of the payment as 1099 non-wage
22 compensation as liquidated damages, statutory penalties, and interest. *Id.* at ¶ 8.6(b). For PAGA
23 Members, the Settlement Administrator shall allocate 100% of the payment as 1099 non-wage
24 compensation as statutory penalties. *Id.* at ¶ 8.6(c). Defendant will pay the Employer Payroll
25 Taxes separately from and in addition to the Total Settlement Amount. *Id.* ¶ 8.1(a).

26 ¹⁰ Checklist, "Class Notice Administration" ¶ 7, 9.

27 ¹¹ Checklist ¶ 4.

28 ¹² Checklist ¶ 7.

1 **F. Notice and Settlement Administrator**

2 The Parties have selected ILYM Group, Inc. (“ILYM”) as the settlement claims
3 administrator (“Settlement Administrator”). Koshkin Decl. ¶ 64. ILYM has agreed to
4 administer the settlement for an amount not to exceed \$8,000, which includes all service fees,
5 costs, and expenses, assuming the class size is approximately 241 individuals as the parties
6 estimate. *Id.*; *see also* Declaration of Lisa Mullins (“ILYM Decl.”), ¶ 10, Ex. C.¹³ ILYM is an
7 experienced claims administrator with extensive expertise in disseminating class action notices
8 and administering class action settlements. ILYM Decl. ¶ 2; *Id.*, Ex. A (ILYM CV).¹⁴ As an
9 experienced claims administrator, ILYM maintains insurance for data breaches and mishandling
10 of settlement funds and has strict and thorough procedures in place to protect the security of class
11 data. *Id.* ¶ 2; *Id.*, Ex. B (Security Summary and Protocol).¹⁵

12 The Parties agreed to ILYM as the settlement administrator after a competitive bidding
13 process involving three settlement administration firms. In addition to ILYM, Plaintiffs sought
14 bids from Rust Consulting, Inc. and XPAND Legal Services. Koshkin Decl. ¶ 66. ILYM’s bid
15 contained the most comprehensive services at the lowest price.¹⁶ *Id.*

16 ILYM will disseminate the Court-approved Notice to Putative Collective Class Members
17 and the California Class Members via mail and email using contact information obtained from
18 Defendants on the Class List. Ex. 1 (Settlement Agreement) ¶ 4.3. Defendant will provide the
19 Class List to ILYM electronically, within five days of the Preliminary Approval Order.¹⁷ *Id.* ¶
20 4.1. Upon receipt, ILYM will run the Class List through the National Change of Address
21 Database and use any updated information in disseminating the Notice.¹⁸ *Id.* ¶ 3.2; ILYM Decl.

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24 ¹³ Checklist, “Class Notice Administration” ¶ 3.

25 ¹⁴ Checklist, “Class Notice Administration” ¶ 2.

26 ¹⁵ Checklist, “Class Notice Administration” ¶ 2.

27 ¹⁶ Checklist, “Class Notice Administration” ¶ 1.

28 ¹⁷ Checklist, “Notice to the Class” ¶ 9; Checklist, “Class Notice Administration” ¶ 4.

¹⁸ Checklist, “Class Notice Administration” ¶ 4.

¶ 6. ILYM will disseminate the Notice within 30 days of the Preliminary Approval Order. Ex. 1 (Settlement Agreement) ¶ 4.3.¹⁹

In the event that a Notice is returned as undeliverable, the Settlement Administrator shall attempt to obtain a correct address, including up to two skip traces, and shall attempt to re-send the Notice to any more recent email or physical address it obtains.²⁰ *Id.* ¶ 4.4. The Notice is attached as Exhibits A-1 and A-2 to the Koshkin Declaration for the Court’s review and approval.

To provide information to Class Members and Putative Collective Class Members during the notice period, ILYM will maintain a settlement website, using the URL www.malwarebyteswagesettlement.com, as well as a mailing address and toll-free telephone number.²¹ ILYM Decl. ¶ 5.

G. Opt-Out and Objection Procedure²²

The Settlement allows for California Class Members to request exclusion from the class by opting out.²³ Ex. 1 (Settlement Agreement) at ¶ 5.1. California Class Members who choose to opt-out of the Settlement must mail a written, signed Opt-Out Statement to the Settlement Administrator that states that they are opting out of the settlement, and includes their name, address, telephone number. *Id.* ¶ 5.2. Opt-Out Statements must be mailed no later than 60 days from the date the Settlement Administrator sends the notice. *Id.* ¶ 5.1.

The Settlement also allows for California Class Members to object to the Settlement and appear at the Fairness Hearing. To do so, California Class Members must submit an Objection in

¹⁹ Checklist, “Class Notice Administration” ¶ 5.

²⁰ Checklist, “Class Notice Administration” ¶ 4.

²¹ Checklist, “Class Notice Administration” ¶ 8.

²² Checklist, “Notice to the Class” ¶ 8.

²³ There is not a similar opt-out procedure for Putative Collective Class Members because their claims are asserted under the FLSA, which creates an opt-in process for participation. 29 U.S.C. § 216(b). Putative Collective Class Members who do not wish to participate in the proposed Settlement can choose not to cash their check to avoid releasing these claims. Similarly, PAGA does not contain a procedure for Aggrieved Employees to opt-out of or object to a settlement. *Turrieta v. Lyft, Inc.*, 16 Cal. 5th 664, 716 (2024)

1 writing to the Settlement Administrator, which includes the reasons for the objection, as well as
2 the name, address, and telephone number of the Objector. *Id.* ¶ 6.2. Objections must be mailed
3 not later than 60 days after the administrator sends the Notice.²⁴ *Id.* ¶ 6.1.

4 **IV. ARGUMENT**

5 Plaintiffs respectfully request the Court (1) preliminarily certify the California Settlement
6 Class; (2) preliminarily certify the Collective; (3) make a preliminary finding that the settlement
7 is fair, reasonable, and adequate; and (4) authorize dissemination of the Notice to Class and
8 Collective Members. Pursuant to the Court’s Checklist for Approval of Class Action and/or
9 PAGA Settlements, Plaintiffs also provide preliminary arguments on the reasonableness of the
10 request for attorneys’ fees and costs as well as service awards to the Named Plaintiffs.

11 **A. Certification of the California Settlement Class Is Appropriate.²⁵**

12 The Court should provisionally certify the California Settlement Class for purposes of
13 settlement because it is ascertainable and sufficiently numerous, there exists a well-defined
14 community of interest, and a class is superior to alternative proceedings. *See Brinker Rest. Corp.*
15 *v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *see also* Code Civ. Proc. § 382. A well-defined
16 community of interest exists when there are “(1) predominant common questions of law or fact;
17 (2) class representatives with claims or defenses typical of the class; and (3) class representatives
18 who can adequately represent the class.” *Brinker Rest. Corp.*, 53 Cal. 4th at 1021 (quoting
19 *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2006)).

20 **1. The Settlement Class Is Ascertainable.**

21 A class is ascertainable when its members may be identified by reference to official
22 records. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981), disapproved of on another
23 grounds by *Noel v. Thrifty Payless, Inc.*, 445 P.3d 626 (2019). Here, the Settlement Class is
24 ascertainable because Class Members are current and former employees of Malwarebytes, whose
25 identities can be identified from its employment records. Koshkin Decl. ¶ 37.

26 ²⁴ ILYM will revise the Notice at ¶ 17 to include the Court’s remote appearance information
27 prior to sending. Checklist, “Notice to the Class” ¶ 12.

28 ²⁵ Checklist ¶ 9.

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Common questions predominate where the legal theory is “likely to prove amenable to class treatment,” such that the resolution of claims “in a single class proceeding would be both desirable and feasible.” *Brinker*, 53 Cal. 4th at 1021-22 (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 327 (2004)). The test for determining predominance of common issues is whether the proposed class is sufficiently cohesive to warrant adjudication on a class wide basis. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

Similarly, Nonexempt Sales Representatives were subject to Defendant's common policy of prohibiting them from recording all their hours and, when they were able to record overtime hours, they were subject to Defendant's common policy of failing to account for incentive pay in the regular rate for determining the overtime wage. Whether Nonexempt Sales Representatives were unable to record all their hours worked and whether they were paid the correct rate when they were able to record their hours are common questions that can be answered on a class wide basis.

1 **4. The Typicality Requirement Is Met.**

2 Where plaintiffs' injuries are of the same nature as those of other class members and arise
3 from the same general course of conduct, the typicality requirement is satisfied. *See, e.g.,*
4 *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Here, Plaintiffs' claims are
5 typical of the Settlement Class's claims because they worked as Sales Representatives in
6 California and were subject to the Malwarebytes' policies that resulted in a failure to pay all
7 wages due. Both Plaintiffs Worthy and Rizzari were subject to Malwarebytes' misclassification
8 during the period they worked as Exempt Sales Representatives, and Plaintiff Rizzari was,
9 during the COVID-19 Pandemic, converted into a Nonexempt Sales Representative and made to
10 work off the clock. Plaintiffs' claims, therefore, arise from the same set of facts and legal
11 theories as do those of the Class Members, satisfying the typicality requirement.

12 **5. The Adequacy Requirement Is Met.**

13 The adequacy requirement is met if the named plaintiffs and their counsel have no
14 interests adverse to the proposed class and are committed to vigorously prosecuting the case on
15 behalf of the class. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450-51 (1976). Here,
16 Plaintiffs are adequate representatives because they have no known conflicts of interest with the
17 Settlement Class, and their claims are consistent with the claims of other Class Members.
18 Koshkin Decl. ¶¶ 18, 38. Plaintiffs' Counsel are adequate because they are skilled and
19 experienced in employment class action litigation and have prosecuted the case vigorously on
20 behalf of the Settlement Class. *Id.* ¶ 15.

21 **6. A Class Action Is Superior to Other Available Methods.**

22 Class treatment is superior to individual adjudication of class members' claims when it
23 would prevent repetitious litigation and provide "a method of obtaining redress for claims which
24 would otherwise be too small to warrant individual litigation." *Richmond v. Dart Indus., Inc.*, 29
25 Cal. 3d 462, 469 (1981) (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir.
26 1968)). Here, although each Class Member's claim is relatively small, each would consume
27 substantial judicial resources if litigated individually to trial. It would therefore be inefficient to
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1 resolve these claims in separate trials. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th
2 1193, 1208 (2008), *disapproved of on another grounds by Noel*, 445 P.3d 626. Because the class
3 mechanism will achieve economies of scale, conserve judicial resources, and avoid repetitive
4 proceedings, superiority is met.

5 **B. Conditional Certification of the Settlement Collective Is Appropriate**

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

14 Here, Plaintiffs have demonstrated that conditional certification is appropriate because
15 they meet the low threshold for establishing that they are similarly situated. Collective Members
16 were subject to common policies that deprived them of proper overtime pay under the FLSA.
17 *See Karl v. Zimmer Biomet Holdings, Inc.*, No. 18 Civ. 4176, 2019 U.S. Dist. LEXIS 111705, at
18 *7 (N.D. Cal. July 2, 2019) (sales representatives similarly situated where they alleged they were
19 victims of a common misclassification policy); *Darling v. Dignity Health*, 2021 U.S. Dist.
20 LEXIS 135262, at *11 (N.D. Cal. July 20, 2021) (granting conditional certification to collective
21 of employees who had to work off the clock).

22 **C. The Settlement Meets the Requirements for Preliminary Approval.**

23 Settlement of class actions is favored by public policy. *See Ferguson v. Lieff, Cabraser,*
24 *Heimann & Bernstein*, 30 Cal. 4th 1037, 1054 (2003) (“Settlement of class actions is encouraged
25 . . . because they consume substantial judicial resources and present unusually large risks for the
26 litigants.”) (citation and quotation marks omitted). A class settlement is reviewed and approved
27 by a court in two steps: (1) an early (preliminary) review, and (2) a final review at a fairness
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1 hearing after notice has been distributed to the class members. Cal. Rules of Court, rule
2 3.769(c)-(g).

3 At the preliminary approval stage, the court “need only determine whether the proposed
4 settlement is within the range of possible approval such that there is a reason to notify the class
5 members of the proposed settlement and to proceed with a fairness hearing.” *Palacios v. Penny*
6 *Newman Grain, Inc.*, No. 14 Civ. 01804, 2015 U.S. Dist. LEXIS 87457, at *17-18 (E.D. Cal.
7 July 6, 2015) (citation and quotation marks omitted).²⁶ “The well-recognized factors that the
8 trial court should consider in evaluating the reasonableness of a class action settlement
9 agreement include [1] ‘the strength of plaintiffs’ case, [2] the risk, expense, complexity and
10 likely duration of further litigation, [3] the risk of maintaining class action status through trial,
11 [4] the amount offered in settlement, [5] the extent of discovery completed and stage of the
12 proceedings, and [5] the experience and views of counsel.’”²⁷ *Kullar v. Foot Locker Retail, Inc.*,
13 168 Cal. App. 4th 116, 128 (2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,
14 1801 (1996)).

15 In the class settlement context, “a presumption of fairness exists where: (1) the settlement
16 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to
17 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
18 and (4) the percentage of objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802.

22 ²⁶ The California Supreme Court has authorized California’s trial courts to use Rule 23 of
23 the Federal Rules of Civil Procedure and cases applying it for guidance in considering class
24 issues. *See Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 821 (1971).

24 ²⁷ *Kullar* also lists as factors “the presence of a governmental participant, and the reaction
25 of the class members to the proposed settlement.” 168 Cal. App. 4th at 128. Here, the proposed
26 settlement did not involve the presence of a governmental participant; therefore, this factor is
27 neutral and does not weigh in favor of or against preliminary approval. Class Members have not
28 yet been notified of the proposed Settlement so the Court cannot evaluate Class Members’
reaction. The Court can evaluate this factor at the final approval stage, after notice has issued to
Class Members, and after the Court has had an opportunity to review any objections and the
number of exclusion requests.

1 **1. The Settlement is the Product of Arm’s Length Negotiations by**
2 **Experienced Counsel After Sufficient Information Exchange.**

3 “The court . . . should give considerable weight to the competency and integrity of
4 counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement
5 represents an arm’s length transaction entered without self-dealing or other potential
6 misconduct.” *Kullar*, 168 Cal. App. 4th at 129. Here, the proposed Settlement was reached
7 through vigorous, hard-fought, arm’s-length negotiation between lawyers with significant
8 experience. Plaintiffs’ Counsel are experienced in the litigation, certification, settlement, and
9 trial of wage and hour class actions cases similar to this case. Koshkin Decl. ¶¶ 15. The Parties
10 reached this settlement after three mediation sessions before two experienced and well-respected
11 mediators with years of complex class and collective employment litigation experience, Stephen
12 P. Sonnenberg, Esq. and Gail A. Glick, Esq. *Id.* ¶ 31.

13 The Parties also engaged in sufficient mediation discovery to recommend settlement. *Id.*
14 ¶ 22. Malwarebytes provided Plaintiffs’ Counsel with comprehensive data for each Class
15 Member, including dates of employment and compensation data, as well as Plaintiff Worthy’s
16 personnel file, which contained pay stubs, job descriptions, documents about employment
17 expectations, and more. *Id.* The Parties exchanged extensive mediation statements which
18 outlined the key arguments they would make in the course of the litigation. *Id.* ¶ 23. This
19 substantial information exchanged was more than sufficient to create “an understanding of the
20 amount that is in controversy and the realistic range of outcomes of the litigation.” *Kullar*, 168
21 Cal. App. 4th at 120.

22 Moreover, there is no risk of a reverse auction. This further buttresses a finding that the
23 negotiations were conducted at arm’s-length. In circumstances where additional plaintiffs are
24 pursuing overlapping claims, and those plaintiffs were not present and active in the mediation,
25 there is often a presumption that the settlement suffers from the structural defect of a reverse
26 auction. Specifically, the court is on guard that the settlement might be an attempt to subvert
27 parallel overlapping litigation, and the settlement dollar amount and other terms are depressed
28 because the settling plaintiff hopes to beat the nonsettling plaintiff in a race to the bottom.

Here, Malwarebytes has confirmed that there is no competing class action, so the specter of a reverse auction is not present, and a finding that the settlement negotiations were truly arm's length and non-collusive is appropriate. Koshkin Decl. ¶ 25. Given that the settlement is the product of good faith arm's-length negotiations involving the participation of an experienced mediator after meaningful document exchange and was negotiated by experienced counsel, this settlement is entitled to a presumption of fairness and preliminary approval is warranted.

2. The Settlement Provides Substantial Relief for Class Members.

The Court should approve the proposed Settlement because it provides substantial relief to the Settlement Class relative to the theoretical maximum recovery. The maximum average net award (after deduction for attorneys' fees, costs, service awards, and administration) Class and Collective Members stand to recover is approximately \$57.76 per workweek (across up to 16,350 workweeks), with an estimated maximum average net total payment of \$3,918.62 per Class and Collective Member if there are approximately 241 Sales Representatives as the Parties estimate.²⁸ Koshkin Decl. ¶ 36. This is a substantial portion of the unpaid wages and other damages Class and Collective Members could have recovered at trial, as described below.

a. Recovery for Unpaid Overtime, Penalties, and Related Damages²⁹

Unpaid Overtime: Based on five hours of unpaid overtime per Class Member, assuming Class Members worked overtime in 90% of workweeks (to account for periods of vacations, leave, and other days off), the California Class could have recovered approximately **\$3,079,030.33**. Koshkin Decl. ¶ 40. Based on these same assumptions, the Collective Class could have recovered approximately **\$936,288.30**. *Id.*

FLSA Liquidated Damages: Unless it can show a good faith defense, an employer who violates the FLSA is liable to employees for liquidated damages equal to the unpaid overtime wages. 29 U.S.C. §§ 216, 260. Here, based on the assumptions above, the Collective Class could have recovered approximately **\$936,288.30** in liquidated damages. Koshkin Decl. ¶ 41.

²⁸ Checklist ¶ 17.

²⁹ Checklist ¶ 13.

1 Interest: Plaintiffs' Counsel estimates that the interest on the California overtime
2 damages amounts to approximately **\$2,155,321.23**. *Id.* at ¶ 42.

3 Meal and Rest Break Penalties: Plaintiffs' Counsel estimated that there were missed
4 breaks (either meal or rest break) per week for 90% of workweeks, yielding an approximate
5 recovery of **\$682,973.18**. *Id.* at ¶ 43.

6 Waiting Time Penalties: Plaintiffs' Counsel estimated waiting time penalties pursuant to
7 Labor Code § 203 of **\$251,936.24**. Koshkin Decl. ¶¶ 44.

8 Wage Statement Penalties: California Class Members could have recovered
9 approximately **\$644,000.00** in wage statement penalties under Labor Code § 226(e). Koshkin
10 Decl. ¶¶ 45.

11 In sum, the maximum total exposure for Class Members' wage and hour claims is
12 approximately **\$8,685,837.58**. The Total Settlement Amount thus represents an 18.5% recovery
13 for Class Members' Labor Code and FLSA claims, and the Net Fund represents a 10.9%
14 recovery. Koshkin Decl. ¶ 39. This recovery is substantial given the litigation risks and the risks
15 in recovering the full extent of possible damages and penalties. *See, e.g., In re Mego Fin. Corp.*
16 *Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding a gross recovery of approximately one
17 sixth (16.67%) of the potential recovery adequate in light of litigation risks); *Villegas v. J.P.*
18 *Morgan Chase & Co.*, No. 09 Civ. 00261, 2012 U.S. Dist. LEXIS 166704, at *17-18 (N.D. Cal.
19 Nov. 21, 2012) (preliminarily approving a settlement where the gross amount represented
20 approximately 15% of the potential recovery).

21 **b. Recovery for PAGA Penalties³⁰**

22 To evaluate the fairness of a PAGA settlement courts look to many of the same factors
23 discussed above including "the strength of the plaintiff's case, the risk, the stage of the
24 proceeding, the complexity and likely duration of further litigation, and the settlement amount."

25 _____
26 ³⁰ Checklist ¶ 14. Plaintiffs gave notice to the LWDA of their intent to pursue PAGA
27 penalties as required by Lab. Code § 2699.3. Koshkin Decl. ¶ 34 n 10. Plaintiffs' Counsel also
28 submitted a copy of the proposed settlement to the LWDA, as required by Lab. Code §
2699(1)(2). *Id.*

1 *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (2021). The Settlement here provides that
2 \$80,500.00 of the Total Settlement Amount will be allocated to the Settlement of the PAGA
3 Group's claims, which represents approximately 5% of the Total Settlement Amount.³¹
4 Settlement ¶¶ 1.55, 1.31; Koshkin Decl. ¶ 46. Plaintiffs estimated maximum PAGA penalties at
5 approximately **\$739,800** based on the above Labor Code violations. The PAGA Fund represents
6 approximately 11% of Plaintiffs' maximum theoretical PAGA recovery. Koshkin Decl. ¶ 47.
7 This recovery is reasonable because of courts' discretion to reduce PAGA penalties (Cal. Lab.
8 Code § 2699(e)(2)) and well within the range that courts routinely approve. *See, e.g., Ruch v.*
9 *AM Retail Grp., Inc.*, No. 14 Civ. 05352, 2016 U.S. Dist. LEXIS 133832, at *22 (N.D. Cal. Sept.
10 28, 2016) (approving PAGA recovery that represented less than 2% of maximum potential
11 recovery); *McLeod v. Bank of Am., N.A.*, No. 16 Civ. 3294, 2018 U.S. Dist. LEXIS 195314, at
12 *5-6, *12 (N.D. Cal. Nov. 14, 2018) (same).³²

13 **3. Plaintiffs Faced Significant Risks in the Absence of Settlement.**

14 This settlement recovery is particularly reasonable in light of the significant litigation
15 risks Plaintiffs faced. Koshkin Decl. ¶¶ 26-32. Although Plaintiffs believe their case is strong,
16 they recognize that class action litigation inherently involves risk and delay, *see Ferguson*, 30
17 Cal. 4th at 1054 (class actions "present unusually large risks for litigants"), and that they faced
18 particular risks here. *Id.*

19 As an initial matter, Defendant argued that Plaintiffs and all, or substantially all, Sales
20 Representatives were subject to individual arbitration agreements. *Id.* ¶ 26. While Plaintiffs
21 may challenge the validity and enforceability of these agreements, Plaintiffs' counsel are
22 experienced class action litigators and recognize the challenges associated with these
23 arguments. *Id.* If Plaintiffs were compelled to individual arbitration, the statutes of limitations

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25 ³¹ Courts that look at the proportion of the PAGA settlement to the overall settlement
26 recovery have approved proportionate recoveries of around 2% or less. *See, e.g., Van Kempen v.*
27 *Matheson Tri-Gas, Inc.*, No. 15 Civ. 00660, 2017 U.S. Dist. LEXIS 137182, at *29-30 (N.D.
28 Cal. Aug. 25, 2017) (1.4 percent); *Slavkov v. Fast Water Heater Partners I, LP*, Case No. 14 Civ.
04324, 2017 U.S. Dist. LEXIS 116303, at *3 (N.D. Cal. July 25, 2017) (2.2 percent).

³² Checklist ¶ 16.

1 for similarly situated Sales Representatives' claims would continue to run and there would be
2 no mechanism to formally advise them of their legal rights. *Id.* Moreover, any Sales
3 Representative who wished to pursue a recovery would be required to participate in intensive
4 individual arbitrations, including document production, deposition testimony, and testifying at
5 the arbitration hearing, only to recover on a relatively small dollar value claim. *Id.*

6 Even if Plaintiffs succeeded in challenging the arbitration agreements, the risks would not
7 end there. First, there was a risk that Plaintiffs would not succeed in certifying or maintaining
8 the class and collective through trial. Malwarebytes would likely argue that differences among
9 Sales Representatives' job duties or compensation levels preclude class certification or warrant
10 decertification of a collective, if certified. Malwarebytes might also argue that whether
11 individual Sales Representatives worked off the clock and Malwarebytes' awareness of that work
12 are individualized issues not appropriate for class litigation. Although Plaintiffs disagree,
13 Plaintiffs recognize that obtaining and maintaining class certification is always a significant
14 obstacle. *Id.* ¶ 27.

15 Second, a trial on the merits would involve significant risks for Plaintiffs on liability
16 issues. Malwarebytes would argue that Exempt Sales Representatives were properly classified
17 as overtime exempt (as "administrators," outside salespeople, commissioned salespeople, or
18 some combination of exemptions). Although Plaintiffs believe that Sales Representatives' job
19 duties do not qualify them for any of the relevant exemptions, Plaintiffs' Counsel recognizes that
20 each exemption inquiry is highly contextual, and that litigation of exemption defenses inherently
21 poses significant risks. *Id.* ¶ 28. Similarly, it might be difficult for Plaintiffs to prove at trial that
22 Nonexempt Sales Representatives worked off the clock and that Malwarebytes was aware of that
23 work. *Id.*

24 Third, a trial on the merits would entail various risks for Plaintiffs in establishing
25 damages. Malwarebytes would claim that Class Members did not miss meal or rest breaks and
26 dispute the number of hours Sales Representatives claim to have worked.³³ While Malwarebytes

27 ³³ For example, Malwarebytes contended that Sales Representatives took their relevant
28 meal breaks and that Plaintiff did no work off the clock. Koshkin Decl. ¶ 29.

1 required nonexempt employees to use a timekeeping system that requires employees to clock in
2 and out to reflect time worked, proving whether Defendant made employees work off the clock
3 outside of those times would be an evidentiary challenge. *Id.* ¶ 29.

4 Fourth, to establish a third year of liability and liquidated damages under the FLSA, as
5 well as waiting time and wage statement penalties, Plaintiffs faced risk to overcome
6 Malwarebytes' various state of mind defenses – that any violations were not willful, knowing, or
7 intentional, and that compliance was attempted in good faith. *Id.* ¶ 30.

8 Fifth, to recover maximum PAGA penalties, Plaintiffs would need to establish that
9 penalties should be stacked, and defeat Malwarebytes's likely argument that plaintiffs may
10 recover heightened PAGA penalties only after a court or the Labor Commissioner has
11 determined that the employer violated the Labor Code. *See, e.g., Amaral v. Cintas Corp. No. 2,*
12 *163 Cal. App. 4th 1157, 1209 (2008); see also Koshkin Decl. ¶ 31.* Malwarebytes may also
13 argue that the Court should exercise its discretion to reduce any penalties awarded. *See Lab.*
14 *Code § 2699(e)(2).*

15 In sum, although Plaintiffs would dispute each of Malwarebytes's arguments, a class trial
16 and the formal discovery process to prepare for it would be long, arduous, and risky; and even if
17 Plaintiffs prevailed on each of their claims, they might face a lengthy appeals process. In light of
18 the myriad risks and delay that litigation would entail, and based on Plaintiffs' Counsel's
19 experience litigating class actions and employment lawsuits, it is the opinion of Plaintiffs'
20 Counsel that the proposed Settlement is in the best interests of the Class Members. Koshkin
21 Decl. ¶ 32.

22 Because all of the considerations indicate that the Settlement is fair, adequate, and
23 reasonable, the Court should grant preliminary approval of the Settlement.

24 **D. The Proposed Notice and Administration Procedure Are Appropriate.³⁴**

25 Constitutional due process requires that notice to class members provides sufficient
26 information to make an informed decision to accept or object to a proposed settlement and an

27 ³⁴
28 Checklist ¶ 19.

1 opportunity to be heard in the proceedings. *See Mullane v. Cent. Hanover Bank & Trust Co.*,
2 339 U.S. 306, 314 (1950); *Wershba v. Apple Comp., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001),
3 *disapproved of on other grounds in Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260
4 (2018). The proposed Notice satisfies these requirements.

5 The content of the proposed Notice to be sent to California Class Members is appropriate
6 because it provides sufficient information for Class Members to decide whether to participate in,
7 object to, or opt out of the Settlement and meets all of the requirements of California Rule of
8 Court 3.766(d). It provides (1) a brief explanation of the case, (2) the material terms of the
9 settlement, (3) the proposed fees and costs of Plaintiffs' Counsel and settlement administration,
10 (4) the proposed Service Awards to Plaintiffs, (5) that California Class Members may opt out of
11 or object to the Settlement (and instructions on how to do so), (5) a statement that the settlement
12 will bind all California Class Members who do not request exclusion and bind all Collective
13 Class Members who choose to opt in, (6) a statement that any Class Member who does not
14 request exclusion may, if she so desires, enter an appearance through counsel, (7) details about
15 the court hearing on settlement approval and the opportunity to object, and (8) how California
16 Class Members can obtain additional information, including documents related to the settlement.
17 Koshkin Decl. ¶ 48.

18 The Notice to be sent to Putative Collective Class Members is nearly identical in all
19 substantive respects, except that it informs recipients that they can cash their check to participate
20 in the Settlement and release their claims or do nothing and not be bound. *Id.* ¶ 49. It also does
21 not provide information about opting out or objecting, as such information does not apply to
22 Putative Collective Class Members. *Id.*

23 All language in both Notices has been agreed to by Counsel for both Parties. *Id.* ¶ 53.³⁵

24 The manner of giving notice also complies with California Rule of Court 3.766(e)
25 because the proposed procedure for distributing the Notice has a likelihood of reaching a
26 substantial percentage of Class Members. *Id.* ¶ 50. The Notice will be sent via First Class U.S.

27
28 ³⁵ Checklist, "Notice to the Class" ¶ 2.

1 mail and e-mail to the last known address of each Class Member, and the Settlement
2 Administrator shall attempt to obtain the correct address for each Settlement Class Member
3 whose Notice is returned as undeliverable, including up to two skip traces, and shall attempt a re-
4 mailing provided it obtains a more recent address. Ex. 1 ¶ 4.3, 4.4; ILYM Decl. ¶ 7. This
5 method of disseminating the Notice is the best means available to reach Class Members and
6 Putative Collective Class Members because they are salespersons who regularly use email in
7 their personal and professional lives.³⁶ Koshkin Decl. ¶ 51. The Notice will be provided only in
8 English; the Parties do not have any reason to believe that any other language is necessary, as
9 English proficiency was a requirement for the jobs in question.³⁷ Koshkin Decl. ¶ 52. Further,
10 the Notice will provide the address of the website established by the Settlement Administrator,
11 www.malwarebyteswagesettlement.com, so that Class Members will be able to read the
12 settlement agreement and court filings. *Id.*

13 The proposed Settlement Administrator, ILYM, is experienced in the field and was
14 chosen only after comparing bids from a number of other well-known administrators. Koshkin
15 Decl. ¶¶ 65-67; Ex. 2 (Mullins Decl.) ¶ 2. The Court should approve ILYM, which estimated
16 that its fees for administering the settlement are not to exceed \$8,000. Ex. 2 at ¶ 10.

17 **E. Plaintiffs' Forthcoming Request for Attorneys' Fees and Costs is**
18 **Appropriate.**

19 Pursuant to the Court's Preliminary Approval Checklist ¶ 20, Plaintiffs submit this
20 argument in support of their forthcoming request for one-third (33.3%) of the Total Settlement
21 Amount as attorneys' fees (\$536,666.67). At the Final Approval stage, Plaintiffs' Counsel will
22 file an application to approve of attorney's fees and memorandum of points and authorities in
23 support.³⁸

24 "California has long recognized, as an exception to the general American rule that parties
25 bear the costs of their own attorneys, the propriety of awarding an attorney fee to a party who has

26 ³⁶ Checklist, "Notice to the Class" ¶ 5.

27 ³⁷ Checklist, "Notice to the Class" ¶ 3.

28 ³⁸ See Cal. Rules of Court, Rule 3.769(b); Sacramento County Superior Court Complex
Litigation Department, Final Approval Checklist ¶¶ 2-3.

1 recovered or preserved a monetary fund for the benefit of himself or herself and others.” *Laffitte*
2 *v. Robert Half Int’l Inc.*, 1 Cal. 5th 480, 488 (2016). In awarding fees in a class action, courts
3 generally use either the percentage of the recovery or the lodestar approach. *See generally id.* at
4 489-97. “The choice of a fee calculation method is generally one within the discretion of the
5 trial court, the goal under either the percentage or lodestar approach being the award of a
6 reasonable fee to compensate counsel for their efforts.” *Id.* at 504. In this case, the proposed
7 attorneys’ fee award is reasonable and supported by the percentage-of-recovery method.

8 The California Supreme Court confirmed that the percentage method is appropriate, fair,
9 and efficient. *See id.* at 505. The Court noted that “most courts and commentators now believe
10 that the percentage method is superior.” *Id.* at 494. It explained that there are numerous
11 “recognized advantages of the percentage method—including relative ease of calculation,
12 alignment of incentives between counsel and the class, a better approximation of market
13 conditions in a contingency case, and the encouragement it provides counsel to seek an early
14 settlement and avoid unnecessarily prolonging the litigation.” *Id.* at 503.

15 Plaintiffs’ Counsel’s request for one-third of the Maximum Settlement Amount is
16 reasonable because it is consistent with the percentages awarded in other class action settlements.
17 In California, “[e]mpirical studies show that, regardless [of] whether the percentage method or
18 the lodestar method is used, fee awards in class actions average around one-third of the
19 recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

20 Employing the percentage method in this case rewards the extreme efficiency with which
21 Plaintiffs’ Counsel obtained a resolution in this case. *See Laffitte*, 1 Cal. 5th at 503 (benefit of
22 the percentage method is “the encouragement it provides counsel to seek an early settlement and
23 avoid unnecessarily prolonging the litigation.”). Plaintiffs’ Counsel’s efforts to master the
24 relevant facts and legal questions – through extensive investigation and mediation discovery –
25 made the resolution of this case possible prior to court rulings that could have significantly
26 weakened Plaintiffs’ claims. Koshkin Decl. ¶ 59. Plaintiffs’ Counsel made an informed
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1 judgment that this Settlement, as opposed to protracted litigation, is in the best interests of
2 Settlement Class Members and secures substantial benefits for the Class now. *Id.* ¶¶ 60.

3 At the final approval stage, Plaintiffs will also explain – with the support of detailed time
4 records pursuant to the Court’s Final Approval Checklist – how the fee request is also
5 appropriate based on a lodestar cross check. *See Laffitte*, 1 Cal. 5th at 503-05 (California trial
6 courts have discretion to conduct a lodestar cross-check on the percentage fee).

7 Plaintiffs also seek reimbursement of \$18,010.02 in reasonably expended litigation costs
8 to date plus estimated future costs of approximately \$2,435.00. Koshkin Decl. ¶ 62-64. An
9 itemized listing of costs incurred to date is attached to the Koshkin Decl. as Ex. 3.³⁹ These
10 litigation costs, which consist primarily of mediators’ fees, filing and vendor fees, and document
11 review costs, were incidental and necessary to the effective representation of the Class and are
12 appropriately reimbursed. *See* Cal. Civ. Proc. Code § 1032(a)(4), (b). Costs will continue to
13 accrue as Plaintiffs’ counsel seeks preliminary and final approval, with an estimate of \$2,435 in
14 additional costs. Koshkin Decl. ¶ 64

15 **F. The Proposed Service Awards Are Appropriate.⁴⁰**

16 In evaluating the reasonableness of a proposed service award, courts consider, *inter alia*,
17 (1) the amount of time and effort spent by the class representative, the duration of the litigation,
18 and the actions they took to protect the interests of the class; (2) the degree to which the class has
19 benefitted from those actions; (3) the personal benefit received by the class representative as a
20 result of the litigation; (4) the risk, both financial and otherwise, the class representative faced in
21 bringing the suit; and (5) the notoriety and personal difficulties encountered by the class
22 representative. *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251, 1272 (2015); see
23 also *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 803 (2009).

24 The proposed Service Award of \$10,000 for each Plaintiff is appropriate here. The
25 named Plaintiffs went beyond the expected service of a class representative. Plaintiff Brandon
26

27 ³⁹ Checklist ¶ 21.

28 ⁴⁰ Checklist ¶ 22.

1 Worthy spent 20-30 hours on this case and Plaintiff Randi Rizzari spent 15-20 hours, which
2 included: being interviewed in detail by Plaintiffs' attorneys and providing information about
3 their job duties and Malwarebytes's policies and practices, as part of the initial investigation;
4 searching for and providing Plaintiffs' attorneys with documents related to their work for
5 Malwarebytes; reviewing a proposed representation agreement and carefully considering
6 whether to serve as a named plaintiff whose name would be on publicly filed court documents;
7 reviewing a draft of the Complaint prior to authorizing their attorneys to file this lawsuit and
8 discussing any questions about it; discussing mediation strategy and settlement numbers with
9 Plaintiffs' attorneys before, during, and after the three mediation sessions; remaining available to
10 answer questions and provide input during all three mediation sessions, including by weighing in
11 on settlement value and settlement terms; participating in numerous phone calls with counsel;
12 reviewing the Settlement Agreement, discussing it in detail with Plaintiffs' attorneys, and signing
13 it. Worthy Decl. ¶ 5; Rizzari Decl. at ¶ 5. The class benefitted greatly from this work: if these
14 two Plaintiffs had not stepped forward to bring this case, there would be no class recovery or
15 accountability for Malwarebytes. These Plaintiffs received no personal benefit from this
16 litigation other than their share of the proposed class settlement and the proposed service awards.
17 Worthy Decl. ¶ 9; Rizzari Decl. ¶ 7.

18 Worthy and Rizzari also took on personal risk to bring this suit. The sales industry for
19 technology companies like Malwarebytes is a small and interconnected world. By bringing these
20 claims against a former employer, Plaintiffs risk reputational harm within the industry and the
21 potential for diminished future job prospects. For instance, Plaintiff Worthy left the industry
22 after struggling to find a similar role after becoming a plaintiff and now works in HR. Worthy
23 Decl. ¶ 7. Plaintiff Rizzari still works with many of her colleagues that she had at Malwarebytes
24 in her new role and is concerned about her reputation. Rizzari Decl. ¶ 5.

25 **G. A Final Approval Hearing Should be Scheduled.**

26 The last step in the settlement approval process is the formal hearing, at which the Court
27 may hear evidence and argument necessary to evaluate the proposed Settlement. Cal. Rule of Ct.
28

1 3.769(e). A proposed order is submitted contemporaneously setting forth the proposed briefing
2 schedule and hearing date for final approval of the settlement.

3 **V. CONCLUSION**

4 For the reasons set forth above, Claimant respectfully request that the Court approve the
5 settlement as set forth in the Settlement Agreement.

6 Dated: May 6, 2025

Respectfully submitted,

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