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12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA**

14 CAMERON ROSETTA (on behalf of
 15 himself and all others similar situated),

16 Plaintiff,

17 v.

18 PAYCOM SOFTWARE, INC. and
 19 PAYCOM PAYROLL, LLC,

20 Defendants.

Case No. 2:19-cv-8994-AS

**MOTION FOR PRELIMINARY
 APPROVAL OF A CLASS ACTION
 SETTLEMENT AND PAGA
 SETTLEMENT; MEMORANDUM
 OF POINTS AND AUTHORITIES
 IN SUPPORT**

Judge: Hon. Alka Sagar

Date: August 5, 2021

Time: 10:00 a.m.

Ctrm: 540, Roybal

22
 23 **PLEASE TAKE NOTICE** that on August 5, 2021, at 10:00 a.m., before the
 24 Honorable Alka Sagar, located at the Roybal Federal Building U.S. Courthouse, 255
 25 East Temple Street, Los Angeles, California 90012, Courtroom 540, Fifth Floor,
 26 plaintiff Cameron Rosetta will, and hereby does, move the Court, pursuant to Rule
 27 23(e) of the Federal Rules of Civil Procedure, for an order: (1) Certifying a class for
 28

1 purposes of settlement; (2) Preliminarily approving the Class Settlement in this
2 action; (3) Approving of the manner and form of notice to be sent to Class
3 Members; and (4) Scheduling a hearing for consideration of final approval of the
4 Class and PAGA Settlement.

5 The motion is made following a meet and confer process that included
6 telephone discussions and email correspondence with Defense Counsel.

7 This Motion is based on this Notice of Motion, the Memorandum of Points
8 and Authorities attached to this Motion, the Declarations, their Exhibits, all
9 pleadings and papers filed herein, the arguments of counsel, and any other matters
10 properly before the Court.

11
12 DATED: July 8, 2021

BAKER CURTIS & SCHWARTZ, P.C.

13
14 By: /s/ Michael Curtis

15 Chris Baker
16 Michael Curtis
17 Attorneys for Plaintiff
18 CAMERON ROSETTA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 18, 2019, Plaintiff Cameron Rosetta filed this action against defendants Paycom Software, Inc. and Paycom Payroll LLC’s (collectively “Paycom”). Plaintiff generally alleged Paycom (1) unlawfully treats its California-based “Sales Professionals” as exempt from California’s overtime laws; and (2) requires its Sales Professionals and other California-based employees to sign and comply with agreements and policies that violate their right to privacy and that contain illegal provisions such as forum selection, release, indemnity, non-disclosure, non-disparagement, non-compete, and non-solicitation requirements. The operative Complaint alleges class claims focused on recovering overtime wages connected with the misclassification and seeks declaratory/injunctive relief to bring Paycom’s policies and agreements into compliance with California law. Plaintiff also asserts a claim under the Private Attorney Generals Act (PAGA) based on each category.

The parties have now settled the alleged claims and stipulated to class certification. In exchange for a release tailored to the facts and claims, Paycom has agreed to (1) pay a non-reversionary, common fund, settlement of \$1,500,000, (2) reclassify its Sales Professionals as non-exempt under some circumstances and otherwise revise the time they work outside the office, and (3) revise its other at-issue policies and agreements. The monetary component of the settlement allocates one million dollars to the Class and PAGA misclassification claims. Five hundred thousand dollars is allocated to the PAGA Contract/Policy Claims. The gross Class settlement amount gets the Class approximately 13 cents on the dollar of their compensatory damages. The gross PAGA settlement recovers over \$81 per pay period. Importantly, the settlement recovers 100 percent of the desired injunctive relief because Paycom has agreed to reclassify its Sales Professionals as exempt during certain employment periods and change their job duties to render them otherwise exempt. Paycom has also agreed to revise its policies and agreements to

1 comply with California law and provide notice to the aggrieved employees of their
2 California rights.

3 Plaintiff respectfully requests that the Court preliminarily approve the Rule 23
4 class action settlement. Plaintiff will request approval of the PAGA settlement at the
5 final approval hearing.

6 **II. BRIEF STATEMENT OF FACTUAL ALLEGATIONS AND CLAIMS**

7 **A. Sales Professionals' Duties**

8 Paycom manufactures and sells cloud-based human resource and payroll
9 solutions. Paycom has multiple sales offices in California that it typically staffs
10 with a sales team comprised of a sales manager and around six to eight "Sales
11 Professionals." (Rosetta Decl. ¶ 5.) From approximately December 2018 through
12 April 2019, Plaintiff worked as an exempt Sales Professional at Paycom's Pasadena,
13 California office. (*Id.* at ¶ 4.)

14 During their initial eight weeks, Sales Professionals spend at least four hours
15 each day, four days a week training. As Paycom explains:

16 We sell our solution exclusively through our captive sales force... [¶]
17 We provide our sales force with an intensive eight-week training course
18 that includes at least one week of training at our headquarters in
19 Oklahoma City. Our unique training program includes instructions in
20 accounting, business metrics, application features and tax matters
21 relevant to our target market and we believe it fosters loyalty and helps
22 maintain our corporate culture. Our training continues for our sales
23 force through weekly in-office strategy sessions and leadership
24 development training. (Curtis Decl. ¶ 39.)

25 When not engaged in the training program, Sales Professionals spend the rest of
26 their first eight weeks doing cold calling and office work. They rarely, if ever, leave
27 their offices to do outside sales work. (Rosetta Decl. ¶ 7.)

28 Following the training program, Plaintiff alleges that Paycom expects its
Sales Professionals to arrive at the sales office between 7:00 and 8:00 a.m., and
leave the sales office after 6:00 p.m. (Rosetta Decl. ¶ 8.) On Mondays and Fridays,

1 Paycom expects its employees to work at the sales office. (*Id.*) On Tuesdays,
 2 Paycom expects its employees to work at least half the business day in the sales
 3 office. (*Id.*) On Wednesdays and Thursdays, Paycom states employees should
 4 spend the business day (between 9:00 and 5:00) outside the sales office. (*Id.*) But
 5 Plaintiff contends that Sales Professionals rarely, if ever, filled Wednesday and
 6 Thursday with meetings outside the office.¹ (*Id.*) Indeed, the job descriptions
 7 produced by Paycom establish that Sales Professionals spend “up to 25%” of their
 8 time traveling. (Curtis Decl. Ex. 5.) And Paycom’s “Position Description”
 9 identifies the responsibilities of: (1) prospecting at least eight hours a week (which
 10 is almost always cold-calling from the office); (2) preparing for sales calls; (3)
 11 conducting in-depth analyses of a potential client’s HR methodologies; (4)
 12 managing the initial implementation of Paycom’s solution; and (5) daily updating of
 13 Paycom’s internal sales tracking system. (Curtis Decl. Ex. 6.)

14 Neither Plaintiff nor other Sales Professionals interviewed by counsel spent
 15 more than 50% of their time outside the office engaged in sales, nor did Paycom tell
 16 them that they were supposed to do so. (*Id.* at ¶ 13; Rosetta Decl. ¶ 6.) Paycom
 17 expected employees to work outside business hours at home. (Rosetta Decl. ¶ 8.)
 18 As a result, Plaintiff worked overtime throughout his Paycom employment,
 19 estimating that he worked 55 hours or more per week. (*Id.* at ¶ 6.) Plaintiff’s
 20 counsel’s interviews of putative class members confirms that the other Sales
 21 Professionals also typically work 55 to 60 hours a week. (Curtis Decl. ¶ 13.)

22 For these reasons, Plaintiff alleged claims for overtime wages and resulting
 23 statutory penalties in his first three causes of action and a related PAGA claim.

24 **B. Paycom’s Agreements and Policies**

25 As a condition of initial and continued employment, Paycom requires
 26

27 ¹ One former employee explained that she only had the targeted number of meetings
 28 two or three times in the 18 months she worked at Paycom. Curtis Decl. ¶ 13.

1 employees to sign and comply with agreements and policies that Plaintiff alleges
2 violate California law. Briefly, Paycom's:

- 3 • Video, Photo and Recording Release and Waiver (Rosetta Decl. Ex. 1)
4 required employees to release their likenesses for Company and non-
5 Company uses in perpetuity and contained an illegal choice of law
6 provision;
- 7 • Code of Ethics and Business Conduct for Officers, Directors and
8 Employees (*Id.* Ex. 2) imposed illegal confidentiality obligations and
9 speech restrictions;
- 10 • Insider Trading Policy (*Id.* Ex. 3) also imposed confidentiality obligations
11 and speech restrictions contrary to California law;
- 12 • Employee Confidentiality, Non-Disparagement, Non-Disclosure,
13 Proprietary Information and Indemnification Agreement (*Id.* Ex. 4)
14 imposed confidentiality, speech, and indemnity obligations contrary to
15 California law and contained illegal choice of law and forum selection
16 provisions;
- 17 • California Addendum to its Employee Handbook (*Id.* Ex. 5) imposed
18 confidentiality obligations and speech restrictions contrary to California
19 law; and
- 20 • Non-Solicitation Agreement (*Id.* Ex. 6) imposed confidentiality and
21 indemnity obligations contrary to California law and illegally forbid
22 employees from soliciting customers, referral sources, etc., and contained
23 illegal choice of law and forum selection provisions.

24 Plaintiff sought class-wide declaratory/injunctive relief and PAGA penalties
25 arising from these illegal agreements and policies.

26 **III. THE CLASSES AND PAGA AGGRIEVED EMPLOYEES**

27 While the Complaint alleges separate classes for the misclassification claim
28 under Rule 23(b)(3) and the policies/agreements claims under Rule 23(b)(1) and (2),
the Class Members of each are the same Sales Professionals. Complaint ¶¶ 52-57.
The parties, therefore, stipulated to certification of a single Rule 23 Class. The Class
Members "are defined as all current and former California Sales Representatives and
Executive Sales Representatives of Defendants classified as exempt outside sales

1 professionals during the Covered Period.” (Curtis Decl. Ex. 1, Article I(g).)² The
 2 Class Period starts on October 18, 2015, as alleged in the Complaint, and continued to
 3 February 28, 2021, a date chosen by the parties to not dilute the recovery of the Class
 4 Members identified at that time while seeking approval of the settlement. (*Id.* at Ex.
 5 1, Article I(i).) There are 180 Class Members. (*Id.* at ¶ 29.)

6 There are also two groups of aggrieved employees under the PAGA claim.

7 First, the PAGA Misclassification Aggrieved Employees are all current and
 8 former California Sales Representatives and Executive Sales Representatives
 9 classified as exempt outside sales professionals. (*Id.* at Ex. 1, Article I(kk).) This is
 10 a subgroup of the Class Members, limited to the shorter PAGA Period of October
 11 18, 2018, and through to February 28, 2021. (*Id.* at Ex. 1, Article I(oo).) There are
 12 107 PAGA Misclassification Aggrieved Employees. (*Id.* at ¶ 37.)

13 Second, the PAGA Contract/Policy Aggrieved Employees are all current and
 14 former California employees during the PAGA Period. (*Id.* at Ex. 1, Article I(kk).)
 15 This group includes all Paycom employees during the PAGA period—not just Sales
 16 Professionals—because they all were subject to the at-issue policies and agreements.
 17 There are 226 PAGA Contract/Policy Aggrieved Employees. (*Id.* at ¶ 37.)

18 **IV. PROCEDURAL HISTORY**

19 On December 31, 2019, Plaintiff filed his First Amended Complaint adding
 20 the PAGA claim. [Doc. #18]. Paycom answered on January 30, 2020 [Doc. #24],
 21 which was followed by a meet and confer process about the propriety of Paycom’s
 22 alleged affirmative defenses. Paycom filed an amended answer removing some of
 23 its alleged defenses [Doc. #33] and Plaintiff moved to strike to obtain this Court’s
 24 ruling on the several of the 21 defenses that Paycom still alleged [Doc. #34].³ The

25 _____
 26 ² This motion establishes the propriety of class certification at pages 9 through 14.

27 ³ Plaintiff contended that the requirement “that a class action trial management plan
 28 must permit the litigation of relevant affirmative defenses,” required Plaintiff to
 limit the Answer to only appropriate affirmative defenses. *Duran v. U.S. Bank*

1 Court subsequently denied Plaintiff’s motion to strike [Doc. #45] (Curtis Decl. ¶ 8.)

2 On February 14, 2020, the parties served their initial disclosures and Plaintiff
 3 served his first set of discovery requests. Then on April 24, 2020, the parties
 4 entered a joint stipulation for protective order for informal mediation discovery
 5 [Doc. #46], which the Court entered on April 27, 2020. (Curtis Decl. ¶ 9.)

6 During this period, the parties were negotiating arrangements for a mediation.
 7 (*Id.*) After the protective order was entered, Paycom provided documents and
 8 information to Plaintiff – including payroll data – in furtherance of mediation. (*Id.*
 9 at ¶ 10.) Plaintiff, with the aid of a data analyst, has modeled Paycom’s exposure.
 10 The parties first attempted mediation with the Honorable Wynne Carvill on July 9,
 11 2020. (*Id.*) That mediation did not result in a settlement. (*Id.*)

12 The parties then turned back to discovery—serving new requests and
 13 responses and working towards resolving discovery disputes. (*Id.* at ¶ 11.) During
 14 this time, the parties also made arrangements for a second mediation. (*Id.*) Armed
 15 with the new information provided through discovery, and further analysis by the
 16 parties and experts, they reached a settlement in principle in a mediation with Steve
 17 Pearl on November 5, 2020. (*Id.*) Over the next seven months, further negotiating
 18 the settlement particulars resulted in a signed Memorandum of Agreement followed
 19 by a finalized long-form settlement agreement. (*Id.*) During this period, the parties
 20 also negotiated the programmatic relief, e.g., the changes to Paycom’s business
 21 practices, agreements, and policies.

22 **V. SUMMARY OF THE AGREEMENT**

23 On May 26, 2021, the parties executed the Settlement Agreement (“SA”), a
 24 copy of which is attached to the Curtis Declaration as Exhibit 1. The Agreement
 25 requires Paycom to pay \$1,500,000 into a non-reversionary settlement fund, labeled

26 *Nat. Assn.*, 59 Cal.4th 1, 25 (2014); *Campbell v. Best Buy Stores, L.P.* 2014 WL
 27 12778925, at *8 (C.D. Cal. August 15, 2014); *Rodman v. Safeway Inc.*, 125 F.
 28 Supp. 3d 922, 942 (N.D. Cal. 2015), *aff’d* 694 Fed. Appx. 612 (9th Cir. 2017).

1 the Gross Settlement Amount. (SA § 3.07(a).) It also requires Paycom to separately
2 pay its employer’s share of related payroll taxes.⁴ (SA § 3.02.)

3 The Gross Settlement Amount is allocated three ways: (1) the \$980,000
4 payment to Participating Class Members (meaning those who do not opt-out) for the
5 release of their class claims (the “Class Payment”), (2) the \$20,000 PAGA
6 Misclassification Settlement Payment to the State and the PAGA Misclassification
7 Aggrieved Employees, and (3) the \$500,000 PAGA Contract/Policy Settlement
8 Payment to the State and the PAGA Contract/Policy Aggrieved Employees. (SA §
9 3.07(d) (1-3).) Each payment is subject to a prorated share of any deductions from
10 the Gross Settlement that the Court approves. (SA, Article 1 ¶¶ h, mm, jj.) Those
11 deductions, as outlined in the Settlement Agreement, are: (1) attorney’s fees and
12 costs, (2) an enhancement award for Plaintiff, and (3) claims administration costs
13 (estimated at no more than \$8,002). (SA § 3.07(c) (1-3).) The Settlement
14 Agreement leaves those amounts to the Court’s discretion in accordance with
15 applicable law, but Plaintiff’s intent is to request attorneys’ fees for \$375,000 (the
16 benchmark 25% of the gross settlement); litigation costs up to \$11,000, and an
17 enhancement award of \$5,000. (Curtis Decl. ¶¶ 34-35.)

18 The net Class Payment after deductions will be dispersed to Participating
19 Class Members based on the amount of Qualifying Workweeks that each
20 Participating Class Member worked during the Class Period. (SA § 3.07(d)(1).)

21 The net PAGA Misclassification Settlement Payment after deductions will be
22 divided between the LWDA’s 75% of the Payment and the Misclassified Aggrieved
23 Employees’ 25%. (SA Art. 1 ¶ mm.) The portion of the Payment for Misclassified
24 Aggrieved Employees will be distributed according to the number of individual
25

26 ⁴ Payroll taxes (at least for Social Security) directly benefit the class. The amount
27 contributed to Social Security correlates with the amount of money the employee
28 will eventually receive. *See*, SOCIAL SECURITY, UNDERSTANDING THE
BENEFITS (2015) at 8-9 (<http://www.ssa.gov/pubs/EN-05-10024.pdf>).

1 Qualifying Pay Periods each such aggrieved employee worked during the PAGA
2 Period. (SA § 3.07(d)(2).)

3 The net PAGA Policy/Contract Settlement Payment after deductions will be
4 divided between the LWDA's 75% of the Payment and the Misclassified Aggrieved
5 Employees' 25%. (SA § 3.07(d)(3); Art. 1 ¶jj.) Of the amount to be dispersed to
6 the aggrieved employees, each will receive a minimum payment of \$150, with the
7 remainder distributed according to the number of Qualifying Pay Periods each such
8 aggrieved employee worked during the PAGA Period. (SA § 3.07(d)(3).)

9 Along with the monetary component, Paycom has also agreed to permanently
10 reclassify its California Sales Professionals as non-exempt employees while they are
11 engaged in the Startline training program and during Covid-19 stay-at-home orders
12 in California. (SA § 3.06(a).) Paycom also agreed to change certain policies and
13 practices related to the time that their California Sales Professionals spend away
14 from its place of business, their job descriptions and duties, and other issues
15 affecting its classification of exempt outside salespersons. (SA § 3.06(b).) Paycom
16 further agreed to abandon its non-solicitation and trade secret agreements as well as
17 adopt new employment agreements and policies for use in California, including its
18 employee handbook, code of conduct, insider trading agreement, NDA, and
19 "Likeness Waiver." (SA § 3.06(c); Curtis Decl. ¶ 27.) The parties have reached
20 agreement on the revisions.⁵ Finally, the PAGA notice that will go to all Paycom's
21 California employees who worked during the PAGA Period notifies that they are no
22 longer subject to Paycom's prior policies and agreements, that new policies and
23 agreements have been adopted, and directs them to the applicable sections of the
24 Labor Code if they want to understand their rights better. (SA § 3.06(d); Ex. 1C.)

25 If the Court grants preliminary approval, the Settlement Administrator will

26 _____
27 ⁵ Paycom has not yet agreed to filing of its revised polices and agreements. Plaintiff
28 recommends that the Court order the revised documents filed so it can review them
before the final approval hearing.

1 send a class notice to each Class Member, by mail and email. (SA § 3.03.) The
 2 notice will provide each Class Member an estimated individual settlement, as
 3 discussed above.⁶ In exchange, Participating Class Members will release:

4 all causes of action that were alleged in the operative complaint or
 5 reasonably could have been alleged based on the facts and legal theories
 6 contained in the operative complaint, including all of the following
 7 claims for relief: (a) failure to pay overtime wages due; (b) failure to
 8 provide complete and accurate wage statements; (c) waiting time
 9 penalties that could have been premised on the claims, causes of action
 10 or legal theories of relief described above or any of the claims, causes of
 11 action or legal theories of relief pleaded in the operative complaint;
 12 (d) unfair business practices that could have been premised on the claims or
 13 legal theories of relief described above or any of the claims, causes of
 14 action or legal theories of relief pleaded in the operative complaint,
 15 including but not limited to the contractual claims arising out of
 16 defendant's use of certain employment agreements and policies, as
 17 alleged in the operative complaint; (e) all claims under the California
 18 Labor Code Private Attorneys General Act of 2004 ("PAGA") for
 19 violations of Labor Code sections 510, 558, 1194, 201, 202, 203, 226,
 20 and 226.3, which could have been premised on the claims or legal
 21 theories described above or any of the claims, causes of action or legal
 22 theories of relief pleaded in the operative complaint; and, (f) any other
 23 claims or penalties under the wage and hour laws pleaded in the Action,
 24 except that the Release under PAGA is limited to the Labor Code
 25 sections identified in subdivision (e) above; and (g) all damages,
 26 penalties, interest and other amounts recoverable under said claims,
 27 causes of action or legal theories of relief.

28 (SA § 4.01.) The period of the Release will extend to the limits of the Covered
 Period, except that the PAGA claims are limited to the PAGA Period. (*Id.*)

VI. ARGUMENT

A. Preliminary Certification Is Appropriate for Settlement Purposes

The Ninth Circuit has declared a strong judicial policy in favor of the settlement
 of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.

⁶ The Notice and payment procedures are further discussed in section IV(B)(2),
 below.

1 1992). Consistent with the policy, courts have long recognized that class actions may
2 be certified for settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

3 A Court’s task in assessing class certification is to “ascertain whether the
4 proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules
5 of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2)
6 commonality, (3) typicality, and (4) adequacy of representation” and that the action is
7 maintainable under F.R.C.P. Rule 23(b)(1), (2) or (3). *Id.* at 1019, 1022. Class
8 certification is appropriate here because the Class meets all the requirements of
9 F.R.C.P. Rule 23(a) and, at a minimum, 23(b)(3).⁷ Moreover, Baker Curtis &
10 Schwartz, P.C., should be formally appointed as Class Counsel under F.R.C.P. 23(g).

11 **1. Numerosity**

12 “There is no magic number for determining when too many parties make
13 joinder impracticable.” *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Hawaii 1995)
14 (“Courts have certified classes with as few as thirteen members....”); *accord Greko v.*
15 *Diesel U.S.A., Inc.*, 277 F.R.D. 419, 425 (N.D. Cal. 2011) (certifying class with
16 dispute about whether it had 33 or 19). The 180 class members here more than meet
17 this standard. The numerosity requirement of F.R.C.P. 23(a)(1) is therefore met.

18 **2. Typicality**

19 Rule 23(a)(3) requires that “the claims or defenses of the representative parties
20 are typical of the claims or defenses of the class.” “Typicality” thus requires that the
21 named plaintiff have claims that are “reasonably coextensive with those of absent
22 members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

23 Plaintiff, a former Sales Professional, claims he was misclassified as exempt
24

25 ⁷ As explained above, the claims related to the polices and agreements were
26 originally alleged as seeking certification under F.R.C.P. Rule 23(b)(1) and (2) but
27 certification under 23(b)(3) is also appropriate because common questions
28 predominate and because the Class Members are the same for all class claims so
they will receive the same Notice.

1 from wage and hour laws just like all class members. He attended the same eight-
 2 week training, worked under the same job description (which was uniformly classified
 3 as exempt) and was subject to the policies/agreements at-issue in this action. In short,
 4 Plaintiff suffered the same harm, under the same practices, agreements and policies as
 5 the proposed Class. Accordingly, his claims are typical under F.R.C.P. 23(a)(3).

6 **3. Adequacy and the Appointment of Class Counsel**

7 Rule 23(a)(4) requires that a class representative “fairly and adequately protect
 8 the interests of the class.” In making this determination, the Court must consider:
 9 (1) if the plaintiff is represented by qualified counsel and (2) whether plaintiff or his
 10 counsel have any interests that conflict with, or are antagonistic to, the putative class
 11 members. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

12 a. Baker Curtis & Schwartz, P.C. Is Qualified Counsel

13 The “qualified counsel” requirement of F.R.C.P. 23(a)(4) overlaps significantly
 14 with the requirements of Rule 23(g) as they relate to the appointment of class counsel.
 15 Plaintiff therefore addresses both these requirements together.

16 Plaintiff’s counsel, Baker Curtis & Schwartz, P.C., is well-qualified to represent
 17 the Class. Chris Baker, Mike Curtis and Deborah Schwartz are all former attorneys at
 18 AmLaw 100 corporate firms where they routinely litigated large wage and hour class
 19 actions on behalf of corporate clients. (Curtis Decl. ¶¶ 3-5.) Each have spent their
 20 careers practicing labor and employment law. (*Id.*) Since founding the firm they have
 21 prosecuted (or are prosecuting) employment class actions or PAGA cases against
 22 Bank of America, OneWest Bank, PennyMac, Fidelity Investments, Google, The
 23 Variable Life Insurance Company (VALIC), Juul, Binary Capital, and, of course,
 24 Paycom. (*Id.*) Moreover, Baker Curtis & Schwartz has spent considerable time and
 25 resources identifying, investigating, and valuing the Class’s claims and has no
 26 interests antagonistic to the Class. (*Id.* at ¶ 6, 10, 13, 25.) It will continue to commit
 27 all necessary resources to representing the Class. (*Id.* at ¶ 6.)

28 For these reasons, Plaintiff requests that the Court find that he is represented by

1 qualified counsel for “adequacy” under F.R.C.P. Rule 23(a)(4) and appoint Baker
2 Curtis & Schwartz P.C. as class counsel under F.R.C.P. Rule 23(g).

3 b. Plaintiff’s Interests Align with The Class’ Interests

4 As noted above, Plaintiff’s interests align with the interests of the putative class.
5 He is an adequate class representative under F.R.C.P. 23(a)(4). *Schlagal v. Learning*
6 *Tree, Int’l*, 1999 WL 672306, *3 (C.D. Cal. Feb. 23, 1999) (finding plaintiff an
7 adequate representative where “the representative’s interests are comparable to those
8 of the absent class members”). Moreover, Plaintiff has been actively involved and is
9 committed to representing the Class. (Curtis Decl. ¶ 35; Rosetta Decl. ¶ 13.)

10 For these reasons, the Court should conclude that Plaintiff has satisfied the
11 requirements of 23(a)(4) related to adequacy.

12 **4. This Case Presents Common and Predominate Questions**
13 **of Law and Fact and a Class Action Is the Superior**
14 **Method of Adjudication**

15 F.R.C.P. 23(a)(2) requires “questions of fact and law that are common to the
16 class.” To satisfy F.R.C.P. 23(b)(3), common questions must “predominate” over
17 individualized issues. “To establish predominance of common issues, a party seeking
18 class certification is not required to show that the legal and factual issues raised by the
19 claims of each class member are identical.” *Kamar v. Radio Shack Corp.*, 254 F.R.D.
20 387, 399 (C.D. Cal. 2008). When common questions “present a significant aspect of
21 the case and . . . can be resolved for all members of the class in a single adjudication,
22 there is a clear justification for handling the dispute on a representative... basis.”
23 *Hanlon*, 150 F.3d at 1022.

24 The common questions that predominate for the Class here include:

- 25 a. Are Sales Professionals exempt from California’s overtime laws?
26 b. Does Paycom reasonably expect its Sales Professionals to perform
27 more than 50% of their working time on outside sales?
28 c. Which, if any, of the Sales Professionals’ job duties constitute outside

1 sales under California law?

2 d. Does Paycom suffer or permit Sales Professionals to work overtime?

3 e. Is Paycom “willfully” refusing to pay Sales Professionals all wages due
4 upon separation within the meaning of Labor Code § 203?

5 f. Do Paycom’s uniform wage statements violate Labor Code §226?

6 g. Do Paycom’s law/forum selection clauses violate California law?

7 h. Do employees have a constitutional right to privacy in their Likeness?

8 i. Can Paycom lawfully require employees to give up their Likeness in
9 consideration for employment?

10 j. Can Paycom lawfully require its employees to release future claims?

11 k. Do Paycom’s confidentiality requirements violate the California law?

12 l. Do Paycom’s indemnity provisions violate California law?

13 m. Does Paycom’s Non-Solicitation Agreement violate California law?

14 The policy/agreement claims should be certified because “class certification is
15 usually appropriate where liability turns on an employer’s uniform policy that is
16 uniformly implemented since in that situation predominance is easily established.”

17 *Kamar*, 254 F.R.D. at 399 (citing *In re Wells Fargo Home Mortg. Overtime Pay*
18 *Litig.*, 527 F. Supp. 2d 1053, 1071 (N.D. Cal. 2007).

19 While the Ninth Circuit has held that a uniform classification no longer suffices
20 on its own to certify a class, it has also explained that “uniform corporate policies will
21 often bear heavily on questions of predominance and superiority” and “centralized
22 rules, to the extent they reflect the realities of the workplace, suggest a uniformity
23 among employees that is susceptible to common proof.” *In re Wells Fargo Home*
24 *Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958-59 (9th Cir. 2009); accord *Wang v.*
25 *Chinese Daily News, Inc.*, 2014 WL 1712180, at *5 (C.D. Cal. Apr. 15, 2014). The
26 uniformity with which Paycom describes the Sales Professional positions shows the
27 similarity of their work, including job duties. (Curtis Decl. ¶¶ 12-13, Exs. 5 and 6.)

28 This similarity in duties combined with the uniform classification calls for collective

1 adjudication. *Martino v. Ecolab*, 2016 WL 614477, at *5 (N.D. Cal. Feb. 16, 2016).

2 As to superiority, “[l]itigation by class action has long been recognized as *the*
3 *superior method* of resolving wage and hour claims in California.” *Martino*, 2016
4 WL 614477, at *10 (quoting *Martinez v. Joe’s Crab Shack Holdings*, 231 Cal. App.
5 4th 362, 367 (2014)). Here, as in other class actions, the potential damage to each
6 Class Member is relatively small, particularly given the short statutes of limitations.
7 In this situation, class certification promotes judicial economy, as well as the interests
8 of the litigants. *Wang*, 2014 WL 1712180, at *5 (“Addressing Plaintiffs’ common
9 questions as a class action avoids hundreds of unnecessary “mini-trials” by allowing
10 the Court to address [employer’s] liability as to each of the nearly 200 class members
11 with a single trial.”) In short, a class action is the superior way to resolve this case.

12 For these reasons, the Court should certify the Class and appoint Baker Curtis
13 & Schwartz, P.C. as Class Counsel.

14 **B. The Class Settlement Meets the Standards for Preliminary**
15 **Approval Under Rule 23(e)**

16 While case law has long recognized that “the approval of a class action
17 settlement takes place in two stages” and that in the first stage, the Court
18 “preliminarily approves the Settlement pending a fairness hearing... and authorizes
19 notice to the class” (*E.g. Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 473 (E.D.
20 Cal. 2010)), the F.R.C.P. only confirmed this process in its 2018 amendments. *See*
21 Rule 23, as amended December 1, 2018. The amended Rule 23(e) also boils down the
22 factors considered across the country at the preliminary approval stage into the central
23 issue of whether “the court will likely be able to... approve the proposal under Rule
24 23(e)(2),” i.e., grant final approval. The Advisory Committee Notes on subdivision
25 (e)(1) provide a streamlined list of issues to focus on at this stage, namely the:

- 26 1. “[E]xtent and type of benefits that the settlement will confer” on the
27 class.
- 28 2. Plans for distribution of any funds left unclaimed.

1 3. Likely range of outcomes and the “risks that might attend full litigation.”

2 4. “[E]xtent of discovery completed in the litigation.”

3 5. Existence of other litigation with claims that would be released.⁸

4 6. “[P]roposed handling of an award of attorney’s fees under Rule 23(h).”⁹

5 Each of these factors may inform the decision of “whether the proposed
6 settlement falls within the range of possible approval,” meaning what could be found
7 to be “fair, adequate, and reasonable.” *Williams v. Costco Wholesale Corp.*, 2010 WL
8 761122, *5 (S.D. Cal. Mar. 4, 2010); *accord Class Plaintiffs*, 955 F.2d at 1276.

9 Moreover, because parties represented by competent counsel are better positioned
10 than courts to produce a settlement reflecting the parties’ expected outcome, courts
11 favor approval of settlement over continued litigation. *In re Pac Enters Sec. Litig.*, 47
12 F.3d 373, 378 (9th Cir. 1995); *In re Heritage Bond Litig.*, 2005 WL 1594403, *2
13 (C.D. Cal. Jun. 10, 2005).

14 As discussed below, the settlement presented here meets these standards.

15 ***1. The Class Greatly Benefits from the Settlement Sum***
16 ***and Paycom’s Changing Its Employment Practices***

17 The first factor for assessing preliminary approval is the “extent and type of

18
19 ⁸ This factor is not analyzed because no there are no related lawsuits.

20 ⁹ This motion structures around these factors, which do not significantly depart from
21 the factors often previously used by California district courts at preliminary and
22 final approval. *See In re Tableware Antitrust Litigation*, 484 F. Supp. 2d 1078,
23 1080 (N.D. Cal. 2007) (reviewing at the preliminary approval stage whether the
24 settlement: (1) is the product of serious, informed, non-collusive negotiations; (2)
25 has no obvious deficiencies; (3) does not improperly grant preferential treatment to
26 class representatives or segments of the class; and (4) falls within the range of
27 possible approval.); *Hanlon*, 150 F.3d at 1019 (assessing at final approval: “the
28 strength of the plaintiffs’ case; the risk, expense, complexity and likely duration of
further litigation; the risk of maintaining class action status throughout the trial; the
amount offered in settlement; the extent of discovery completed and the stage of
proceedings; the experience and views of counsel; the presence of a government
participant; and the reaction of the class members to the ... settlement”).

1 benefits that the settlement will confer on the members of the class.”

2 First, Paycom has agreed to a \$1.5 million non-reversionary settlement, with
3 \$980,000 allocated to the Class, exclusive of PAGA penalties.

4 Second, Paycom has agreed to reclassify its Sales Professionals during its
5 training program¹⁰ and during Covid-19 stay-at-home orders in California (SA §
6 3.06(a)) on top of changing its policies and practices related to the time that their
7 California Sales Professionals spend away from its place of business so that they will
8 be properly classified exempt. (SA § 3.06(b).) This is of tremendous value to all
9 current employees, who are 43 of the Class Members. (Trembley Decl. ¶ 9.)

10 Third, Paycom revised or abandoned its at-issue policies and agreements so
11 that current and former employees are no longer constrained by their illegality.
12 (Curtis Decl. ¶ 27; SA § 3.06(c).) And the PAGA notice that will go to all
13 Paycom’s California employees who worked during the PAGA period notifies them
14 of these changes and directs them to the applicable sections of the California Labor
15 Code if they want to understand their rights better. (SA § 3.06(d); Ex. 1C.) This is
16 hugely important because:

17 [e]mployees, having no reason to familiarize themselves with the
18 specifics of California’s employment law, will tend to assume that the
19 contractual terms proposed by their employer . . . are legal, if draconian.
20 Furthermore, even if they strongly suspect that a . . . clause is
21 unenforceable, such employees will be reluctant to challenge the
22 legality of the contractual terms and risk the deployment of [the
23 employer’s] considerable legal resources against them. Thus, the *in*
24 *terrorem* effect of the Agreement will tend to secure compliance with
25 its illegal terms in the vast majority of cases.

22 *Latona v. Aetna U.S. Healthcare Inc.*, 82 F. Supp. 2d 1089, 1096 (C.D. Cal. 1999).

23 All these reasons support granting preliminary approval.

24 **2. Unclaimed Funds Will Be Sent to the State Controller
25 Unclaimed Property Fund to Be Held for the Class Member**

26 This factor supports preliminary approval because the settlement is non-

27 ¹⁰ This is particularly significant because on average Sales Professionals eight weeks
28 in training makes up 33% of their total employment for terminated employees and
15% for current employees. (Trembley Decl. ¶ 9.)

1 reversionary, meaning Paycom will actually pay out the entire \$1,500,000. *Minor v.*
2 *FedEx Office & Print Servs., Inc.*, 2013 WL 503268, *4 (N.D. Cal. Feb. 8, 2013)
3 (“reversionary clauses often raise concerns about whether the settlement is in the best
4 interests of the class.”). The Settlement Agreement provides for the Settlement
5 Administrator to send undeliverable class payments to the State of California’s State
6 Controller Unclaimed Property Fund, where they will be held for future collection.
7 (SA § 3.03; 3.07(f).) But, before that happens, the Settlement Administrator will have
8 gone through the extensive measures to try to get the settlement payments to the Class
9 Members, as discussed below in Section IV(B)(2).

10 **3. The Gross Settlement Amount Recovers a Significant Percentage**
11 **of the Potential Damages Despite Considerable Risks**

12 The third factor of comparing the “likely range of litigated outcomes” to the
13 “risks that might attend full litigation” also supports preliminary approval.

14 “To evaluate the range of possible approval criterion, which focuses on
15 substantive fairness and adequacy, courts primarily consider plaintiffs’ *expected*
16 recovery balanced against the value of the settlement offer.” *Tableware Antitrust*
17 *Litig.*, 484 F. Supp. 2d at 1080 (emphasis added). “[T]he very essence of a settlement
18 is compromise, a yielding of absolutes and an abandoning of highest hopes.” *Offs. for*
19 *Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). As
20 the Ninth Circuit further explained: “the proposed settlement is not to be judged
21 against a hypothetical or speculative measure of what might have been achieved by
22 the negotiators.” *Id.* at 625; accord *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234,
23 1242 (9th Cir. 1998). Rather, any analysis of a fair settlement amount must account
24 for the risks of further litigation and trial, as well as expenses and delays associated
25 with continued litigation. *Andrew Potter v. Big Text Trailer Mfg., Inc.*, 2020 WL
26 1942619, at *4 (C.D. Cal. Mar. 2, 2020). “The fact that a proposed settlement may
27 only amount to a fraction of the potential recovery does not, in and of itself, mean that
28 the proposed settlement is grossly inadequate and should be disapproved.” *City of*

1 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).

2 Furthermore, it is the Class's estimated compensatory damages that should be
 3 weighed against the value received by the settlement. *E.g.*, *Rodriguez v. W. Publ'g*
 4 *Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) (noting that courts determine the fairness of
 5 class action settlement based on how it compensates for past injuries). To consider
 6 penalties or other punitive measures, presupposes that the plaintiff prevails at the end
 7 of trial, which undercuts the point of a negotiated resolution. *See Id.*

8 Class Members' compensatory damages for owed overtime (and interest) totals
 9 approximately \$7,809,666 assuming 15 hours of overtime per week of overtime across
 10 Class Members' 11,574 workweeks during the Class Period.¹¹ (Trembley Decl. ¶¶ 9,
 11 12.) Thus, the guaranteed gross settlement amount of \$980,000 (separate and apart
 12 from the \$520,000 allocated to the PAGA claim) is about 13% of the amount of all
 13 damages through the settlement class period.¹² (*Id.* at ¶¶ 9, 15.) Moreover, if the
 14 Court were to grant the full deductions that Class Counsel and Plaintiff plan to
 15 request, about \$719,332 will actually be distributed to the Class Members, for an
 16 average of about \$3,996 per class member, and a guaranteed 9.2 cents on the dollar
 17

18 ¹¹ As explained further in the Trembley declaration, years in which employees
 19 earned more than half of their compensation from commissions were not included in
 20 this figure because they would be exempt under California's inside sales exemption.

21 ¹² It is appropriate to consider the gross award (*before* deductions) in comparing the
 22 litigation value against the settlement award. First, if this was a single-plaintiff case,
 23 there would be a contingency agreement, and a contingency-fee plaintiff normally
 24 pays a percentage of any award to his or her counsel *regardless of fee shifting*.
 25 Second, fees are paid out of common funds even in fee-shifting cases, "to avoid the
 26 unjust enrichment of those who benefit from the fund that is created, protected, or
 27 increased by litigation and who otherwise bear none of the litigation costs." *Sobel v.*
 28 *Hertz Corp.*, 2014 WL 5063397, *5 (D. Nev. Oct. 9, 2014). Third, even if this case
 proceeded to judgment, and plaintiff was entirely successful, it is likely that, while
 some portion of plaintiff's fee would be paid directly by defendant, other portions
 would *still* be paid out of the common fund. *Id.* at *8; *Savani v. URS Prof'l Sols.*
LLC, 2014 WL 172503, *9 (D.S.C. Jan. 15, 2014).

1 recovery. (*Id.*) The range of recoveries are between \$17,812 and \$124. (*Id.* at ¶ 16.)

2 If the litigation were to go forward rather than settle, Plaintiff would seek to
3 establish recover the owed overtime, interest, and potentially implicated penalties but
4 he would face considerable risk in doing so, as discussed below.

5 a. Misclassification Claims

6 i. ***Overtime***

7 Plaintiff's First Cause of Action seeks the overtime wages owed to Sales
8 Professionals who Paycom misclassified as exempt. The Ninth Cause of Action
9 extended the recovery period of the Class back to four years before the Complaint was
10 filed pursuant to Business and Professions Code section 17200 *et seq.*¹³

11 “[A]n outside salesperson is one who customarily and regularly works more
12 than half the working time away from the employer’s business selling tangible or
13 intangible items....” *Duran, supra*, 59 Cal.4th at 31. Paycom’s stated schedule splits
14 the business hours each week in half between office (Mondays, Fridays and half of
15 Tuesdays) and outside sales work (half of Tuesdays, Wednesdays and Thursdays).
16 Plaintiff would argue that under Paycom’s schedule, even if the Sales Professionals
17 had as many outside meetings as hoped for—which is very rare—any work at home—
18 which is very common—means they spend the majority of their time working in the
19 office. E.g., 29 CFR § 541.502 (home office is an employer’s place of business for
20 outside sales exemption). Plaintiff would also contend that the entire eight-week
21 training was non-exempt work. *Harris v. Vector Marketing Corp.*, 656 F. Supp.2d
22

23 ¹³ Although, Plaintiff believes he would prevail in class certification, court have
24 noted the significance of this risk in approving a settlement. *Andrew Potter*, 2020
25 WL 1942619, at *3 (noting that the “Plaintiff recognizes that Defendants would
26 have vigorously contested class certification [and] acknowledges that the costs and
27 risks to the parties of further litigation included a possible determination that the
28 claims were unsuitable for class treatment, appeals, and the possibility of no
recovery, as well as the costs associated with trial.”); SA § 2.01 (noting that Paycom
stipulates to certification only for the purpose of the settlement).

1 1128,1142-1143 (N.D. Cal. 2009) (time spent in training not outside sales under the
 2 FLSA). Paycom, however, will contend that work done at home was rare and all work
 3 done to earn commissions on outside sales and specialized sales training are job duties
 4 that meet the exemption. See *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1263 (C.D.
 5 Cal. 2007). Plaintiff believes he has the better argument on the realistic expectations
 6 of the job (*Duran, supra*, at 52), but there is risk to this position.¹⁴

7 **ii. Related Penalties**

8 While Plaintiff likes his chances to recover damages, he would face a whole
 9 other series of hurdles to establish that Paycom must pay penalties on top of the
 10 amounts that would have been owed for its alleged transgressions.

11 Plaintiff's second cause of action is for waiting time penalties under section
 12 203. Paycom would seek to bar those penalties based on its "good faith"
 13 defense. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008). Paycom
 14 would have considerable case law to support its position. See *Reber v.*
 15 *AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147 at *9 (C.D. Cal. Aug. 25,
 16 2008) ("genuine issue of material fact exists as to whether [plaintiffs] are [properly
 17 classified as] administrative employees" prevents penalties under Section 203.");
 18 *Topete v. Red Robin Int'l, Inc.*, 2018 WL 5917905 at *3 (C.D. Cal. Aug. 30, 2018)
 19 (refusing plaintiff's section 203 claim stemming from his alleged misclassification
 20 because the employer had a "good faith defense").

21 Plaintiff's Third Cause of Action is for statutory penalties under Labor Code
 22 section 226 for failure to provide accurate wage statements. Recovery of these
 23 penalties may also be difficult because Plaintiff will have to show that the violations
 24 were knowing and intentional. *Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal.

25 _____
 26 ¹⁴ There is also some risk that Paycom could establish that, at least, some of the
 27 Sales Professionals meet the administrative exemption. Many cases have applied
 28 that exemption to sales employees. *E.g., D'Este v. Bayer Corp*, 492 Fed. Appx. 721
 (2012); *Miranda v. Citibank, N.A.*, 2009 WL 10673988 (C.D. Cal. Aug. 3, 2009).

1 App. 5th 667, 680 (2018). Paycom will also be able to cite case law against the
 2 imposition of section 226 penalties under these circumstances. *Stafford v. Brink's,*
 3 *Inc.*, 2014 WL 12586066, at *5 (C.D. Cal. Aug. 5, 2014) (“many courts have held
 4 that the employer's good faith belief that it is not in violation of § 226 precludes a
 5 finding of a knowing and intentional violation.”).

6 For these reasons, and because the 9th Circuit directs that the determination of
 7 class action settlements should measure the recovery against the injury—not
 8 potentially applicable penalties (*Rodriguez*, 563 F.3d at 964)—Plaintiff neither
 9 includes the potential penalty amounts in his calculations above nor does the
 10 Settlement Agreement provide additional compensation to the former Sales
 11 Professionals who could assert a section 203 claim.

12 b. The Agreement/Policy Class Claims

13 Plaintiff’s Fourth through Eighth Causes of Action and part of the Ninth
 14 Cause of Action seek declaratory and/or injunctive relief to make Paycom’s policies
 15 and agreements comply with the law. Plaintiff obtained exactly the relief sought in
 16 these claims in that he negotiated revisions to the applicable documents (or Paycom
 17 abandoned the illegal provisions altogether) with Paycom as part of the settlement
 18 agreement. (SA § 3.06(c); Curtis Decl. ¶ 27.) Thus, the settlement of these claims
 19 attains the equivalent of 100 cents on the dollar.

20 **4. Plaintiff Performed the Necessary Discovery to Assess and**
 21 **Resolve this Case**

22 In assessing this factor, courts evaluate whether “the parties have sufficient
 23 information to make an informed decision about settlement.” *Linney*, 151 F.3d at
 24 1239; accord *Andrew Potter*, 2020 WL 1942619, at *5 (factor met where counsel
 25 “reviewed and analyzed thousands of pages of data and documents, interviewed
 26 Plaintiff and other Class Members, and met with Defendants on numerous
 27 occasions”). If they do, then “the recommendations of plaintiff’s counsel should be
 28 given a presumption of reasonableness.” *In re Omnivision Technologies, Inc.*, 559 F.

1 Supp. 2d 1036, 1043 (N.D. Cal. 2008). Indeed “where a class settlement has been
 2 reached after meaningful discovery, after arm’s length negotiation, conducted by
 3 capable counsel, it is presumptively fair.” *Cicero v. DirecTV, Inc.*, 2010 WL 2991486,
 4 at *3 (C.D. Cal. July 27, 2010).

5 Here, Plaintiff conducted an independent investigation, formal discovery, and
 6 informal discovery in connection with the two mediations. As part of the independent
 7 investigation, Plaintiff interviewed Class Members and confirmed the similarity of
 8 their experiences. (Curtis Decl. ¶¶ 10, 13.) Plaintiff served three rounds of discovery.
 9 Extensive meeting and conferring was then required to get the answers Plaintiff
 10 needed to assess the case. Plaintiff obtained the relevant policies and agreements, job
 11 descriptions, wage statements, and pay data needed. He worked with his counsel and
 12 its data expert to value the claims. (Curtis Decl. ¶ 35.) The parties were well-situated
 13 to resolve the case at the second mediation. This factor too is met.

14 **5. *The Settlement Leaves the Award of Attorneys’ Fees to***
 15 ***the Court’s Discretion***

16 The requested attorneys’ fees is the final consideration. This factor supports
 17 preliminary approval here because Plaintiff’s counsel only intends to seek the 25%
 18 benchmark in the Ninth Circuit, or \$375,000, although courts often award higher
 19 amounts in wage and hour litigation like this. *Hanlon*, 150 F.3d at 1029; *Cicero*, 2010
 20 WL 2991486, at *6 (“courts usually award attorneys’ fees in the 30-40% range in
 21 wage and hour class actions that result in ... a common fund under \$10 million.”).

22 Counsel has billed 485 hours on this case to date. (Curtis Decl. ¶ 34.)
 23 Counsel’s lodestar is \$348,000, so the planned request for \$375,000 in fees currently
 24 equals a 1.087 multiplier. (*Id.*) There will of course still be more work on this case.
 25 Thus, the multiplier ultimately will be even less. “Multipliers ranging from one to four
 26 are frequently awarded in common fund cases....” *Lazarin v. Pro Unlimited, Inc.*,
 27 2013 WL 3541217, at *8 (N.D. Cal. July 11, 2013).

28 ///

1 **C. The Class Notice Satisfies F.R.C.P. Rule 23**

2 The Settlement Agreement attaches the proposed Class Notice as Exhibit 1A
3 to the Curtis Declaration. Pursuant to F.R.C.P. 23(c)(2)(B), class members must be
4 provided with the best notice practicable under the circumstances.

5 The proposed Notice satisfies the above standard. The notice is clearly
6 written, in plain English, and it “describes the terms of the settlement in sufficient
7 detail to alert those with adverse viewpoints to investigate and come forward to be
8 heard.” *Rodriguez*, 563 F.3d at 962. In-line with best practices, the class notice also
9 contains: Class Counsel’s contact information (p. 6); direction to a website that
10 posts the important case documents (*Id.*); instructions on how to access the case
11 docket; (*Id.*); the date of the final approval hearing, (pp. 2, 5); individual estimated
12 settlement recovery amounts (pp. 1, 5); instructions on how to opt out via the
13 Exclusion Form (p. 5); and instructions on how to object to the settlement (pp. 5-6.)

14 Under the Settlement Agreement, Paycom must provide the Claims
15 Administrator with the name, last-known address, and email of each Class Member.
16 (SA § 3.03.) The Claims Administrator will then:

- 17 • Send the notice by first-class mail *and email*. (SA § 3.03)
- 18 • “[C]heck all Class Member addresses against the National Change of
19 Address database and ... update any addresses before mailing.” (*Id.*)
- 20 • Re-mail the Notice Packet to any received forwarding address. (*Id.*)
- 21 • Perform a skip trace or mass search on LexisNexis databases, and
22 mail the Notice Packet to any other addresses identified. (*Id.*)

23 In the Claims Administrator’s experience, notice distributed in by the above process is
24 reasonable, adequate, and consistent with its past practices. (Curtis Decl. Ex. 2 ¶ 12.)

25 In sum, the Court should preliminarily approve the Class settlement because
26 each of the above factors indicates that the Court will be able to grant final approval.

27 **D. Resolution of the PAGA Claims also Supports Preliminary Approval**

28 “Because a PAGA action is brought as proxy of law enforcement agencies,
[t]here is no requirement that the Court certify a PAGA claim for representative

1 treatment like in Rule 23.” *Rodriguez v. Marshalls of CA, LLC*, 2020 WL 7753300,
2 at *7 (C.D. Cal. July 31, 2020). “However, because a settlement of PAGA claims
3 compromises a claim that could otherwise be brought by the state, the PAGA
4 provides that ‘court[s] shall review and approve any settlement of any civil action
5 filed pursuant to [PAGA].’” *Id.*

6 **1. PAGA Misclassification Claims**

7 The Complaint seeks PAGA penalties under Labor Code sections 510, 558 and
8 1194 (overtime) and 226.3 (wage statements) in connections with Paycom’s
9 misclassification of Sale Professionals. These claims are derivative of the Class
10 claims. The Settlement allocates \$20,000 of the \$1 million paid to Sales Professionals
11 for the misclassification claims to the PAGA claim. (SA Art. 1, mm.) Two percent
12 allocation is a more than reasonable amount to allocate to a PAGA claim based on the
13 same conduct as the Class claims. *See e.g., Contreras v. Worldwide Flight Services,*
14 *Inc.*, 2020 WL 2083017, at *10 (C.D. Cal. Apr. 1, 2020) (approving PAGA allocation
15 of \$20,000 [2.14 percent of the \$700,000 Gross Settlement Amount] because that was
16 “higher than the zero to two percent range for PAGA claims approved by courts.”); *In*
17 *re M.L. Stern Overtime Litig.*, 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009)
18 (approving PAGA settlement of 2 percent); *Hopson v. Hanesbrands, Inc.*, 2008 WL
19 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3
20 percent); *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801 (E.D. Cal. Nov. 27,
21 2012) (approving PAGA allocation of \$10,000 against a settlement of \$2.5 million (.4
22 %)); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645 (N.D. Cal. Feb. 16,
23 2011) (approving PAGA allocation of \$10,000 out of \$6.9 million settlement (.1 %)).

24 **2. PAGA Agreement/Policy Claims**

25 In connection with Paycom’s agreements and policies that contain illegal forum
26 selection, release, indemnity, non-disclosure, non-disparagement, non-compete, non-
27 solicitation requirements, and its Likeness waiver’s violating their employees’ rights
28 to privacy, Plaintiff seeks PAGA penalties for violating Labor Code sections

1 432.4/450, 96(k)/98.6, 232, 232.5, 925, 1102.5, and 2802/2804. Some of these
2 violations occurred once when the employees' signed their onboarding documents
3 during their first pay period while others continued through each pay period of their
4 employment. The settlement recovers \$81 per pay period, which is many times that
5 which PAGA settlements commonly recover. Curtis Decl. ¶¶ 38 and 39.

6 Paycom's revising its at-issue documents to comply with California law is
7 perhaps also the most significant relief obtained on the PAGA agreement/policy
8 claims. *Eisenacher v. VITAS Hospice Servs., LLC*, 2021 WL 1846574, at *2 (N.D.
9 Cal. Apr. 2, 2021) (approving PAGA settlement where employer agreed to change its
10 practices to comply with California law even though the employer paid only \$20,000
11 in penalties as part of the settlement). Here, not only did Plaintiff get Paycom to fix
12 the problems with its policies and agreements, he also obtained \$500,000 in penalties
13 for those violations. (SA Art. 1, jj.)

14 While the PAGA "is surprisingly short on specifics, and neither the California
15 legislature, the LWDA, nor California courts have identified the appropriate standard
16 for approval of such a settlement" (*Lourdes Lefevre v. Five Star Quality Care, Inc.*,
17 2021 WL 2389884, at *2 (C.D. Cal. Jan. 7, 2021)), Plaintiff will provide any
18 additional analysis needed to confirm the appropriateness of the PAGA settlement
19 with his Motion for Final Approval.

20 **VII. CONCLUSION**

21 Plaintiff respectfully moves this Court to enter the [Proposed] Orders submitted
22 with this motion and approve the Class and PAGA settlements.

23 Respectfully submitted,

24 DATED: July 8, 2021

BAKER CURTIS & SCHWARTZ, P.C.

25
26 By: /s/ Michael Curtis

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CAMERON ROSETTA