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9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SAN BERNARDINO**
12

13 ESTEBAN MARTINEZ, on behalf of all others
14 similarly aggrieved,

15 Plaintiff,
16 vs.

17 'T' MCGEE ELECTRIC, INC., a California
corporation; TRENT MCGEE, an Individual;
and DOES 1-20, Inclusive,

18 Defendants.
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23
24

CASE NO. CIVSB2114427

Assigned for All Purposes to:
Hon. David Cohn
Dept. S-26

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

[Filed concurrently with Notice of Motion
and Motion, Declarations of J. Kirk
Donnelly, Zachary M. Crosner, Esteban
Martinez, and Julie Green, [Proposed]
Order]

Date: August 23, 2023
Time: 9:00 a.m.
Dept.: S-26

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1 **I. INTRODUCTION**

2 Plaintiff Esteban Martinez hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 460 individuals employed by Defendant ‘T’ McGee Electric, Inc.
5 (“McGee Electric” or “Defendant”) as non-exempt employees during the period of May 21, 2017
6 through July 22, 2023. The proposed \$950,000 settlement will provide at least \$535,833 in cash
7 payments to the settlement class, with an average award of about \$1,100. The balance of
8 approximately \$414,167 will cover a modest enhancement award to Plaintiff, reasonable
9 attorney’s fees and actual litigation costs, settlement administration costs, and payment of civil
10 penalties to the state. The settlement is the product of Plaintiff’s pre- and post-filing
11 investigation, formal discovery, class member interviews, an informal pre-mediation exchange of
12 information, and arms-length and adversarial negotiations overseen by experienced and well-
13 regarded mediator the Hon. Carl J. West (Ret.).

14 As demonstrated below, the settlement is within the “range of reasonableness” for
15 preliminary approval. Plaintiff’s counsel believes the settlement is a significant result for the
16 class given the substantial risks inherent in this matter. Accordingly, Plaintiff requests the Court
17 enter an order: (1) granting preliminary approval to the proposed class action settlement; (2)
18 conditionally certifying the settlement class as defined below; (3) appointing J. Kirk Donnelly
19 and the Law Offices of J. Kirk Donnelly, APC, and Zachary M. Crosner and Crosner Legal, P.C.
20 as Class Counsel; (4) appointing plaintiff Esteban Martinez as the Class Representative; (5)
21 appointing CPT Group, Inc. as the Settlement Administrator; (6) approving the form of notice to
22 the class and the procedure for providing such notice; and (7) scheduling a final fairness hearing.

23 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

24 On May 21, 2021, Plaintiff filed a PAGA-only complaint against Defendant for several
25 alleged violations of the Labor Code and IWC Wage Orders. Plaintiff filed his complaint on
26 behalf of individuals who worked for Defendant as non-exempt employees in California during
27 the relevant time frame. Defendant is an electrical contractor operating throughout Southern
28 California and based out of Pomona. Plaintiff Martinez worked for McGee Electric as a non-

1 exempt yard and warehouse employee for several months in 2019-20. After confirming there was
2 no potentially applicable arbitration agreement, and after a contested motion, the Court granted
3 leave for Plaintiff to file a first amended complaint adding class allegations based on the same
4 alleged wage and hour violations. Plaintiff filed his FAC on January 31, 2022, on behalf of a
5 putative class of all of Defendant's California non-exempt employees from May 21, 2017 to
6 present. [Declaration of J. Kirk Donnelly ("Donnelly Decl."), ¶ 4.]

7 Plaintiff alleges a number of wage and hour violations by Defendant. First, he alleges
8 McGee Electric failed to pay all wages due, and more specifically that: (a) McGee Electric fails to
9 include non-discretionary bonus pay in its calculations of the "regular rate of pay" for purposes of
10 calculating overtime pay, (b) fails to compensate certain employees who are paid on piece rate for
11 all of their rest and recovery periods, and fails to compensate them for all of their "non-
12 productive" time. [Donnelly Decl., ¶ 6.]

13 Plaintiff next alleges Defendant failed to maintain a compliant written meal and rest break
14 policy, and further failed to provide all required meal and rest breaks on a fully compliant basis.
15 In particular, Plaintiff claims Defendant frequently provided untimely meal periods based on a
16 review of the company's own time records, and further that Defendant never provided second
17 meal periods on shifts of 10+ hours. For the alleged rest break violations, Plaintiff primarily
18 claims McGee Electric did not provide required third rest breaks on 10+ hour shifts. Likewise,
19 Plaintiff contends TWC never paid an extra hour of premium pay in lieu of a missed or non-
20 compliant break. [Donnelly Decl., ¶ 6.]

21 Based on these allegations, Plaintiff's FAC asserted class claims for failure to pay all
22 wages due, failure to provide meal and rest breaks, failure to provide accurate wage statements,
23 failure to pay wages due on separation of employment, and violation of the Unfair Competition
24 Law, Bus. & Prof. Code sections 17200, *et seq.* Plaintiff also alleged violations of the Private
25 Attorney's General Act premised on the same Labor Code violations. [Donnelly Decl., ¶ 6.]

26 McGee Electric has at all times denied Plaintiff's allegations and maintained its meal
27 break and payroll policies and procedures comply with California law, that it provided its
28 employees with required meal and rest breaks, that it properly tracked employee time and paid

1 Plaintiff and all other employees all wages due. Additionally, Defendant strongly contends the
2 case cannot be maintained as any kind of class or representative action, arguing that to the extent
3 class members missed meal breaks, that such breaks were non-compliant, or that any unpaid non-
4 productive work occurred, it was intermittent and infrequent and evidence of such violations
5 would be purely anecdotal, and therefore individualized issues predominate and trial would be
6 unmanageable. [Donnelly Decl., ¶ 7.]

7 After Plaintiff filed his complaint, the Parties engaged in formal discovery, both
8 propounding and responding to written discovery, and Plaintiff filed multiple discovery motions.
9 Defendant filed a motion to dismiss the PAGA claims following the U.S. Supreme Court's
10 Viking River Cruises decision, which motion the Court denied. After further meet and confer
11 discussions regarding ongoing discovery and discovery disputes, potential law and motion, and
12 other case management issues, the Parties ultimately agreed to attempt mediation. Thereafter, the
13 Parties engaged in additional informal discovery to facilitate an exchange of information
14 necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel reviewed
15 payroll records, personnel policies/handbooks, meal and rest break policies, personnel files, and a
16 random sampling of paystubs and time records produced by McGee Electric for about 20% of the
17 class. After obtaining a class list through discovery, Plaintiff also disseminated written
18 questionnaires to the class members, and followed up on the responses with telephone interviews.
19 Defendant also provided documents and information reflecting the estimated total amount of
20 workweeks and pay periods the class members worked, and average hourly pay rates, among
21 other relevant data. Plaintiff had that data reviewed and analyzed by Berger Consulting Group to
22 assist with determining potential break violation rates, amount of underpaid rest and recovery
23 time and unproductive time, etc., and preparing a damages model. [Donnelly Decl., ¶ 8.]

24 The Parties then engaged the Hon. Carl J. West (Ret.) a highly respected mediator with
25 extensive wage and hour class action experience and, on May 23, 2023, participated in a full-day
26 mediation with Judge West. Throughout the day, the arms-length negotiations were hard-fought
27 and adversarial as the Parties exchanged extensive information on their legal and factual
28 positions, and made numerous offers and counter-offers. Ultimately, the Parties reached

1 agreement on all major issues and thereafter collaboratively drafted the Settlement Agreement
2 setting forth the full and final settlement terms. [Donnelly Decl., ¶ 9.]

3 **III. THE PROPOSED SETTLEMENT TERMS**

4 Under the settlement, McGee Electric will pay \$950,000.00 into a common fund, the
5 Gross Settlement Amount (“GSA”). Reasonable attorney’s fees of up to one-third of the GSA, or
6 \$316,666.67, actual litigation costs of up to \$25,000, a modest enhancement award of up to
7 \$10,000 for plaintiff, settlement administration costs of no more than \$12,500, and \$50,000 for
8 alleged civil penalties under PAGA,¹ all will be paid from the GSA. The remainder of
9 approximately \$535,833 will be allocated among the Participating Class Members based on their
10 total weeks worked during the Class Period. No portion of the GSA will revert to Defendant.
11 [Donnelly Decl., ¶ 10.]

12 **A. Certification of the Settlement Class**

13 The settlement provides for conditional certification of a settlement class including all
14 individuals who worked for Defendant as a non-exempt employee in California during the Class
15 Period, which runs from May 21, 2017 through July 22, 2023. As of the May 23 mediation,
16 McGee Electric estimated the Settlement Class consisted of approximately 460 individuals.
17 [Donnelly Decl., ¶ 11.]

18 **B. The Benefit Conferred on the Settlement Class**

19 As noted, the settlement obligates McGee Electric to pay \$950,000 to resolve the
20 Settlement Class’s claims, inclusive of attorney’s fees and costs. At least \$535,833 from the GSA
21 will be distributed to the Participating Class Members. This is a cash settlement that does not
22 require Participating Class Members to submit a claim form to receive their settlement share.
23 Participating Class Members will receive their settlement checks automatically via First Class
24 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining
25 eighty percent will be allocated to penalties and interest. McGee will pay any and all applicable
26 employer-side payroll taxes separately and in addition to the GSA. Subject to the Court’s

27 ¹ Consistent with PAGA, \$37,500 of that amount will go the LWDA for the State’s share of the civil penalties, and
28 the remaining \$12,500 will be distributed pro rata to the Aggrieved Employees (defined as all individuals employed
as non-exempt employees during the PAGA period of March 17, 2020 to July 22, 2023).

1 approval, any amounts not claimed (because a class member does not cash his or her settlement
2 check) will be forwarded to the California State Controller's Unclaimed Property Fund.

3 [Donnelly Decl., ¶ 12.]

4 Each Participating Class Member will receive a share of the Net Settlement Amount based
5 on his or her position held and total weeks worked for TWC during the Class Period while
6 employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment
7 will be calculated using criteria typically used in determining appropriate amounts of alleged
8 unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory penalties
9 under applicable law. These methods are intended to ensure each Class Member receives a
10 portion of the available settlement funds corresponding to the relative value of his or her potential
11 claims. The proposed allocation provides a reasonable way to compensate Class Members based
12 on the amount of time they worked for Defendant, and the number of instances they missed a
13 break, were not provided compensation in lieu of such missed breaks, or lost wages due to
14 Defendant's alleged improper payroll practices. The average award across the board will be
15 approximately \$1,165. Per McGee Electric, as of the mediation, there were approximately 297
16 Aggrieved Employees, and their average PAGA award will be about \$42. [Donnelly Decl., ¶ 13.]

17 As discussed below, the overall settlement amount is reasonable in light of the
18 considerable risks associated with Plaintiff's claims as well as the delay and risk posed by
19 continuing to litigate such disputed allegations. In Plaintiff's counsel's judgment, the total value
20 recovered for the class is substantial and in the range of reasonableness.

21 **C. Settlement Administration**

22 Subject to the Court's approval, the Parties have agreed on CPT Group, Inc. ("CPT") as
23 the Settlement Administrator. CPT is qualified and has significant experience administering class
24 action settlements, including numerous wage and hour matters. CPT's fees will not exceed
25 \$12,500.00, and currently are estimated at \$10,500.00. [Declaration of Julie Green, ¶¶ 2-11, Exhs.
26 A-B.]

27 **D. The Class Notice**

28 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about

1 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
2 individualized information used to calculate Class Members' Individual Settlement Payments and
3 each Class Member's estimated settlement award. The Notice likewise details the procedures for
4 Class Members to dispute their individual information, the procedure for submitting an objection
5 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
6 Members with the information necessary to evaluate the Settlement, provides fair opportunity to
7 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
8 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the
9 proposed Notice provides the Class with the best notice practicable. [Donnelly Decl., ¶ 15.]

10 **E. Right to Correct Information, Opt Out, or Object**

11 Class Members will have forty-five (45) days to dispute the information in their Notice
12 used to calculate their settlement award, and also have 45 days to submit any objections to the
13 settlement or to request exclusion. In the event a Class Member disputes their individual
14 information, the Settlement Administrator will review the Class Member's records as well as any
15 additional information submitted, and make a final determination. [Donnelly Decl., ¶ 16.]

16 **F. Release of Claims**

17 All Participating Class Members will be deemed to release Defendant from all class
18 claims alleged in the operative complaint, or that could have been brought based on the
19 allegations in the operative complaint, May 21, 2017 through July 22, 2023, and the Aggrieved
20 Employees will release all claims under PAGA for the PAGA Period of March 17, 2020 to July
21 22, 2023. The release is limited to the claims that were actually pleaded or could have been
22 pleaded based on the alleged facts in the complaint. [Donnelly Decl., ¶ 17.]

23 **G. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

24 The settlement provides Defendant will not oppose a request for reasonable attorney's
25 fees not to exceed one-third of the Gross Settlement Amount, or \$316,666.67.00, nor will it
26 oppose a request for reimbursement of actual litigation costs and expenses of up to \$25,000.00.
27 Defendant also will not oppose a request for an enhancement award to Plaintiff of not more than
28 \$10,000.00 each in recognition of his time spent on this matter, the risks he undertook on behalf

1 of the class, and the benefit conferred to the class. Plaintiff's counsel will provide the Court with
2 appropriate summaries and evidence of their efforts and time records in anticipation of the Final
3 Approval Hearing, and Plaintiff has submitted his declaration herewith. If the Court approves
4 less than the above amounts, the difference will remain in the Net Settlement Amount for
5 distribution to the Participating Class Members. [Donnelly Decl., ¶ 18.]

6 **H. PAGA Claims and Notice to the LWDA**

7 The Parties allocated \$50,000 to payment of civil penalties under PAGA for such claims
8 against McGee Electric, as addressed in more detail below. As required by Labor Code section
9 2699(l)(2), Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA
10 via its online portal. [Donnelly Decl., ¶ 19; Exh. 3.]

11 **IV. ARGUMENT**

12 **A. Standard of Review for a Class Action Settlement**

13 The law favors settlement, particularly in class actions where substantial resources can be
14 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
15 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
16 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
17 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
18 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
19 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
20 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion and
21 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
22 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
23 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

24 The first step is a motion for preliminary approval, through which the parties present the
25 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
26 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
27 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
28 "range of reasonableness" and if notice should be provided to the class regarding the settlement's

proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. TouchTWC Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class actions, courts generally apply a presumption of fairness to class action settlements when (1) the settlement results from arms-length bargaining, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

If the court grants preliminary approval, it then orders the class be given notice in an appropriate manner, establishes a schedule and procedures for class members to request exclusion or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s fees and costs, and any enhancement for the class representative(s), is filed subsequent to preliminary approval and heard with the motion for final approval, as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800; Wershba, 91 Cal.App.4th at 232.

The proposed settlement in this matter warrants preliminary approval under the liberal standard discussed above, as it is fair, reasonable and adequate under all the circumstances, and represents a favorable result for the class.

B. The Proposed Settlement Class Should Be Conditionally Certified

The purpose of conditional class certification for purposes of settlement is to facilitate provision of notice of the proposed settlement’s terms, and the date and time of the final fairness hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should use different standards to determine the propriety of a settlement class.”)

In the present matter, conditional certification is proper since this matter satisfies all requirements for class certification under Code of Civil Procedure section 382. First, the class is both sufficiently numerous, consisting of approximately 460 individuals, and ascertainable by reference to Defendant’s personnel and payroll records. [Donnelly Decl., ¶ 20.] Next, Plaintiff is

1 an adequate class representative, as his claims do not conflict with and are not antagonistic to the
2 claims of other class members. Further, his claims are typical given he is a member of the class
3 and his claims arise from the same employment practices and course of conduct giving rise to the
4 claims of the other class members. [Donnelly Decl., ¶ 21; Declaration of Esteban Martinez, ¶¶ 2-
5 9.] Lastly, his counsel is experienced and adequate class counsel. [Donnelly Decl., ¶¶ 33-35;
6 Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶¶ 3-6.]

7 Next, common questions of law and fact predominate – particularly for purposes of a
8 settlement class – as the Class Members all were subject to the same meal rest break policies, the
9 same alleged policy that shorted them on hours worked. Since the focus of the claims against
10 McGee Electric concerns the legality of common policies applied uniformly to the entire class,
11 common issues predominate over individualized inquiries concerning liability. McGee’s de facto
12 policy of not providing second meal breaks and third rest breaks is company-wide policy applied
13 equally and consistently to all class members, and this policy is either compliant with California
14 law or it is not. Regardless of that determination, it will decide liability for all class members one
15 way or another. Similarly, whether McGee Electric properly paid for rest and recovery time
16 present another common issue. [Donnelly Decl., ¶ 22.]

17 By now it is well-settled that a theory of recovery asserting the existence of a uniform
18 policy violating California law is sufficient to satisfy the requirements for class certification.
19 Jones v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform
20 policy consistently applied to a group of employees is in violation of the wage and hour laws are
21 of the sort routinely, and properly, found suitable for class treatment”); Williams v. Superior
22 Court (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question
23 of fact or law that supports commonality for class certification”). Lastly, a class action is
24 superior to other means for the fair and efficient adjudication of this controversy. [Donnelly
25 Decl., ¶ 23.]

26 C. **The Proposed Settlement Meets the Dunk and Kullar Factors and is**
27 **within the Range of Reasonableness**

28 The proposed settlement resulted from serious, arms-length negotiations facilitated by

1 respected mediator the Hon. Carl J. West (Ret.), who has extensive experience mediating wage
2 and hour class actions. [Donnelly Decl., ¶ 9.] Plaintiff's counsel J. Kirk Donnelly and Zachary M.
3 Crosner both have years of litigation experience, including litigating wage and hour class actions.
4 Plaintiff's counsel is well-qualified to evaluate the risks and benefits of pursuing further litigation
5 or settling the matter. [Donnelly Decl., ¶¶ 33-35; Crosner Decl., ¶¶ 3-6.]

6 California law recognizes several factors bearing on the fairness, adequacy, and
7 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
8 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement
9 2) the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
10 litigation; 4) the risk of maintaining class action status throughout trial; 5) the experience and
11 views of counsel; and 6) the reaction of the class members to the proposed settlement. Id. As
12 demonstrated below, the proposed settlement satisfies these requirements.

13 Prior to mediation, the parties engaged in extensive formal informal discovery to facilitate
14 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
15 McGee Electric's payroll practices, pay stubs and time records for a sampling of class members,
16 meal and rest break policies, etc., and information from Defendant regarding class size and
17 breakdown of job positions, work weeks, rates of pay, and other information used to formulate a
18 damages model. Plaintiff also obtained information from putative class members via surveys and
19 interviews. This extensive information then was analyzed by a consulting expert to look for meal
20 and rest break violation rates, whether McGee Electric properly tracked and paid for rest and
21 recovery breaks, and other issues relevant to liability and damages. Plaintiff's counsel are
22 confident they obtained sufficient information to enable them to understand the law and facts of
23 this case and make an informed decision regarding the proposed settlement and whether it is in
24 the best interests of the class. [Donnelly Decl., ¶¶ 8, 24.]

25 Next, the proposed settlement falls within the range of reasonableness warranting
26 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
27 will confer direct monetary benefits on the class members. As described above, each class
28 member will be entitled to a monetary payment without having to file a claim and each payment

1 will be relative to the value of his or her potential claims.

2 Plaintiff's analysis was supported by the pre-mediation production described above, which
3 permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using
4 that data, Plaintiff ran various calculations and estimated McGee Electric's likely maximum
5 exposure on the class claims at approximately \$8,367,000, including \$260,000 on the
6 unpaid/underpaid rest and rec pay claims, \$1,648,000 on the unpaid/underpaid non-productive
7 time claim, \$20,000 on the regular rate claim, \$3,320,000 on the meal break claims, \$605,000 on
8 the rest break claims, \$845,000 on the wage statement claims, and \$1,669,000 on the waiting time
9 penalty claims. [Donnelly Decl., ¶¶ 25-26.] Plaintiff and his counsel substantially discounted the
10 value of these claims, however, in light of the multiple and considerable risks posed by
11 proceeding with the litigation.

12 The unpaid wage claims focus primarily on McGee Electric's alleged failure to pay piece
13 rate employees correctly, and in particular to separately account and pay for rest break time and
14 non-productive time. Under well-settled law, all such time must be paid for separately from the
15 piece rate compensation. Labor Code 226.2; Cardinas v. McLane Foodservices, Inc. (C.D. Cal.
16 2011) 796 F.Supp.2d 1246, 1252 (confirming a piece-rate pay formula that does not "compensate
17 for all time worked does not comply with the California Labor Code, even if, averaged out, it
18 would pay at least minimum wage for all hours worked."); Gonzalez v. Downtown LA Motors,
19 LP (2013) 215 Cal.App.4th 36, 49 (same); Armenta v. Osmose, Inc. (2005) 135 Cal.App.4th 314,
20 320 (same). Here it does not appear McGee fully complied with these requirements. First as to
21 "rest and rec pay" (i.e. pay for rest breaks), the pay records suggest McGee Electric pays for
22 break time for some employees but not others and, as to those employees who did receive
23 separate pay for their break time, McGee Electric pays for such time based on a schedule that
24 understated the number of "rest and rec" hours and thus shorted employees on the rest and rec
25 pay. Further, since McGee Electric's rest break policy arguably did not provide for third breaks,
26 employees likewise were not paid applicable rest and rec pay on shifts lasting longer than 10
27 hours (which is about 15% of all shifts). Finally, McGee Electric did not apply the correct
28 formula for determining the "regular rate" of pay for rest and rec pay and as result underpaid any

1 rest and rec pay that it did actually issue. Defendant likewise did not account for non-
2 discretionary pay, primarily bonuses, when calculating the employees' "regular rate of pay" for
3 purposes of determining the correct overtime rate. Alvarado v. Dart Container Corp. of
4 California (2018) 4 Cal.5th 542, 552–54. As a result, McGee Electric underpaid class members
5 for their overtime. [Donnelly Decl., ¶ 28.]

6 In response, McGee Electric argued its payroll policies are fully compliant, that it
7 properly tracked and paid for all hours worked, including non-productive hours. Defendant also
8 argued that, if any class members failed to record and report non-productive time it was in
9 violation of company policy and would have occurred on a haphazard and individual basis.
10 Accordingly Defendant argued the issue would not be certifiable since it would require
11 individualized inquiries whether compensable non-productive time occurred and why it was
12 documented and paid for. [Donnelly Decl., ¶ 27.]

13 On the meal and rest break claims, Plaintiff contends McGee Electric's written policies
14 are not fully compliant, as they arguably do not (a) account for second meal periods and third rest
15 breaks on shifts longer than 10 hours, or address potential waiver of second meal periods, and (b)
16 do not properly advise employees as to the timing of meal periods (i.e., before the start of the fifth
17 hour of work). Plaintiff's review of the time and payroll records provided suggested these
18 deficiencies in the written policies affected employee breaks, as the violation rate for late meal
19 periods is about 79%, and the violation rate for second meal periods is over 99%. [Donnelly
20 Decl., ¶ 27.]

21 In response, McGee Electric argued its written policies are fully compliant, that it
22 provided employees with all required breaks, and that many class members waived their second
23 meal periods. Defendant further maintained that, in light of its compliant policies, whether a
24 class member missed a meal period, received a late meal period, or missed a rest break would
25 have been aberrational and against company policy. Thus, per McGee Electric, these issues are
26 not amenable to class or representative treatment since their resolution would require
27 individualized inquiries as to why a break was missed or non-compliant. [Donnelly Decl., ¶ 27.]

28 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid

1 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
2 posed by the need to take into account the discretionary nature of such awards and the “good
3 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
4 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
5 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
6 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
7 defenses. [Donnelly Decl., ¶ 29.]

8 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
9 entitled to penalties totaling about \$4 million in civil penalties should Plaintiff prevail on all
10 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶
11 30.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on
12 Defendant’s various defenses on the merits and also accounted for the Court’s wide discretion to
13 reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington
14 v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
15 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
16 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
17 trial). Accordingly, the Parties allocated \$50,000 to PAGA penalties, and Plaintiff submits this
18 amount is reasonable under the circumstances and in line with comparable settlements in other
19 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
20 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
21 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
22 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
23 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
24 possible weaknesses in Plaintiffs’ case, or 2.2 percent of total settlement). Additionally, the
25 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to
26 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist.
27 LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where “[p]laintiffs
28 [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the

1 settlement.

2 The settlement obviates the significant risk that this Court may find any kind of class or
3 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
4 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
5 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
6 motion to decertify, as well as trial and possible appeals, and would further and substantially
7 delay any recovery by the class with no assurance of recovering significantly more than the
8 proposed settlement. While Plaintiff is confident in the merits of these claims, legitimate
9 controversies exist regarding each one of them. Plaintiff also recognizes proving the amount of
10 wages and penalties due each Class Member would be an expensive, time-consuming, and
11 uncertain proposition. [Donnelly Decl., ¶ 31.]

12 Plaintiff and his counsel discounted the value of the class claims consistent with the risks
13 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
14 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and
15 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
16 was in the best interests of the class, and the overall \$950,000 recovery represents a significant
17 percentage of Defendant's potential exposure. Given these risks, a total recovery for the class of
18 \$950,000, which will result in average award of over \$1,100 per class member, is a significant
19 result well within the range of reasonableness considering all potential outcomes, and it will
20 provide direct monetary awards to all Class Members in short order. [Donnelly Decl., ¶ 32;
21 Crosner Decl., ¶¶ 7-14.]

22 Importantly, the mere fact that a settlement does not provide the same recovery as might
23 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
24 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
25 settlement process...even if the relief afforded by the proposed settlement is substantially
26 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
27 settlement because the public interest may indeed be served by a voluntary settlement in which
28 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.

1 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is
2 different from the question whether the settlement is perfect in the estimation of the reviewing
3 court"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
4 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential
5 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
6 should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
7 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
8 represented 99% discount off the maximum value of the claims). Importantly as well, the
9 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
10 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
11 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
12 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
13 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
14 within the "range of reasonableness," and is fair and adequate for the Class.

15 **V. CONCLUSION**

16 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this
17 motion, conditionally certify the settlement class, grant preliminary approval to the proposed
18 class action settlement, and enter the [Proposed] Order filed herewith.

20 Dated: August 8, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

22 *J. Kirk Donnelly*

23 J. Kirk Donnelly
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