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8 **SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF LOS ANGELES**

10
11 MARIO HERRERA, on behalf of all others
12 similarly aggrieved,

13 Plaintiff,

14 vs. STONE ETC., INC., a California
15 corporation, G.B. MARBLE, INC., a
16 California corporation, GIORA BAREKET,
an individual, and DOES 1 through 10,
inclusive,

17 Defendants.

CASE NO. 21STCV43188

Assigned for All Purposes to:
Hon. Michelle Williams Court
Dept. 74

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of J. Kirk Donnelly and
Alejandra Singh; [Proposed] Order]

Date: November 16, 2022

Time: 8:30 a.m.

Dept. 74

Reservation No.: 579549830228

1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Mario Herrera seeks final approval of a non-
3 reversionary class action settlement resolving wage and hour claims on behalf of 249
4 individuals who worked for Defendants Stone Etc., Inc., G.B. Marble, Inc., and Giora
5 Bareket (together “Stone” or “Defendants”) as non-exempt employees in California during the
6 period of November 23, 2017 through July 16, 2022. The proposed \$335,000 total settlement
7 provides about \$185,000 in cash payments to the Class Members, and the remaining balance
8 will cover a modest service award to Plaintiff, settlement administration costs, civil penalties
9 to the state, and reasonable attorney’s fees and costs. The parties and their counsel finalized
10 the settlement after extensive and difficult arms-length negotiations overseen by an
11 experienced and highly-regarded mediator. The Court conditionally certified the Class
12 and preliminarily approved the settlement on August 8, 2022.

13 Since then, the Court-approved notice form was mailed to the Class Members, who
14 reacted very favorably to the settlement. No Class Members requested exclusion, and there
15 are no objections. Accordingly, on behalf of himself and the Settlement Class, Plaintiff
16 respectfully requests the Court grant this motion, give full and final approval to the
17 settlement, and enter judgment accordingly.

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

19 The details of the procedural and factual background of this matter were outlined in
20 the Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (filed on or about
21 June 28, 2022). To re-familiarize the Court with this litigation, on November 23, 2021,
22 Plaintiff filed a complaint under the Private Attorneys General Act, Labor Code section 2698, *et*
23 *seq.*, seeking civil penalties against Defendants for several alleged violations of the Labor Code
24 and IWC Wage Orders. Plaintiff filed his PAGA claims on behalf of individuals who worked for
25 Defendants as non-exempt employees in California during the relevant time frame. Defendants
26 are an integrated operation that fabricates and installs stone counters and other fixtures in both
27 residential and commercial projects, and as well as tile installation. Plaintiff Mario Herrera
28

1 worked for both companies as a non-exempt slab installation helper from approximately
2 September 2020 to March 2021 and then again from July 2021 to August 2021. [Declaration of J.
3 Kirk Donnelly (“Donnelly Decl.”), ¶ 2.]

4 Plaintiff alleged he and other employees were entitled to receive their meal breaks as
5 required under the Labor Code and IWC Wage Orders since they regularly worked shifts longer
6 than 8 hours, and frequently worked shifts exceeding 10 or even 12 hours. Information obtained
7 from Plaintiff, in conjunction with review of payroll and time records and other information
8 received from Stone, suggests they did not receive all of the required meal breaks, or did not
9 record having taken meal breaks, especially as to second meal breaks on shifts exceeding 10
10 hours. Plaintiff also contends meal periods frequently were provided late and did not start until
11 after the fifth hour of work. Similarly, Plaintiff alleges Defendants failed to provide all required
12 rest breaks, again mostly as to third break on shifts over 10 hours. Likewise, Plaintiff contends
13 Stone never paid an extra hour of premium pay in lieu of a missed or non-compliant break.
14 [Donnelly Decl., ¶ 3.]

15 He further alleges Stone “rounded” employee time punches to the nearest quarter hour
16 such that the employees lost hours worked since the time rounding unfairly favored the employer.
17 Additionally, certain employees, namely tile installers and tile helpers, drove their own vehicles
18 to job sites and occasionally were entitled to, but did not, receive pay for their travel time. Those
19 same employees also were entitled to receive mileage reimbursement, and Plaintiff and other
20 employees used their personal phones for business purposes but did not receive any
21 reimbursement. Lastly, Plaintiff alleged claims for failing to provide proper itemized wage
22 statements and payment of all wages due on separation of employment. [Donnelly Decl., ¶ 4.]

23 Stone has at all times denied Plaintiffs’ allegations and maintained its meal break and
24 payroll policies and procedures comply with California law, that it provided its employees with
25 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all
26 other employees all wages due, and that . Additionally, Stone strongly contends the case cannot
27 be maintained as any kind of class or representative action, arguing that to the extent class
28 members missed meal breaks, that such breaks were non-compliant, or that any unpaid “off the

1 clock” work occurred, it was intermittent and infrequent and evidence of such violations would be
2 purely anecdotal, and therefore individualized issues predominate and trial would be
3 unmanageable. [Donnelly Decl., ¶ 5.]

4 Ultimately, after initial discovery and meet and confer discussions about the merits of the
5 case, the parties agreed to attempt early mediation, and to further discuss a potential class-wide
6 resolution in addition to the PAGA claims. The settlement was reached in May 2021 after
7 extensive investigation, discovery and negotiations. The negotiations were at arms-length, and
8 facilitated by experienced and well-respected neutral Deborah Saxe, Esq., over the course of a full
9 day of mediation. [Donnelly Decl., ¶¶ 6-7.] This Court preliminarily approved the settlement
10 on August 8, 2022.

11 Class Notices were mailed to class members on September 6, 2022, with a 45-day
12 window (to October 21, 2022) for class members to opt out or object to the proposed
13 settlement. [Declaration of Laura Singh (“Singh Decl.”), ¶¶ 7, 10.]

14 **III. THE PROPOSED SETTLEMENT TERMS**

15 Under the settlement, Stone will pay \$335,000.00 into a common fund, the Gross
16 Settlement Amount (“GSA”), in three separate payments (of \$135,000, \$100,000 and \$100,000)
17 over approximately 13 months. Reasonable attorney’s fees of up to one-third of the GSA, or
18 \$111,666.67, actual litigation costs of up to \$15,000 (although only \$12,308.18 is requested), a
19 modest enhancement award of up to \$7,500 for plaintiff, settlement administration costs of no
20 more than \$15,000 (actually \$13,500), and \$5,000 allocated to PAGA penalties, all will be paid
21 from the GSA. The remainder of approximately \$185,000 will be allocated among the
22 Participating Class Members based on their job position held and total weeks worked during the
23 Class Period, with additional sums payable to those Class Members eligible for a payment under
24 PAGA. No portion of the GSA will revert to Stone. [Donnelly Decl., ¶ 8.]

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

26 The Court conditionally certified a settlement class defined to include all individuals
27 employed by Defendants as a non-exempt employee in California during the period from
28 November 23, 2017 through July 16, 2022. The Settlement Administrator ultimately mailed

1 class notices to 249 individuals identified as members of the Class. [Singh Decl., ¶¶ 5-8.]
2 Nothing has changed to require reconsideration of the Court's certification of the
3 Settlement Class.

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

5 As noted, the settlement obligates Stone to pay \$335,000 to resolve the Settlement Class's
6 claims, inclusive of attorney's fees and costs. About \$185,000 from the GSA will be distributed
7 to the Participating Class Members. This is a cash settlement that does not require Participating
8 Class Members to submit a claim form to receive their settlement share. Participating Class
9 Members will receive their settlement checks automatically via First Class U.S. Mail. One-third
10 of each settlement share will be allocated to wages and the remaining two-thirds percent will be
11 allocated to expenses, penalties and interest. Stone will pay any and all applicable employer-side
12 payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts
13 not claimed (because a class member does not cash his or her settlement check) will be forwarded
14 to the California State Controller's Unclaimed Property Fund. [Donnelly Decl., ¶ 9.]

15 Because certain job positions have stronger and/or different claims than others, as
16 discussed in more detail below, the net settlement amount will be divided as follows: forty
17 percent (40%) will be allocated to class members who worked as slab installer or slab installer
18 helper; fifty percent (50%) will be allocated to class members who worked as a tile installer or tile
19 helper, and the remaining ten percent (10%) is allocated to class members who worked as
20 fabricators/polishers, cutters, and yard personnel. Each Participating Class Member will receive a
21 share of the Net Settlement Amount based on his or her position held and total weeks worked for
22 Stone during the Class Period while employed in one of the above job titles. Thus, each Class
23 Member's Individual Settlement Payment will be calculated using criteria typically used in
24 determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal
25 breaks, unreimbursed expenses, and potential statutory penalties under applicable law. These
26 methods are intended to ensure each Class Member receives a portion of the available settlement
27 funds corresponding to the relative value of his or her potential claims. The proposed allocation
28 provides a reasonable way to compensate Class Members based on the particulars of their job

1 position and job duties, the amount of time they worked for Stone, and the number of instances
2 they missed a break, were not provided compensation in lieu of such missed breaks, lost wages
3 due to rounding, or did not receive expense reimbursement. [Donnelly Decl., ¶ 10.]

4 Settlement awards for the three groups will range as follows: (a) for slab installers from
5 \$86.49 to over \$5,250, with an average of about \$297; (b) for tile installers, from \$9.19 to over
6 \$2,200, with an average of about \$371, and (c) for fabricators, from \$ 7.87 to about \$955, with an
7 average of about \$74. [Singh Decl., ¶ 17.] Given that the settlement will be funded in three
8 installments, there will be three separate pro rata distributions of all amounts payable under the
9 settlement.

10 **C. Settlement Administration**

11 CPT Group, Inc., as the Court-approved Settlement Administrator, mailed the Notice
12 Packet to the Class members after making all reasonable effort to ascertain the best mailing
13 address, including running each address through the National Change of Address database
14 and "skip-tracing" any Notice Packets returned as undeliverable. [Singh Decl., ¶¶ 4-8.] The
15 Class Notice, previously approved by the Court, duly informed Class Members of the
16 settlement terms, including the estimated relief each Class Member will receive, the amounts
17 to be requested for attorney's fees and the class representative enhancement awards, and the
18 right to opt out of or object to the settlement. [Singh Decl., ¶ 4, Exh. A.] CPT mailed 249
19 Notice Packets on September 6, 2022. [Singh Decl., ¶ 7.] Ultimately, only 5 Notice Packets
20 were deemed undeliverable, representing a 98% success rate. [Singh Decl., ¶ 9.] The 45-day
21 response window for opting out of or objecting to the settlement expired on October 21,
22 2022. [Singh Decl., ¶ 10.] As of the filing of this motion, CPT has received no requests for
23 exclusion, zero objections to the settlement, and no disputes have been submitted regarding
24 the information used to calculate class member settlement shares. [Singh Decl., ¶¶ 10-14.]

25 **D. Release of Claims**

26 All Participating Class Members will be deemed to release defendants Stone Etc., Inc.,
27 G.B.. Marble, Inc. and Giora Bareket from all claims alleged in the operative complaint, or that
28 could have been brought based on the allegations in the FAC, including PAGA claims, from

1 November 23, 2017 through July 16, 2022. The release is limited to the claims that were actually
2 pleaded or could have been pleaded based on the alleged facts in the FAC. [Donnelly Decl., ¶
3 11.]

4 **E. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

5 The settlement provides Defendants will not oppose a request for reasonable attorney's
6 fees not to exceed one-third of the Gross Settlement Amount, or \$111,666.67, nor will it oppose a
7 request for reimbursement of actual litigation costs and expenses of up to \$15,000.00 (although
8 only \$12,308.18 is requested). Plaintiff's counsel filed a separate motion for attorney's fees
9 and costs, concurrently with this motion, attesting to the nature and scope of the work
10 performed and costs and expenses incurred. [Donnelly Decl., ¶ 12.]

11 **F. PAGA Claims and Notice to the LWDA**

12 The settlement provides for \$5,000 to be allocated to civil penalties under PAGA and
13 Plaintiff requests the Court approve said amount. Consistent with PAGA, \$3,750 of this
14 amount will be paid to the LWDA as the state's share of the civil penalties, with the
15 remainder included in the Net Settlement Amount for distribution to the Class. The
16 settlement agreement and this motion were submitted to the LWDA through its online portal prior
17 to filing. [Donnelly Decl., ¶ 13; Exh. 1.]

18 **IV. ARGUMENT**

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

20 The law favors settlement, particularly in class actions where substantial resources
21 can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg &
22 A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of
23 Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v.
24 Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37
25 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
26 compromised, the settlement of a class action requires court approval. Cal. Rule of Court
27 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple
28 Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect

1 against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48
2 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a
3 two-step process intended to determine whether, under the totality of circumstances, the
4 settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91
5 Cal.App.4th at 245.

6 On a motion for final approval, the trial court is charged with determining whether, in
7 light of the total circumstances of the action and the response of the class members to the
8 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at
9 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that
10 determination and may consider a number of relevant factors, including: the strength of
11 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of
12 further litigation; the amount offered in settlement; the extent of discovery and stage of the
13 proceedings; the experience and opinion of counsel; and the reaction of class members to the
14 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,
15 courts generally apply a presumption of fairness to a proposed class action settlement when:
16 (1) the settlement is reached through arm's-length bargaining; (2) investigation and
17 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is
18 experienced in similar litigation; and (4) the percentage of objectors is small. Dunk, 48
19 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

20 **B. The Proposed Settlement Merits Final Approval**

21 The proposed settlement of this action warrants final approval under the standards
22 summarized above. The settlement is fair, reasonable and adequate, and represents a
23 favorable resolution of highly disputed claims. Further, the settlement was overwhelmingly
24 approved by the class members, as there were no objections and no class members requested
25 exclusion, for a 100% participation rate.

26 **1. The Settlement Is the Product of Arm's-Length, Informed** 27 **Negotiations**

28 The settlement is not the result of fraud or collusion. Rather, the proposed settlement

1 was reached following arm's-length negotiations presided over by the Deborah Saxe, Esq., a
2 highly respected and well-known mediator with extensive experience mediating wage and
3 hour class actions. [Donnelly Decl., ¶7.] Moreover, Plaintiff and his counsel were well-
4 informed about the facts and the law. [Donnelly Decl., ¶¶ 6, 14.] Plaintiff's counsel J. Kirk
5 Donnelly has years of extensive experience litigating wage and hour class actions and
6 representative actions.¹ Defendants likewise were represented by highly-qualified and
7 experienced defense counsel. Both sides advocated vigorously for their clients and nothing
8 was "left on the table."

9 Prior to mediation, Plaintiff engaged in significant formal and informal discovery.
10 [Crosner Decl., ¶¶ 6, 14.] Plaintiff's counsel are confident they obtained sufficient information to
11 enable them to understand the law and facts of this case and make an informed decision regarding
12 the proposed settlement and whether it is in the best interests of the class.

13 2. The Class Reacted Favorably to the Settlement

14 The settlement was well-received by the class. As of the filing of this motion, no
15 objections have been filed, and not a single class member has requested exclusion out of 326
16 settlement class members. [Singh Decl., ¶¶ 11-12.] As many courts recognize, class member
17 reaction to the settlement is one of the most important factors to consider in determining if final
18 approval should be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th
19 Cir. 1976); see also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y.
20 2001) ("It is well-settled that the reaction of the class to the settlement is perhaps the most
21 significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

22 3. The Settlement Is Fair and Reasonable Considering the Benefits 23 Conferred, the Case Value, and Significant Litigation Risks

24 The proposed settlement involves a substantial sum of money that, when distributed,
25 will confer meaningful monetary benefits on the Class members. As described above, each
26 individual award will be based on an allocation consistent with the nature of the claims

27
28 ¹ Class counsel's experience and qualifications are set forth in detail in the Donnelly Declaration in
support of Plaintiff's motion for attorney's fees, filed concurrently herewith.

1 asserted and will fairly and equitably allocate the available funds in relation to the degree of
2 damage each Class member incurred. While Class members who worked for only a short
3 period of time will receive relatively small sums, those with longer tenures and who worked
4 more hours and shifts throughout the class period will receive appropriately larger awards.

5 Prior to mediation, the parties engaged in informal discovery to facilitate settlement
6 discussions. Thus, Plaintiffs reviewed documents and information regarding Stone's payroll
7 practices, a random sampling of pay stubs and time records for the class members, applicable
8 compensation plans, meal and rest break policies, etc., and information from Defendant regarding
9 class size and breakdown, work weeks/pay periods, rates of pay, and other information used to
10 formulate a damages model. Plaintiff then had that information analyzed by a consulting expert to
11 assist in determining potential violation rates and other data used to formulate a damages model.
12 Plaintiff's counsel are confident they obtained sufficient information to understand the law and
13 facts of this case and make an informed decision regarding the proposed settlement and whether it
14 is fair and reasonable. [Donnelly Decl., ¶¶ 6, 14.]

15 Using that data, Plaintiff ran various calculations and estimated Stone's likely maximum
16 exposure on the class claims at approximately \$1,415,445, including \$499,000 on the meal and
17 rest break claims, \$225,950 on the wage statement claims, \$488,400 on the waiting time penalty
18 claims, \$115,795 on the unpaid wage/rounding claims, and \$86,290 on the expense
19 reimbursement claims. [Donnelly Decl., ¶ 15.] Plaintiff and his counsel substantially discounted
20 the value of these claims, however, in light of the multiple and considerable risks posed by
21 proceeding with the litigation.

22 First, on the meal and rest break claims, Stone noted it had resolved another wage and
23 hour class action several years ago and substantially revised all of its wage and hour policies, and
24 that its meal and rest break policies are fully compliant. Nevertheless, Plaintiff's review of the
25 time and payroll records provided suggested numerous de facto violations, as Stone rarely if ever
26 provided second meal periods or third rest periods on shifts lasting over 10 hours. Further,
27 Plaintiff contended at least some class members did not receive their meal periods until as late as
28 6-6.5 hours into a shift. In response, Stone argued many class members waived their second meal

1 periods and also that, in light of its compliant policies, whether a class member missed a meal
2 period, received a late meal period, or missed a rest break would have been aberrational and
3 against company policy. Thus, per Stone, these issues are not amenable to class or representative
4 treatment since their resolution would require individualized inquiries as to why a break was
5 missed or non-compliant. [Donnelly Decl., ¶ 16.]

6 On the unpaid wage and rounding claims, Plaintiff alleged Defendants' rounding policy
7 favored the employer overall, caused employees to lose hours worked and corresponding pay
8 over time, and noted numerous instances in the pay records showing a loss of several minutes per
9 shift due to rounding. On the other hand, Stone argued its time keeping and rounding policy is
10 entirely neutral in effect and did not deprive class members of compensable hours worked over
11 time and, accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct.
12 (2012) 210 Cal. App. 4th 889, 901. While Plaintiff believes this is one of his stronger claims, he
13 also notes the employees typically lose only a minute or two per shift and thus the aggregate
14 damages aren't all that great even the class prevails. As to potential drive time by tile installers
15 and helpers, Stone provided information showing the vast majority of projects occurred within a
16 reasonable driving distance of its Gardena facility and, as a result, when class members drove
17 their own vehicles to job sites it was equivalent to their "regular commute" and therefore not
18 compensable. [Donnelly Decl., ¶ 17.]

19 On the expense reimbursement claim, Plaintiff contends he and other employees had to
20 use their personal phones to take pictures of completed projects, download schematics, etc., while
21 Stone argues that it provided supervisors with company phones/tablets that always were available
22 for employees to use. Thus, per Stone, if employees used their personal phones it was purely for
23 their own convenience rather than business necessity. On the mileage reimbursement issue, Stone
24 again noted that few if any projects were far enough away to justify any reimbursement since the
25 employees simply were undertaking their regular commute when driving to job sites. [Donnelly
26 Decl., ¶ 18.]

27 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
28 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks

1 posed by the need to take into account the discretionary nature of such awards and the “good
2 faith” and other defenses available to Defendants. Amaral v. Cintas Corp. No. 2 (2008) 163
3 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
4 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
5 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
6 defenses. [Donnelly Decl., ¶ 19.]

7 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
8 entitled to penalties totaling about \$1.2 million in civil penalties should Plaintiff prevail on all
9 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶
10 20.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on Stone’s
11 various defenses on the merits and also accounted for the Court’s wide discretion to reduce such
12 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
13 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
14 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
15 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
16 trial). Accordingly, the Parties allocated \$5,000 to PAGA penalties, and Plaintiff submits this
17 amount is reasonable under the circumstances and in line with comparable settlements in other
18 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
19 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
20 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
21 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
22 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
23 possible weaknesses in Plaintiffs’ case, or 2.2 percent of total settlement). Additionally, the
24 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to
25 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.
26 Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
27 “[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
28 objected to the settlement.

1 Thus, Defendants raised various defenses to each of Plaintiff's claims, any one of which,
2 if successful, could have derailed Plaintiff's case. Accordingly, Plaintiff faced risky issues going
3 forward with this litigation, and given the need to secure class certification, try the case, and deal
4 with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff
5 and his counsel discounted the value of the class claims consistent with the risks discussed above,
6 and carefully weighed the likelihood of the class receiving substantially greater benefit if the
7 litigation continued. They concluded – in light of these very real and substantial risks –
8 settlement on the proposed terms and without prolonged and costly litigation was in the best
9 interests of the class. The overall \$335,000 recovery represents a significant percentage of
10 Defendant's potential exposure, and is roughly 24% of the maximum theoretical value of the class
11 claims. Given these risks, a total recovery for the class of \$335,000 is a fair result within the
12 range of reasonableness considering all potential outcomes. [Donnelly Decl., ¶¶ 21-23.]

13 Importantly, the mere fact that a settlement does not provide the same recovery as might
14 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
15 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
16 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
17 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
18 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
19 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
20 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
21 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
22 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
23 fundamentally fair . . . is different from the question whether the settlement is perfect in the
24 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
25 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable
26 even though it represented 99% discount off the maximum value of the claims). Importantly as
27 well, the proposed settlement is non-reversionary and will provide benefits to the Class Members
28 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing

1 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
2 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
3 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
4 within the “range of reasonableness,” and is fair and adequate for the Class.

5 It is also significant that the settlement funds do not revert back to Stone, and provide
6 immediate benefit to a class of workers without a lengthy claims process. White, 803
7 F.Supp.2d at 1086; Kakani v. Oracle Corp. (N.D. Cal. June 19, 2007) 2007 WL 1793774, at
8 *7; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges
9 (3d ed. 2010) at 20, at <http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf> (reversionary
10 provisions and/or cumbersome claims process may indicate lack of fairness). In sum, Plaintiff
11 and his counsel have concluded the settlement, which assures Class Members prompt and
12 reasonable compensation, is in the best interests of the class.

13 **V. PLAINTIFF’S ENHANCEMENT AWARD**

14 Pursuant to the terms of the settlement, Plaintiff seeks modest incentive award of \$7,500
15 each for his service in bringing these claims on behalf of the Class. This request is reasonable
16 given the risks he undertook on behalf of the Class Members. By contacting and retaining
17 counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent Class
18 Members (plus the aforementioned true up payments), while shouldering the risk of being liable
19 for Defendant’s litigation costs. Plaintiff also exposed himself to unwanted notoriety related to
20 filing a public lawsuit (discoverable even through a simple google search) for the benefit of other
21 employees, placing themselves at risk of discrimination by future prospective employers. As set
22 forth in more detail in his declaration submitted with the preliminary approval motion, among
23 taking many other actions assisting in the successful litigation of this case, Plaintiff provided
24 substantial factual information and documents to counsel, attended numerous meetings/phone
25 conferences with counsel to discuss the case, and kept abreast of all significant developments.
26 Finally, there are no class member objections submitted with respect to the amounts Plaintiff
27 proposes to receive. [Singh Decl., ¶ 11.] Accordingly, the requested enhancement payment to
28 Plaintiff is appropriate and justified as part of the settlement. [Donnelly Decl., ¶ 24.]

1 **VI. SETTLEMENT ADMINISTRATION COSTS**

2 The settlement provides for a payment to CPT of no more than \$15,000 for its services as
3 the Settlement Administrator. As set forth in the Declaration of Laura Singh, CPT has performed
4 and will continue to perform its required duties through final distribution of the settlement funds,
5 and incurred \$13,500 in fees and expenses. [Singh Decl., ¶ 16.] Accordingly, Plaintiff
6 respectfully requests the Court approve payment of \$13,500.00 to CPT from the GSA. [Donnelly
7 Decl., ¶ 25.]

8 **VII. CONCLUSION**

9 For all the foregoing reasons, Plaintiff Mario Herrera respectfully requests that the Court
10 grant this motion and grant final approval of the proposed class action settlement and approve the
11 payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of
12 the Settlement Administrator's fees and expenses, approve the requested class representative
13 enhancement payment, approve the award of attorney's fees and costs as requested in Plaintiff's
14 Motion for Attorney's Fees and Costs, and enter judgment in this action. Finally, Plaintiff
15 requests the Court set a final compliance hearing for December 4, 2024, or a later date convenient
16 for the Court.

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18 Dated: October 21, 2022

LAW OFFICES OF J. KIRK DONNELLY, APC

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21 J. Kirk Donnelly
22 Attorneys for Plaintiff Mario Herrera
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