

1 J. KIRK DONNELLY (SBN 179401)
2 LAW OFFICES OF J. KIRK DONNELLY, APC
2173 Salk Avenue, Suite 250
3 Carlsbad, CA 92008
Tel. (760) 209-5894
4 kdonnelly@jkd-law.com

5 Counsel for Plaintiff MARIO HERRERA
6
7

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

17 Defendants.
18
19
20
21
22
23
24
25
26
27
28

CASE NO. 21STCV43188

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

NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

[Filed concurrently with Memorandum of Points
and Authorities; Declarations of J. Kirk
Donnelly and Mario Herrera; [Proposed] Order]

Date: July 22, 2022
Time: 8:30 a.m.
Dept. 74

Reservation No.: 077778271824

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	Error! Bookmark not defined.
II.	FACTUAL BACKGROUND AND PROCEDURAL POSTURE	1
III.	THE PROPOSED SETTLEMENT TERMS	4
	A. Certification of the Settlement Class	4
	B. The Benefit Conferred on the Settlement Class	4
	C. Value of the Settlement to the Class Members	Error! Bookmark not defined.
	D. Settlement Administration	5
	E. The Class Notice	6
	F. Right to Correct Information, Opt Out, or Object.....	6
	G. Release of Claims.....	6
	H. Attorney’s Fees and Costs, and Plaintiffs’ Enhancement Awards.....	7
IV.	ARGUMENT	7
	A. Standard of Review for a Class Action Settlement.....	7
	B. The Proposed Settlement Class Should Be Conditionally Certified	8
	C. The Proposed Settlement Meets the Dunk and Kullar Factors and is within the Range of Reasonableness within the Range of Reasonableness	10
	D. The Proposed Class Notice	Error! Bookmark not defined.
	E. Notice to the LWDA	Error! Bookmark not defined.
	F. Plaintiff’s Enhancement Award and Attorney’s Fees and Costs.....	Error! Bookmark not defined.
V.	CONCLUSION	Error! Bookmark not defined.

TABLE OF AUTHORIES

CASES

7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150.....	13
Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953.....	7
Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801	7, 8
Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 839.....	8
Jones v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996	9
Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 128.....	10
Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819	13
Mullane v. C. Hanover Bank & Trust (1950) 339 U.S. 306, 314-18.....	14
North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90.....	8
Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 602	7
Rodriguez v. W Publ’g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009)	14
Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977	14
Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245.....	7, 8, 13
White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098.....	13
Williams v. Superior Court (2013) 221 Cal.App.4th 1353.....	9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES

Cal. Rule of Court 3.769(c).....8, 7, 13
Labor Code section 2699(l)(2) 14
Cal. Rule of Court 3.766(d)..... 13

OTHER AUTHORITIES

Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for
Judges (3d ed. 2010) at 20, available at [http://
www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) 13
H. Newberg & A. Conte, 4 Newberg on Class Actions (4th ed. 2002) § 11.41

1 **I. INTRODUCTION**

2 Plaintiff Mario Herrera 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 224 individuals employed by Defendants Stone Etc., Inc., G.B.
5 Marble, Inc., and their owner Giora Bareket (collectively “Stone” or “Defendants”) as non-
6 exempt employees during the period of November 23, 2017 through July 16, 2022. The proposed
7 \$335,000 settlement will provide at least \$182,000 in cash payments to the settlement class, with
8 an average award of about \$812. The balance of approximately \$153,000 will cover a modest
9 enhancement award to Plaintiff, reasonable attorney’s fees and actual litigation costs, settlement
10 administration costs, and payment of civil penalties to the state. The settlement is the product of
11 Plaintiff’s pre- and post-filing investigation, a pre-mediation exchange of information, and arms-
12 length and adversarial negotiations overseen by experienced and well-regarded mediator Deborah
13 Saxe, Esq.

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 as Class Counsel; (4) appointing plaintiff Mario
20 Herrera as the Class Representative; (5) appointing CPT Group, Inc. as the Settlement
21 Administrator; (6) approving the form of notice to the class and the procedure for providing such
22 notice; and (7) scheduling a final fairness hearing.

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

24 On November 23, 2021, Plaintiff filed a complaint under the Private Attorneys General
25 Act, Labor Code section 2698, *et seq.*, seeking civil penalties against Defendants for several
26 alleged violations of the Labor Code and IWC Wage Orders. Plaintiff filed his PAGA claims on
27 behalf of individuals who worked for Defendants as non-exempt employees in California during
28 the relevant time frame. Defendants are an integrated operation that fabricates and installs stone

1 counters and other fixtures in both residential and commercial projects, and as well as tile
2 installation. Plaintiff Mario Herrera worked for both companies as a non-exempt slab installation
3 helper from approximately September 2020 to March 2021 and then again from July 2021 to
4 August 2021. [Declaration of J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

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

16 He further alleges Stone “rounded” employee time punches to the nearest quarter hour
17 such that the employees lost hours worked since the time rounding unfairly favored the employer.
18 Additionally, certain employees, namely tile installers and tile helpers, drove their own vehicles
19 to job sites and occasionally were entitled to, but did not, receive pay for their travel time. Those
20 same employees also were entitled to receive mileage reimbursement, and Plaintiff and other
21 employees used their personal phones for business purposes but did not receive any
22 reimbursement. Lastly, Plaintiff alleged claims for failing to provide proper itemized wage
23 statements and payment of all wages due on separation of employment. [Donnelly Decl., ¶ 6.]

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

1 members missed meal breaks, that such breaks were non-compliant, or that any unpaid “off the
2 clock” work occurred, it was intermittent and infrequent and evidence of such violations would be
3 purely anecdotal, and therefore individualized issues predominate and trial would be
4 unmanageable. [Donnelly Decl., ¶ 7.]

5 After Plaintiff filed his complaint, he served initial written discovery. Thereafter, the
6 Parties engaged in substantial meet and confer discussions regarding discovery, potential law and
7 motion, and other case management issues, and ultimately agreed to attempt early mediation.
8 Thereafter, the Parties engaged in additional informal discovery to facilitate an exchange of
9 information necessary to engage in a meaningful mediation. Consequently, Plaintiff’s counsel
10 reviewed payroll records, personnel policies/handbooks, meal break policies, personnel files, and
11 a random sampling of paystubs and time records produced by Stone for about 25% of the class.
12 Defendant also provided documents and information reflecting the estimated total amount of
13 workweeks and pay periods they worked, and average hourly pay rates, among other relevant
14 data. Plaintiff had that data reviewed and analyzed by Berger Consulting Group to assist with
15 determining potential meal and rest break violation rates, time lost due to rounding, etc., and
16 preparing a damages model. [Donnelly Decl., ¶ 8.]

17 The Parties then engaged Deborah Saxe, Esq. a highly respected mediator with extensive
18 wage and hour class action experience and, on May 17, 2021, participated in a full day mediation
19 with Ms. Saxe. Throughout the day, the arms-length negotiations were hard-fought and
20 adversarial as the Parties exchanged extensive information on their legal and factual positions,
21 and made numerous offers and counter-offers. Near the end of the day, the Parties reached
22 agreement on all major issues and reduced their tentative agreement to a Memorandum of
23 Understanding. Thereafter, the Parties collaboratively drafted the Settlement Agreement setting
24 forth the full and final settlement terms. [Donnelly Decl., ¶ 9.]

25 With Ms. Saxe’s assistance, the Parties also included potential class claims in their
26 settlement discussions, and ultimately agreed to settle potential class claims in addition to the
27 PAGA claims. Accordingly, Plaintiff concurrently has submitted a stipulation and proposed
28 order to file his First Amended Complaint to add a class claims based on the same alleged Labor

1 Code violations. The FAC is the operative pleading for purposes of effectuating the proposed
2 settlement. [Donnelly Decl., ¶ 10.]

3 **III. THE PROPOSED SETTLEMENT TERMS**

4 Under the settlement, Stone will pay \$335,000.00 into a common fund, the Gross
5 Settlement Amount (“GSA”), in three separate payments (of \$135,000, \$100,000 and \$100,000)
6 over approximately 13 months. Reasonable attorney’s fees of up to one-third of the GSA, or
7 \$111,666.67, actual litigation costs of up to \$15,000, a modest enhancement award of up to
8 \$7,500 for plaintiff, settlement administration costs of no more than \$15,000, and a payment of
9 \$3,750 to the Labor and Workforce Development Agency for its share of the PAGA penalties, all
10 will be paid from the GSA. The remainder of approximately \$182,000 will be allocated among
11 the Participating Class Members based on their total weeks worked during the Class Period. No
12 portion of the GSA will revert to Stone. [Donnelly Decl., ¶ 11.]

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

14 The settlement provides for conditional certification of a settlement class including all
15 individuals who worked for Defendants as a non-exempt employee during the Class Period,
16 which runs from November 23, 2017 through July 16, 2022. The Settlement Class consists of
17 approximately 224 individuals. [Donnelly Decl., ¶ 12.]

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

19 As noted, the settlement obligates Stone to pay \$335,000 to resolve the Settlement Class’s
20 claims, inclusive of attorney’s fees and costs. At least \$182,000 from the GSA will be distributed
21 to the Participating Class Members. This is a cash settlement that does not require Participating
22 Class Members to submit a claim form to receive their settlement share. Participating Class
23 Members will receive their settlement checks automatically via First Class U.S. Mail. One-third
24 of each settlement share will be allocated to wages and the remaining two-thirds percent will be
25 allocated to expenses, penalties and interest. Stone will pay any and all applicable employer-side
26 payroll taxes separately and in addition to the GSA. Subject to the Court’s approval, any amounts
27 not claimed (because a class member does not cash his or her settlement check) will be forwarded
28 to the California State Controller’s Unclaimed Property Fund. [Donnelly Decl., ¶ 13.]

1 Because certain job positions have stronger and/or different claims than others, as
2 discussed in more detail below, the net settlement amount will be divided as follows: forty
3 percent (40%) will be allocated to class members who worked as slab installer or slab installer
4 helper; fifty percent (50%) will be allocated to class members who worked as a tile installer or tile
5 helper, and the remaining ten percent (10%) is allocated to class members who worked as
6 fabricators/polishers, cutters, and yard personnel. Each Participating Class Member will receive a
7 share of the Net Settlement Amount based on his or her position held and total weeks worked for
8 Stone during the Class Period while employed in one of the above job titles. Thus, each Class
9 Member's Individual Settlement Payment will be calculated using criteria typically used in
10 determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal
11 breaks, unreimbursed expenses, and potential statutory penalties under applicable law. These
12 methods are intended to ensure each Class Member receives a portion of the available settlement
13 funds corresponding to the relative value of his or her potential claims. The proposed allocation
14 provides a reasonable way to compensate Class Members based on the particulars of their job
15 position and job duties, the amount of time they worked for Stone, and the number of instances
16 they missed a break, were not provided compensation in lieu of such missed breaks, lost wages
17 due to rounding, or did not receive expense reimbursement. [Donnelly Decl., ¶ 14.]

18 The average award across the board will be approximately \$812, although the awards will
19 vary considerably depending on job position held. Given that the settlement will be funded in
20 three installments, there will be three separate pro rata distributions of all amounts payable under
21 the settlement. As discussed below, the overall settlement amount is reasonable in light of the
22 considerable risks associated with Plaintiff's claims as well as the delay and risk posed by
23 continuing to litigate such disputed allegations. In Plaintiff's counsel's judgment, the total value
24 recovered for the class is substantial and in the range of reasonableness. [Donnelly Decl., ¶ 15.]

25 **C. Settlement Administration**

26 Subject to the Court's approval, the Parties have agreed on CPT Group, Inc. ("CPT") as
27 the Settlement Administrator. CPT is qualified and has significant experience administering class
28 action settlements, including numerous wage and hour matters. While \$15,000 is allocated to

1 administration, CPT currently estimates its fees will be no more than \$13,000.00. If the Court
2 approves less than the above amount, the difference will remain in the Net Settlement Amount for
3 distribution to the Participating Class Members. [Donnelly Decl., ¶ 16; Exh. 3.]

4 **D. The Class Notice**

5 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
6 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
7 individualized information used to calculate Class Members' Individual Settlement Payments and
8 each Class Member's estimated settlement award. The Notice likewise details the procedures for
9 Class Members to dispute their individual information, the procedure for submitting an objection
10 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
11 Members with the information necessary to evaluate the Settlement, provides fair opportunity to
12 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
13 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the
14 proposed Notice provides the Settlement Class with the best notice practicable. [Donnelly Decl.,
15 ¶ 17.]

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

17 Class Members will have forty-five (45) days to dispute the information in their Notice
18 used to calculate their settlement award, and also have 45 days to submit any objections to the
19 settlement or to request exclusion. In the event a Class Member disputes their individual
20 information, the Settlement Administrator will review the Class Member's records as well as any
21 additional information submitted, and make a final determination. [Donnelly Decl., ¶ 18.]

22 **F. Release of Claims**

23 All Participating Class Members will be deemed to release defendants Stone Etc., Inc.,
24 G.B.. Marble, Inc. and Giora Bareket from all claims alleged in the operative complaint, or that
25 could have been brought based on the allegations in the FAC, including PAGA claims, from
26 November 23, 2017 through July 16, 2022. The release is limited to the claims that were actually
27 pleaded or could have been pleaded based on the alleged facts in the FAC. [Donnelly Decl., ¶
28 19.]

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

2 The settlement provides Defendants will not oppose a request for reasonable attorney's
3 fees not to exceed one-third of the Gross Settlement Amount, or \$111,666.67, nor will it oppose a
4 request for reimbursement of actual litigation costs and expenses of up to \$15,000.00.

5 Defendants also will not oppose a request for an enhancement award to Plaintiff of not more than
6 \$7,500.00 each in recognition of his time spent on this matter, the risks he undertook on behalf of
7 the class, and the benefit conferred to the class. These payments also will be made pro rata on the
8 same distribution schedule as the distributions to Participating Class Members. Plaintiff's
9 counsel will provide the Court with appropriate summaries and evidence of its efforts and time
10 records in anticipation of the Final Approval Hearing, and Plaintiff has submitted his declaration
11 herewith. If the Court approves less than the above amounts, the difference will remain in the Net
12 Settlement Amount for distribution to the Participating Class Members. [Donnelly Decl., ¶ 20.]

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

14 The Parties allocated \$5,000 to payment of civil penalties under PAGA for such claims
15 against Stone, as addressed in more detail below. As required by Labor Code section 2699(l)(2),
16 Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA via its
17 online portal. [Donnelly Decl., ¶ 21; Exh. 4.]

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 can be
21 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
22 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
23 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
24 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
25 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
26 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
27 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion and
28 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review

1 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
2 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

3 The first step is a motion for preliminary approval, through which the parties present the
4 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
5 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
6 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
7 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
8 proposed terms and conditions, and whether a final fairness hearing should be scheduled.

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

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

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

25 **B. The Proposed Settlement Class Should Be Conditionally Certified**

26 The purpose of conditional class certification for purposes of settlement is to facilitate
27 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness
28 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of

1 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
2 Superior Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should
3 use different standards to determine the propriety of a settlement class.”)

4 In the present matter, conditional certification is proper since this matter satisfies all
5 requirements for class certification under Code of Civil Procedure section 382. First, the class is
6 both sufficiently numerous, consisting of approximately 224 individuals, and ascertainable by
7 reference to Defendants’ personnel and payroll records. [Donnelly Decl., ¶ 22.] Next, Plaintiff is
8 an adequate class representative, as his claims do not conflict with and are not antagonistic to the
9 claims of other class members. Further, his claims are typical given he is a member of the class
10 and his claims arise from the same employment practices and course of conduct giving rise to the
11 claims of the other class members. [Donnelly Decl., ¶ 23; Declaration of Mario Herrera, ¶¶ 2-9.]
12 Lastly, his counsel is experienced and adequate class counsel. [Donnelly Decl., ¶¶ 36-38.]

13 Next, common questions of law and fact predominate – particularly for purposes of a
14 settlement class – as the Class Members all were subject to the same meal rest break policies, the
15 same alleged rounding policy that shorted them on hours worked, and the same expense
16 reimbursement policies. Since the focus of the claims against Stone concerns the legality of
17 common policies applied uniformly to the entire class, common issues predominate over
18 individualized inquiries concerning liability. Stone’s de facto policy of not providing second
19 meal breaks and third rest breaks is company-wide policy applied equally and consistently to all
20 class members, and this policy is either compliant with California law or it is not. Regardless of
21 that determination, it will decide liability for all class members one way or another. Similarly, the
22 rounding issue raises questions common to all class members. [Donnelly Decl., ¶ 24.]

23 By now it is well-settled that a theory of recovery asserting the existence of a uniform
24 policy violating California law is sufficient to satisfy the requirements for class certification.
25 Jones v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform
26 policy consistently applied to a group of employees is in violation of the wage and hour laws are
27 of the sort routinely, and properly, found suitable for class treatment”); Williams v. Superior
28 Court (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question

of fact or law that supports commonality for class certification”). Lastly, a class action is superior to other means for the fair and efficient adjudication of this controversy. [Donnelly Decl., ¶ 25.]

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

The proposed settlement resulted from serious, arms-length negotiations facilitated by respected mediator Deborah Saxe, Esq., who has extensive experience mediating wage and hour class actions. [Donnelly Decl., ¶ 9.] Plaintiff’s counsel J. Kirk Donnelly has years of litigation experience, including litigating wage and hour class actions. Plaintiff’s counsel is well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Donnelly Decl., ¶¶ 36-38.]

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

Prior to mediation, the parties engaged in extensive informal discovery to facilitate settlement discussions. As a result, Plaintiff reviewed documents and information regarding Stone’s payroll practices, pay stubs and time records for a sampling of class members, meal and rest break policies, etc., and information from Defendants regarding class size and breakdown of job positions, work weeks, rates of pay, and other information used to formulate a damages model. Plaintiff had this extensive information analyzed by a consulting expert to look for meal and rest break violation rates, time lost due to rounding, and other issues relevant to liability and damages. Plaintiff’s counsel is confident they obtained sufficient information to enable them to understand the law and facts of this case and make an informed decision regarding the proposed

1 settlement and whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 8, 26.]

2 Next, the proposed settlement falls within the range of reasonableness warranting
3 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
4 will confer direct monetary benefits on the class members. As described above, each class
5 member will be entitled to a monetary payment without having to file a claim and each payment
6 will be relative to the value of his or her potential claims.

7 Plaintiff's analysis was supported by the pre-mediation production described above, which
8 permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using
9 that data, Plaintiff ran various calculations and estimated Stone's likely maximum exposure on
10 the class claims at approximately \$1,415,445, including \$499,000 on the meal and rest break
11 claims, \$225,950 on the wage statement claims, \$488,400 on the waiting time penalty claims,
12 \$115,795 on the unpaid wage/rounding claims, and \$86,290 on the expense reimbursement
13 claims. [Donnelly Decl., ¶¶ 27-28.] Plaintiff and his counsel substantially discounted the value
14 of these claims, however, in light of the multiple and considerable risks posed by proceeding with
15 the litigation.

16 First, on the meal and rest break claims, Stone noted it had resolved another wage and
17 hour class action several years ago and substantially revised all of its wage and hour policies, and
18 that its meal and rest break policies are fully compliant. Nevertheless, Plaintiff's review of the
19 time and payroll records provided suggested numerous de facto violations, as Stone rarely if ever
20 provided second meal periods or third rest periods on shifts lasting over 10 hours. Further,
21 Plaintiff contended at least some class members did not receive their meal periods until as late as
22 6-6.5 hours into a shift. In response, Stone argued many class members waived their second meal
23 periods and also that, in light of its compliant policies, whether a class member missed a meal
24 period, received a late meal period, or missed a rest break would have been aberrational and
25 against company policy. Thus, per Stone, these issues are not amenable to class or representative
26 treatment since their resolution would require individualized inquiries as to why a break was
27 missed or non-compliant. [Donnelly Decl., ¶ 29.]

28 On the unpaid wage and rounding claims, Plaintiff alleged Defendants' rounding policy

1 favored the employer overall, caused employees to lose hours worked and corresponding pay
2 over time, and noted numerous instances in the pay records showing a loss of several minutes per
3 shift due to rounding. On the other hand, Stone argued its time keeping and rounding policy is
4 entirely neutral in effect and did not deprive class members of compensable hours worked over
5 time and, accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct.
6 (2012) 210 Cal. App. 4th 889, 901. While Plaintiff believes this is one of his stronger claims, he
7 also notes the employees typically lose only a minute or two per shift and thus the aggregate
8 damages aren't all that great even the class prevails. As to potential drive time by tile installers
9 and helpers, Stone provided information showing the vast majority of projects occurred within a
10 reasonable driving distance of its Gardena facility and, as a result, when class members drove
11 their own vehicles to job sites it was equivalent to their "regular commute" and therefore not
12 compensable. [Donnelly Decl., ¶ 30.]

13 On the expense reimbursement claim, Plaintiff contends he and other employees had to
14 use their personal phones to take pictures of completed projects, download schematics, etc., while
15 Stone argues that it provided supervisors with company phones/tablets that always were available
16 for employees to use. Thus, per Stone, if employees used their personal phones it was purely for
17 their own convenience rather than business necessity. On the mileage reimbursement issue, Stone
18 again noted that few if any projects were far enough away to justify any reimbursement since the
19 employees simply were undertaking their regular commute when driving to job sites. [Donnelly
20 Decl., ¶ 31.]

21 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
22 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
23 posed by the need to take into account the discretionary nature of such awards and the "good
24 faith" and other defenses available to Defendants. Amaral v. Cintas Corp. No. 2 (2008) 163
25 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
26 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
27 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
28

1 defenses. [Donnelly Decl., ¶ 32.]

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

24 The settlement obviates the significant risk that this Court may find any kind of class or
25 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
26 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
27 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
28 motion to decertify, as well as trial and possible appeals, and would substantially delay any

1 recovery by the class with no assurance of recovering significantly more than the proposed
2 settlement. While Plaintiff is confident in the merits of these claims, legitimate controversies exist
3 regarding each one of them. Plaintiff also recognizes proving the amount of wages and penalties
4 due each Class Member would be an expensive, time-consuming, and uncertain proposition.
5 [Donnelly Decl., ¶ 34.]

6 Plaintiff and his counsel discounted the value of the class claims consistent with the risks
7 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
8 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real
9 and substantial risks – settlement on the proposed terms and without prolonged and costly
10 litigation was in the best interests of the class. The overall \$335,000 recovery represents a
11 significant percentage of Defendant’s potential exposure at roughly 25% of the maximum value
12 of the class claims. Given these risks, a total recovery for the class of \$335,000, which will result
13 in average award of over \$800 per class member, is a significant result well within the range of
14 reasonableness considering all potential outcomes, and it will provide direct monetary awards to
15 all Class Members within a reasonable time. [Donnelly Decl., ¶ 35.]

16 Importantly, the mere fact that a settlement does not provide the same recovery as might
17 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
18 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
19 settlement process...even if the relief afforded by the proposed settlement is substantially
20 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
21 settlement because the public interest may indeed be served by a voluntary settlement in which
22 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
23 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
24 different from the question whether the settlement is perfect in the estimation of the reviewing
25 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
26 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
27 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
28 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803

1 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
2 represented 99% discount off the maximum value of the claims). Importantly as well, the
3 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
4 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
5 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)
6 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
7 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
8 within the “range of reasonableness,” and is fair and adequate for the Class.

9 **V. CONCLUSION**

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

13
14 Dated: June 27, 2022

LAW OFFICES OF J. KIRK DONNELLY, APC

15
16 
17 J. Kirk Donnelly
18 Attorneys for Plaintiff Mario Herrera
19
20
21
22
23
24
25
26
27
28