

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 Marisol Rios
6
7

8 **SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ALAMEDA**
10

11 MARISOL RIOS, on behalf of all others
12 similarly aggrieved,

13 Plaintiff,

14 vs. AMI FOODS, INC., a California
corporation, ALI IQBAL, an individual, and
15 DOES 1 through 10, inclusive,

16 Defendants.
17
18
19
20
21

CASE NO. 22CV005381

Assigned for All Purposes to:
Hon. Jeffrey Brand
Dept. 22

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

Date: December 5, 2023
Time: 2:00 p.m.
Dept. 22

Reservation No.: 325795997714
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND AND PROCEDURAL POSTURE	1
III.	THE PROPOSED SETTLEMENT TERMS.....	3
A.	Certification of the Settlement Class	4
B.	The Benefit Conferred on the Settlement Class	4
C.	Settlement Administration	5
D.	The Class Notice.....	5
E.	Right to Correct Information, Opt Out, or Object	6
F.	Release of Claims	6
G.	Attorney’s Fees and Costs, and Plaintiff’s Enhancement Award.....	6
H.	PAGA Claims and Notice to the LWDA.....	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	9
	within the Range of Reasonableness	9
V.	CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135.....	14
<u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157.....	12
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504.....	12
<u>Class Plaintiffs v. City of Seattle</u> (9th Cir. 1992) 955 F.2d 1268, <u>cert. denied</u> , 506 U.S. 953	7
<u>Cochran v. Schwan's Home Services, Inc.</u> (2014) 228 Cal.App.4th 1137.....	12
<u>Dunk v. Ford Motor Co.</u> (1996) 48 Cal.App.4th 1794.....	7, 8
<u>Global Minerals & Metals Corp. v. Superior Court</u> (2003) 113 Cal.App.4th 836.....	8
<u>Jennings v. Open Door Mktg. Inc.</u> (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356	13
<u>Jones v. Farmers Ins. Exch.</u> (2013) 221 Cal.App.4th 986.....	9
<u>Kullar v. Foot Locker Retail, Inc.</u> (2008) 168 Cal.App.4th 116.....	10
<u>Lane v. Facebook, Inc.</u> (9th Cir. 2012) 696 F.3d 811	14
<u>North County Contractors Ass'n, Inc. v. TouchTWC Ins. Servs.</u> (1994) 27 Cal.App.4th 1085.....	7
<u>Potter v. Pacific Coast Lumber Co.</u> (1951) 37 Cal.2d 592.....	7
<u>See's Candy Shops, Inc. v. Superior Court</u> (2012) 210 Cal.App.4th 889.....	11
<u>Slavkov v. First Water Heater Partners I</u> (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303	13

1	<u>In re Taco Bell Wage and Hour Actions</u>	
2	(E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557	13
3	<u>Van Kempen v. Matheson Tri-Gas, Inc.</u>	
4	(N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182	13
5	<u>Wershba v. Apple Computer</u>	
6	(2001) 91 Cal.App.4th 224.....	7, 8, 14
7	<u>White v. Experian Information Solutions, Inc.</u>	
8	(C.D. Cal. 2011) 803 F.Supp.2d 1086.....	14
9	<u>Williams v. Superior Court</u>	
10	(2013) 221 Cal.App.4th 1353.....	9

1	Statutes	
2	Cal. Rule of Court. 3.769	7
3	Cal. Rule of Court 3.769(c).....	7
4	California Rules of Court 3.769(f)	5
5	California Rules of Court 3.766(d)	5
6	Code of Civil Procedure section 382.....	8
7	Labor Code sections	12
8	Labor Code § 203	12
9	Labor Code sections 203 and 226	12
10	Labor Code § 2699(e)(2).....	12
11	Labor Code section 2699(l)(2)	7
12	Other Authorities	
13	Federal Judicial Center, <u>Managing Class Action Litigation: A Pocket Guide for</u>	
14	<u>Judges</u> (3d ed. 2010), available at http://	
15	www.fjc.gov/sites/default/files/2012/ClassGd3.pdf	14
16	H. Newberg & A. Conte, 4 <u>Newberg on Class Actions</u> (4th ed. 2002) § 11.41	7

1 **I. INTRODUCTION**

2 Plaintiff Marisol Rios hereby moves the Court for an order granting preliminary approval
3 to a proposed non-reversionary class action settlement to resolve wage and hour claims on behalf
4 of approximately 581 individuals employed as non-exempt employees at 17 Dominos Pizza
5 restaurants owned and operated by Defendant Ali Iqbal, and including named defendant AMI
6 Foods, Inc. and its related entities PK Foods, Inc., RYK Foods, Inc., IS Foods, Inc., ISR Foods,
7 Inc. ISR Foods, Inc., AM Foods, Inc., GSR Foods, Inc., AMIS Foods, Inc., Team SJ, Inc., 3 Star
8 Foods, Inc., 5 Star Foods, Inc., MR Foods, Inc., MB Foods, Inc., Tri Valley Foods, Inc., SUB
9 Foods, Inc. IMY Foods, Inc., and LIT Foods, Inc. (collectively the “Settling Parties”). The
10 putative class members worked for Settling Parties during the class period of November 20, 2020
11 to October 1, 2023.

12 The proposed \$500,000 settlement will provide at least \$272,333 in cash payments to the
13 settlement class, with an average award of about \$470. The balance of approximately \$227,667
14 will cover a modest enhancement award to Plaintiff, reasonable attorney’s fees and actual
15 litigation costs, settlement administration costs, and payment of civil penalties to the state. The
16 settlement is the product of Plaintiff’s pre- and post-filing investigation, a pre-mediation
17 exchange of information, and arms-length and adversarial negotiations overseen by experienced
18 and well-regarded mediator the Hon. Carl J. West (Ret.).

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

28 /////

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On January 13, 2022, Plaintiff filed a complaint under the Private Attorneys General Act, Labor Code section 2698, *et seq.*, seeking civil penalties against Defendants AMI Foods, Inc. and Ali Iqbal for several alleged violations of the Labor Code and IWC Wage Orders.¹ Plaintiff filed her PAGA claims on behalf of individuals who worked for Defendants as non-exempt employees in California during the relevant time frame. Settling Parties are an integrated operation of some seventeen Dominos Pizza franchises operating in and around the South and East Bay areas. They operate as an integrated operation with a uniform set of employment policies applicable to all class members, and the Settling Parties share employees as many of the class members worked for multiple entities and at multiple locations, frequently during the same work week and/or pay period. Plaintiff Marisol Rios worked primarily for AMI Foods as a non-exempt employee from approximately July to October 2021. Like the majority of the class members, Plaintiff was a part-time employee and typically worked around 25-30 hours per week.² [Declaration of J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

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

She further alleges the Settling Parties failed to pay all wages due, as employees worked

¹ Plaintiff exhausted all required administrative remedies via her November 3, 2021 PAGA notice letter, and September 25, 2023 Amended PAGA notice letter. [Donnelly Decl., Exhs. 2 and 3.]

² Based on information provided Settling Parties, the average shift length was about 6.4 hours, and the class members worked an average of 4.3 shifts per week.

1 “off the clock” and also lost overtime pay when they worked at two locations during the same
2 work week because their time was recorded separately for each location, i.e., if they worked 25
3 hours at location A and 25 hours at location B, they were paid 50 hours of straight time rather
4 than receiving 10 hours of overtime. Lastly, Plaintiff alleged claims for failing to provide proper
5 itemized wage statements and payment of all wages due on separation of employment. [Donnelly
6 Decl., ¶ 6.]

7 Settling Parties have at all times denied Plaintiff’s allegations and maintained their meal
8 break and payroll policies and procedures comply with California law, that they provided
9 employees with required meal and rest breaks, that they properly tracked employee time and paid
10 Plaintiff and all other employees all wages due and at the correct hourly rate. Additionally,
11 Settling Parties strongly contend the case cannot be maintained as any kind of class or
12 representative action, arguing that to the extent class members missed meal breaks, that such
13 breaks were non-compliant, or that any unpaid “off the clock” work occurred, it was intermittent
14 and infrequent and evidence of such violations would be purely anecdotal, and therefore
15 individualized issues predominate and trial would be unmanageable. [Donnelly Decl., ¶ 7.]

16 After Plaintiff filed her complaint, she served initial written discovery. Thereafter, the
17 Parties engaged in substantial meet and confer discussions regarding discovery, potential law and
18 motion, and other case management issues, and ultimately agreed to attempt early mediation.
19 Importantly, as the Parties were in the process of scheduling the mediation, the Settling Parties
20 underwent a wage and hour audit by the federal Department of Labor in early 2023. In April
21 2023, they entered into a settlement agreement with the DoL that obligates them to pay a total of
22 approximately \$538,000 in back wages and liquidated damages in resolution of alleged violations
23 of the federal Fair Labor Standards Act. The Settling Parties are paying the DoL settlement in
24 quarterly installments through April 2024. [Donnelly Decl., ¶ 8.]

25 Nevertheless, the Parties agreed to move forward with the mediation in order to attempt to
26 separately resolve the pending state law claims. The Parties accordingly engaged in additional
27 informal discovery to facilitate an exchange of information necessary to engage in a meaningful
28 mediation. Consequently, Plaintiff’s counsel reviewed payroll records, personnel policies and

1 employee handbooks, meal break policies, personnel files, and a random sampling of paystubs
2 and time records produced by Settling Parties for all of the class members. Defendant also
3 provided documents and information reflecting the estimated total amount of workweeks and pay
4 periods they worked, and average hourly pay rates, among other relevant data. Plaintiff had that
5 data reviewed and analyzed by Berger Consulting Group to assist with determining potential meal
6 and rest break violation rates, time lost due to rounding, etc., and preparing a damages model.
7 Additionally, the Entities produced certain financial information to Plaintiff, which Plaintiff had
8 reviewed by an accounting expert to assist with evaluating the Entities ability to continue
9 business operations while simultaneously addressing both the DoL settlement and any settlement
10 in this matter. [Donnelly Decl., ¶ 9.]

11 The Parties then engaged the Hon. Carl J. West (Ret.) a highly respected mediator with
12 extensive wage and hour class action experience and, on August 2, 2021, participated in a full day
13 mediation with Judge West. Throughout the day, the arms-length negotiations were hard-fought
14 and adversarial as the Parties exchanged extensive information on their legal and factual
15 positions, and made numerous offers and counter-offers. Near the end of the day, the Parties
16 reached agreement on all major issues and reduced their tentative agreement to a Memorandum of
17 Understanding. Thereafter, the Parties collaboratively drafted the Settlement Agreement setting
18 forth the full and final settlement terms. [Donnelly Decl., ¶ 10; Exh. 1.]

19 With Judge West’s assistance, the Parties also included potential class claims in their
20 settlement discussions, and ultimately agreed to settle potential class claims in addition to the
21 PAGA claims. Accordingly, Plaintiff filed her First Amended Complaint on September 18, 2023
22 to add a class claims based on the same alleged Labor Code violations. The FAC is the operative
23 pleading for purposes of effectuating the proposed settlement. [Donnelly Decl., ¶ 11.]

24 **III. THE PROPOSED SETTLEMENT TERMS**

25 Under the settlement, the Settling Parties will pay \$500,000.00 into a common fund, the
26 Gross Settlement Amount (“GSA”), no later than April 1, 2025, which is the earliest date the
27 Parties agreed the Settling Parties can pay that amount after fully funding the DoL settlement
28 while continuing to be able to operate the businesses. Reasonable attorney’s fees of up to one-

1 third of the GSA, or \$166,666.67, actual litigation costs of up to \$17,500, a modest enhancement
2 award of up to \$2,500 for plaintiff,³ settlement administration costs of no more than \$11,000, and
3 a payment of \$30,000 for alleged civil penalties under PAGA (of which \$22,500 will go to the
4 Labor and Workforce Development Agency for its share of the PAGA penalties, with the
5 remaining \$7,500 to the Aggrieved Employees), all will be paid from the GSA. The remainder of
6 approximately \$272,333 will be allocated among the Participating Class Members based on their
7 total weeks worked during the Class Period. No portion of the GSA will revert to the Settling
8 Parties. [Donnelly Decl., ¶ 12.]

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

10 The settlement provides for conditional certification of a settlement class including all
11 individuals who worked for Settling Parties as a non-exempt employee during the Class Period,
12 which runs from November 20, 2020 to October 1, 2023. The Settlement Class consists of
13 approximately 581 individuals. [Donnelly Decl., ¶ 13.]

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

15 As noted, the settlement obligates Settling Parties to pay \$500,000 to resolve the
16 Settlement Class's claims, inclusive of attorney's fees and costs. At least \$272,333,000 from the
17 GSA will be distributed to the Participating Class Members. This is a cash settlement that does
18 not require Participating Class Members to submit a claim form to receive their settlement share.
19 Participating Class Members will receive their settlement checks automatically via First Class
20 U.S. Mail. One-third of each settlement share will be allocated to wages and the remaining two-
21 thirds percent will be allocated to expenses, penalties and interest. Settling Parties will pay any
22 and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to
23 the Court's approval, any amounts not claimed (because a class member does not cash his or her
24 settlement check) will be forwarded to the California State Controller's Unclaimed Property
25 Fund. [Donnelly Decl., ¶ 14.]

26 Each Class Member's Individual Settlement Payment will be calculated using criteria

27 ³ Plaintiff also alleges she was retaliated against and wrongfully discharged, and she has also entered into a separate
28 and confidential individual settlement agreement to resolve these alleged non-wage and hour allegations related to
the termination of her employment.

1 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
2 missed meal breaks, and potential statutory penalties under applicable law. These methods are
3 intended to ensure each Class Member receives a portion of the available settlement funds
4 corresponding to the relative value of his or her potential claims. The proposed allocation
5 provides a reasonable way to compensate Class Members based on the particulars of their job
6 position and job duties, the amount of time they worked for Stone, and the number of instances
7 they missed a break, were not provided compensation in lieu of such missed breaks, or lost wages
8 due to off the clock work on unpaid overtime. The average class award will be approximately
9 \$470, while the average PAGA award will be about \$12.90. [Donnelly Decl., ¶ 15.]

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

14 **C. Settlement Administration**

15 Subject to the Court's approval, the Parties have agreed on CPT Group, Inc. ("CPT") as
16 the Settlement Administrator. CPT is qualified and has significant experience administering class
17 action settlements, including numerous wage and hour matters. CPT currently estimates its fees
18 will be no more than \$11,000.00. If the Court approves less than the above amount, the
19 difference will remain in the Net Settlement Amount for distribution to the Participating Class
20 Members. [Donnelly Decl., ¶ 16; Declaration of Julie Green, ¶¶ 2-8; Exhs. A-B.]

21 **D. The Class Notice**

22 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
23 this case and explains the basic settlement terms in plain language. The Notice also sets forth the
24 individualized information used to calculate Class Members' Individual Settlement Payments and
25 each Class Member's estimated settlement award. The Notice likewise details the procedures for
26 Class Members to dispute their individual information, the procedure for submitting an objection
27 to the Settlement, and the procedure to request exclusion. In sum, the Notice provides the Class
28 Members with the information necessary to evaluate the Settlement, provides fair opportunity to

1 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
2 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the
3 proposed Notice provides the Settlement Class with the best notice practicable. The Notice will
4 be mailed in both English and Spanish versions. [Donnelly Decl., ¶ 17.]

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

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

11 **F. Release of Claims**

12 All Participating Class Members will be deemed to release Ali Iqbal, AMI Foods, Inc., PK
13 Foods, Inc., RYK Foods, Inc., IS Foods, Inc., ISR Foods, Inc. ISR Foods, Inc., AM Foods, Inc.,
14 GSR Foods, Inc., AMIS Foods, Inc., Team SJ, Inc., 3 Star Foods, Inc., 5 Star Foods, Inc., MR
15 Foods, Inc., MB Foods, Inc., Tri Valley Foods, Inc., SUB Foods, Inc. IMY Foods, Inc., and LIT
16 Foods, Inc., from all claims alleged in the operative First Amended Complaint, or that could have
17 been brought based on the allegations in the FAC, including PAGA claims, from November 20,
18 2020 through October 1, 2023. The release is limited to the claims that were actually pleaded or
19 could have been pleaded based on the alleged facts in the FAC. [Donnelly Decl., ¶ 19.]

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

21 The settlement provides Settling Parties will not oppose a request for reasonable
22 attorney's fees not to exceed one-third of the Gross Settlement Amount, or \$166,666.67, nor will
23 they oppose a request for reimbursement of actual litigation costs and expenses of up to
24 \$17,500.00. Settling Parties also will not oppose a request for an enhancement award to Plaintiff
25 of not more than \$2,500.00 in recognition of her time spent on this matter, the risks she undertook
26 on behalf of the class, and the benefit conferred to the class. Plaintiff's counsel will provide the
27 Court with appropriate summaries and evidence of its efforts and time records in anticipation of
28 the Final Approval Hearing, and Plaintiff has submitted her declaration herewith. If the Court

1 approves less than the above amounts, the difference will remain in the Net Settlement Amount
2 for distribution to the Participating Class Members. [Donnelly Decl., ¶ 20.]

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

4 The Parties allocated \$30,000 to payment of civil penalties under PAGA for such claims
5 against Settling Parties, as addressed in more detail below. As required by Labor Code section
6 2699(l)(2), Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA
7 via its online portal. [Donnelly Decl., ¶ 21; Exh. 4.]

8 **IV. ARGUMENT**

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

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

21 The first step is a motion for preliminary approval, through which the parties present the
22 court with the proposed settlement and seek a determination if it is sufficiently fair and reasonable
23 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
24 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
25 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
26 proposed terms and conditions, and whether a final fairness hearing should be scheduled.
27 Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins.
28 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring

1 settlement of class actions, courts generally apply a presumption of fairness to class action
2 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and
3 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
4 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
5 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

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

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

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

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

22 In the present matter, conditional certification is proper since this matter satisfies all
23 requirements for class certification under Code of Civil Procedure section 382. First, the class is
24 both sufficiently numerous, consisting of approximately 581 individuals, and ascertainable by
25 reference to Settling Parties' personnel and payroll records. [Donnelly Decl., ¶ 22.] Next,
26 Plaintiff is an adequate class representative, as her claims do not conflict with and are not
27 antagonistic to the claims of other class members. Further, her claims are typical given she is a
28 member of the class and his claims arise from the same employment practices and course of

1 conduct giving rise to the claims of the other class members. [Donnelly Decl., ¶ 23; Declaration
2 of Marisol Rios, ¶¶ 2-9.] Lastly, her counsel is experienced and adequate class counsel.
3 [Donnelly Decl., ¶¶ 35-38.]

4 Next, common questions of law and fact predominate – particularly for purposes of a
5 settlement class – as the Class Members all were subject to the same meal and rest break policies,
6 the same alleged overtime policies that shorted them on overtime pay. Since the focus of the
7 claims against Settling Parties concerns the legality of common policies applied uniformly to the
8 entire class, common issues predominate over individualized inquiries concerning liability.
9 Settling Parties’ lack of a compliant break policy and the resulting failure to provide compliant
10 meal breaks is company-wide policy applied equally and consistently to all class members, and
11 this policy is either compliant with California law or it is not. Regardless of that determination, it
12 will decide liability for all class members one way or another. Similarly, the overtime issue
13 arising from working at multiple locations raises another common question. [Donnelly Decl., ¶
14 24.]

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

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

25 The proposed settlement resulted from serious, arms-length negotiations facilitated by
26 respected mediator the Hon. Carl J. West (Ret.), who has extensive experience mediating wage
27 and hour class actions. [Donnelly Decl., ¶ 9.] Plaintiff’s counsel J. Kirk Donnelly has years of
28 litigation experience, including litigating wage and hour class actions. Plaintiff’s counsel is well-

1 qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter.
2 [Donnelly Decl., ¶¶ 35-38.]

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

10 Prior to mediation, the parties engaged in both formal and informal discovery to facilitate
11 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
12 Settling Parties' payroll practices, pay stubs and time records for essentially all of the class
13 members, meal and rest break policies, etc., and information from Settling Parties regarding class
14 size and breakdown of job positions, work weeks, rates of pay, and other information used to
15 formulate a damages model. Plaintiff had this extensive information analyzed by a consulting
16 expert to look for meal and rest break violation rates, overtime pay lost, and other issues relevant
17 to liability and damages. Settling Parties also provided financial information such as profit and
18 loss statements and balance sheets, which were reviewed by a financial expert, to help the Parties
19 navigate Settling Parties' ability to pay in light of the DoL Settlement. Plaintiff's counsel are
20 confident they obtained sufficient information to enable them to understand the law and facts of
21 this case and make an informed decision regarding the proposed settlement and whether it is in
22 the best interests of the class. [Donnelly Decl., ¶¶ 8-9, 26.]

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

28 Plaintiff's analysis was supported by the pre-mediation production described above, which

1 permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using
2 that data, Plaintiff ran various calculations and estimated Settling Parties' likely maximum
3 exposure on the class claims at approximately \$4,090,500, including about \$313,500 on the
4 unpaid wage/off the clock claims, \$526,000 on the meal break claims, \$582,000 on the rest break
5 claims, \$1,093,000 on the wage statement claims, and \$1,576,000 on the waiting time penalty
6 claims. [Donnelly Decl., ¶¶ 27-28.] Plaintiff and her counsel substantially discounted the value
7 of these claims, however, in light of the multiple and considerable risks posed by proceeding with
8 the litigation.

9 First, on the meal and rest break claims, Plaintiff argued Settling Parties' meal and rest
10 break policy was not fully compliant with California law and, regardless, that Plaintiff's review
11 of the time and payroll records provided suggested numerous de facto violations, such as late and
12 short meal breaks. In response, Settling Parties argued its policies were fully compliant and that
13 they met the obligation to provide employees with all required meal and rest periods. Per Settling
14 Parties, many class members waived meal periods when appropriate and also that, in light of the
15 compliant policies, whether a class member missed a meal period, received a late meal period, or
16 missed a rest break would have been aberrational and against company policy. Thus, per Settling
17 Parties, these issues are not amenable to class or representative treatment since their resolution
18 would require individualized inquiries as to why a break was missed or non-compliant. [Donnelly
19 Decl., ¶ 29.]

20 On the unpaid wage claims, Plaintiff alleged she and other employees frequently worked
21 off the clock, and came a few minutes before the start of shift to do prep work, or had to work
22 through a meal break due to the press of business and insufficient staffing. On the other hand,
23 Settling Parties argued their time keeping policy accurately captured and paid for all time worked,
24 and that off the clock work was strictly against company policy. Per Settling Parties, any off the
25 clock work was unauthorized and done without the employer's knowledge and therefore not
26 compensable. White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 (the
27 employer must have actual or constructive knowledge of the off the clock work). On the overtime
28 claims, Defendant emphasized such claims were resolved via the DoL Settlement, and even if

1 Plaintiff prevailed on that claim under state law then the damages would be minimal in light the
2 substantial amounts already paid. [Donnelly Decl., ¶ 30.]

3 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
4 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
5 posed by the need to take into account the discretionary nature of such awards and the “good
6 faith” and other defenses available to Settling Parties. Amaral v. Cintas Corp. No. 2 (2008) 163
7 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
8 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
9 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
10 defenses. [Donnelly Decl., ¶ 31.]

11 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
12 entitled to penalties totaling about \$3.9 million in civil penalties should Plaintiff prevail on all
13 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶
14 32.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on Stone’s
15 various defenses on the merits and also accounted for the Court’s wide discretion to reduce such
16 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
17 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
18 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
19 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
20 trial). Accordingly, the Parties allocated \$20,000 to PAGA penalties, and Plaintiff submits this
21 amount is reasonable under the circumstances and in line with comparable settlements in other
22 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
23 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
24 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
25 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
26 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
27 possible weaknesses in Plaintiffs’ case, or 2.2 percent of total settlement). Additionally, the
28 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to

1 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.
2 Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
3 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
4 objected to the settlement.

5 The settlement obviates the significant risk that this Court may find any kind of class or
6 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
7 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
8 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
9 motion to decertify, as well as trial and possible appeals, and would substantially delay any
10 recovery by the class with no assurance of recovering significantly more than the proposed
11 settlement. Further, in light of the significant amounts being paid per the DoL Settlement, there is
12 some question about the Settling Parties' ability to litigate a class action and pay another large
13 judgment without jeopardizing ongoing business operations. While Plaintiff is confident in the
14 merits of these claims, legitimate controversies exist regarding each one of them and Plaintiff also
15 recognizes proving the amount of wages and penalties due each Class Member would be an
16 expensive, time-consuming, and uncertain proposition. [Donnelly Decl., ¶ 33.]

17 Plaintiff and her counsel discounted the value of the class claims consistent with the risks
18 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
19 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real
20 and substantial risks – settlement on the proposed terms and without prolonged and costly
21 litigation was in the best interests of the class. The overall \$500,000 recovery represents a
22 significant percentage of Defendant's potential exposure at roughly 25% of the maximum value
23 of the class claims, and ensures Settling Parties can resolve the DoL Settlement first without
24 affecting their ability to continue operations. Given these risks, a total recovery for the class of
25 \$500,000, which will result in average award of some \$470 per class member, plus additional
26 amounts under PAGA, is a significant result well within the range of reasonableness considering
27 all potential outcomes, and it will provide direct monetary awards to all Class Members within a
28 reasonable time. [Donnelly Decl., ¶ 34.]

1 Importantly, the mere fact that a settlement does not provide the same recovery as might
2 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
3 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
4 settlement process...even if the relief afforded by the proposed settlement is substantially
5 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
6 settlement because the public interest may indeed be served by a voluntary settlement in which
7 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
8 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
9 different from the question whether the settlement is perfect in the estimation of the reviewing
10 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
11 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
12 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
13 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
14 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
15 represented 99% discount off the maximum value of the claims). Importantly as well, the
16 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
17 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
18 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)
19 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
20 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
21 within the “range of reasonableness,” and is fair and adequate for the Class.

22 **V. CONCLUSION**

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

26 Dated: September 28, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

J. Kirk Donnelly
Attorneys for Plaintiff Marisol Rios
16