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

11 HECTOR O. ACOSTA, individually, and on
12 behalf of all others similarly situated and
13 aggrieved,

14 Plaintiff,

15 vs. TURLOCK WALNUT COMPANY,
INC., and DOES 1 through 10, inclusive,

16 Defendants.
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CASE NO. CV-22-001051

Assigned for All Purposes to:
Hon. Stacy D. Speiller
Dept. 22

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND REQUEST FOR
ATTORNEY'S FEES AND COSTS

Date: June 15, 2023
Time: 8:30 a.m.
Dept.: 22
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1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Hector O. Acosta seeks final approval of a non-
3 reversionary class action settlement resolving wage and hour claims on behalf of 87 individuals
4 who worked for Turlock Walnut Company, Inc. (“TWC” or “Defendant”) as non-exempt
5 employees in California during the class period of March 7, 2018 to January 7, 2023. The
6 proposed \$60,000 total settlement provides about \$18,000 in cash payments to the Class, with an
7 average award of about \$206, plus additional amounts payable under PAGA. The remaining
8 balance will cover a modest service award to Plaintiff, settlement administration costs, civil
9 penalties to the state, and reasonable attorney’s fees and costs. The parties and their counsel
10 finalized the settlement after extensive and difficult arms-length negotiations overseen by an
11 experienced and highly-regarded mediator. The Court conditionally certified the Class and
12 preliminarily approved the settlement on February 9, 2023. Since then, the Court-approved notice
13 form was mailed to the Class Members on March 24, 2023, and they reacted very favorably to the
14 settlement. Not one Class Member requested exclusion, and there are no objections.

15 Class Counsel secured an excellent settlement with TWC after extensive
16 investigation, litigation, and settlement negotiation and administration, all without any
17 compensation for services rendered or costs expended. The class notice duly informed
18 the class members that Class Counsel would request attorney’s fees not to exceed 1/3 of
19 the Gross Settlement Amount, or \$20,000, along with reimbursement of no more than
20 \$10,000 for actual costs incurred litigating this matter. As of the filing of this motion,
21 *not one Class Member objected* to the proposed fee award. Consistent with the
22 Settlement and notice, Plaintiff now respectfully requests the Court award Class
23 Counsel’s fees in the amount of \$20,000 and costs in the amount of \$10,000, as described
24 in the Declaration of J. Kirk Donnelly (“Donnelly Decl.”) filed herewith. The requested
25 attorney’s fees are well within the range of reasonableness, especially considering the
26 complex and risky nature of this litigation, the contingent risk assumed, the nearly two-
27 plus delay in payment and, when subjected to a lodestar crosscheck, result in a base
28 lodestar that is slightly higher than the actual fee request.

1 Accordingly, on behalf of himself and the Settlement Class, Plaintiff respectfully
2 requests the Court grant this motion, give full and final approval to the settlement, grant
3 Class Counsel's request for attorney's fees and costs, and enter judgment accordingly.

4 **II. BACKGROUND**

5 The details of the procedural and factual background of this matter were outlined in
6 the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about
7 January 18, 2022). To re-familiarize the Court with this litigation, on March 7, 2022, Plaintiff
8 filed a class action complaint against Defendant for several alleged violations of the Labor Code
9 and IWC Wage Orders. Plaintiff filed his complaint on behalf of individuals who worked for
10 Defendant as non-exempt employees in California during the relevant time frame. Defendant
11 operates a nut processing facility in Turlock, California. Plaintiff Acosta worked for TWC as a
12 non-exempt forklift operator for several months in 2021. While Plaintiff was directly employed
13 by TWC, the majority of the Class Members were temporary secured through temporary labor
14 contractors and who typically worked on a few weeks or even just a few days, depending on the
15 season and the workload. Indeed, TWC directly employed only 13 class members, 51 of the 87
16 Class Members worked there for less than 1 month, and 28 worked there for less than 2 weeks.
17 [Donnelly Decl., ¶ 2.]

18 Plaintiff alleged he and other employees were entitled to receive their meal breaks as
19 required under the Labor Code and IWC Wage Orders since they regularly worked shifts longer
20 than 8 hours, and frequently worked shifts exceeding 10 or even 12 hours. Information obtained
21 from Plaintiff, in conjunction with review of payroll and time records and other information
22 received from TWC, suggests they did not receive all of the required meal breaks, or that meal
23 periods frequently were cut short or provided late in a shift. Similarly, Plaintiff alleges Defendant
24 failed to provide all required rest breaks, again mostly as to third breaks on shifts over 10 hours,
25 and that breaks frequently lasted less than 10 minutes because employees had to be back at their
26 work station after exactly 10 minutes. Likewise, Plaintiff contends TWC never paid an extra hour
27 of premium pay in lieu of a missed or non-compliant break. Plaintiff further alleges he and the
28 class members worked a few minutes "off the clock" each shift by virtue of having to spend

1 several minutes getting from the break room to their work station and back. Since employees had
2 to be at their station ready to work exactly on time, they had to cut their meal breaks short in
3 order to traverse the facility and wait in line to clock in/out. [Donnelly Decl., ¶ 3.]

4 Based on these allegations, Plaintiff's complaint asserted class claims for failure to pay all
5 wages due, failure to provide meal and rest breaks, failure to provide accurate wage statements,
6 failure to pay wages due on separation of employment, and violation of the Unfair Competition
7 Law, Bus. & Prof. Code sections 17200, *et seq.* Plaintiff also alleged violations of the Private
8 Attorney's General Act premised on the same Labor Code violations. [Donnelly Decl., ¶ 4.]

9 TWC has at all times denied Plaintiffs' allegations and maintained its meal break and
10 payroll policies and procedures comply with California law, that it provided its employees with
11 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all
12 other employees all wages due. Additionally, TWC strongly contends the case cannot be
13 maintained as any kind of class or representative action, arguing that to the extent class members
14 missed meal breaks, that such breaks were non-compliant, or that any unpaid "off the clock" work
15 occurred, it was intermittent and infrequent and evidence of such violations would be purely
16 anecdotal, and therefore individualized issues predominate and trial would be unmanageable.
17 [Donnelly Decl., ¶ 5.]

18 Both before and after Plaintiff filed his complaint, the Parties engaged in meet and confer
19 discussions regarding discovery, potential law and motion, and the merits of the case, and
20 ultimately agreed to attempt early global mediation. They then engaged in significant informal
21 discovery to facilitate an exchange of information necessary to engage in a meaningful mediation.
22 The Parties then engaged the Michael Young, Esq., a respected mediator with extensive wage and
23 hour class action experience and, on November 8, 2022, participated in a full day mediation with
24 Mr. Young that resulted in the proposed settlement. [Donnelly Decl., ¶¶ 6-7.] This Court
25 preliminarily approved the settlement on February 9, 2023.

26 Class Notices were mailed to class members on March 24, 2023, with a 45-day
27 window (to May 8, 2023) for class members to opt out or object to the proposed settlement.
28 [Declaration of Jarrod Salinas ("Salinas Decl."), ¶¶ 5, 8-10.]

1 **III. THE PROPOSED SETTLEMENT TERMS**

2 Under the settlement, TWC will pay \$60,000.00 into a common fund, the Gross
3 Settlement Amount (“GSA”), in two equal payments over approximately 90 days, with the full
4 amount to be funded by June 1, 2023. Reasonable attorney’s fees of up to one-third of the GSA,
5 or \$20,000.00, actual litigation costs of up to \$10,000, a modest enhancement award of up to
6 \$5,000 for plaintiff, settlement administration costs of no more than \$5,000, and a \$2,000 for
7 alleged civil penalties under PAGA,¹ all will be paid from the GSA. The remainder of
8 approximately \$18,000 will be allocated among the Participating Class Members based on their
9 total weeks worked during the Class Period. No portion of the GSA will revert to TWC.
10 [Donnelly Decl., ¶ 8.]

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

12 The Court conditionally certified a settlement class defined to include including all
13 individuals who worked for Defendant as a non-exempt employee in California during the Class
14 Period, which runs from March 7, 2018 to January 7, 2023. The Settlement Administrator
15 ultimately mailed class notices to 87 individuals identified as members of the Class. [Salinas
16 Decl., ¶ 5.] Nothing has changed to require reconsideration of the Court’s certification of
17 the Settlement Class.

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

19 As noted, the settlement obligates TWC to pay \$60,000 to resolve the Settlement Class’s
20 claims, inclusive of attorney’s fees and costs. At least \$18,000 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 will be allocated
25 to expenses, penalties and interest. TWC will pay any and all applicable employer-side payroll
26 taxes separately and in addition to the GSA. Subject to the Court’s approval, any amounts not
27 _____

28 ¹ Consistent with PAGA, \$1,500 of that amount will go the LWDA for the State’s share of the civil penalties, and the remaining \$500 will be distributed pro rata to the eligible Class Members.

1 claimed (because a class member does not cash his or her settlement check) will be forwarded to
2 the California State Controller's Unclaimed Property Fund. [Donnelly Decl., ¶ 9.]

3 Each Participating Class Member will receive a share of the Net Settlement Amount based
4 on his or her position held and total weeks worked for TWC during the Class Period while
5 employed as a non-exempt employee. Thus, each Class Member's Individual Settlement
6 Payment will be calculated using criteria typically used in determining appropriate amounts of
7 alleged unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory
8 penalties under applicable law. These methods are intended to ensure each Class Member receives
9 a portion of the available settlement funds corresponding to the relative value of his or her
10 potential claims. The proposed allocation provides a reasonable way to compensate Class
11 Members based on the amount of time they worked for TWC, and the number of instances they
12 missed a break, were not provided compensation in lieu of such missed breaks, or lost wages due
13 to off the clock work. [Donnelly Decl., ¶ 10.]

14 The average class award will be approximately \$206, and the largest award will be over
15 \$2,300. There are 40 Class Members also eligible to receive a share of the PAGA civil penalties,
16 and their average PAGA award will be about \$12.50. [Salinas Decl., ¶¶ 13-14.]

17 **C. Settlement Administration**

18 Phoenix Settlement Administrators, as the Court-approved Settlement Administrator,
19 mailed the Notice Packet to the Class members after making all reasonable effort to ascertain
20 the best mailing address, including running each address through the National Change of
21 Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Salinas
22 Decl., ¶¶ 2-4.] The Class Notice, previously approved by the Court, duly informed Class
23 Members of the settlement terms, including the estimated relief each Class Member will
24 receive, the amounts to be requested for attorney's fees and the class representative
25 enhancement awards, and the right to opt out of or object to the settlement. [Salinas Decl., ¶
26 5, Exh. A.] Phoenix mailed 87 Notice Packets on March 24, 2023 in both English and
27 Spanish. [Salinas Decl., ¶ 5.] Ultimately, four Notice Packets were deemed undeliverable,
28 representing a 95.4% success rate. [Salinas Decl., ¶¶ 6-7.] The 45-day response window for

1 objecting to the settlement expired on March 8, 2023. [Salinas Decl., ¶¶ 8-10.] As of the
2 filing of this motion, Phoenix has received zero requests for exclusion (for a 100%
3 participation rate), and zero objections to the settlement. No disputes have been submitted
4 regarding the information used to calculate class member settlement shares. [Salinas Decl.,
5 ¶¶ 8-10.]

6 **D. Release of Claims**

7 All Participating Class Members will be deemed to release TWC from all claims alleged
8 in the operative complaint, or that could have been brought based on the allegations in the
9 operative complaint, including PAGA claims, from March 7, 2018 through January 7, 2023. The
10 release is limited to the claims that were actually pleaded or could have been pleaded based on the
11 alleged facts in the complaint. [Donnelly Decl., ¶ 11.]

12 **E. PAGA Claims and Notice to the LWDA**

13 The Parties allocated \$2,000 to payment of civil penalties under PAGA for such claims
14 against TWC, as addressed in more detail below. As required by Labor Code section 2699(l)(2),
15 Plaintiff gave notice of the settlement and preliminary approval hearing to the LWDA via its
16 online portal. [Donnelly Decl., ¶ 12; Exh. 1.]

17 **IV. ARGUMENT**

18 The law favors settlement, particularly in class actions where substantial resources
19 can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg &
20 A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of
21 Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v.
22 Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37
23 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
24 compromised, the settlement of a class action requires court approval. Cal. Rule of Court
25 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple
26 Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect
27 against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48
28 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a

1 two-step process intended to determine whether, under the totality of circumstances, the
2 settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91
3 Cal.App.4th at 245.

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

18 **A. The Proposed Settlement Merits Final Approval**

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

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

26 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
27 was reached following arm's-length negotiations presided over by Michael Young, Esq., a
28 highly respected and well-known mediator with extensive experience mediating wage and

1 hour class actions. [Donnelly Decl., ¶ 7.] Moreover, Plaintiff and his counsel were well-
2 informed about the facts and the law, and counsel J. Kirk Donnelly has years of litigation
3 experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified
4 to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Donnelly
5 Decl., ¶¶ 26-28.] Defendant TWC likewise was represented by highly-qualified and
6 experienced defense counsel. Both sides advocated vigorously for their clients, and nothing
7 was "left on the table."

8 **2. The Class Reacted Favorably to the Settlement**

9 The settlement was well-received by the class. As of the filing of this motion, no
10 objections have been filed, and no Class Members requested exclusion out of 87 settlement
11 class members. [Salinas Decl., ¶¶ 9-10.] As many courts recognize, class member reaction to the
12 settlement is one of the most important factors to consider in determining if final approval should
13 be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see
14 also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is
15 well-settled that the reaction of the class to the settlement is perhaps the most significant factor to
16 be weighed in considering its adequacy") (internal quotation marks omitted).

17 **3. The Settlement Is Fair and Reasonable Considering the Benefits** 18 **Conferred, the Case Value, and Significant Litigation Risks**

19 The proposed settlement involves a substantial sum of money that, when distributed,
20 will confer meaningful monetary benefits on the Class members. As described above, each
21 individual award will be based on an allocation consistent with the nature of the claims
22 asserted and will fairly and equitably allocate the available funds in relation to the degree of
23 damage each Class member incurred. While Class members who worked for only a short
24 period of time will receive relatively small sums, those with longer tenures and who worked
25 more hours and shifts throughout the class period will receive appropriately larger awards.

26 Prior to mediation, the parties engaged in extensive informal discovery to facilitate
27 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
28 TWC's payroll practices, pay stubs and time records for a sampling of class members, meal and

1 rest break policies, etc., and information from Defendant regarding class size and breakdown of
2 job positions, work weeks, rates of pay, and other information used to formulate a damages
3 model. This extensive information then was analyzed by a consulting expert to look for meal and
4 rest break violation rates, time lost due to off the clock work, and other issues relevant to liability
5 and damages. Plaintiff's counsel is confident they obtained sufficient information to enable them
6 to understand the law and facts of this case and make an informed decision regarding the
7 proposed settlement and whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 6, 13.]

8 Plaintiff's analysis was supported by the pre-mediation production described above, which
9 permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using
10 that data, Plaintiff ran various calculations and estimated TWC's likely maximum exposure on
11 the class claims at approximately \$468,000, including \$11,000 on the unpaid wage claims,
12 \$15,000 on the meal break claims, \$132,000 on the rest break claims, \$43,000 on the wage
13 statement claims, and \$267,000 on the waiting time penalty claims. [Donnelly Decl., ¶ 14.]
14 Plaintiff and his counsel substantially discounted the value of these claims, however, in light of
15 the multiple and considerable risks posed by proceeding with the litigation.

16 First, on the meal and rest break claims, while TWC's written policies generally
17 appeared compliant, Plaintiff's review of the time and payroll records provided suggested
18 numerous de facto violations, as TWC rarely if ever provided second meal periods or third rest
19 periods on shifts lasting over 10 hours and many other times meal breaks were cut short or
20 provided late in a shift. In response, TWC argued many class members waived their second meal
21 periods and also that, in light of its compliant policies, whether a class member missed a meal
22 period, received a late meal period, or missed a rest break would have been aberrational and
23 against company policy. Thus, per TWC, these issues are not amenable to class or representative
24 treatment since their resolution would require individualized inquiries as to why a break was
25 missed or non-compliant. [Donnelly Decl., ¶ 15.]

26 On the unpaid wage claims, Plaintiff alleged he and other employees lost a few minutes
27 per shift waiting in line to clock in, and getting across the facility to the time clock and back,
28 particularly on meal breaks where Plaintiff contends he and his co-workers had to cut their break

1 short in order to back at their workstation after exactly 30 minutes. On the other hand, TWC
2 argued it accurately tracked and paid for all hour worked, and had no “de facto” policies that
3 compelled employees to shorten their meal breaks or otherwise work off the clock for any reason.
4 [Donnelly Decl., ¶ 16.]

5 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
6 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
7 posed by the need to take into account the discretionary nature of such awards and the “good
8 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
9 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
10 even though class prevailed on underlying claim for failure to pay living wages). Thus, while
11 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
12 defenses. [Donnelly Decl., ¶ 17.]

13 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
14 entitled to penalties totaling about \$250,000 in civil penalties should Plaintiff prevail on all
15 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶
16 18.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on TWC’s
17 various defenses on the merits and also accounted for the Court’s wide discretion to reduce such
18 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
19 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
20 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
21 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
22 trial). Accordingly, the Parties allocated \$2,000 to PAGA penalties, and Plaintiff submits this
23 amount is reasonable under the circumstances and in line with comparable settlements in other
24 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
25 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
26 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
27 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
28 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the

possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement.

Thus, Defendant raised various defenses to each of Plaintiff's claims, any one of which, if successful, could have derailed Plaintiffs' case. Accordingly, Plaintiff faced risky issues going forward with this litigation, and given the need to secure class certification, try the case, and deal with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff and his counsel discounted the value of the class claims consistent with the risks discussed above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and substantial risks – settlement on the proposed terms and without prolonged and costly litigation was in the best interests of the class. [Donnelly Decl., ¶¶ 19-21.]

The overall recovery represents a significant percentage of Defendant's potential exposure and, given the risks addressed above, a total recovery for the class of \$60,000, which will result in average awards of some \$206 per class member is a significant result well within the range of reasonableness considering all potential outcomes, and it will provide direct monetary awards to all Class Members without further delay. [Donnelly Decl., ¶¶ 21.]

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement process...even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is

different from the question whether the settlement is perfect in the estimation of the reviewing court"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide timely benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., 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> (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for the Class.

V. PLAINTIFF'S ENHANCEMENT AWARD

Pursuant to the terms of the settlement, Plaintiff seeks a modest incentive award of \$5,000 for his service in bringing these claims on behalf of the Class. The request is reasonable given the risks he undertook on behalf of the Class Members. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent Class Members, while shouldering the risk of being liable for Defendant's litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing himself at risk of discrimination by future prospective employers. As set forth in more detail in his declaration submitted with the preliminary approval motion, among taking many other actions assisting in the successful litigation of this case, Plaintiff provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Declaration of Hector O. Acosta, ¶¶ 2-9; Donnelly Decl., ¶ 22.] Finally, there are no class member objections submitted with respect to the amounts Plaintiff proposes to receive. [Salinas Decl., ¶ 9.] Accordingly, the requested enhancement

1 payments to Plaintiff is appropriate and justified as part of the settlement.

2 **VI. SETTLEMENT ADMINISTRATION COSTS**

3 The settlement provides for a payment to Phoenix for its services as the Settlement
4 Administrator. As set forth in the Declaration of Jarrod Salinas, Phoenix has performed and will
5 continue to perform its required duties through final distribution of the settlement funds and
6 incurred \$5,000.00 in fees and expenses. [Salinas Decl., ¶ 15.] Accordingly, Plaintiff respectfully
7 requests the Court approve payment of \$5,000 to Phoenix from the GSA. [Donnelly Decl., ¶ 23.]

8 **VII. ATTORNEY'S FEES AND COSTS**

9 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be**
10 **Approved**

11 This Court has discretion over the amount of attorneys' fees awarded and court
12 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
13 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82
14 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
15 marketplace for cases involving significant contingent risk, such as this one. Deposit
16 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.
17 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed
18 private bargaining, if it were truly possible, might have reached" in determining a reasonable
19 fee, and a fee award should approximate a "range of fees freely negotiated in comparable
20 litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and
21 justified by the work performed, the benefits obtained, and the contingent risk assumed.

22 As addressed in detail above, at the time the parties reached the tentative settlement
23 success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that
24 some or all the claims would not be certified for class treatment, as Defendant had strong
25 arguments that its compensation policies were legal and properly compensated the class
26 members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the
27 merits, it undoubtedly would have taken several years to realize any recovery while they
28 pursued class certification, trial, and an almost certain appeal. [Donnelly Decl., ¶¶ 15-21.]

1 Nonetheless, Plaintiff succeeded and expeditiously obtained the relief he set out to
2 obtain, and the settlement provides substantial cash payments to Class Members, with an
3 average award of about \$206, and with a maximum award of over \$2,300. Importantly as
4 well, the Class Members have been overwhelmingly supportive of the Settlement – as of the
5 filing of this motion, there are no objections to the settlement and no opt outs. [Salinas Decl.,
6 ¶¶ 8-9.]

7 **B. The Requested Fee Award Is Reasonable and Appropriate**

8 The United States Supreme Court has ruled the parties to a class action properly may
9 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
10 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
11 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
12 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
13 should not result in a second major litigation. Ideally, of course, litigants will settle the
14 amount of a fee." The United States Supreme Court has reemphasized this policy and further
15 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
16 (1984) 465 U.S. 886, 902 n.19.

17 As part of the Settlement, TWC agreed not to object to an award of no more than 1/3
18 of the GSA for attorney's fees, or \$20,000.00, and up to \$10,000 in reimbursement for
19 litigation costs and expenses. Such a fee is commensurate with what the market would
20 provide for similar services and the Court therefore can most certainly enforce the
21 agreement. As California's Court of Appeal has instructed:

22 Given the unique reliance of our legal system on private litigants to enforce substantive
23 provisions of law through class and derivative actions, attorneys providing the essential
24 enforcement services must be provided incentives roughly comparable to those negotiated
in the private bargaining that takes place in the legal marketplace, as it will otherwise be
economic for defendants to increase injurious behavior.

25 Lealao, 82 Cal.App.4th at 47.

26 Here, the parties did not negotiate the inclusion of attorney's fees until after extensive
27 arms-length bargaining regarding relief to the Class was completed. [Donnelly Decl.,
28 ¶ 24.] The requested fee and cost award was a product of these arms-length negotiations and

1 fairly reflects the marketplace value of the services rendered by Class Counsel in this case.
2 As a result, the fee agreed to by the parties should be approved.

3 **C. Class Counsel's Fees are Justified When Calculated as a Percentage of the**
4 **Common Fund**

5 In approving fee applications, courts typically apply either a percentage-of-recovery
6 method or the lodestar method. Laffitte v. Robert Half Int'l., Inc. (2016) 1 Cal.5th 480, 489;
7 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other
8 grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California
9 Supreme Court recently recognized the advantages and equities of calculating attorney's fees
10 using the percentage-of-the-common-fund method in another wage-and-hour case:

11 The recognized advantages of the percentage method-including relative ease of
12 calculation, alignment of incentives between counsel and the class, a better
13 approximation of market conditions in a contingency case, and the encouragement it
14 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
litigation convince us the percentage method is a valuable tool that should not be
denied our trial courts.

15 Laffitte, 1 Cal.5th at 503 (citations omitted).

16 Indeed, both California and federal courts have long recognized an appropriate
17 method for determining the award of attorney's fees is based on a percentage of the total
18 value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20
19 Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air
20 West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the
21 common fund recovered operates to "spread litigation costs proportionately among all the
22 beneficiaries so that the active beneficiary does not bear the entire burden alone." Vincent,
23 557 F.2d at 769.

24 In determining a reasonable common fund fee award, courts should also consider the
25 fact that fees serve as an economic incentive for lawyers to bring class action litigation to
26 achieve increased access to the judicial system for meritorious claims and to enhance
27 deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without
28 prosecution on a contingent basis and use of the class action mechanism, the courthouse door

1 would effectively be closed to most class members due to the relatively small size of their
2 individual claims in relation to the enormous time and cost associated with class action
3 litigation.

4 Here, Class Counsel seek a fee award for their successful prosecution and resolution
5 of this action of no more than 1/3 percent of the total amount recovered by the Class via the
6 lawsuit, or \$20,000. The percentage requested is justified for the reasons set forth further
7 below, and comports with fee awards calculated on a percentage-of-the-benefit basis.
8 Indeed, review of class action settlements shows that courts have historically awarded fees in
9 the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner
10 Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that
11 percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on
12 Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a
13 reasonable fee award from a common fund in order to assure that the fees do not consume a
14 disproportionate part of the recovery obtained for the class, although somewhat larger
15 percentages are not unprecedented.").

16 **D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request**

17 To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar
18 cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for
19 bringing an objective measure of the work performed into the calculation of a reasonable
20 attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 41.7 hours of time on this
21 matter, resulting in a modest and very reasonable lodestar of \$31,935.00.

22 As is fully detailed in the Donnelly Declaration, Class Counsel's efforts included: (1)
23 extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal
24 research, research into similar claims and claims against other employers in the same industry,
25 and attempts to locate and contact other TWC employees; (2) drafting a PAGA notice letter; (3)
26 drafting the initial complaint and related documents; (4) case management, including
27 communications with defense counsel, meeting and conferring/preparing case management
28 statements, etc.; (5) lengthy discussions with defense counsel regarding settlement/mediation and

1 informal discovery needed for meaningful settlement discussions; (6) engaging in substantial
2 informal discovery, including propounding informal discovery “requests” and reviewing
3 documents and other information produced; (7) drafting a mediation brief and accompanying
4 damages model after review and analysis of defendant’s informal discovery production; (8)
5 attending an all-day mediation; (9) negotiating and drafting the settlement agreement and related
6 documents; (10) drafting the motion for preliminary approval, and attending the hearing; (11)
7 administration of the settlement, including communications with the Settlement Administrator
8 and settlement class members; (13) drafting the motion for final approval and motion for
9 attorney’s fees, and attending the final approval hearing; and (14) extensive communications with
10 the Plaintiff regarding case status, case investigation and document review, mediation, and
11 settlement terms. Additionally, Class Counsel will incur additional time following final approval
12 to, inter alia, respond to class member inquiries, work with the Settlement Administrator on the
13 distribution of settlement funds, and on the compliance hearing and amended judgment.

14 [Donnelly Decl., ¶ 25, Exh. 2.]

15 In pursuing this matter, Class Counsel incurred total attorney’s fees of \$31,935.00, the
16 lodestar is based on an eminently reasonable number of hours worked to litigate this matter to a
17 successful conclusion (41.7) attorney and paralegal hours, and the requested attorney hourly rates
18 are reasonable and comport with hourly rates charged by other attorneys with similar experience
19 in this practice area in California. [Donnelly Decl., ¶¶ 26-32.] On a lodestar basis, the fee
20 request of \$20,000 results in a base lodestar that is higher than the fees requested on
21 percentage of the recovery basis and, accordingly, there is no request for a lodestar
22 enhancement. Class Counsel submits the lodestar crosscheck operates to show that the
23 percentage fee request is reasonable considering the fees requested are lower than the actual
24 value of the services rendered when valued via traditional hourly billing.

25 E. **The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill**
26 **Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar**
27 **Cases.**

28 What has now emerged in most fee award decisions is the recognition that fee

1 determinations in both common fund and statutory fee situations are incapable of
2 mathematical precision because of the intangible factors that must be resolved in the court's
3 discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In
4 determining an appropriate fee in a common fund case, a Court must decide, based on the
5 unique posture of each case, what percentage of the common fund would most reasonably
6 compensate Class Counsel given the nature of the litigation and the performance of counsel.
7 Paul, Johnson, Alston & Hunt v. Gaulty (9th Cir. 1989 886 F.2d 268, 272) (the benchmark
8 percentage fee may be adjusted to account for the circumstances involved in a case).

9 Courts apply a five-part test in calculating a reasonable percentage fee in common
10 fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the
11 quality of work; (4) the contingent nature of the fee and the financial burden carried by the
12 plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

13 **1. The Results Achieved.**

14 Class Counsel obtained an excellent result in this case for the Class Members. The
15 Settlement provides real monetary benefits to the Class Members, and the Settlement is
16 particularly advantageous to the Class Member because the proceeds will be distributed
17 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.
18 Considering many individual claims would be very modest and would not be cost-effective
19 to pursue successfully, the Settlement provided them with fair compensation for their claims.
20 Moreover, the absence of any objection to either the Settlement or the attorney's fee request
21 bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated
22 by the fact that not only one class member opted out. Additionally, the settlement amounts to
23 a substantial percentage of the maximum value of the amount the Class might have obtained
24 if it had tried the case and recovered on all theories seeking recovery of wages and penalties.
25 "It is well-settled law that a cash settlement amounting to only a fraction of the potential
26 recovery does not per se render the settlement inadequate or unfair." In re Omnivision
27 Techs., Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

28 /////

1 **2. Class Counsel Bore Considerable Risk.**

2 At the time of filing the complaint, Class Counsel recognized that they would have to
3 expend a substantial amount of time and advance significant costs to prosecute a statewide
4 class action suit with no guarantee of compensation or reimbursement, in the hope of
5 prevailing against a sophisticated company represented by first-rate attorneys. Despite
6 their belief in the validity of Plaintiff’s claims, they also knew they faced substantial risks
7 of class certification and the ability to prove class-wide and individual damages. In light of
8 the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant
9 would dig in and attempt to bury their small firms in work. Given the small size of Class
10 Counsel’s firm, not receiving any compensation for several years while simultaneously
11 advancing litigation costs posed considerable risk and difficulty. [Donnelly Decl., ¶¶ 33-35.]

12 **3. The Skill Required and the Quality of Work.**

13 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
14 experience. The issues presented in this case required more than just a general appreciation
15 of wage and hour law and class action procedure. This Settlement was possible only
16 because counsel persuaded TWC that Plaintiff and the putative class had a realistic
17 chance of prevailing on their claims despite TWC’s contrary arguments, and that the
18 case would be pursued through class certification and trial if necessary. In successfully
19 navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a
20 risky and difficult case.

21 **4. The Contingent Nature of the Fee and Risk Assumed**

22 There is a substantial difference between the risk assumed by attorneys being paid
23 by the hour and attorneys working on a contingent fee basis. The attorney being paid by
24 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d
25 1249, 1256. The attorney working on a contingent basis can only log hours while
26 working without pay towards a result that will hopefully entitle him to a market fee
27 considering the risk and other factors of the undertaking. Id. at 1257. Otherwise, the
28 contingent fee attorney receives nothing. Id. In this case, Class Counsel subjected

1 themselves to this risk in this all or nothing contingent fee case wherein the necessity
2 and financial burden of private enforcement makes the requested award appropriate.

3 Counsel retained on a contingency fee basis, whether in private matters or in class
4 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent
5 fee schedule to compensate for both the contingent risk assumed and the delay in
6 payment. The simple fact is that despite the most vigorous and competent of efforts,
7 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.
8 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class
9 actions, competent attorneys will be discouraged from prosecuting similar cases.
10 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208
11 Cal.App.3d 279, 287.

12 Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate
13 the investment of unnecessary time in a case, and the adverse resolution of any one of several
14 difficult issues present in this matter could have doomed the entire effort. As discussed, the
15 attorney's fees in this case were not only contingent but fairly risky, and there was always a
16 palpable chance Plaintiff's counsel would receive nothing for any number of reasons.
17 [Donnelly Decl., ¶¶ 33-35.] Accordingly, the contingent nature of the fee and the financial
18 burdens on Class Counsel and Plaintiff also support the fee requested.

19 5. Awards in Other Cases

20 As discussed, the attorney's fees requested by Class Counsel are within the range of
21 fees awarded in comparable cases, as California courts regularly approve class action fee
22 awards amounting to 1/3 of a common fund. Additionally, review of class action settlements
23 over the past 10 years shows that the courts have historically awarded fees in the range of 20
24 to 50 percent, depending upon the circumstances of the case. In re Warner Communications
25 Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in
26 common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d
27 ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee
28 award from a common fund in order to assure that the fees do not consume a

1 disproportionate part of the recovery obtained for the class, although somewhat larger
2 percentages are not unprecedented."). Class Counsel's requested fees equal one-third of the
3 gross amount recovered on behalf of the class and are well within the range of
4 reasonableness under either the percentage of the recovery or the lodestar method in light of
5 the contingent risk assumed, the delay in payment, the result achieved, and the overall
6 quality of the representation.

7 **F. Class Counsels' Costs and Expenses are Reasonable**

8 Plaintiff's counsel also requests reimbursement of actual out-of-pocket expenses incurred
9 to prosecute this action. These expenses were incidental and necessary to the effective
10 representation of the employees, and Plaintiffs' counsel is permitted to recover litigation costs
11 and expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d
12 at 35 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County
13 of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund
14 "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of
15 attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiffs' counsel also is entitled to recover "those
16 out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v.
17 Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

18 As explained in the Donnelly Declaration, Class Counsel incurred a total of
19 \$10,792.42 in expenses incurred in connection with this litigation. These expenses
20 include the amounts paid for court filing fees, service of process, Vcourt remote
21 appearances, expert fees, postage, and mediation fees, all of which are costs normally
22 billed to and paid by the client. These costs were reasonably incurred in the prosecution
23 of this matter. Since the Settlement Agreement caps cost reimbursement at \$10,000,
24 Plaintiff respectfully requests that the Court authorize reimbursement of counsel's costs
25 in the amount of \$10,000. [Donnelly Decl., ¶¶ 36-37.]

26 **VIII. CONCLUSION**

27 For all the foregoing reasons, Plaintiff Marcus French respectfully requests that the Court
28 grant this motion and grant final approval of the proposed class action settlement and approve the

1 payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of
2 the Settlement Administrator's fees and expenses, approve the requested class representative
3 enhancement payment, approve the award of attorney's fees and costs as requested, and enter
4 judgment in this action. Finally, Plaintiff request the Court set a final compliance hearing for
5 June 6, 2024, or a later date convenient for the Court.

6
7 Dated: May 15, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

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J. Kirk Donnelly
Attorneys for Plaintiff Hector O. Acosta