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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 PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

Date: February 8, 2023
Time: 8:30 a.m.
Dept.: 22

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1 **I. INTRODUCTION**

2 Plaintiff Hector O. Acosta hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 87 individuals employed by Defendant Turlock Walnut Company,
5 Inc. (“TWC” or “Defendants”) as non-exempt employees during the period of March 7, 2018
6 through January 7, 2023. The proposed \$60,000 settlement will provide at least \$18,000 in cash
7 payments to the settlement class, with an average award of about \$207. The balance of
8 approximately \$32,000 will cover a modest enhancement award to Plaintiff, reasonable attorney’s
9 fees and actual litigation costs, settlement administration costs, and payment of civil penalties to
10 the state. The settlement is the product of Plaintiff’s pre- and post-filing investigation, a pre-
11 mediation exchange of information, and arms-length and adversarial negotiations overseen by
12 experienced and well-regarded mediator Michael Young, Esq.

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

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

23 On March 7, 2022, Plaintiff filed a class action complaint against Defendant for several
24 alleged violations of the Labor Code and IWC Wage Orders. Plaintiff filed his complaint on
25 behalf of individuals who worked for Defendant as non-exempt employees in California during
26 the relevant time frame. Defendant operates a nut processing facility in Turlock, California.
27 Plaintiff Acosta worked for TWC as a non-exempt forklift operator for several months in 2021.
28 While Plaintiff was directly employed by TWC, the majority of the Class Members were

1 temporary secured through temporary labor contractors and who typically worked on a few weeks
2 or even just a few days, depending on the season and the workload. Indeed, TWC directly
3 employed only 13 class members, 51 of the 87 Class Members worked there for less than 1
4 month, and 28 worked there for less than 2 weeks. [Declaration of J. Kirk Donnelly (“Donnelly
5 Decl.”), ¶ 4.]

6 Plaintiff alleged he and other employees were entitled to receive their meal breaks as
7 required under the Labor Code and IWC Wage Orders since they regularly worked shifts longer
8 than 8 hours, and frequently worked shifts exceeding 10 or even 12 hours. Information obtained
9 from Plaintiff, in conjunction with review of payroll and time records and other information
10 received from TWC, suggests they did not receive all of the required meal breaks, or that meal
11 periods frequently were cut short or provided late in a shift. Similarly, Plaintiff alleges Defendant
12 failed to provide all required rest breaks, again mostly as to third breaks on shifts over 10 hours,
13 and that breaks frequently lasted less than 10 minutes because employees had to be back at their
14 work station after exactly 10 minutes. Likewise, Plaintiff contends TWC never paid an extra hour
15 of premium pay in lieu of a missed or non-compliant break. Plaintiff further alleges he and the
16 class members worked a few minutes “off the clock” each shift by virtue of having to spend
17 several minutes getting from the break room to their work station and back. Since employees had
18 to be at their station ready to work exactly on time, they had to cut their meal breaks short in
19 order to traverse the facility and wait in line to clock in/out. [Donnelly Decl., ¶ 5.]

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

25 TWC has at all times denied Plaintiffs’ allegations and maintained its meal break and
26 payroll policies and procedures comply with California law, that it provided its employees with
27 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all
28 other employees all wages due. Additionally, TWC strongly contends the case cannot be

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

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

17 The Parties then engaged Michael Young, Esq. a highly respected mediator with extensive
18 wage and hour class action experience and, on November 8, 2022, participated in a full day
19 mediation with Mr. Young. Throughout the day, the arms-length negotiations were hard-fought
20 and adversarial as the Parties exchanged extensive information on their legal and factual
21 positions, and made numerous offers and counter-offers. Additionally, Defendant for the first
22 time raised an “ability to pay” issue and shared information regarding its current finances with
23 mediator. Ultimately, the Parties reached agreement on all major issues and reduced their
24 tentative agreement to a Memorandum of Understanding. Thereafter, the Parties collaboratively
25 drafted the Settlement Agreement setting forth the full and final settlement terms. [Donnelly
26 Decl., ¶ 9.]

27 **III. THE PROPOSED SETTLEMENT TERMS**

28 Under the settlement, TWC will pay \$60,000.00 into a common fund, the Gross

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

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

9 The settlement provides for conditional certification of a settlement class including all
10 individuals who worked for Defendant as a non-exempt employee during the Class Period, which
11 runs from March 7, 2018 through January 7, 2023. As of the November 8 mediation, the
12 Settlement Class consisted of approximately 87 individuals. [Donnelly Decl., ¶ 11.]

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

14 As noted, the settlement obligates TWC to pay \$60,000 to resolve the Settlement Class’s
15 claims, inclusive of attorney’s fees and costs. At least \$18,000 from the GSA will be distributed
16 to the Participating Class Members. This is a cash settlement that does not require Participating
17 Class Members to submit a claim form to receive their settlement share. Participating Class
18 Members will receive their settlement checks automatically via First Class U.S. Mail. One-third
19 of each settlement share will be allocated to wages and the remaining two-thirds percent will be
20 allocated to expenses, penalties and interest. TWC will pay any and all applicable employer-side
21 payroll taxes separately and in addition to the GSA. Subject to the Court’s approval, any amounts
22 not claimed (because a class member does not cash his or her settlement check) will be forwarded
23 to the California State Controller’s Unclaimed Property Fund. [Donnelly Decl., ¶ 12.]

24 Each Participating Class Member will receive a share of the Net Settlement Amount based
25 on his or her position held and total weeks worked for TWC during the Class Period while
26 employed as a non-exempt employee. Thus, each Class Member’s Individual Settlement

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 Payment will be calculated using criteria typically used in determining appropriate amounts of
2 alleged unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory
3 penalties under applicable law. These methods are intended to ensure each Class Member receives
4 a portion of the available settlement funds corresponding to the relative value of his or her
5 potential claims. The proposed allocation provides a reasonable way to compensate Class
6 Members based on the amount of time they worked for TWC, and the number of instances they
7 missed a break, were not provided compensation in lieu of such missed breaks, or lost wages due
8 to off the clock work. The average award across the board will be approximately \$207. There are
9 approximately 32 Class Members also eligible to receive a share of the PAGA civil penalties, and
10 their average PAGA award will be about \$15.60. [Donnelly Decl., ¶ 13.]

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

15 **C. Settlement Administration**

16 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
17 Administrators ("Phoenix") as the Settlement Administrator. Phoenix is qualified and has
18 significant experience administering class action settlements, including numerous wage and hour
19 matters. Phoenix's fees will not exceed \$5,000.00. If the Court approves less than the above
20 amount, the difference will remain in the Net Settlement Amount for distribution to the
21 Participating Class Members. [Donnelly Decl., ¶ 14; Exh. 2.]

22 **D. The Class Notice**

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

1 Members with the information necessary to evaluate the Settlement, provides fair opportunity to
2 participate in, opt out of, or object to the proposed Settlement, and otherwise complies with
3 California Rules of Court 3.769(f) and 3.766(d). Coupled with the notice procedure, the
4 proposed Notice provides the Settlement Class with the best notice practicable. [Donnelly Decl.,
5 ¶ 15.]

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

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

12 **F. Release of Claims**

13 All Participating Class Members will be deemed to release TWC from all claims alleged
14 in the operative complaint, or that could have been brought based on the allegations in the
15 operative complaint, including PAGA claims, from March 7, 2018 through January 7, 2023. The
16 release is limited to the claims that were actually pleaded or could have been pleaded based on the
17 alleged facts in the complaint. [Donnelly Decl., ¶ 17.]

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

19 The settlement provides Defendant will not oppose a request for reasonable attorney's
20 fees not to exceed one-third of the Gross Settlement Amount, or \$20,000.00, nor will it oppose a
21 request for reimbursement of actual litigation costs and expenses of up to \$10,000.00. Defendant
22 also will not oppose a request for an enhancement award to Plaintiff of not more than \$5,000.00
23 each in recognition of his time spent on this matter, the risks he undertook on behalf of the class,
24 and the benefit conferred to the class. These payments also will be made pro rata on the same
25 distribution schedule as the distributions to Participating Class Members. Plaintiff's counsel will
26 provide the Court with appropriate summaries and evidence of its efforts and time records in
27 anticipation of the Final Approval Hearing, and Plaintiff has submitted his declaration herewith.
28 If the Court approves less than the above amounts, the difference will remain in the Net

1 Settlement Amount for distribution to the Participating Class Members. [Donnelly Decl., ¶ 18.]

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

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

7 **IV. ARGUMENT**

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

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

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

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

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

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

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

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

21 In the present matter, conditional certification is proper since this matter satisfies all
22 requirements for class certification under Code of Civil Procedure section 382. First, the class is
23 both sufficiently numerous, consisting of approximately 87 individuals, and ascertainable by
24 reference to Defendant's personnel and payroll records. [Donnelly Decl., ¶ 20.] Next, Plaintiff is
25 an adequate class representative, as his claims do not conflict with and are not antagonistic to the
26 claims of other class members. Further, his claims are typical given he is a member of the class
27 and his claims arise from the same employment practices and course of conduct giving rise to the
28 claims of the other class members. [Donnelly Decl., ¶ 21; Declaration of Hector O. Acosta, ¶¶ 2-

9.] Lastly, his counsel is experienced and adequate class counsel. [Donnelly Decl., ¶¶ 33-35.]

Next, common questions of law and fact predominate – particularly for purposes of a settlement class – as the Class Members all were subject to the same meal rest break policies, the same alleged policy that shorted them on hours worked. Since the focus of the claims against TWC concerns the legality of common policies applied uniformly to the entire class, common issues predominate over individualized inquiries concerning liability. TWC’s de facto policy of not providing second meal breaks and third rest breaks is company-wide policy applied equally and consistently to all class members, and this policy is either compliant with California law or it is not. Regardless of that determination, it will decide liability for all class members one way or another. Similarly, whether TWC had a policy that meant employees had to cut their breaks short in order to be their station ready to work raises questions common to all class members.

[Donnelly Decl., ¶ 22.]

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

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

The proposed settlement resulted from serious, arms-length negotiations facilitated by respected mediator Michael Young, Esq., who has extensive experience mediating wage and hour class actions. [Donnelly Decl., ¶ .] Plaintiff’s counsel J. Kirk Donnelly has years of litigation experience, including litigating wage and hour class actions. Plaintiff’s counsel is well-qualified

1 to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Donnelly
2 Decl., ¶¶ 33-35.]

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 extensive informal discovery to facilitate
11 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
12 TWC's payroll practices, pay stubs and time records for a sampling of class members, meal and
13 rest break policies, etc., and information from Defendant regarding class size and breakdown of
14 job positions, work weeks, rates of pay, and other information used to formulate a damages
15 model. This extensive information then was analyzed by a consulting expert to look for meal and
16 rest break violation rates, time lost due to off the clock work, and other issues relevant to liability
17 and damages. Plaintiff's counsel is confident they obtained sufficient information to enable them
18 to understand the law and facts of this case and make an informed decision regarding the
19 proposed settlement and whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 8, 24.]

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

25 Plaintiff's analysis was supported by the pre-mediation production described above, which
26 permitted Plaintiff's counsel to estimate potential damages on various theories of liability. Using
27 that data, Plaintiff ran various calculations and estimated TWC's likely maximum exposure on
28 the class claims at approximately \$468,000, including \$11,000 on the unpaid wage claims,

1 \$15,000 on the meal break claims, \$132,000 on the rest break claims, \$43,000 on the wage
2 statement claims, and \$267,000 on the waiting time penalty claims. [Donnelly Decl., ¶¶ 25-26.]
3 Plaintiff and his counsel substantially discounted the value of these claims, however, in light of
4 the multiple and considerable risks posed by proceeding with the litigation.

5 First, on the meal and rest break claims, while TWC's written policies generally
6 appeared compliant, Plaintiff's review of the time and payroll records provided suggested
7 numerous de facto violations, as TWC rarely if ever provided second meal periods or third rest
8 periods on shifts lasting over 10 hours and many other times meal breaks were cut short or
9 provided late in a shift. In response, TWC argued many class members waived their second meal
10 periods and also that, in light of its compliant policies, whether a class member missed a meal
11 period, received a late meal period, or missed a rest break would have been aberrational and
12 against company policy. Thus, per TWC, these issues are not amenable to class or representative
13 treatment since their resolution would require individualized inquiries as to why a break was
14 missed or non-compliant. [Donnelly Decl., ¶ 27.]

15 On the unpaid wage claims, Plaintiff alleged he and other employees lost a few minutes
16 per shift waiting in line to clock in, and getting across the facility to the time clock and back,
17 particularly on meal breaks where Plaintiff contends he and his co-workers had to cut their break
18 short in order to back at their workstation after exactly 30 minutes. On the other hand, TWC
19 argued it accurately tracked and paid for all hour worked, and had no "de facto" policies that
20 compelled employees to shorten their meal breaks or otherwise work off the clock for any reason.
21 [Donnelly Decl., ¶ 28.]

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

1 defenses. [Donnelly Decl., ¶ 29.]

2 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
3 entitled to penalties totaling about \$250,000 in civil penalties should Plaintiff prevail on all
4 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶
5 30.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on TWC's
6 various defenses on the merits and also accounted for the Court's wide discretion to reduce such
7 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v.
8 Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period
9 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour
10 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after
11 trial). Accordingly, the Parties allocated \$2,000 to PAGA penalties, and Plaintiff submits this
12 amount is reasonable under the circumstances and in line with comparable settlements in other
13 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.
14 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA
15 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
16 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500
17 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the
18 possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the
19 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to
20 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S.
21 Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
22 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
23 objected to the settlement.

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

1 recovery by the class with no assurance of recovering significantly more than the proposed
2 settlement. Lastly, as noted, TWC provided information to the mediator suggesting it is not in
3 particularly robust financial shape, and the Parties took that into account in their negotiations.
4 While Plaintiff is confident in the merits of these claims, legitimate controversies exist regarding
5 each one of them. Plaintiff also recognizes proving the amount of wages and penalties due each
6 Class Member would be an expensive, time-consuming, and uncertain proposition. [Donnelly
7 Decl., ¶ 31.]

8 Plaintiff and his counsel discounted the value of the class claims consistent with the risks
9 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
10 benefit if the litigation continued as well as the potential impact of a judgment on TWC's ability
11 to continue operations. Plaintiff and counsel concluded – in light of these very real and
12 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
13 was in the best interests of the class. The overall \$60,000 recovery represents a significant
14 percentage of Defendant's potential exposure. Given these risks, a total recovery for the class of
15 \$60,000, which will result in average award of \$207 per class member, is a significant result well
16 within the range of reasonableness considering all potential outcomes, and it will provide direct
17 monetary awards to all Class Members within a reasonable time without jeopardizing the
18 company's operations. [Donnelly Decl., ¶ 32.]

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

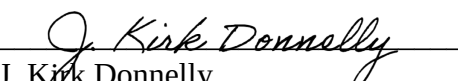
1 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
2 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
3 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
4 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
5 represented 99% discount off the maximum value of the claims). Importantly as well, the
6 proposed settlement is non-reversionary and will provide timely benefits to the Class Members
7 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
8 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)
9 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
10 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
11 within the “range of reasonableness,” and is fair and adequate for the Class.

12 **V. CONCLUSION**

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

16
17 Dated: December 6, 2022

LAW OFFICES OF J. KIRK DONNELLY, APC

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20 J. Kirk Donnelly
21 Attorneys for Plaintiff Hector O. Acosta
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