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

10
11 JESUS BAUTISTA, individually, and on
12 behalf of all others similarly situated,
13 Plaintiff,
14 vs. WESTERN CARE CONSTRUCTION
15 COMPANY, INC., a California corporation,
16 and DOES 1 through 20, inclusive,
17 Defendants.
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CASE NO. S-CV-0049217

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

Date: December 5, 2023
Time: 8:30 a.m.
Dept.: 40

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1 **I. INTRODUCTION**

2 Plaintiff Jesus Bautista 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 60 individuals employed by Defendant Western Care Construction Company, Inc. (“WCCC”
5 or “Defendant”) as non-exempt employees during the period of April 8, 2018 to November 4,
6 2023. The proposed \$75,000 settlement will provide about \$19,505 in cash payments to the
7 settlement class, with an average award of about \$325. The balance of approximately \$55,555
8 will cover a modest enhancement award to Plaintiff, settlement of Plaintiff’s individual non-wage
9 and hour claims, reasonable attorney’s fees and actual litigation costs, settlement administration
10 costs, and payment of civil penalties to the state. The settlement is the product of Plaintiff’s pre-
11 and post-filing investigation and discovery, an informal pre-mediation exchange of information,
12 and arms-length and adversarial negotiations overseen by experienced and well-regarded
13 mediator Vivian Williamson, Esq.

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

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

24 On October 3, 2022, Plaintiff, on behalf of himself and all others similarly situated, filed a
25 class action complaint against Defendant for several alleged violations of the Labor Code and
26 IWC Wage Orders. Plaintiff filed his claims on behalf of a putative class of individuals who
27 worked for WCCC as non-exempt employees. Defendant WCCC develops and maintains senior
28

1 living facilities and is headquartered in Rocklin, California. Plaintiff Jesus Bautista worked for
2 WCCC as a non-exempt employee for some 20 years. Plaintiff claims he was terminated in and
3 around June 2022 in retaliation after dispute regarding a prior on the job injury that later wound
4 up requiring surgery. [Declaration of J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

5 On the class wage and hour claims Plaintiff alleged that, as non-exempt employees, he
6 and the class members were entitled to receive their meal and rest breaks as required under the
7 Labor Code and IWC Wage Orders. Plaintiff and the class members regularly worked shifts
8 longer than 8 hours, and frequently worked shifts exceeding 10 or even 12 hours. Based on
9 information obtained from Plaintiff, in conjunction with review of payroll and time records and
10 other information received from WCCC, Plaintiff alleges they did not receive all of the required
11 meal breaks. Plaintiff further alleges review of those same time records also suggests numerous
12 de facto violations where the class members’ meal breaks were late or lasted less than 30 minutes,
13 and that class members never received an extra hour of premium pay in lieu of a missed meal or
14 rest break. Plaintiff also alleges he and the class members worked off the clock by being required
15 to complete their work, such as cleaning up job sites, loading/unloading equipment, etc., after the
16 scheduled end of a shift but without proper compensation. Plaintiff next contends he and the
17 class members had to use their own personal phones for work purposes, such as receiving texts
18 and phone calls from supervisors and taking pictures of their work, as well as using their own
19 vehicles to transport equipment and materials, etc. [Donnelly Decl., ¶ 5.]

20 Based on these allegations, Plaintiff’s class action complaint asserted claims for damages
21 for: (1) failure to pay all wages due, (2) failure to provide all required meal and rest breaks or
22 compensation in lieu thereof; (3) failure to reimburse business expenses; (4) failure to provide
23 accurate, itemized wage statements; (4) failure to pay all wages due upon termination of
24 employment; and (5) unfair competition. Plaintiff filed a First Amended Complaint on November
25 14, 2022 that added a claim for civil penalties under PAGA based on the same alleged violations.
26 The FAC is the operative complaint for purposes of settlement. [Donnelly Decl., ¶ 6.]

27 WCCC has at all times denied Plaintiff’s allegations and maintained its meal and rest
28 break and payroll policies and procedures comply with California law, and that it provided the

1 class members with required meal and rest breaks. WCCC also argued it accurately tracked and
2 paid for all hours worked by its employees, and that off the clock work was strictly against
3 company policy. Defendant also emphasized it owns and operates multiple company vehicles and
4 there would rarely if ever be a need for an employee to use a personal vehicle for their work.
5 Additionally, WCCC strongly contends the case cannot be maintained as any kind of class or
6 representative action, arguing that to the extent class members missed meal and/or rest breaks,
7 that such breaks were non-compliant, or that an employee worked off the clock, it would have
8 been intermittent and infrequent and evidence of such missed breaks or off the clock work would
9 be purely anecdotal, and therefore individualized issues would predominate and trial would be
10 unmanageable. Next, WCCC emphasized that about half the class – 30 out of 60 individuals –
11 signed arbitration agreements, severance agreements, or both, and that those individuals therefore
12 would be unable to participate in any certified class action. Lastly, WCCC contends Plaintiff
13 actually resigned his employment and was not terminated in retaliation for any kind of medical
14 condition, or for any other improper reason. [Donnelly Decl., ¶ 7.]

15 After Plaintiff filed his complaint, he served initial written discovery, to which WCCC
16 responded in March 2023. Thereafter, the Parties met and conferred on discovery, potential law
17 and motion, and other case management issues, and ultimately agreed to attempt early mediation.
18 The Parties then engaged in additional informal discovery to facilitate an exchange of information
19 necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel reviewed
20 payroll records, personnel policies/handbooks, sample arbitration agreements, sample meal period
21 waivers, meal and rest break policies, personnel files, and a random sampling paystubs and time
22 records produced by WCCC for about 15% of the putative class. Defendant also provided
23 documents reflecting its wage and hour policies and practices during the class period, and data
24 regarding the total number of current and former employees, the estimated total amount of
25 workweeks and pay periods they worked, and average hourly pay rates, among other relevant
26 data. [Donnelly Decl., ¶ 8.]

27 The Parties then engaged Vivian Williamson, Esq., a highly respected mediator with
28 extensive wage and hour class action experience, and, on September 5, 2023, participated in a full

1 day mediation with Ms. Williamson. Throughout the day, the arms-length negotiations were
2 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
3 factual positions, and made numerous offers and counter-offers. By the end of the day the Parties
4 were able to reach agreement on all major issues. Thereafter, the Parties reduced their tentative
5 agreement to the Settlement Agreement now before the Court for approval. [Donnelly Decl., ¶ 9.]

6 **III. THE PROPOSED SETTLEMENT TERMS**

7 Under the settlement, WCCC will pay \$75,000.00 into a common fund, the Gross
8 Settlement Amount.¹ Reasonable attorney's fees of up to 40% of the GSA, or \$30,000, litigation
9 costs of up to \$9,000, an enhancement award of up to \$5,000 and a \$5,000 payment to Plaintiff
10 Bautista in resolution of his personal non-wage and hour claims, settlement administration costs
11 of no more than \$3,995, and \$2,500 for PAGA civil penalties,² all will be paid from the Gross
12 Settlement Amount. The remainder of approximately \$19,505 will be allocated among the
13 Participating Class Members based on their total weeks worked during the Class Period. No
14 portion of the Class Settlement Amount will revert to WCCC. [Donnelly Decl., ¶ 10.]

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

16 The settlement provides for conditional certification of a class including all individuals
17 who worked for Defendant as a non-exempt employee during the Class Period, which runs from
18 April 8, 2018 to November 4, 2023, and consists of 60 individuals. [Donnelly Decl., ¶ 11.]

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

20 As noted, Plaintiff estimates at least \$19,505 from the Gross Settlement Amount will be
21 distributed to the Participating Class Members. This is a cash settlement that does not require
22 Participating Class Members to submit a claim form to receive their settlement share.
23 Participating Class Members will receive their settlement checks automatically via First Class
24 U.S. Mail. One-third of each settlement share will be allocated to wages and the remaining two-
25 thirds will be allocated to expenses, penalties and interest, which allocation is consistent with

26
27 ¹ Unless otherwise stated, all capitalized terms have the same meaning as those defined in the Settlement Agreement

28 ² Per PAGA, the \$1,875 of this amount will go to the Labor & Workforce Development Agency as the State's share of the civil penalties, and the remaining \$625 will be distributed pro rata to the Aggrieved Employees

1 WCCC's potential liability as discussed below. All applicable payroll taxes will be deducted
2 from each Class Member's settlement award, and allocated one-third to wages and two-thirds to
3 penalties and interest. Subject to the Court's approval, any amounts not claimed (because a class
4 member does not cash his or her settlement check) will be forwarded to The Gathering Inn as the
5 agreed upon *cy pres* beneficiary. [Donnelly Decl., ¶ 12.]

6 Each Participating Class Member will receive a share of the Net Settlement Amount based
7 on his or her total weeks worked for WCCC during the Class Period while employed in a non-
8 exempt position. Thus, each Class Member's Individual Settlement Payment will be calculated
9 using criteria typically used in determining appropriate amounts of unpaid wages, unpaid
10 premium wages for missed meal and rest breaks, and potential statutory penalties under
11 applicable law. These methods are intended to ensure each Class Member receives a portion of
12 the available settlement funds corresponding to the relative value of his or her potential claims.
13 The proposed allocation provides a reasonable way to compensate Class Members based on the
14 amount of time they worked for WCCC and the number of instances they missed a meal break
15 and/or rest break, were not provided compensation in lieu of such missed breaks, or lost hours
16 worked due to the alleged off the clock work. The average award will be approximately \$325.
17 [Donnelly Decl., ¶ 13.]

18 **D. Settlement Administration**

19 Subject to the Court's approval, the Parties have agreed on ILYM Group, Inc. as the
20 Settlement Administrator. ILYM is qualified and has significant experience administering class
21 action settlements, including numerous wage and hour matters, and has agreed to cap its fees and
22 costs at \$3,995. If the Court approves less than the above amount, the difference will remain in
23 the Net Settlement Amount for distribution to the Participating Class Members. [Donnelly Decl.,
24 ¶ 14; Declaration of Kimberly Sutherland, ¶¶ 2-10; Exhs. A-C.]

25 **E. The Class Notice**

26 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
27 this case and explains the basic settlement terms in plain language. It will be disseminated in both
28 English and Spanish. The Notice also sets forth the individualized information used to calculate

1 Class Member Individual Settlement Payments and each Class Member's estimated settlement
2 award. The Notice likewise details the procedures for Class Members to dispute their individual
3 information, the procedure for submitting an objection to the Settlement, and the procedure to
4 request exclusion. In sum, the Notice provides the Class Members with the information
5 necessary to evaluate the Settlement and provides fair opportunity to participate in, opt out of, or
6 object to the proposed Settlement. Coupled with the notice procedure, the proposed Notice
7 provides the Settlement Class with the best notice practicable. [Donnelly Decl., ¶ 15.]

8 **F. Right to Correct Information, Opt Out, or Object**

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

14 **G. Release of Claims**

15 All Participating Class Members will be deemed to release defendant WCCC from all
16 claims alleged in the operative complaint, or that could have been brought based on the facts
17 asserted in the operative complaint, including PAGA claims, from April 8, 2018 to November 4,
18 2023. The release is limited to the claims that were actually pleaded or could have been pleaded
19 based on the alleged facts in the operative complaint. Only Plaintiff Bautista is providing a full
20 general release of claims and waiver of Civil Code section 1542. [Donnelly Decl., ¶ 17.]

21 **H. Attorney's Fees and Costs, and Plaintiff's Enhancement Award**

22 The settlement provides Defendant will not oppose a request for attorney's fees of up to
23 forty percent of the GSA, or \$30,000.00, nor will it oppose a request for reimbursement of
24 litigation costs and expenses of up to \$9,000.00. Defendant also will not oppose a request for an
25 enhancement award to Plaintiff of not more than \$5,000.00 in recognition of his time spent on
26 this matter, the risk he undertook on behalf of the class, and the benefit conferred to the class.
27 The proposed enhancement to Plaintiff is in addition to the \$5,000 allocated to him to settle his
28 individual non-wage and hour claims. Plaintiff's counsel will provide the Court with appropriate

1 summaries and evidence of their efforts and time records in anticipation of the Final Approval
2 Hearing, and Plaintiff has submitted his declaration herewith. If the Court approves less than the
3 above amounts, the difference will be distributed to the Participating Class Members. [Donnelly
4 Decl., ¶ 18.]

5 **I. PAGA and Notice to the LWDA**

6 As noted, the Parties allocated \$2,500 to payment of alleged civil penalties under PAGA.
7 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and the
8 approval hearing to the LWDA via its online portal. [Donnelly Decl., ¶ 19; Exh. 3.]

9 **IV. ARGUMENT**

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

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

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

1 Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring
2 settlement of class actions, courts generally apply a presumption of fairness to class action
3 settlements when (1) the settlement results from arms-length bargaining, (2) investigation and
4 discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is
5 experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
6 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

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

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

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

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

23 In the present matter, conditional certification is proper since this matter satisfies all
24 requirements for class certification under Code of Civil Procedure section 382. First, the class is
25 both sufficiently numerous, consisting of at least 60 individuals, and ascertainable by reference to
26 WCCC's personnel and payroll records. [Donnelly Decl., ¶ 20.]

27 Next, Plaintiff is an adequate class representative, as his claims do not conflict with and
28 are not antagonistic to the claims of other class members. In this regard, the settlement of his

1 individual claims is not an obstacle to his ability to serve as class representative for several
2 reasons. First, his independent claim in no way impacted negotiation of the final class settlement
3 which, as noted, was achieved via negotiations facilitated by a professional neutral and which
4 negotiations took into account Plaintiff's individual claims – in other words, the settlement
5 amount represents a professional neutral's independent evaluation of the value of the case.
6 Second, rather than execute a separate and confidential settlement agreement, the Parties elected
7 to include Plaintiff's individual settlement in the class settlement documents and class notice in
8 order to ensure full disclosure to the Court and the Class Members. Third, Plaintiff is seeking a
9 modest enhancement award in recognition of the fact he is receiving additional monies for his
10 individual non-wage and hour claims. Thus, Plaintiff has in no way “sold out” the class members
11 for his own personal benefit but instead has simply received fair value for his separate claims in
12 addition to securing a positive result for the absent class members. For these reasons, Plaintiff
13 contends he is an adequate class representative. [Donnelly Decl., ¶ 21; Declaration of Jesus
14 Bautista (“Bautista Decl.”), ¶¶ 2-9.] Further, his claims are typical given he is a member of the
15 class and his claims arise from the same employment practices and course of conduct giving rise
16 to the claims of the other class members. [Donnelly Decl., ¶ 22; Bautista Decl., ¶¶ 2-3.] Lastly,
17 his counsel is experienced and adequate class counsel. [Donnelly Decl., ¶¶ 36-40.]

18 Next, common questions of law and fact predominate – particularly for purposes of a
19 settlement class – as the Class Members all were subject to the same meal and rest break policy,
20 and likewise allegedly worked “off the clock.” Since the focus of the claims against WCCC
21 concerns the legality of common policies applied uniformly to the entire class, common issues
22 predominate over individualized inquiries concerning liability. WCCC's meal and rest break
23 policy is company-wide policy applied equally and consistently to all class members, and this
24 policy is either compliant with California law or it is not. Regardless of that determination, it will
25 decide liability for all class members one way or another. The same holds true as to the alleged
26 auto-deduct policy. [Donnelly Decl., ¶ 23.]

27 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
28 violating California law is sufficient to satisfy the requirements for class certification. Jones v.

1 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
2 consistently applied to a group of employees is in violation of the wage and hour laws are of the
3 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
4 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
5 or law that supports commonality for class certification”). Lastly, a class action is superior to
6 other means for the fair and efficient adjudication of this controversy. [Donnelly Decl., ¶ 24.]

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

9 The proposed settlement resulted from serious, arms-length negotiations facilitated by
10 respected mediator Vivian Williamson, Esq., who has extensive experience both litigating and
11 mediating wage and hour class actions. [Donnelly Decl., ¶ 9.] Plaintiff’s counsel J. Kirk
12 Donnelly has years of experience litigating wage and hour class actions. Plaintiff’s counsel is
13 well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the
14 matter. [Donnelly Decl., ¶¶ 36-40.]

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

22 Prior to mediation, the parties engaged in informal discovery to facilitate settlement
23 discussions. As a result, Plaintiff has reviewed documents and information regarding WCCC’s
24 payroll practices, a sampling of pay stubs and time records, meal and rest break policies,
25 employee handbooks, sample arbitration agreements, etc., and information from Defendants
26 regarding class size and breakdown, work weeks, rates of pay, number of putative class members
27 who signed arbitration agreements, and other information used to formulate a damages model.
28 Plaintiff’s counsel is confident they obtained sufficient information to enable them to understand

1 the law and facts of this case and make an informed decision regarding the proposed settlement
2 and whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 8, 25.]

3 Next, the proposed settlement falls within the range of reasonableness warranting
4 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
5 will confer direct monetary benefits on the class members. As described above, each class
6 member will be entitled to a monetary payment without having to file a claim and each payment
7 will be relative to the value of his or her potential claims. Through the information exchanged and
8 analysis undertaken, Plaintiff weighed the risks of continued litigation against the benefits of the
9 proposed settlement and determined settlement to be the most reasonable option.

10 Using that data, Plaintiff ran various calculations under different theories of liability and
11 estimated WCCC's maximum exposure on the class claims at approximately \$752,000, including
12 and \$92,326 on the unpaid wage/off the clock claim, \$585,312 on the meal and rest break claims,
13 \$34,480 on the expense reimbursement claims, \$127,400 on the wage statement claims, and
14 \$107,520 on the waiting time penalty claims. [Donnelly Decl., ¶¶ 26-27.]

15 Plaintiff substantially discounted the value of these claims in light of the multiple and
16 considerable risks posed by proceeding with the litigation. First, Plaintiff and the class/aggrieved
17 employees face the risk of not being able to proceed on a class basis since about half of the class
18 members signed arbitration agreements or severance agreements, or both, and those individuals
19 would be unlikely to be able to participate further in the case. In fact, if only about 30 individuals
20 would be eligible to become class members, this raised the possibility that the Court might find
21 against Plaintiff on the numerosity requirement on class certification. Even if Plaintiff overcame
22 that hurdle, the potential recovery essentially would be cut in half. [Donnelly Decl., ¶ 28.]

23 As far as off the clock work, Plaintiff alleged he and the class members frequently worked
24 several extra minutes at the end of a shift on various duties such as cleaning up a job site,
25 loading/unloading trucks, storing equipment, etc., and that such time was not accounted or paid
26 for by WCCC. WCCC countered by arguing that its timekeeping and payroll policies accurately
27 recorded and paid for all hours worked, and that it frequently paid overtime to Plaintiff and the
28 class members when they worked beyond the end of their scheduled shift. Defendant contends to

1 the extent any off the clock work occurred, it was against company policy and done without
2 company knowledge. Accordingly Defendant argued the issue would not be certifiable since it
3 would require individualized inquiries whether any compensable “off the clock” work occurred
4 and why it was or was not documented and paid for. White v. Starbucks Corp., 497 F.Supp.2d
5 1080, 1083 (N.D. Cal. 2007) (employer must have actual or constructive knowledge of the off the
6 clock work for liability to attach). [Donnelly Decl., ¶ 29.]

7 Plaintiff also contends WCCC fails to provide duty-free meal and rest periods to Class
8 Members by failing to relinquish control over how Class Members utilize their rest period time
9 by instructing Plaintiff and Class Members to monitor their phones and respond to any incoming
10 calls/texts from management. Plaintiff also contends Defendant’s own records show de facto
11 violations where meal periods were not recorded, especially with respect to second meal periods,
12 or started late. [Donnelly Decl., ¶ 30.]

13 Defendant denies Plaintiff’s contentions, claiming it made meal and rest breaks available
14 to Class Members in compliance with California law. Defendant contends its meal and rest break
15 policies are lawful and that Class Members were frequently reminded they were required to take
16 all meal and rest breaks. Defendant also contends that time records demonstrate that Class
17 Members took duty-free, timely meal and rest breaks. Finally, Defendant argues that Plaintiff’s
18 meal and rest break claims are not susceptible to common proof, as the claims would require
19 individualized inquiry, including whether there was an unlawful companywide policy, whether
20 employees had the opportunity to take meal and rest periods, whether they voluntarily chose to
21 forego their meal and rest periods, and whether Defendant ever prevented them from taking meal
22 and rest periods. Accordingly, Defendant contends these claims are vulnerable to a ruling that
23 class treatment is not appropriate. [Donnelly Decl., ¶ 31.]

24 On the expense reimbursement claim, Plaintiff alleges that throughout their employment,
25 he and the class members were required to use their personal cell phones in order to communicate
26 with supervisors and other employees during work hours, and take pictures of their work.
27 However, Defendants did not reimburse Plaintiffs and the class members for this expense.
28 Cochran v. Schwan’s Home Serv., Inc. (2014) 228 Cal.App.4th 113. On the other hand,

1 Defendant argued there would be no conceivable need for employees to use their phones for work
2 and that any use of employee phones was purely for personal convenience and therefore not
3 reimbursable. Plaintiff also contends he used his own vehicle for company business, while
4 Defendant countered that it owns and operates a fleet of vehicles that employees use to perform
5 their duties, and that it employees were prohibited from using their own vehicles to mitigate
6 potential liability among other reasons. [Donnelly Decl., ¶ 32.]

7 Plaintiff also contends Defendant's wage statements failed to include the employee ID
8 number or last four digits of the SSN, as required by Labor Code section 226(a)(7), and therefore
9 violated the Labor Code on their face. Plaintiff also alleged derivatively that, as a result of the
10 above alleged violations, Defendant failed to provide accurate wage statements and failed to
11 timely pay all wages that were due and owing upon separation of employment. Thus, should the
12 primary claims fail, Plaintiff's derivative claims would also fail. Defendant also contends it
13 would not be liable for waiting time penalties because a "good faith dispute" exists over the
14 payment of past wages. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201.
15 Further, Defendant contends Plaintiff would have to prove that Defendant "willfully" failed to
16 pay Class Members appropriate wages due upon separation of employment. Defendant contends
17 that any failure to pay wages upon separation was not willful. [Donnelly Decl., ¶ 33.]

18 As far as potential PAGA liability, the Aggrieved Employees theoretically are entitled to
19 penalties totaling upwards of \$700,000 should Plaintiff prevail on all claims and establish
20 violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶ 34.] As with the class
21 claims, Plaintiff discounted the potential PAGA penalties since the Court possesses wide
22 discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
23 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
24 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re
25 Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557
26 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$2,500 to PAGA penalties,
27 which amount Plaintiff submits is reasonable under the circumstances and in line with
28 comparable settlements in other wage and hour class actions in California. *E.g., Van Kempen v.*

1 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
2 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
3 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS
4 116303 (finding a \$7,500 PAGA payment reasonable when measured against the overall
5 settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total
6 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
7 settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D.
8 Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA
9 penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA,
10 and the LWDA has not objected to the settlement.

11 The settlement obviates the significant risk that this Court may find any kind of class
12 resolution unachievable or might deny certification of all or some of Plaintiff's claims.
13 Furthermore, even if Plaintiffs obtained certification of all or some of the claims, continued
14 litigation would be expensive as the parties pursued merits discovery, a probable motion to
15 decertify, as well as trial and possible appeals, and would substantially delay any recovery by the
16 class with no assurance of recovering significantly more than the proposed settlement. While
17 Plaintiff is confident in the merits of his claims, a legitimate controversy exists as to each cause
18 of action. Plaintiff also recognizes proving the amount of wages and penalties due each Class
19 Member would be an expensive and uncertain proposition. [Donnelly Decl., ¶ 35.]

20 Plaintiff and counsel discounted the value of the class claims consistent with the risks
21 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
22 benefit if the litigation continued, and the difficulties posed by the arbitration agreements,
23 Plaintiff concluded – in light of these very real and substantial risks – settlement on the proposed
24 terms and without prolonged and costly litigation was in the best interests of the class. The
25 overall \$75,000 recovery represents a significant percentage of Defendant's potential exposure
26 and, given the risks addressed above, a total recovery for the class of \$75,000, which will result in
27 average award of some \$325 per class member, is a significant result well within the range of
28 reasonableness considering all potential outcomes, and it will provide direct monetary awards to

1 all Class Members without further delay. [Donnelly Decl., ¶ 36.]

2 Importantly, the mere fact that a settlement does not provide the same recovery as might
3 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
4 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
5 settlement process...even if the relief afforded by the proposed settlement is substantially
6 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
7 settlement because the public interest may indeed be served by a voluntary settlement in which
8 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc., 696 F.3d
9 811, 819 (9th Cir. 2012) (“[T]he question whether a settlement is fundamentally fair . . . is
10 different from the question whether the settlement is perfect in the estimation of the reviewing
11 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
12 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
13 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
14 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
15 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
16 represented 99% discount off the maximum value of the claims). Importantly as well, the
17 proposed settlement is non-reversionary and will provide immediate benefits to the Class
18 Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center,
19 Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
20 [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or
21 cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the
22 settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

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1 **IV. CONCLUSION**

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

5
6 Dated: November 7, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

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8 
9 J. Kirk Donnelly
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