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7 **SUPERIOR COURT OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SANTA CLARA**
9

10 JUAN MANUEL NINO RICO, individually,
11 and on behalf of all others similarly situated
and aggrieved,

12 Plaintiff,

13 vs. F M A LANDSCAPE SERVICES, INC.,
14 a California corporation, MIGUEL A.
MEDINA, an individual, and DOES 1
15 through 20, inclusive,

16 Defendants.
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CASE NO. 23CV409762

Assigned for All Purposes to:
Hon. Theodore C. Zayner
Dept. 19

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

[Filed concurrently with Notice of Motion and
Motion; Declarations of J. Kirk Donnelly, Juan
Manuel Nino Rico, and Michael Moore;
[Proposed] Order

Date: July 24, 2024
Time: 1:30 p.m.
Dept.: 19

1 **I. INTRODUCTION**

2 Plaintiff Juan Manuel Nino Rico hereby moves the Court for an order granting
3 preliminary approval to a proposed non-reversionary class action settlement to resolve wage and
4 hour claims on behalf of approximately 193 individuals employed by Defendants FMA
5 Landscape Services, Inc. and its owner Miguel Medina (together “FMA” or “Defendant”) in as a
6 non-exempt employee during the period of July 16, 2018 through December 31, 2023. The
7 proposed \$360,000 settlement will provide about \$188,000 in cash payments to the settlement
8 class, with an average award of about \$975. The balance of approximately \$172,000 will cover a
9 modest enhancement award to Plaintiff, reasonable attorney’s fees and actual litigation costs,
10 settlement administration costs, and payment of civil penalties to the state. The settlement is the
11 product of Plaintiff’s pre- and post-filing investigation and discovery, an informal pre-mediation
12 exchange of information, and arms-length and adversarial negotiations overseen by experienced
13 and well-regarded mediator the Hon. George Hernandez (Ret.).

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 Juan
20 Manuel Nino Rico as the Class Representative; (5) appointing Phoenix Settlement Administrators
21 as the Settlement Administrator; (6) approving the form of notice to the class and the procedure
22 for providing such notice; and (7) scheduling a final fairness hearing.

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

24 On March 20, 2023, 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 FMA as non-exempt employees in California. Defendant FMA provides commercial
28

1 landscaping services in the San Jose area. Plaintiff Juan Rico worked for FMA as landscaper and
2 crew lead. He was hired in December 2021 and terminated on or about October 2, 2022. His
3 starting rate of pay was \$18/hour, was increased to \$20.00/hour in January 2022, and he was paid
4 weekly. His basic schedule was 6 am to 2:30 pm, Monday through Friday. He claims he was
5 terminated in and around December 2022 when he went on leave to have surgery. [Declaration of
6 J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

7 Plaintiff alleged that FMA failed to pay the class all wages due by paying employees
8 based on their scheduled hours rather than their actual time punches, essentially resulting in
9 substantial time on the clock that went uncompensated. Plaintiff also alleged FMA failed to
10 provide all required meal and rest breaks on a fully compliant basis, primarily by combining
11 employee meal and rest breaks into a single one-hour break. Plaintiff alleges class members never
12 received an extra hour of premium pay in lieu of a missed or non-compliant meal or rest break.
13 [Donnelly Decl., ¶ 5.]

14 Based on these allegations, Plaintiff’s class action complaint asserted claims for damages
15 for: (1) failure to pay all wages due, (2) failure to provide all required meal and rest breaks or
16 compensation in lieu thereof; (3) failure to provide accurate, itemized wage statements; (4) failure
17 to pay all wages due upon termination of employment; (5) unfair competition, and (6) violation of
18 PAGA. [Donnelly Decl., ¶ 6.]

19 FMA has at all times denied Plaintiff’s allegations and maintained its meal and rest break
20 and payroll policies and procedures comply with California law, and that it provided the class
21 members with required meal and rest breaks. FMA also argued it accurately tracked and paid for
22 all hours worked by its employees, including overtime hours. Additionally, FMA strongly
23 contends the case cannot be maintained as any kind of class or representative action, arguing that
24 to the extent class members missed meal and/or rest breaks, that such breaks were non-compliant,
25 it would have been intermittent and infrequent and evidence of such missed breaks or off the
26 clock work would be purely anecdotal, and therefore individualized issues would predominate
27 and trial would be unmanageable. [Donnelly Decl., ¶ 7.]

28 After Plaintiff filed his complaint, the Parties met and conferred on discovery, potential

1 law and motion, and other case management issues, and ultimately agreed to attempt early
2 mediation. The Parties then engaged in extensive informal discovery to facilitate an exchange of
3 information necessary to engage in a meaningful mediation. Consequently, Plaintiff's counsel
4 reviewed payroll records, personnel policies/handbooks, meal and rest break policies, personnel
5 files, and a random sampling paystubs and time records produced by FMA for about 25% of the
6 putative class. Defendant also provided documents reflecting its wage and hour policies and
7 practices during the class period, and data regarding the total number of current and former
8 employees, the estimated total amount of workweeks and pay periods they worked, and average
9 hourly pay rates, among other relevant data. [Donnelly Decl., ¶ 8.]

10 The Parties then engaged the Hon. George Hernandez (Ret.), a highly respected mediator
11 with extensive wage and hour class action experience and, on October 30, 2023, participated in a
12 full day mediation with Judge Hernandez. Throughout the day, the arms-length negotiations were
13 hard-fought and adversarial as the Parties exchanged extensive information on their legal and
14 factual positions, and made numerous offers and counter-offers. By the end of the day the Parties
15 were able to reach agreement on all major issues. Thereafter, the Parties reduced their tentative
16 agreement to the Settlement Agreement now before the Court for approval. [Donnelly Decl., ¶ 9.]

17 **III. THE PROPOSED SETTLEMENT TERMS**

18 Under the settlement, FMA will pay \$360,000.00 into a common fund, the Gross
19 Settlement Amount, in three installments over approximately 300 days following final approval.
20 Reasonable attorney's fees of up to 1/3 of the GSA, or \$120,000.00, litigation costs of up to
21 \$10,000, an enhancement award of up to \$10,000 to Plaintiff, settlement administration costs of
22 no more than \$12,000, and \$20,000 for PAGA civil penalties,¹ all will be paid from the Gross
23 Settlement Amount. The remainder of approximately \$188,000 will be allocated pro rata among
24 the Participating Class Members based on the weeks worked during the Class Period. No portion
25 of the Class Settlement Amount will revert to FMA. [Donnelly Decl., ¶ 10.]

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27 ¹ Per PAGA, the \$15,000 of this amount will go to the Labor & Workforce Development Agency as the
28 State's share of the civil penalties, and the remaining \$5,000 will be distributed pro rata to the Aggrieved
Employees

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

2 The settlement provides for conditional certification of a class including all individuals
3 who worked for FMA as a non-exempt employee during the period of July 16, 2018 through
4 December 31, 2023. The class consists of about 193 individuals. [Donnelly Decl., ¶ 11.]

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

6 As noted, Plaintiff estimates at least \$188,000 from the Gross Settlement Amount will be
7 distributed to the Participating Class Members. This is a cash settlement that does not require
8 Participating Class Members to submit a claim form to receive their settlement share.
9 Participating Class Members will receive their settlement checks automatically via First Class
10 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining
11 eighty percent will be allocated to expenses, penalties and interest, which allocation is consistent
12 with FMA's potential liability as discussed below. FMA will pay all applicable employer-side
13 payroll taxes separately from the GSA. Subject to the Court's approval, any amounts not claimed
14 (because a class member does not cash his or her settlement check) will be forwarded to the
15 California State Controller's Unclaimed Property Fund. [Donnelly Decl., ¶ 12.]

16 Each Participating Class Member will receive a pro rata share of the Net Settlement
17 Amount based on their total weeks worked for FMA as a non-exempt employee during the Class
18 Period. Thus, each Individual Settlement Payment will be calculated using formulaic criteria
19 equally applied to all Class Members in order to proportionately compensate them for the actual
20 value of their claims relative to fellow class members. Similarly, each Class Member's
21 Individual Settlement Payment will be calculated using criteria that would typically be used in
22 determining appropriate amounts of unpaid wages and damages in wage and hour litigation under
23 applicable law. These methods are intended to ensure each Class Member receives a portion of
24 the available settlement funds corresponding to the relative value of his or her potential claims.
25 The proposed allocation provides the most reasonable way to compensate Class Members based
26 on the amount of time they worked for FMA and the number of instances they were not
27 compensated properly or may have been denied required breaks. The average award will be
28 approximately \$975. [Donnelly Decl., ¶ 13.]

1 **D. Settlement Administration**

2 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
3 Administrators as the Settlement Administrator. Phoenix is qualified and has significant
4 experience administering class action settlements, including numerous wage and hour matters,
5 and has agreed to cap its fees and costs at \$12,000. If the Court approves less than the above
6 amount, the difference will remain in the Net Settlement Amount for distribution to the
7 Participating Class Members. [Donnelly Decl., ¶ 14; Declaration of Michael Moore, ¶¶ 2-17;
8 Exhs. A-B.]

9 **E. The Class Notice**

10 The proposed Notice (Exhibit A to the Settlement Agreement) sets out information about
11 this case and explains the basic settlement terms in plain language. It will be disseminated in both
12 English and Spanish. The Notice also sets forth the individualized information used to calculate
13 Class Member Individual Settlement Payments and each Class Member's estimated settlement
14 award. The Notice likewise details the procedures for Class Members to dispute their individual
15 information, the procedure for submitting an objection to the Settlement, and the procedure to
16 request exclusion. In sum, the Notice provides the Class Members with the information
17 necessary to evaluate the Settlement and provides fair opportunity to participate in, opt out of, or
18 object to the proposed Settlement. Coupled with the notice procedure, the proposed Notice
19 provides the Settlement Class with the best notice practicable. [Donnelly Decl., ¶ 15.]

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

21 Class Members will have 60 days to dispute the information in their Notice used to
22 calculate their settlement award, and also have 60 days to submit any objections to the settlement
23 or to request exclusion. In the event a Class Member disputes their individual information, the
24 Settlement Administrator will review the Class Member's records as well as any additional
25 information submitted, and make a final determination. [Donnelly Decl., ¶ 16.]

26 **G. Release of Claims**

27 All Participating Class Members will be deemed to release defendant FMA from all
28 claims alleged in the operative complaint, or that could have been brought based on the facts

1 asserted in the operative complaint, including PAGA claims, from July 16, 2018 through
2 December 31, 2023. The release is limited to the claims that were actually pleaded or could have
3 been pleaded based on the alleged facts in the complaint. Only Plaintiff Rico is providing a full
4 general release of claims and waiver of Civil Code section 1542. [Donnelly Decl., ¶ 17.]

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

6 The settlement provides Defendant will not oppose a request for attorney's fees of up to
7 1/3 of the GSA, or \$120,000.00, nor will it oppose a request for reimbursement of litigation costs
8 and expenses of up to \$10,000.00. Defendant also will not oppose a request for an enhancement
9 award to Plaintiff of not more than \$10,000.00 in recognition of his time spent on this matter, the
10 risk he undertook on behalf of the class, and the benefit conferred to the class. Plaintiff's counsel
11 will provide the Court with appropriate summaries and evidence of their efforts and time records
12 in anticipation of the Final Approval Hearing, and Plaintiff has submitted his declaration
13 herewith. If the Court approves less than the above amounts, the difference will be distributed to
14 the Participating Class Members. [Donnelly Decl., ¶ 18.]

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

16 As noted, the Parties allocated \$20,000 to payment of alleged civil penalties under PAGA.
17 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and the
18 approval hearing to the LWDA via its online portal. [Donnelly Decl., ¶ 19; Exh. 3.]

19 **IV. ARGUMENT**

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

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

1 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
2 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
3 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

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

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

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

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

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

27 The purpose of conditional class certification for purposes of settlement is to facilitate
28 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness

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

5 In the present matter, conditional certification is proper since this matter satisfies all
6 requirements for class certification under Code of Civil Procedure section 382. First, the class is
7 both sufficiently numerous, consisting of at least 193 individuals, and ascertainable by reference
8 to FMA’s personnel and payroll records. [Donnelly Decl., ¶ 20.]

9 Next, Plaintiff is an adequate class representative, as his claims do not conflict with and
10 are not antagonistic to the claims of other class members. For these reasons, Plaintiff contends he
11 is an adequate class representative. [Donnelly Decl., ¶ 21; Declaration of Juan Manuel Nino Rico
12 (“Rico Decl.”), ¶¶ 2-9.] Further, his claims are typical given he is a member of the class and his
13 claims arise from the same employment practices and course of conduct giving rise to the claims
14 of the other class members. [Donnelly Decl., ¶ 21; Rico Decl., ¶¶ 2-3.] Lastly, his counsel is
15 experienced and adequate class counsel. [Donnelly Decl., ¶¶ 34-37.]

16 Next, common questions of law and fact predominate – particularly for purposes of a
17 settlement class – as the Class Members all were subject to the same time keeping policies that
18 allegedly shorted them on hours worked and compensation, and subject to the same meal and rest
19 break policies. Since the focus of the claims against FMA concerns the legality of common
20 policies applied uniformly to the entire class, common issues predominate over individualized
21 inquiries concerning liability. For instance, FMA’s alleged policy of not counting hours worked
22 after the scheduled end of a shift is company-wide policy applied equally and consistently to all
23 class members, and this policy is either compliant with California law or it is not. Regardless of
24 that determination, it will decide liability for the class one way or another. Similarly, whether
25 FMA improperly combined meal and rest periods into one long break presents yet another
26 common question. [Donnelly Decl., ¶ 22.]

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., ¶ 23.]

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 the Hon. George Hernandez (Ret.), who has extensive experience mediating
11 wage and hour class actions. [Donnelly Decl., ¶ 9.] Plaintiff’s counsel J. Kirk Donnelly has years
12 of experience litigating wage and hour class actions. Plaintiff’s counsel is well-qualified to
13 evaluate the risks and benefits of pursuing further litigation or settling the matter. [Donnelly
14 Decl., ¶¶ 34-37.]

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 FMA’s
24 payroll practices, a sampling of pay stubs and time records, meal and rest break policies,
25 employee handbooks, etc., and information from Defendant regarding class size and breakdown,
26 work weeks, rates of pay, and other information used to formulate a damages model. Plaintiff’s
27 counsel is confident they obtained sufficient information to enable them to understand the law
28 and facts of this case and make an informed decision regarding the proposed settlement and

1 whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 8, 24.]

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

9 Using that data, Plaintiff ran various calculations under different theories of liability and
10 estimated FMA's maximum exposure on the class claims at approximately \$2,344,175, including
11 about \$185,775 on the unpaid wage claim, \$1,238,500 on the meal and rest break claims,
12 \$278,100 on the wage statement claim, and \$234,000 on the waiting time penalty claim.
13 [Donnelly Decl., ¶¶ 25-26.] Plaintiff substantially discounted the value of these claims,
14 however, in light of the multiple and considerable risks posed by proceeding with the litigation.

15 First, on the unpaid wage claims, Plaintiff alleged that his review of the time and pay
16 records produced indicated FMA essentially paid the class members a weekly "salary" based on
17 40 hours per week. Per Plaintiff, the pay records show employees were paid for 40 hours per
18 week almost without fail even though the corresponding time punches, which tracked time to the
19 exact minute, show they frequently worked more than 8 hours per shift and more than 40 hours
20 per week. Plaintiff's review of the sampling of time records suggests approximately 65% of
21 shifts are for more than 8 hours, and accordingly Plaintiff contends FMA shorted the class
22 members on hours worked and compensation almost 2/3 of the time. Under the California
23 Supreme Court's decision in Troester v. Starbucks Corporation (2018) 5 Cal.5th 829, FMA
24 violated minimum wage and overtime laws each shift it failed to compensate employees for all
25 hours worked, even when the lost time is nominal. "[A]n employer that requires its employees to
26 work minutes off the clock on a regular basis or as a regular feature of the job may not evade the
27 obligation to compensate the employee for that time by invoking the de minimis doctrine. A few
28 extra minutes of work each day can add up." In response, FMA contended it accurately tracked

1 and paid for all employee hours worked, and noted its payroll records demonstrated that it
2 frequently paid overtime when employees worked over 8 hours per shift or over 40 hours per
3 week. [Donnelly Decl., ¶ 27.]

4 Plaintiff also contended Defendant's written meal and rest break policy was at best
5 partially compliant, and did not explain meal and rest breaks must be for a net 30 minutes/10
6 minutes without interruption, nor does it contain the required "major fraction thereof" language
7 required for rest periods. Also, while it provides employees shall do no work while on a meal
8 period, it does not specify that employees are completely free from all employer control during a
9 meal break (or a rest break for that matter. As a practical matter, however, Plaintiff contended
10 multiple de facto violations. First, the review of FMA's time records suggests it did not track the
11 clock out/in times for meal periods but instead had an "auto deduct" policy where 30 minutes was
12 deducted each shift for a meal period regardless of whether the meal period occurred or not.
13 Under California law, "[i]f time records show missed, short, or delayed meal periods with no
14 indication of proper compensation, then a rebuttable presumption [of meal period violations]
15 arises" against the employer, including at the summary judgment stage. Donohue v. AMN Servs.
16 LLC (2021) 11 Cal.5th 58, 77. Nevertheless, while it appears Plaintiff and the class members
17 generally received their meal periods, Plaintiff also contends FMA's combined the meal period
18 with the required paid rest breaks and he and the class members received a single, one-hour break
19 at the approximate mid-point of each shift, which practice violates California law. He also
20 contends the company placed limits on how employees used their meal periods, and specifically
21 that employees were not permitted to lie down and rest or take a nap. [Donnelly Decl., ¶ 28.]

22 Defendant denies Plaintiff's contentions, claiming it made meal and rest breaks available
23 to Class Members in compliance with California law. Defendant contends its meal and rest break
24 policies are lawful and that Class Members were frequently reminded they were required to take
25 all meal and rest breaks, and that they in fact took all required breaks. Finally, Defendant argues
26 that Plaintiff's meal and rest break claims are not susceptible to common proof, as the claims
27 would require individualized inquiry, including whether there was an unlawful companywide
28 policy, whether employees had the opportunity to take meal and rest periods, whether they

1 voluntarily chose to forego their meal and rest periods, and whether Defendant ever prevented
2 them from taking meal and rest periods. Accordingly, Defendant contends these claims are
3 vulnerable to a ruling that class treatment is not appropriate. [Donnelly Decl., ¶ 29.]

4 Plaintiff also alleged derivatively that, as a result of the above alleged violations,
5 Defendant failed to provide accurate wage statements and failed to timely pay all wages that were
6 due and owing upon separation of employment. Thus, should the primary claims fail, Plaintiff's
7 derivative claims would also fail. Defendant also contends it would not be liable for waiting time
8 penalties because a "good faith dispute" exists over the payment of past wages. Amaral v. Cintas
9 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiff would
10 have to prove that Defendant "willfully" failed to pay Class Members appropriate wages due
11 upon separation of employment. Defendant contends that any failure to pay wages upon
12 separation was not willful. [Donnelly Decl., ¶ 30.]

13 As far as potential PAGA liability, the Aggrieved Employees theoretically are entitled to
14 penalties totaling upwards of \$1,500,000 should Plaintiff prevail on all claims and establish
15 violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶ 31.] As with the class
16 claims, Plaintiff discounted the potential PAGA penalties since the Court possesses wide
17 discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
18 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
19 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re
20 Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557
21 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$20,000 to PAGA
22 penalties, which amount Plaintiff submits is reasonable under the circumstances and in line with
23 comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v.
24 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
25 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
26 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS
27 116303 (finding a \$7,500 PAGA payment reasonable when measured against the overall
28 settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total

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

6 The settlement obviates the significant risk that this Court may find any kind of class
7 resolution unachievable or might deny certification of all or some of Plaintiff's claims.
8 Furthermore, even if Plaintiffs obtained certification of all or some of the claims, continued
9 litigation would be expensive as the parties pursued merits discovery, a probable motion to
10 decertify, as well as trial and possible appeals, and would substantially delay any recovery by the
11 class with no assurance of recovering significantly more than the proposed settlement. Further, in
12 support of its position that installment payments are appropriate, Defendant provided Plaintiff
13 with financial documentation such as tax returns, balance sheets, and P&L statements, which
14 Plaintiff then had reviewed by an accounting expert. Based on that review, the Parties agreed
15 installments are appropriate to ensure the settlement does not impact the business's cash flow
16 such that it would jeopardize ongoing operations and its ability to meet payroll obligations to
17 current employees. Overall, while Plaintiff is confident in the merits of his claims, a legitimate
18 controversy exists as to each cause of action. Plaintiff also recognizes proving the amount of
19 wages and penalties due each Class Member would be an expensive and uncertain proposition.
20 [Donnelly Decl., ¶ 32.]

21 Plaintiff and counsel discounted the value of the class claims consistent with the risks
22 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
23 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and
24 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
25 was in the best interests of the class. The overall \$360,000 recovery represents a significant
26 percentage of Defendant's potential exposure and, given the risks addressed above, a total
27 recovery for the class of \$360,000, which will result in average award of some \$975 per class
28 member, is a significant result well within the range of reasonableness considering all potential

1 outcomes, and it will provide direct monetary awards to all Class Members without further delay.
2 [Donnelly Decl., ¶ 33.]

3 Importantly, the mere fact that a settlement does not provide the same recovery as might
4 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
5 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
6 settlement process...even if the relief afforded by the proposed settlement is substantially
7 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
8 settlement because the public interest may indeed be served by a voluntary settlement in which
9 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc., 696 F.3d
10 811, 819 (9th Cir. 2012) (“[T]he question whether a settlement is fundamentally fair . . . is
11 different from the question whether the settlement is perfect in the estimation of the reviewing
12 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
13 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential
14 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
15 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803
16 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it
17 represented 99% discount off the maximum value of the claims). Importantly as well, the
18 proposed settlement is non-reversionary and will provide immediate benefits to the Class
19 Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center,
20 Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
21 [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or
22 cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the
23 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 Dated: March 6, 2024

LAW OFFICES OF J. KIRK DONNELLY, APC

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