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

11
12 JOSE LUIS VELASQUEZ, on behalf of all
13 others similarly aggrieved,

14 **PLAINTIFFS,**

15 vs. WATER DAMAGE RESCUE, INC., a
California corporation, ORI LAZAROVITS,
16 an individual, and DOES 1 through 10,
inclusive,

17 **Defendants.**
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23

CASE NO. 21STCV46033

Assigned for All Purposes to:
Hon. Holly J. Fujie
Dept. 56

**MEMORANDUM OF POINTS AND
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, Shani
O. Zakay, Jean-Claude Lapuyade, Jose Luis
Velasquez, Marvin Glenn Holloway, and Sean
Hartranft; [Proposed] Order]

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Federal Rules of Civil Procedure Rule 23 16

1 **I. INTRODUCTION**

2 Plaintiffs Jose Luis Velasquez and Marvin Glenn Holloway hereby move the Court for an
3 order granting preliminary approval to a proposed non-reversionary class action settlement to
4 resolve wage and hour claims on behalf of approximately 317 individuals employed by Defendant
5 Water Damage Rescue, Inc. (“WDR” or “Defendant”) as non-exempt employees during the
6 period of December 17, 2017 and July 17, 2023. The proposed \$640,000 settlement will provide
7 at least \$341,667 in cash payments to the settlement class, with an average award of about
8 \$1,078. The balance of approximately \$298,333 will cover modest enhancement awards to the
9 named Plaintiffs, 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 Plaintiffs’ pre-
11 and post-filing investigation, extensive formal and informal discovery, and arms-length and
12 adversarial negotiations overseen by experienced mediator Steve Serratore, Esq.

13 As demonstrated below, the settlement is within the “range of reasonableness” for
14 preliminary approval, and is fair, reasonable and adequate. Plaintiffs’ counsel believe the
15 settlement is a significant result for the class given the substantial risks inherent in this matter.
16 Accordingly, Plaintiffs request the Court enter an order: (1) granting preliminary approval to the
17 proposed class action settlement; (2) conditionally certifying the settlement class as defined
18 below; (3) appointing the Law Offices of J. Kirk Donnelly, APC, Zakay Law Group, APLC, and
19 JCL Law Firm, APC as Class Counsel; (4) appointing plaintiffs Jose Luis Velasquez and Marvin
20 Glenn Holloway as the Class Representatives; (5) appointing Apex Class Action LLC as the
21 Settlement Administrator; (6) approving the form of notice to the class and the procedure for
22 providing such notice; and (7) scheduling a final fairness hearing.

23 **II. BACKGROUND/LITIGATION HISTORY**

24 Defendant Water Damage Rescue Inc. is an emergency service restoration company with
25 branches in Canoga Park, La Jolla and San Jose, California. Ori Lazarovits is its CEO and owner.
26 Plaintiff Holloway was employed by Defendant as a non-exempt Water Mitigation Lead
27 Technician from July 2021 through October 2021, was paid on an hourly basis, and received non-
28 discretionary compensation. His primary job duties were to travel to commercial and residential

1 buildings to perform water, fire, smoke, mold, and contents mitigation and remediation services.
2 Plaintiff Velasquez worked for Defendant from approximately November 2020 to September
3 2021 performing similar mitigation and remediation services. (Declaration of J. Kirk Donnelly
4 (“Donnelly Decl.”), ¶ 12.)

5 On October 8, 2021, Plaintiff Velasquez served the Labor & Workforce Development
6 Agency (“LWDA”) and WDR with a PAGA notice. He then filed a PAGA-only complaint
7 against Defendant in Los Angeles County Superior Court. On March 4, 2022, Plaintiff Holloway
8 similarly served the LWDA and WDR with a PAGA Notice,¹ and later filed a PAGA and class
9 action complaint against WDR on May 10, 2022 in Sacramento County Superior Court. Both
10 complaints allege WDR violated California’s wage and hour laws by failing to pay minimum
11 wages, failing to pay overtime wages, failing to provide required meal periods and rest periods,
12 failing to provide accurate itemized wage statements, failing to pay wages on separation of
13 employment, and failing to reimburse required business expenses. (Donnelly Decl., ¶ 13; Exh. 4;
14 Declaration of Shani O. Zakay (“Zakay Decl.”), ¶ 3; Exch. A.)

15 On May 17, 2023, the Parties participated in a global mediation with Steve Serratore,
16 Esq., a respected wage and hour class action mediator. The mediation lasted a full day and with
17 the mediator’s assistance, and following a mediator’s proposal, the Parties reached agreement on
18 all major issues. They then reduced the proposed settlement to the Class Action and PAGA
19 Settlement Agreement (“Agreement”) now before the Court for approval. The Agreement was
20 uploaded to the LWDA. (Donnelly Decl., ¶ 14; Exh. 1.)

21 Finally, In order to fully effectuate the proposed settlement on a global basis, the Parties
22 stipulated to the filing of a First Amended Complaint in this matter that added Holloway as a
23 party-plaintiff and also added the class claims alleged in the Holloway Action. Plaintiff
24 Velasquez filed the FAC on June 16, 2023, and the FAC is the operative pleading for purposes of
25 this settlement. (Donnelly Decl., ¶ 14.)

26
27 ¹ Neither Plaintiff received notice from the LWDA that it intended to investigate the alleged violations
28 outlined in their respective PAGA letters and accordingly exhausted the required administrative remedies.
(Donnelly Decl., ¶ 13.)

1 **III. INVESTIGATION**

2 After filing his complaint, Plaintiff Velasquez initiated written discovery. Shortly
3 thereafter Plaintiff Holloway filed his complaint, and all Parties engaged in several meet and
4 confer discussions regarding discovery, potential law and motion, and other case management
5 issues, and ultimately agreed to attempt a global mediation. The Parties also agreed to undertake
6 additional and substantial informal discovery to facilitate an exchange of information necessary to
7 engage in a meaningful mediation. (Donnelly Decl., ¶ 15.)

8 Prior to the mediation Defendant provided Plaintiffs with extensive informal discovery,
9 including Plaintiffs' respective personnel, time, and payroll records, time and payroll records for
10 a randomly selected sampling of about 30% of the Class Members, wage statement exemplars,
11 Defendant's employee handbooks, including Defendant's policies and procedures regarding the
12 payment of wages, meal and rest breaks, timekeeping policies (including recording hours),
13 expense reimbursement, and information regarding the number of putative Class Members who
14 are current and former employees, the number of Aggrieved Employees, the number of
15 workweeks throughout the Class Period, and the number of pay periods throughout the PAGA
16 Period. From this information, Plaintiffs analyzed Defendant's potential liability for the claims
17 asserted in this case and, with the assistance of consulting experts from Berger Consulting Group,
18 the potential exposure and damages. (Donnelly Decl., ¶ 16.)

19 Based on this formal and informal discovery, Plaintiffs contend the Class Members were
20 not paid all minimum and overtime wages, not provided with legally compliant meal and rest
21 periods, did not receive reimbursement for certain business expenses, did not receive compliant
22 wage statements, and did not receive all wages due on separation of employment. In considering
23 the reasonableness of the proposed settlement, Plaintiffs considered each of Defendant's
24 counterarguments, which sharply contested Plaintiffs' claims. Plaintiffs' Counsel weighed the
25 strength of Defendant's arguments, including the risks of prevailing at class certification and on
26 the merits, and determined that the proposed settlement is in the best interests of the Class.
27 Although remaining confident in the strength of their claims, all these factors led Plaintiffs to
28 discount the exposure analysis, discussed in detail below. (Donnelly Decl., ¶ 17.)

1 **IV. TERMS OF THE PROPOSED SETTLEMENT**

2 **A. Deductions from the Settlement**

3 The Parties have agreed (subject to the Court’s approval) that this action be settled and
4 compromised for the non-reversionary amount of \$640,000.00 (“Gross Settlement Amount” or
5 “GSA”) (Agreement, § 3.1.), which includes: (a) attorney’s fees of up to \$213,333.33 (one-third
6 of the GSA)² to compensate Class Counsel for work already performed and all work remaining to
7 be performed (Agreement, § 3.2.2.); (b) actual litigation expenses as documented and not to
8 exceed \$25,000.00³ (Agreement, § 3.2.2.); (c) Enhancement Awards to Plaintiffs in an amount
9 not to exceed \$10,000.00 each (Agreement, § 3.2.1.); (d) Administration Costs to Apex Class
10 Action LLC (the proposed settlement administrator) in an amount not to exceed \$10,000.00
11 (Agreement, § 3.2.3.); and (e) PAGA penalties of \$30,000, of which 75% (\$22,500) will go the
12 LWDA and the remaining 25% (\$7,500.00) will be distributed pro rata to the Aggrieved
13 Employees⁴ (Agreement, § 3.2.5.). Defendant will pay all employer-side payroll taxes separate
14 and apart from the GSA. (Agreement, § 3.1.)

15 **B. Calculation of the Individual Settlement Payments to Class and PAGA**
16 **Members**

17 After all Court-approved deductions from the GSA, it is estimated that about \$341,667
18 (“Net Settlement Amount” or “NSA”) will be distributed to the estimated 317 Class Members,
19 with an average individual settlement amount of around \$1,078.⁵ Additionally, it is estimated that
20 the 25% PAGA Payment (\$7,500.00) will be distributed to the estimated 101 Aggrieved
21 Employees, resulting in an average payment of \$74 per Aggrieved Employee.⁶ (Donnelly Decl., ¶
22

23 _____
24 ² The percentage method, with or without a lodestar cross-check, may be used in common fund cases like
25 this one. *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503. In support of their fee request at Final
26 Approval, Class Counsel will provide the Court with lodestar information to permit the Court to do a
27 lodestar cross-check in connection with Class Counsel’s request for attorney’s fees.

28 ³ At Final Approval, Class Counsel will provide documentation regarding actual expenses incurred to
support Class Counsel’s request for reimbursement of actual expenses.

⁴ Defined as all current and former non-exempt California employees who worked for Defendants at any
time during the period between October 13, 2020 and July 17, 2023. (Agreement, § 1.5.)

⁵ \$341,667 NSA/317 Class Members

⁶ \$7,500 (25% PAGA Payment) /101 PAGA Members

18.) Under no circumstances will any portion of the Settlement revert to Defendant. (Agreement, § 3.1.)

Subject to the terms and conditions of the Settlement, Apex will calculate and issue Individual Class Payments to Participating Class Members by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (Agreement, § 3.2.4.) Additionally, Apex will calculate and issue payments to PAGA Members based (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$7,500) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. (Agreement, § 3.2.5.1.)

Each Class Member's settlement share will be apportioned as follows: twenty percent (20%) wages and eighty percent to expense reimbursement, penalties and interest. (Agreement, § 3.2.4.1.) Apex will issue Form W-2s for amounts deemed "wages" and Form 1099s for the portions allocated to expenses, penalties and interest. (Agreement, §§ 3.2.4.1. and 3.2.5.2.)

C. Uncashed Funds to Unclaimed Property Fund

Settlement checks must be cashed or deposited within 180 days after the checks are mailed to the Participating Class Members and Aggrieved Employees. (Agreement, § 4.4.1.) In the event a settlement check remains uncashed, the unclaimed funds will go to the State Controller's Unclaimed Property Fund in the name of the Participating Class Member and/or Aggrieved Employee. (Agreement, § 4.4.3.) Because this lawsuit benefits Class Members/Aggrieved Employees who are releasing claims by participating in the lawsuit, the funds representing their settlement payments should remain their property. By sending the uncashed funds to the Unclaimed Property Fund, they can reclaim their property at a future date convenient to the Class Member. There will be no unpaid residue or unclaimed or abandoned Class Member funds under California Code of Civil Procedure section 384(a).

D. Notice and Extended Response Deadline for Re-Mailed Notices

Within 20 calendar days after entry of the Preliminary Approval Order, Defendant will

1 provide Apex with the Class Data, which Apex will maintain as private and confidential.
2 (Agreement, § 4.2.) Prior to mailing, Apex will search for updated addresses in the National
3 Change of Address Database. (Agreement, § 7.4.2.) Apex will use the NCOA and skip traces to
4 attempt to find current addresses for any Notice returned as undeliverable. If Apex is unable to
5 obtain a better address for a Class Member, the Notice will be deemed undeliverable.
6 (Agreement, § 7.4.3.) Within 10 business days after receipt of the Class Data, Apex will mail a
7 Notice to all Class Members via regular First-Class mail. (Agreement, § 7.4.2.)

8 **E. Responses to the Settlement and Deadline Thereon**

9 Class Members will have forty-five days from the initial mailing of the Notice to respond
10 to the settlement by submitting a challenge to the number of weeks or pay periods attributed to
11 them, submitting an objection, or requesting exclusion. (Agreement, §§ 7.5-7.)

12 Class Members can object to the settlement in writing via mail or fax by submitting a
13 document with their name, the words “Notice of Objection” or “Formal Objection” and a
14 description of the arguments supporting their objection. Class Members are informed that the
15 Court will hear any objections from any Class Member who attends the Final Approval Hearing.
16 (Agreement, § 7.7.) Class Members can also submit a written request for exclusion from the
17 settlement by mailing or faxing a written request, including his or her name, address, and phone
18 number, and a statement demonstrating his or her intent to opt out of the settlement. (Agreement,
19 § 7.5.) The Notice also informs the Class Member/Aggrieved Employees that they can dispute
20 the number of weeks/pay periods allotted to them to calculate their settlement payments by
21 contacting Apex before the Response Deadline and including any documentation supporting the
22 dispute. Apex will investigate the dispute, request additional information from Defendant, and
23 make a final decision as to the number of eligible work weeks/pay periods. (Agreement, § 7.6.)

24 **F. Funding and Distribution of the Settlement**

25 Defendant shall fund the settlement in two equal installments, the first within thirty days
26 of Final Approval, and the second installment within 120 days of Final Approval. (Agreement, §
27 4.3.). Apex shall make two pro rata disbursements, one after receipt of each installment payment,
28 within 10 calendar days of receipt. (Agreement, § 4.4.)

1 **G. Release of Claims**

2 Upon final approval, Participating Class Members shall forever release the Released
3 Parties⁷ for the Released Claims for the Class Period, including all claims pleaded in the
4 Operative Complaint, and which could reasonably have been alleged, based on the Class Period
5 facts, allegations, and/or claims stated in the Operative Complaint, for work performed during the
6 Class Period, and as specifically detailed in Section 5.2. of the Agreement. Additionally, the
7 Aggrieved Employees will the Released Parties from all claims for PAGA penalties that were
8 alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the
9 Operative Complaint, and PAGA Notice, and as detailed in Section 5.3 of the Agreement.

10 Plaintiffs and their counsel are convinced that the proposed settlement is in the Class
11 Members' best interests based on the negotiations and a detailed knowledge of the issues present
12 in this action. The length and risks of continued litigation and trial, Defendant's affirmative
13 defenses, the uncertainty of class certification, the difficulties of complex litigation, the lengthy
14 process of establishing specific damages, and possible delays and appeals, all were carefully
15 considered in arriving at the proposed settlement. (Donnelly Decl., ¶ 31.)

16 **H. The Class Representative Service Awards Are Justified Given the Risks and**
17 **Should be Preliminarily Approved**

18 The Agreement provides for a service payment not to exceed \$10,000.00 to each Plaintiff.
19 (Agreement, § 3.2.1.) Courts routinely approve service payments, or incentive awards, to
20 compensate named plaintiffs for the services they provide and the risks they incur during class
21 litigation. *In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393 ("These
22 awards are discretionary . . . and are intended to compensate class representatives for work done
23 on behalf of the class, to make up for financial or reputational risk undertaken in bringing the
24 action, and, sometimes, to recognize their willingness to act as a private attorney general."); *Bell*
25 *v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class
26 representatives).

27 ⁷ "Released Parties" means Defendants and each of their former and present directors, officers, partners,
28 shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries,
affiliates and parents. (Agreement, § 1.43.)

1 The requested service awards are reasonable in light of the benefits Plaintiffs conferred
2 upon the entire Class, resulting in a benefit to all Class Members and the State of California, the
3 time spent assisting counsel with the investigation and prosecution of these claims, commitment
4 to responding to discovery, and consenting to the proposed Agreement. Furthermore, by attaching
5 their names to a lawsuit, Plaintiffs also took on the reputational risk that future employers would
6 learn of their participation in this case and unfairly associate them with costly litigation, costing
7 them future employment opportunities. Any future employer could easily perform a simple
8 Google search – an unauthorized simple background check unknown to Plaintiffs that can still
9 provide a plethora of information – and conclude Plaintiffs are not worth the risk of hiring. This
10 kind of reputational risk, borne only by Plaintiffs and no other Class Member, that an incentive
11 award is meant to compensate. Furthermore, in pursuing this action on behalf of the Class,
12 Plaintiffs risked a judgment for attorney’s fees and costs in the event this matter had been lost.
13 For these reasons, at final approval, Plaintiffs will request enhancement payment not exceed
14 \$10,000 each. (Donnelly Decl., ¶ 32; Declaration of Jose Luis Velasquez, ¶¶ 2-9; Declaration of
15 Marvin Glen Holloway, ¶¶ 2-9.)

16 **V. ARGUMENT**

17 In deciding whether to approve a proposed class action settlement under Code of Civil
18 Procedure section 382, the Court must find that a proposed settlement is “fair, adequate and
19 reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [quoting *Officers for*
20 *Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625, cert. den. (1983) 459 U.S.
21 1217]. A proposed class action settlement is **presumed** fair under the following circumstances:
22 (1) the parties reached settlement after arms-length negotiations; (2) investigation and discovery
23 were sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
24 similar litigation; and (4) the percentage of objectors is small. *Id.* at 1802. As the following
25 shows, all of these elements are present here and the Court should grant of preliminary approval.

26 **A. The Settlement was Reached as a Result of Arm’s Length Negotiations**

27 The proposed settlement was reached as a result of arm’s-length negotiations. Though
28 cordial and professional, the settlement negotiations were at all times adversarial and non-

1 collusive. Following mediation, the Parties' counsel conducted extensive arm's length
2 negotiations on all terms memorialized in the Agreement. (Donnelly Decl., ¶ 33.)

3 **B. The Settlement is the Result of Thorough Investigation and Discovery**

4 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of
5 their arguments before reaching the proposed settlement, and engaged in sufficient investigation,
6 research and discovery to support the settlement. The proposed settlement was only possible
7 following significant analysis and evaluation of Defendant's relevant policies and procedures, as
8 well as the data it produced for the putative Class, which permitted Plaintiffs' Counsel and
9 experts to engage in a comprehensive analysis of liability and potential damages to prepare for
10 mediation. (Donnelly Decl., ¶¶ 15-16, 35-36.) This litigation has reached the stage where "the
11 Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to
12 support the Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

13 **C. Counsel for the Parties are Experienced in Similar Litigation**

14 Counsel for the Parties are particularly experienced in wage and hour employment law,
15 class actions and PAGA actions. Plaintiffs' Counsel have prosecuted numerous cases on behalf of
16 employees for wage and hour violations and are qualified to evaluate the class and PAGA claims,
17 the viability of WDR's defenses, and the risks and benefits of settlement versus trial. This
18 experience informed Plaintiffs' Counsel on the risks and uncertainties of further litigation and
19 guided their determination to endorse the proposed settlement.⁸ (Donnelly Decl. ¶¶ 8-11; Zakay
20 Decl., ¶ 4, Exh. B; Declaration of Jean-Claude Lapuyade ("Lapuyade Decl."), ¶¶ 3-11; Exh. 1.)

21 **D. The Proposed Settlement is a Reasonable Compromise of Claims**

22 An understanding of the amount in controversy is an important factor in considering
23 whether settlement "of the class members' claims is reasonable in light of the strengths and
24 weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail,*
25 *Inc.* (2008) 168 Cal.App.4th 116, 129; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
26 (2010) 186 Cal.App.4th 399, 409. Indeed, the most important factor in this regard is "the strength

27 ⁸ The final factor mentioned in *Dunk* - the number of objectors - is not determinable until the Notice of Class Action
28 Settlement has been provided to the Class and they have had an opportunity to respond. This information will be
provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

1 of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Kullar*,
2 168 Cal.App.4th at 129.

3 In weighing the strength of a plaintiff’s case, *Kullar* instructs that a court does not “decide
4 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of
5 the attorneys.” 168 Cal.App.4th at 133. Further, this analysis does not require an explicit
6 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
7 provided there is a record that allows “an understanding of the amount that is in controversy and
8 the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409. Put differently,
9 “as the court does when it approves a settlement as in good faith under Code of Civil Procedure
10 section 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’
11 of reasonableness.” *Kullar*, 168 Cal.App.4th at 133 citing *Tech-Bilt v. Woodward-Clyde &*
12 *Associates* (1985) 38 Cal.3d 488, 499-500. As shown below, the Parties’ investigation and
13 discovery revealed several reasons to discount claims and agree to this settlement.

14 E. **The Settlement is Fair and Reasonable Based on the Strengths of Plaintiffs’**
15 **Case and the Risks and Costs of Further Litigation**

16 The proposed settlement was only possible following significant analysis and evaluation
17 of Defendant’s relevant policies and procedures, as well as the data that Defendant produced for
18 the Class. This permitted Plaintiffs’ Counsel to engage in a comprehensive analysis of liability
19 and potential damages. The discovery conducted resulted in Plaintiffs’ central theories of liability,
20 which are based on Plaintiffs’ claims that Defendant failed to provide compliant meal and rest
21 periods, failed to pay all minimum and overtime wages, failed to reimburse business expenses,
22 failed to provide accurate, itemized wage statements and failed to pay all wages due on separation
23 of employment As explained above, Defendant maintains the information and documents
24 produced demonstrate it would succeed at both class certification and on the merits. (Donnelly
25 Decl., ¶¶ 15-16, 35-36.)

26 Plaintiffs believe this case is suitable for certification as there are company-wide policies
27 that violate California wage and hour law and uniformly affect the Class Members. Defendant’s
28 counterarguments, however, raise uncertainties as to both class certification and success on the

merits. As the California Supreme Court emphasized in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319 (2004), class certification is always a matter of the trial court's sound discretion, and decisions following *Sav-On* have reached different conclusions with respect to certification of wage and hour claims.⁹ While remaining confident in the strengths of their claims, all of these factors led Plaintiffs to discount their claims. (Donnelly Decl., ¶ 37.)

1. The Settlement Amount is Reasonable Based on Plaintiffs' Evaluation of the Claims and Defenses

Defendant provided Plaintiffs with class-wide data from which Plaintiff's Counsel could extrapolate a damage analysis in preparation of mediation. Prior to mediation, there were a total of 317 Class Members who worked approximately 17,509 work weeks in the Class Period, and 101 Aggrieved Employees and 7,980 pay periods for the PAGA Period. (Donnelly Decl., ¶ 38.)

First, Plaintiffs contend Defendant failed to provide legally compliant meal and rest breaks. Specifically, as to meal breaks, Plaintiffs contend their analysis of the time and payroll records produced by WDR reveals at least 25% of all shifts contained a unique meal period violation (i.e., late, short, or missed), and that the violation rate for second meal periods on shifts of 10+ hours was over 99%. Plaintiffs claim this violates Labor Code sections 512, 226.7, and the applicable IWC Wage Orders, as well as *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 and *Augustus v. ABM Security Serv., Inc.* (2016) 2 Cal.5th 257 for failure to provide all required meal periods and within the required time frames. Plaintiffs also contend WDR fails to provide duty-free rest periods to Class Members by failing to relinquish control over how Class Members utilize their rest period time by prohibiting Class Members from leaving the premises during rest periods and further that WDR supervisors instructed Plaintiffs and Class Members to respond to any incoming calls such that the Class Members were not truly free of employer control during their breaks. (Donnelly Decl., ¶ 39.)

Defendant denies Plaintiffs' contentions, claiming it made meal and rest breaks available to Class Members in compliance with California law. Defendant contends its meal and rest break

⁹ *E.g.*, *Walsh v. IKON Solutions, Inc.*, (2008) 148 Cal.App.4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*, (2006) 144 Cal.App.4th 121 (2006) (reversing denial of certification); *Dunbar v. Albertson's Inc.* (2005) 141 Cal.App.4th 1422 (2006).

1 policies are lawful and that its policies and practices comport with the flexibility the *Brinker* court
2 held was integral to California’s meal and rest period requirements. Per WDR, Class Members
3 were frequently reminded to take all meal and rest breaks, and Defendant contends its time
4 records demonstrate that Class Members took duty-free, timely meal and rest breaks. Finally,
5 Defendant argues that Plaintiffs’ meal and rest break claims are not susceptible to common proof,
6 as the claims would require individualized inquiry, including whether there was an unlawful
7 companywide policy, whether employees had the opportunity to take meal and rest periods,
8 whether they voluntarily chose to forego their meal and rest periods, and whether Defendant ever
9 prevented them from taking meal and rest periods. Accordingly, Defendant contends these claims
10 are vulnerable to a ruling that class treatment is not appropriate. (Donnelly Decl., ¶ 40.) Without
11 taking into consideration any of Defendant’s defenses to certification or on the merits, Plaintiffs
12 estimate WDR faces **\$518,342** in damages for meal period violations and **\$531,372** in damages
13 under on the rest period claims. (Donnelly Decl., ¶ 41.)

14 Plaintiffs further contend Defendant failed to pay all overtime wages because it failed to
15 include non-discretionary payments in calculating the regular rate of pay when paying overtime.
16 *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 552–54 (employee’s
17 “regular rate of pay” for purposes of paying overtime is not the same as the employee’s straight
18 time rate and must account for, among other things, non-discretionary bonuses and awards, shift
19 differentials and the per-hour value of any non-hourly compensation the employee has earned).
20 Class Members, including Plaintiffs, received non-discretionary commission payments of \$75 for
21 each water damage job they sold, and Plaintiffs contend WDR did not include non-discretionary
22 payments in the calculation of class members’ regular rates of and thereby underpaid for
23 overtime. Plaintiffs also allege they and Class Members often had to work off-the clock both
24 before and after their shifts ended, including receiving work phone calls after the end of a shifts,
25 having to complete reports and other paperwork after the end of their shift, and purchasing
26 supplies before the start of a shift. Defendant required these job tasks be done either before or
27 after Class Members clocked in/out, and thus Class Members were not compensated for the time
28 spent on these “off the clock” tasks. Without taking into consideration any of Defendant’s

1 defenses to certification or on the merits, Plaintiffs’ experts calculated Defendant’s maximum
2 exposure for this claim **\$40,130** in damages for unpaid overtime, and estimated the “off the
3 clock” exposure at **\$1,034,800**, based on one hour of off the clock work per shift. (Donnelly
4 Decl., ¶ 42.)

5 On the expense reimbursement claims, Defendant requires employees to wear company
6 uniforms, but did not pay for maintenance or cleaning of these uniforms which was particularly
7 necessary here since Class Members worked mitigating mold, fire and smoke damage and
8 uniforms are easily soiled and require frequent maintenance. Defendant also failed to reimburse
9 Plaintiffs and Class Members for the use of their personal cell phones. While Defendant issued
10 work cell phones to employees after one month of employment, Defendant still contacted
11 employees on their personal cell phones for purposes of group messaging, and receiving work-
12 related calls. Defendant did not reimburse employees for the cost associated with the use of the
13 personal cellular phones for Defendant’s benefit. *Cochran v. Schwan’s Home Serv.* (2014) 228
14 Cal.App.4th 1137, 1144. Without taking into consideration any of Defendant’s defenses to
15 certification or on the merits, Plaintiffs’ experts calculated Defendant’s maximum exposure for
16 this claim at **\$106,025** in damages based on \$25/month in unreimbursed expenses. (Donnelly
17 Decl., ¶ 43.)

18 As a result of the above alleged violations, Plaintiffs also derivatively allege WDR failed
19 to provide accurate wage statements and failed timely pay all wages that were due and owing
20 upon separation of employment. Should the primary claims for unpaid wages fail, Plaintiffs’
21 derivative claims for wage statement penalties and waiting time penalties would also fail.
22 Defendant also contends it would not be liable for waiting time penalties because a “good faith
23 dispute” exists over the payment of past wages. Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas*
24 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiffs would
25 have to prove that Defendant “willfully” failed to pay Class Members appropriate wages due
26 upon separation of employment. Without taking into consideration any of Defendant’s defenses to
27 certification or on the merits, Plaintiffs calculated Defendant’s maximum exposure for wage
28 statement penalties at **\$775,000** and waiting time penalties at **\$1,851,450**. (Donnelly Decl., ¶ 44.)

1 As far as potential PAGA liability, the theoretical civil penalties likely exceed \$4 million
2 should Plaintiffs prevail on all claims and establish violations of the multiple Labor Code sections
3 at issue. (Donnelly Decl., ¶ 45.) As with the class claims, Plaintiffs discounted the potential
4 PAGA penalties based on Defendant's various defenses on the merits and also accounted for the
5 Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor
6 Code § 2699(e)(2); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (trial court
7 awarded penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal);
8 *In re Taco Bell Wage and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557
9 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$30,000 to PAGA
10 penalties. (Agreement, § 3.2.5.)

11 Plaintiffs submit this amount is reasonable under the circumstances and in line with
12 comparable settlements in other wage and hour class actions in California. *E.g.*, *Van Kempen v.*
13 *Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
14 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
15 *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS
16 116303 (finding a \$7,500 PAGA payment reasonable when measured against the overall
17 settlement of \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total
18 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
19 settlement, and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D.
20 Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA
21 penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA,
22 and the LWDA has not objected to the settlement").

23 Thus, Plaintiffs and their counsel discounted the value of the class claims consistent with
24 the risks discussed above, and carefully weighed the likelihood of the class receiving
25 substantially greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light
26 of these very real and substantial risks – settlement on the proposed terms and without prolonged
27 and costly litigation was in the best interests of the class. The overall \$640,000 recovery
28 represents a significant percentage of Defendant's potential exposure, and given Defendant's

1 multi-layered defenses and all other potential risks of continued litigation, a total recovery for the
2 class of \$640,000, which will result in average award of some \$1,078 per class member, plus
3 additional sums under PAGA, is a significant result well within the range of reasonableness
4 considering all potential outcomes, and it will provide direct monetary awards to all Class
5 Members without further delay. (Donnelly Decl., ¶ 46.)

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

27 **F. Provisional Class Certification Should be Granted**

28 A class action is appropriate when the class is ascertainable and there is “a well-defined

community of interest in the questions of law and fact involved affecting the parties to be represented.” Code Civ. Proc. § 382. Class certification requirements under Section 382 follow Rule 23 of the Federal Rules of Civil Procedure, and require: numerosity, typicality of the class representatives’ claims, adequacy of representation, predominance of common issues, and superiority. Fed.R.Civ.Proc. 23(b)(3); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. While a court must certify a class for settlement purposes if a class has not already been certified, “it is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836, 859 citing *Dunk*, Cal.App.4th 1794, 1807, n.19; *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 237-38.

1. The Proposed Class is Sufficiently Numerous and Ascertainable

First, the class is both sufficiently numerous, consisting of approximately 317 individuals, and ascertainable by reference to Defendant’s personnel and payroll records. (Donnelly Decl., ¶ 47.) “There is no set number required to maintain a class action, and the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the court.’” *Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable); *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932 (finding that “Class Members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official records.”).

2. The Typicality and Adequacy Requirements Are Met

The typicality requirement is met if the claims of the named representative are typical of those of the Class, though, “they need not be substantially identical.” *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Here, Plaintiffs both contend their claims are typical of the Class Members’ claims because they arise from the same factual basis and are based on the same legal theories applicable to the Class Members. Plaintiffs further contend Defendant’s policies applied to all Class Members and each Class Member is challenging the same policies and practices. As such, the typicality requirement is satisfied for purposes of settlement. (Veleasquez Decl., ¶¶ 3-5,

1 Holloway Decl., ¶¶ 3-5; Donnelly Decl. ¶ 48.)

2 Adequacy requires that the Plaintiffs have no interests adverse to the interests of the
3 proposed Class Members and be committed to vigorously prosecuting the case on behalf of the
4 Class. *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Both Plaintiffs have been
5 and will continue to be committed to vigorously prosecuting this case, and neither has any
6 conflicts of interest with the Class. (Velasquez Decl., ¶¶ 3-7; Holloway Decl., ¶¶ 3-7; Donnelly
7 Decl., ¶ 48.)

8 3. The Commonality Requirement is Met

9 Next, common questions of law and fact predominate – particularly for purposes of a
10 settlement class – as the Class Members all were subject to the same meal and rest break policies
11 and alleged “de facto” policies resulting in meal period violations, and similarly subject to the
12 same improper “off the clock” work policies. Since the focus of the claims against Defendant
13 concerns the legality of common policies applied uniformly to the entire class, common issues
14 predominate over individualized inquiries concerning liability. For instance, Defendant’s meal
15 and rest break policy is company-wide policy applied equally and consistently to all class
16 members, and this policy is either compliant with California law or it is not. Regardless of that
17 determination, it will decide liability for all class members one way or another. Similarly,
18 whether the class members had to complete reports and other paperwork after hours and off the
19 clock is another question common to all class members. [Donnelly Decl., ¶ 49.]

20 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
21 violating California law is sufficient to satisfy the requirements for class certification. *Jones v.*
22 *Farmers Ins. Exch.* (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
23 consistently applied to a group of employees is in violation of the wage and hour laws are of the
24 sort routinely, and properly, found suitable for class treatment”); *Williams v. Superior Court*
25 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
26 or law that supports commonality for class certification”). Lastly, a class action is superior to
27 other means for the fair and efficient adjudication of this controversy. [Donnelly Decl., ¶ 50.]

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VI. CONCLUSION

Dated: July 24, 2023

J. Kirk Donnelly
J. Kirk Donnelly
Attorneys for Plaintiff Jose Luis Velasquez