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on behalf of himself and others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

OVIDIO G. GRAMAJO RODAS, an
individual, on behalf of himself and others
similarly situated,

Plaintiff,

vs.

ANDREW CHEKENE ENTERPRISES,
INC., a California corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: RG20057424

CLASS ACTION

Assigned for All Purposes To:
Hon. Stephen Kaus
Dept.: 19

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND PAGA ACTION
SETTLEMENT AGREEMENT AND
RELEASE**

*[Filed concurrently with Notice of Motion and
Motion; Declarations of David Yeremian, Alvin
B. Lindsay and Ovidio G. Gramajo Rodas; and
[Proposed] Order]*

Reservation ID 920889044547
Date: December 2, 2021
Time: 3:00 p.m.
Department 19

Original Complaint Filed: March 5, 2020
First Amended Complaint: May 13, 2020
Trial Date: None Set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff OVIDIO G. GRAMAJO RODAS (“Plaintiff”), on behalf of himself and all other
3 similarly situated employees of Defendant ANDREW CHEKENE ENTERPRISES, INC.
4 (“Defendant”) (with Plaintiff, “the parties”), respectfully requests preliminary approval of the
5 parties’ Class and PAGA Action Settlement Agreement and Release (“Settlement” or “Settlement
6 Agreement”) pursuant to California Code of Civil Procedure § 382 and Rule 3.769 of the
7 California Rule of Court.

8 **1. INTRODUCTION**

9 Plaintiff was employed by Defendant along with the other Class members as hourly, non-
10 exempt construction employees performing various construction related work tasks at the
11 contracted job sites of Defendant’s customers. Plaintiff was employed based out of Defendant’s
12 offices and facilities in Hayward, California. (*See* Declaration of David Yeremian in support of
13 Motion for Preliminary Approval (“Yeremian Decl.”), ¶ 10). Plaintiff filed his Class Action
14 Complaint on **March 5, 2020** in Orange County Superior Court alleging nine causes of action
15 against Defendant for (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and Overtime
16 Under Labor Code § 510; (3) Meal Period Liability Under Labor Code § 226.7; (4) Rest Break
17 Liability Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6) Violation of Labor
18 Code § 221; (7) Violation of Labor Code § 204; (8) Violation of Labor Code § 203; (9) Failure to
19 Reimburse Necessary Business Expenditures Under Labor Code § 2802; and (10) Violation of
20 Business and Professions Code § 17200 *et seq.* (Yeremian Decl., ¶ 11).

21 On May 13, 2020, Plaintiff filed a First Amended Complaint adding an eleventh cause of
22 action for Penalties Under Private Attorneys General Act, Labor Code § 2698 *et seq.* (“PAGA”).
23 (Yeremian Decl., ¶ 12). The parties’ counsel then conducted conferences to discuss the case and
24 claims and agreed to proceed with early mediation following informal discovery. (Yeremian Decl.,
25 ¶ 13). The parties completed their mediation with Tripper Ortman, Esq. on **February 3, 2021**.
26 After a full day of negotiation with the assistance of the mediator, the parties executed a
27 Memorandum of Understanding which was later memorialized in the Settlement now before the
28 Court for approval.. (*Id.* at ¶¶ 13-14, 31-32; *see also* Exhibit A to Yeremian Decl., Class and

1 PAGA Action Settlement Agreement and Release (“Settlement Agreement”), ¶¶ 35-36).¹

2 Without opposition from Defendant, Plaintiff requests that the Court grant preliminary
3 approval of the parties’ Settlement Agreement at **Exhibit A** to the Declaration of Class Counsel
4 (“Yeremian Decl.”), and the Class Notice at **Exhibit 1** to the Settlement. Defendant’s records
5 established there were 948 Settlement Class members through December of 2020, which the parties
6 now estimate to be no more than **1,100**, satisfying the following Class definition: “all individuals
7 who are or previously were employed by Defendant as non-exempt, hourly employees within the
8 State of California during the Class Period,” which is **March 5, 2016** through the date that the court
9 grants preliminary approval. (Yeremian Decl., ¶¶ 9, 26, 36; Exhibit A, Settlement, ¶¶ 2, 7).

10 The agreed upon “Gross Fund Value” is **\$735,000.00**, inclusive of all fees and costs.
11 (Yeremian Decl., ¶ 34). All estimated **1,100** Settlement Class Members will automatically receive
12 a settlement share unless they opt out and will divide, on a *pro-rata* basis, a Net Fund Value of
13 approximately **\$380,000.00** if all allocations are approved. The estimated average gross individual
14 settlement payment to the Class members, using a straight average, is **\$345.45**. (Yeremian Decl.,
15 ¶¶ 35-37, 71-72). The Gross Fund Value of \$735,000.00 is **9.91%** of the total maximum liability
16 exposure Plaintiff estimated Defendant could face on the class-wide claims. (*Id.* at ¶¶ 70-71).

17 The proposed Settlement is fair, reasonable, and adequate, and in the best interests of the
18 Class. Plaintiff, with the consent of Defendant, respectfully requests that this Court issue an Order
19 in the form provided herewith: (1) preliminarily approving the proposed class-wide settlement of
20 this action; (2) approving the form and method for providing class-wide notice; (3) directing that
21 notice of the proposed settlement be given to the class; (4) appointing Plaintiff Ovidio G. Gramajo
22 Rodas as Class Representative for settlement purposes only; (5) appointing David Yeremian and
23 Alvin B. Lindsay of David Yeremian & Associates, Inc. as Class Counsel for settlement purposes
24 only; and (6) scheduling a hearing date for Final Approval of the Settlement and Plaintiff’s
25 application for attorneys’ fees and costs.

26
27 ¹ Plaintiff also filed a separate individual action on May 11, 2020 for wrongful termination and
28 related claims against Defendant and two of its managers, Case Number RG20062645. Defendant
and Plaintiff also agreed at mediation to enter into a settlement of this Individual Action and to a
general release of all of Plaintiff’s individual claims, including a release under Civil Code Section
1542 of unknown claims. (Yeremian Decl., ¶ 14).

1 **2. FACTUAL BACKGROUND, DISCOVERY, AND MEDIATION**

2 **A. Plaintiff's Claims and Defendant's Denials**

3 Plaintiff's operative First Amended Complaint asserts that Plaintiff and the Class worked
4 significantly longer than their scheduled shifts and for which they were actually paid. Plaintiff has
5 alleged that he and the Class members were considered late for their shifts if they did not report a
6 half hour early to begin performing required job duties, and they were instructed by supervisors to
7 use this time to prepare their tools and equipment for the work day, to go to the bathroom, or to
8 perform other required job duties. (Yeremian Decl., ¶ 16).

9 Plaintiff also alleged that foremen and supervisors would record shifts according to their
10 scheduled times rather than the actual hours worked, and would do so on a master listing, as the
11 workers did not enter them into a system or have separate time sheets or any sort of electronic
12 timekeeping entries, and supervisors were also the ones who recorded when and if meal periods
13 were allegedly provided. (Yeremian Decl., ¶ 17). Plaintiff also alleged Defendant's supervisors
14 would automatically deduct 30 minutes for a meal period without regard to whether it was actually
15 provided, and that Defendant called employees or otherwise contacted them about work matters
16 when they were off-duty or even when they were on breaks. (Yeremian Decl., ¶¶ 18-19).

17 Plaintiff has also asserted class claims for meal and rest break violations for the occasions
18 when he and the Class members were not provided with breaks or the ones they were provided
19 were untimely or shortened or interrupted by work demands. (Yeremian Decl., ¶ 20). Plaintiff also
20 contended that Defendant exerted control over employees during their rest breaks or otherwise
21 required them to respond to work duties and job demands during breaks or remain under
22 Defendant's control. (*Id.*). Plaintiff further alleged Defendant failed to reimburse necessary
23 business expenses and asserted other claims deriving from the above alleged violations, including
24 for failure to provide accurate itemized wage statements and failure to timely pay all wages and
25 pay all wages at termination or separation, and for unfair competition and the above-addressed
26 PAGA claims. (Yeremian Decl., ¶¶ 16-22).

27 Defendant denies all of Plaintiff's Class and PAGA claims, and contend, among other
28 things, they have complied at all times with all applicable laws and asserted that the Settlement

1 Class Members were properly compensated for all time worked, and otherwise treated at all times
2 in compliance with all applicable laws. (Yeremian Decl., ¶¶ 23, 27, Exhibit 1, Settlement, ¶ 33).
3 Defendant contends, among other things, that it has complied at all times with all applicable laws
4 and assert that Plaintiff and the Class Members were properly compensated for all time worked,
5 and otherwise treated at all times in compliance with all applicable laws. (Yeremian Decl., ¶ 23;
6 Exhibit A thereto, Settlement, ¶ 38).

7 Defendant contends it maintained legally compliant policies and have properly, timely and
8 fully paid all earned wages, that they did not require employees to work without pay, nor did
9 Defendant have knowledge of any purported work performed off-the-clock, and that they have
10 paid all required overtime and provided breaks. Defendant also argued it authorized and permitted
11 timely meal and rest breaks, and that, to the extent an individual employee did not take a provided
12 break, employees waived their right to them and to seek relief herein. Defendant also asserted it
13 issued accurate wage statements to employees, and neither Plaintiff nor any of the putative class
14 members are entitled to any penalties for alleged inaccurate wage statements. (Yeremian Decl., ¶¶
15 23, 27, 46-72; Ex. A, Settlement, ¶ 38).

16 After extensive investigation and informal discovery, including analysis of relevant
17 documents and other gathered data and after relying upon and completing an assessment of
18 Defendant's potential liability exposure with the help of their expert, Class Counsel believed that
19 this case was appropriate for resolution. Given the high level of risk present for both sides, and the
20 substantial uncertainty and expense of protracted litigation, the parties elected to mediate Plaintiff's
21 claims and explore settlement, which they achieved and now ask the Court to preliminarily approve.
22 (Yeremian Decl., ¶¶ 24-33; Exhibit A, Settlement, ¶¶ 35, 37, 67).

23 **B. Investigation and Discovery**

24 Before filing, Class Counsel investigated and researched the circumstances and facts
25 underlying the pertinent issues and the law applicable thereto. (Yeremian Decl., ¶¶ 24-33; 46-72;
26 Exhibit A, Settlement, ¶¶ 35-38). This required thorough discussions and interviews between Class
27 Counsel and Plaintiff, in addition to the above described research into the various legal issues
28 involved in the case. (Yeremian Decl., ¶¶ 86-91; *see also* Declaration of Ovidio G. Gramajo Rodas

1 (“Gramajo Decl.”), at ¶¶ 5, 10-13). After filing the lawsuit, Class Counsel conducted a thorough
2 investigation of the facts and claims giving rise to the action, including: (1) conducting informal
3 and formal discovery, and meeting and conferring with defense counsel about same; (2) reviewing
4 and analyzing time and pay records as well as employment handbooks, Plaintiff’s personnel file,
5 relevant policies and other documentation; (3) interviewing class members; (4) researching the
6 applicable law and potential defenses; (5) constructing damage models based on interpretations of
7 California law; and (6) reviewing other relevant information provided by Defendant in advance of
8 the mediation. (*Id.* at ¶ 25; Exhibit A, Settlement, ¶ 35).

9 Upon agreeing to schedule mediation, and leading up to their agreement, the parties
10 conducted informal discovery and exchanged details regarding the claims and defenses and the
11 items Plaintiff believed were required to file a motion for class certification and complete a
12 constructive and meaningful mediation. (Yeremian Decl., ¶¶ 27-29). Plaintiff provided a
13 comprehensive listing of data and items required to which Defendant responded, including by
14 producing all relevant policy related documents. (*Id.* at ¶ 29). Plaintiff’s counsel and Defendant’s
15 counsel also exchanged class-wide data and numbers, including the total numbers of Class
16 members, work weeks, pay periods, average wage rates, etc., and Plaintiff’s counsel reviewed the
17 documents and data and provided summaries and recommendations to the mediator and defense
18 counsel. (*Id.* at ¶ 29-32). After conducting the initial investigation, Class Counsel determined
19 Plaintiff’s claims were suited for class action adjudication based on what they believed was a
20 common course of conduct affecting a similarly situated group of employees. (*Id.* at ¶¶ 33, 46-72,
21 Exhibit A, Settlement, ¶¶ 35-38).

22 **C. Mediation and Settlement Efforts**

23 On **February 3, 2021**, the parties completed their mediation with Tripper Ortman, Esq.,
24 (Yeremian Decl., ¶ 32, Exhibit A, Settlement, ¶ 36). Mr. Ortman is a respected mediator in wage
25 and hour class actions. The mediation took place only after the parties exchanged extensive
26 informal information, documents, and data. During the mediation, the parties discussed all aspects
27 of the case, including the risks of litigation and the risks to both parties of proceeding with a
28 motion for class certification as well as the law relating to meal periods and rest breaks and off the

1 clock work and overtime. (Yeremian Decl., ¶¶ 13-14, 32). After a full day of negotiation with the
2 assistance of the mediator, the parties agreed to settlement terms embodied in a memorandum of
3 understanding. After conferring amongst themselves and with the mediator, the parties ultimately
4 reached agreement on material terms, which were later memorialized in the Settlement Agreement
5 now before the Court for preliminary approval. (*Id.* at ¶¶ 14, 32; Exhibit A, Settlement, ¶¶ 35-36).

6 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
7 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Counsel
8 believes that the recovery for each Class Member is fair and reasonable taking into consideration
9 the amounts received in other wage and hour class actions, the risks inherent in litigation of this
10 genre, and the reasonable tailoring of each Class Member’s claim to the settlement award he or she
11 will receive. (Yeremian Decl., ¶ 33). Based on the settlement negotiations, which were extensive
12 and conducted in good faith and at arm’s length between attorneys with substantial experience
13 litigating wage and hour cases, the Settlement was the product of a non-collusive settlement process
14 and compromises in the interest of reaching a full and complete settlement. (*Id.*; Exhibit A,
15 Settlement, ¶¶ 32-33).

16 **3. THE PROPOSED SETTLEMENT, TERMS, AND NOTICE**

17 Defendant has agreed to pay a Gross Fund Value of **\$735,000.00** on a non-reversionary
18 basis to settle and release all claims asserted by Plaintiff and the Class. (Yeremian Decl., ¶ 34;
19 Exhibit A, Settlement, ¶¶ 15, 49(b), 49(f) through 49(i)). The Settlement Agreement defines the
20 “Class Members” or “Class” as “all individuals who are or previously were employed by
21 Defendant as non-exempt, hourly employees within the State of California during the Class
22 Period,” and the Class Period is March 5, 2016 through the date that the court grants preliminary
23 approval of the class action settlement. (Yeremian Decl., ¶ 9; Exhibit A, Settlement, ¶¶ 2, 7). The
24 “Settlement Class” or “Settlement Class Members” are all Class Members who have not opted out
25 of the Class by submitting a timely Request for Exclusion. (Yeremian Decl., Exhibit A, Settlement,
26 ¶¶ 32, 47(d)). Defendant’s records established **938** Settlement Class Members through December
27 of 2020, which is the number they used for mediation purposes, and the parties estimate there will
28 be no more than **1,100** through preliminary approval. (Yeremian Decl., ¶¶ 26, 37, 71, 93).

1 The “Net Fund Value” is the Gross Fund Value, less Court-approved Settlement
2 Administration Costs (up to \$15,000.00), Attorneys’ Fees (up one-third of the Gross Fund Value,
3 \$245,000.00) and Costs (up to \$15,000.00), the Class Representative Enhancement Award
4 (\$5,000.00), and the 75% portion of the PAGA Penalties payable to the LWDA (i.e. \$75,000.00).
5 Each Class Member who does not opt out will be entitled to a share of the Net Fund Value, which
6 will be a fixed proportional amount of the Net Fund Value per workweek. (Yeremian Decl., ¶ 35,
7 Exhibit A, Settlement, ¶¶ 18, 49(b), 49(f) through 49(i)).

8 If the Court approves all requested allocations and awards above, the Net Fund Value is
9 estimated to be **\$380,000.00**. For the approximately **1,100** estimated Settlement Class Members (if
10 no exclusions), the average gross individual settlement payment, using a straight average, is
11 **\$345.45**. (Yeremian Decl., ¶ 36). Any amounts not approved by the Court as a Class
12 Representative Service Award, or Class Counsel Fees and Costs, or Settlement Administration
13 costs or for the PAGA claim will be added back to the Net Fund Value to be distributed to the
14 Settlement Class Members who are Class participants. (*Id.* at Exhibit A, Settlement, ¶¶ 4, 49(g)).

15 For each Class Participant’s “Individual Settlement Payment,” the Settlement
16 Administrator will calculate the total Compensable Workweeks for all Settlement Class Members.
17 The respective Compensable Workweeks for each Settlement Class Member will be divided by the
18 total Compensable Workweeks for all Settlement Class Members, resulting in the Payment Ratio
19 for each Settlement Class Member. Each Settlement Class Member’s Payment Ratio is then
20 multiplied by the Net Settlement Amount to determine his or her Individual Settlement Payment.
21 Workweeks will include only those weeks an employee was actively employed as a non-exempt
22 employee during the Class Period. (Yeremian Decl., ¶ 37, Exhibit A, Settlement, ¶¶ 49, 49(a)).

23 Each Individual Settlement Payment will be allocated 50% to wages and 50% to penalties
24 and pre-judgment interest. The Settlement Administrator will issue an IRS Form 1099 – MISC to
25 each Class Member for 50% of each Individual Settlement Payment, and a form W2 for 50% of
26 each Individual Settlement Payment. (Yeremian Decl., ¶ 38; Exhibit A, Settlement, ¶ 49(b)).

27 “Effective Date” means the date the Court enters an order granting final approval and enters a
28 Final Judgment, if no objections are filed to the Settlement. If objections are filed and overruled,

1 and no appeal is taken of the final approval order, then the effective date of final approval is the
2 first court day after the latest of (a) the date after which the Final Approval Order may no longer be
3 appealed, or (b) if any appeals are filed, then after the appeal has become final or is otherwise
4 dismissed without the possibility of further review, and the judgment is effective or affirmed. (*Id.*
5 at Settlement, ¶ 13).

6 Checks issued to Settlement Class Members pursuant to the Settlement Agreement will
7 remain negotiable for One Hundred Eighty (180) days. Any settlement checks that are not claimed
8 or not negotiated within 180 calendar days after the distribution of Individual Settlement Payments
9 to Settlement Class Members will be void and the funds not disbursed as a result. They will instead
10 be paid to the State Controller's Office Unclaimed Property Fund to be held in the name of the
11 Class Member and in accordance with the procedures set forth in Code of Civil Procedure §1520.
12 (Yeremian Decl., ¶ 39, Exhibit A, Settlement, ¶ 49(c)).

13 Upon final approval and as of the Effective Date, all Class Members will release Defendant
14 and the "Released Parties" from the "Released Claims," which are defined as those "arising out of
15 the allegations and claims asserted in the Complaint, including those which arose during
16 employment by Defendant during the Class Period, including, but not limited to, any claim arising
17 under Labor Code sections 201-204, 221, 226, 226.2, 226.7, 510, 512, 558, 1174, 1174.5, 1185,
18 1194, 1194.1, 1194.2, 1197, 1197.1, 1198, 1199, 2802, 2698 *et. seq.*, under Business and
19 Professions Code section 17200 *et. seq.*, and under the applicable Wage Order for all claims
20 related to (1) failure to minimum wages for all hours worked, (2) failure to pay wages and
21 overtime, (3) meal period liability, (4) rest break liability, (5) violation of Labor Code §226, (6)
22 violation of Labor Code §221, (7) violation of Labor Code §204, (8) violation of Labor Code §203,
23 (9) failure to reimburse necessary business expenses under Labor Code §2802, (10) Violation of
24 Business & Professions Code § 17200 *et. seq.*, and (11) penalties under PAGA, Labor Code
25 §2698, which the Named Plaintiff or any Class Member has against the Released Parties."
26 (Yeremian Decl., ¶¶ 40, 41; Exhibit A, Settlement, ¶¶ 26-27). The Settlement and Notice provide
27 further details on the release, and along with the release specific to Plaintiff. (*Id.* at ¶ 25).

1 The parties have selected ILYM Group, Inc. as the Settlement Claims Administrator.
2 (Yeremian Decl., ¶ 26, 36, 77; Exhibit A, Settlement, ¶¶ 30, 31, 46, 47, 49(h); *see also* Exhibit 1
3 thereto, Class Notice). Based on a quote from ILYM Group, the Settlement Agreement budgets up
4 to \$15,000.00 for its services. (*Id.*). Notice of the Settlement will be provided by the Administrator
5 to the Settlement Class in the form of the Class Notice attached to the Settlement as Exhibit 1.
6 (Yeremian Decl., ¶ 42; Exhibit A, ¶ 47; and Settlement Class Notice at Exhibit 1 thereto). The
7 Class Notice includes a summary of the case and settlement terms and provides Class Members
8 with instructions on how to exclude themselves, dispute their workweeks, and object to the
9 settlement, and addresses the deadlines and procedures for doing so. (Yeremian Decl., ¶¶ 42-44;
10 Exhibit A, Settlement, ¶¶ 28, 47(d), 47(e), Exhibit 1 thereto, Class Notice).

11 **4. THE THREE-STEP APPROVAL PROCESS**

12 California Rule of Court 3.769 requires court approval of the settlement of class action
13 lawsuits. Preliminary approval is merely the first of three steps that comprise the approval
14 procedure for settlements of class actions. *See* Manual for Complex Litigation, Second §30.44
15 (1993); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The second approval step is
16 dissemination of notice of the settlement to all Class Members. *Id.* The third step is a final
17 settlement approval hearing, at which evidence and argument concerning the fairness, adequacy,
18 and reasonableness of the settlement may be presented and Class Members may be heard. *Id.*

19 The determinations of whether a settlement should be preliminarily approved requires,
20 “basic information about the nature and magnitude of the claims in question and the basis for
21 concluding that the consideration being paid for the release of those claims represents a reasonable
22 compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008). However, the
23 record need not contain an explicit statement of the maximum theoretical amount that the class
24 could recover. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399,
25 409 (2010) (“*Kullar* does not, ... require any such explicit statement of value; it requires a record
26 which allows “an understanding of the amount that is in controversy and the realistic range of
27 outcomes of the litigation.”). Nonetheless, Class Counsel performed a potential liability exposure
28 analysis in advance of mediation, which the parties addressed in detail with the mediator.

(Yeremian Decl., ¶¶ 13-14, 24-32, 46-72). “If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.” Manual for Complex Litigation, Second § 30.44, at 229.

In deciding whether to approve a proposed class action settlement under California Code of Civil Procedure § 382 and the California Rules of Court, the Court must find that a proposed settlement is “fair, adequate, and reasonable” and falls within the “range of approval.” *Dunk*, 48 Cal.App.4th at 1801-02. The trial court considers all relevant factors, such as “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” *Id.* The instant settlement satisfies all of these requirements.

5. THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR APPROVAL

The Court’s decision to preliminarily approve a settlement is granted great deference, as an exercise within its broad discretion. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-235 (2001). Applying the above factors, the proposed settlement provides a substantial benefit to the Class. It is fair, reasonable, and adequate, and should be preliminarily approved.

A. The Settlement Is the Result of Serious, Informed, Non-Collusive Negotiations

The proposed settlement was reached as a result of arm’s length negotiations after the completion of substantial discovery and the exchange of necessary class data. (Yeremian Decl., ¶¶ 13-14, 24-32). The negotiations have been, at all times, adversarial and non-collusive in nature. *See*, 4 Newberg on Class Actions § 13:45 (5th ed.) (due to the preference of settlement over litigation, “a court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion.”). While Plaintiff believes in the merits of his case, he and counsel also

1 recognized the inherent risks of litigation and understood the benefit of the Settlement Class
2 receiving funds immediately, as opposed to risking an unfavorable decision on class certification,
3 or then at trial and appeal, that would take several more years to litigate. Assistance from a well-
4 respected mediator ensured negotiations were non-collusive and well-informed. (Yeremian Decl.,
5 ¶¶ 24, 27, 32-33, 43, 46-70, 73-76).

6 **B. The Parties Engaged In Extensive Discovery and Investigation**

7 As discussed above, the parties engaged in substantial informal discovery before the
8 Settlement was reached to allow them to fully evaluate the class claims and Defendant's defenses.
9 (Yeremian Decl., ¶¶ 13-14, 24-32, 76). This litigation has reached the stage where the parties have
10 a clear view of the strengths and weaknesses of their cases sufficient to support the settlement.

11 **C. Class Counsel Are Experienced Class Action and Employment Attorneys**

12 Experienced counsel, operating at arm's length, have weighed the strengths of the case
13 and examined all the issues and risks of litigation and endorse the proposed settlement. Class
14 Counsel are experienced in class actions, have represented their clients zealously, and have no
15 conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 84, 97; Declaration of Alvin Lindsay ("Lindsay
16 Decl.") filed concurrently herewith, ¶¶ 3-12). Class counsel submits the Settlement is fair,
17 adequate and reasonable in view of the risks and other considerations addressed, and is well-
18 suited for final approval upon completion of the administration process. (Yeremian Decl., ¶¶ 28,
19 33, 71-74, 78-82; Exhibit A, Settlement, ¶¶ 37, 67; Lindsay Decl., ¶ 12).

20 **D. The Presence of a Governmental Participant**

21 Class Counsel will be submitting the Settlement Agreement to the LWDA concurrently
22 with the filing of this motion pursuant to Labor Code § 2699(1)(2). (Yeremian Decl., ¶ 15).

23 **E. The Strength of Plaintiff's Case and the Risks and Cost of Further Litigation.**

24 As with all litigation, there was risk that Plaintiff would not prevail on the merits of his
25 class claims. (Yeremian Decl., ¶¶ 27, 32-33, 43, 46-70, 73-76). Class counsel has addressed the
26 strengths of each of the main class claims, Defendant's arguments against liability, and the
27 estimated potential liability exposure Defendant faced on each. (Yeremian Decl., ¶¶ 46-72). For
28 example, Plaintiff contends he and the other class members were not properly provided meal and

1 rest periods. (Yeremian Decl., ¶¶ 50-56). Defendant contended that Plaintiff and other class
2 members were provided with the opportunity to take proper meal and rest periods, on-duty breaks
3 were not required, their policies were lawful and they provided timely breaks without
4 interruption, and the lack of records for rest periods and the differences between job sites created
5 individualized issues. (*Id.* at ¶ 53; *see also, Brinker Restaurant Corp. v. Superior Court* (2012) 53
6 Cal. 4th 1004, 1028-29).

7 Plaintiff also alleged he was not paid for all hours worked, including overtime pay, due to
8 Defendant's policy and practice of requiring off the clock work and miscalculating and/or failing
9 to pay overtime. (Yeremian Decl., ¶¶ 48-49). Defendant again argued these claims were not
10 suitable for class treatment, they did not require off the clock work, and they did not miscalculate
11 or improperly pay overtime or the regular rate, and paid for all hours worked. (*Id.*). If Defendant
12 prevailed, there would have been no recovery.

13 There were also risks in proving liability for failure to provide accurate wage statements
14 under Labor Code § 226 and failure to pay all wages at termination under Labor Code § 203.
15 (Yeremian Decl., ¶¶ 57-63). These derivative claims require that the underlying claims be proven
16 first, and there are conflicting interpretations as to whether alleged meal and rest claims can even
17 provide the predicate violations for inaccurate wage statement and waiting time penalties claims.²

18 Defendant also disputed liability for the underlying wage and meal and rest claims, and
19 penalties under Labor Code § 203 are available only if "an employer willfully fails to pay...any
20 wages of an employee who is discharged or quits..." With these penalties, there is always the risk
21 that the trier of fact will not find Defendant's actions willful. There was also risk associated with
22 the PAGA claim given the Court's discretion to award a lesser amount. *See*, Labor Code §
23 2699(e)(2). Plaintiff's counsel addresses these risks. (Yeremian Decl., ¶¶ 62-67, 69-72). This
24 settlement, like most others, was the product of compromise and a realistic assessment of all
25 perspectives.

26
27 ² *See, Stewart v. San Luis Ambulance, Inc.*, 878 F.3d 883, 887 (9th Cir. 2017) (recognizing that the
28 "*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007) "Court characterized the
extra hours paid for meal period violations as a 'premium wage' rather than a penalty," but, in
Kirby v. Immoos Fire Protection, Inc., 53 Cal. 4th 1244 1167–68 (2012), "the Court held that a
meal-period violation is not tied to the nonpayment of wages.").

1 While Plaintiff believes and continues to believe this is a strong case for certification,
2 there is risk and significant expense associated with class certification proceedings. As set forth
3 above, Defendant disputed liability and the anticipated class certification motion, arguing
4 significant legal uncertainties are associated with wage and hour cases, which can be factually
5 complex and require protracted litigation to resolve. Plaintiff alleges there were company-wide
6 policies that affected the employees uniformly, and which could be established using
7 representative testimony and company documents that would not require separate mini-trials on
8 liability, but Defendant vigorously contested liability and would have presented several
9 significant defenses to the wage claims as well as to class certification. (Yeremian Decl., ¶¶ 27,
10 46-70, 72, 73-76; Exhibit A, Settlement, ¶¶ 35-38).

11 Finally, in class actions, decertification is always a possibility, and there is always a risk
12 that a trial of this magnitude can become unmanageable. (Yeremian Decl., ¶¶ 22, 75, 100, 103).
13 Cases like *Duran v. U.S. Bank Nat. Assn.*, 59 Cal. 4th 1, 34 (2014) address the complexity of
14 using statistical samples in class actions, and decertification is a real risk that Class Counsel must
15 take into account. (*See also*, Yeremian Decl., ¶ 75). A class trial would have also required expert
16 witnesses, the accrual of extensive litigation costs, and commitment of extensive further time and
17 financial resources. Finally, given the complexity and unsettled nature of the issues, it is likely
18 that any outcome at trial would have resulted in a lengthy and costly appeal. An appeal would
19 result in further delay for the class members who have already waited years for resolution in this
20 matter. (*Id.* at ¶ 76). Risk and legal uncertainty must be dealt with in any litigation, and this
21 Settlement was the product of compromise accounting for those risks and that uncertainty.

22 **F. The Amount Offered in Settlement and Method of Allocation are Fair**

23 In light of the uncertainties and risks of certification and litigation, the parties agreed to a
24 compromise settlement of **\$735,000.00**. Class Counsel estimated **\$7,413,421.08** in potential
25 liability exposure to Defendant for Plaintiff's main claims for damages and penalties, and the
26 Gross Fund Value of **\$735,000.00** therefore represents a recovery for the Class members of
27 approximately **9.91%** of the total estimated maximum liability exposure. (Yeremian Decl., ¶¶ 71-
28 72). Under the Settlement, if the Court approves all requested allocations and awards, the Net

1 Fund Value is estimated to be **\$380,000.00**. For the approximately **1,100** estimated Settlement
2 Class Members (if no exclusions), the average gross individual settlement payment, using a
3 straight average, is **\$345.45**. (Yeremian Decl., ¶¶ 37, 71, Exhibit A, Settlement, ¶¶ 4, 49(g)).
4 Any amounts not approved by the Court will be added back to the Net Fund Value to be
5 distributed to the Settlement Class Members who do not opt-out. (*Id.*).

6 Plaintiff and Class counsel submit this is an excellent result and the Settlement is fair,
7 reasonable, and certainly advantageous to the Class. (Yeremian Decl., ¶¶ 27, 32, 41, 46, 64-66,
8 70, 74, 95-97). Each Settlement Class Member will be compensated using a formula based on the
9 total number of workweeks he/she held a non-exempt position with Defendant during the Class
10 Period. (Yeremian Decl., ¶ 38, Exhibit A, Settlement, ¶¶ 49, 49(a)). Basing the size of the award
11 on Settlement Class Members' work weeks during the Class Period ensures that those with more
12 valuable potential claims receive more money. All Settlement Class Members will enjoy benefits
13 under the same formula, and none are singled out for special treatment, save for Plaintiff's
14 requested representative enhancement award. (Yeremian Decl., ¶¶ 86-91).

15 **G. A Balance of Risk Factors and Kullar Analysis Support Approval**

16 In deciding whether to approve the settlement, the Court must balance these risk factors
17 against an "understanding of the amount in controversy and the realistic range of outcomes of the
18 litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130, 133; *Munoz v. BCI*
19 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-09. The court "must stop
20 short of the detailed and thorough investigation that it would undertake if it were actually trying
21 the case" *Munoz*, at 408. Plaintiff's counsel used the comprehensive data and documents
22 provided to perform an analysis of the potential liability exposure Defendant faced on Plaintiff's
23 main class-wide claims, establishing the realistic upper range of the outcome here. (Yeremian
24 Decl., ¶¶ 13-14, 24-32, 46-72, 74).

25 The fact remains there was a very real prospect that nothing would be recovered if
26 litigation continued and class certification was ultimately denied. At the same time, further
27 litigation would require the expenditure of significant time and financial resources, and there is
28 always the possibility of adverse developments in the law and the likelihood of extended battles in

both the trial court and the courts of appeal. Settlement is a prudent compromise that benefits the Class Members promptly and eliminates such concern.

6. THE NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS MEMBERS

To be deemed proper, a Notice must provide the class members with sufficient information to make an informed decision as to whether to accept or object to the settlement. *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. The notice must apprise the class members of the pendency of the action; reasonably convey information regarding the settlement and the class members' rights, entitlements, and obligations; and afford class members the opportunity to present their objections. *Id.* The Notice (at Yeremian Decl., Exhibit A, Settlement, Exhibit 1 thereto) provides all the information a reasonable person would need to make a fully informed decision about the settlement. It will notify all Class members of the terms of the settlement, of its effect on their rights, of their options as Class members (i.e., participate, object, opt out, and dispute work weeks), and of the consequences of and procedures for exercising those options. (Yeremian Decl., ¶¶ 43-45, 77-79; Exhibit A, Settlement, ¶¶ 47(b), 47(d)-(e); and Settlement Class Notice at Exhibit 1 thereto). The Notice also directs Class members who have questions or concerns to contact the settlement administrator or Class Counsel. (*Id.* at ¶ 37, 78).

The standard for determining the adequacy of notice is whether it has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. Here, the Notice will be sent via first-class mail to each of the 1,638 Class members at their addresses from Defendant's records. (Yeremian Decl., ¶ 77; Exhibit A, Settlement, ¶¶ 46-47). If any Notice Packets are returned undeliverable without a forwarding address, the Claims Administrator will use the national change of address database and perform a skip trace to locate the Class member and mail a new Notice to the correct address. (*Id.*). The Class Notice (at Settlement, Exhibit 1) should be approved as the best and most practicable way to ensure the greatest possible number of Class members will receive notice.

7. CLASS REPRESENTATIVE ENHANCEMENT IS FAIR AND REASONABLE

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 Newberg on Class Actions § 17:1 (5th ed.).

1 Plaintiff requests a reasonable service award as an enhancement payment for his effort and
2 initiative in bringing and helping to prosecute this class action. Plaintiff has dedicated significant
3 time and effort to these proceedings. (Yeremian Decl., ¶¶ 86-91; Gramajo Decl., ¶¶ 5, 10-13).
4 Plaintiff's courage in proceeding with his class-wide claims should not be underestimated. By
5 suing Defendant, Plaintiff contends he increased his risk of retaliation by prospective employers,
6 who must choose between an applicant who has never sued a prior employer and one who has.
7 (Yeremian Decl., ¶ 88; Gramajo Decl., ¶¶ 10-13). Plaintiff contends this risk is particularly real in
8 the information age, where employers can perform background checks of prospective employees,
9 sometimes with the stroke of a key. (*Id.*).

10 Plaintiff has devoted a substantial amount of time to helping Class Counsel effectively
11 develop and prosecute this action at every stage of the litigation. (Yeremian Decl., ¶¶ 86-91;
12 Gramajo Decl., ¶¶ 5, 10-13). Both before and after filing, Plaintiff conferred with Class Counsel to
13 discuss every aspect of this case. He provided Class Counsel with information about Defendant
14 and the industry, reviewed documents, identified witnesses, consulted Class Counsel throughout
15 the litigation, helped complete discovery, and participated in the mediation process and reviewed
16 and signed the settlement agreement after several conferences with Class Counsel. (*Id.*)

17 Plaintiff has spent a significant amount of time with Class Counsel detailing his knowledge
18 of Defendant's practices. He has diligently, adequately, and fairly represented the Class members,
19 and has not placed his interests above any member of the putative Class. This sort of payment to a
20 Class representative has been a common feature of settlements negotiated by Class Counsel and
21 has been routinely approved by trial courts. The representative enhancement award in the amount
22 of **\$5,000.00** to the Class Representative is fair and reasonable. (Yeremian Decl., ¶¶ 86-91; Exhibit
23 A, Settlement, ¶ 49(f)).

24 **8. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE**

25 Class Counsel respectfully requests, without opposition from Defendant, an award of
26 attorneys' fees in an amount not to exceed one-third (1/3) of the Gross Fund Value (i.e. up to
27 **\$245,000.00**), and for an award of reasonable costs and expenses in an amount not to exceed
28 **\$15,000.00**, subject to approval by the Court. (Yeremian Decl., ¶¶ 81-85; Settlement, ¶ 49(g)).

Class counsel submits it has the requisite experience, knowledge, and resources to serve as Class counsel and to zealously represent the Class. (Yeremian Decl., ¶¶ 3-9, 84, 97; Lindsay Decl., ¶¶ 3-12). Plaintiff's counsel has incurred substantial fees and costs thus far in the litigation, including over \$11,700.00 in litigation costs, and will provide further details regarding hourly rates, lodestar, and hours, and will document expenses incurred, in support of final approval and its fees and costs motion. (Yeremian Decl., ¶ 85). It is anticipated that no lodestar multiplier, or at modest one, will be required to award the requested fees of one-third of the common benefit created for the Class.

9. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

Certification is appropriate when the moving party has demonstrated the existence of an ascertainable class and a well-defined community of interest among the class. *See, e.g., Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. Defendant does not dispute, for settlement purposes only, that all of the elements for class certification are met here. Defendant does not concede that certification is appropriate outside of this Settlement and preserve all rights to oppose certification if, for any reason, the settlement does not become effective. (Yeremian Decl., ¶ 92, Exhibit A, Settlement Agreement, ¶ 42).

A. There Is A Numerous and Ascertainable Class

Whether a class is ascertainable is determined by examining the class definition, the size of the class and the means available for identifying class members. *See, Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263, 1271. Defendant's records will establish approximately **1,100** total Class members. Given the passage of time and turnover since the mediation, this total number of Class members has increased from the 948 number used at mediation. (Yeremian Decl., ¶ 26). Defendant does not dispute, for settlement purposes, that approximately 1,100 Class Members are ascertainable and sufficiently numerous. (Yeremian Decl., ¶¶ 93-94).

B. There Is a Well-Defined Community of Interest

A community of interest is established by predominant common issues of law and fact. *See Vasquez*, 4 Cal. 3d at 811. It "does not depend upon an identical recovery,...The mere fact that

1 separate transactions are involved does not of itself preclude a finding of the requisite community
2 of interest so long as every member of the alleged class would not be required to litigate numerous
3 and substantial questions to determine his individual right to recover...” *Id.* at 809.

4 Plaintiff contends, and Defendant does not dispute for settlement purposes, that common
5 issues of fact and law predominate as to each of the claims alleged by Plaintiff. (Yeremian Decl.,
6 ¶¶ 99-100). California courts show “no hesitancy” in inferring class-wide causation, injury, and
7 damages when a common course of action has been shown. *B.W.I. Custom Kitchens v. Owens-*
8 *Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350. This inference ““eliminates the need for each
9 class member to prove individually the consequences of the Defendant’s actions to him or her.””
10 *Id.* at 1351 (quoting *Rosack v. Volvo of America Corp* (1982) 131 Cal. App. 3d 741, 753).

11 This action involves, *inter alia*, a determination about Defendant’s alleged failure to
12 provide meal and rest periods, failure to pay wages and overtime due to allegedly common and
13 unlawful wage rate calculations and off the clock work policies, the resulting failure to pay final
14 wages when required, the failure to provide accurate paystubs, and largely derivative claims under
15 the UCL and PAGA. (Yeremian Decl., ¶¶ 16-23, 46-70). Plaintiff contends these practices
16 affected Class members in the same way and present questions that are suitable for common
17 adjudication because all Class members were subject to the same employment policies and
18 practices, which applied uniformly to all Class members. The outcome of litigation on this matter
19 depends upon questions that are common to Class members. (Yeremian Decl., ¶¶ 99-100). While
20 Defendant maintained otherwise, these issues will not be decided on the basis of facts peculiar to
21 each Class member, but rather on facts common to them all, and liability can be determined on a
22 class-wide basis. (*Id.*)

23 **C. The Named Plaintiff’s Claims Are Typical**

24 A class representative’s claims are typical when they arise from the same event, practice,
25 or course of conduct that gives rise to the claims of other putative class members, and if their
26 claims rest on the same legal theories. The class representative’s claims must be “typical” but not
27 necessarily identical to the claims of other class members. It is sufficient that the representative is
28 similarly situated so that he or she will have the motive to litigate on behalf of all class members.

1 *Classen v. Weller* (1983)145 Cal.App.3d 27, 47; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*
2 (1987) 191 Cal.App.3d 1341, 1347 (“[I]t has never been the law in California that the class
3 representative must have identical interests with the class members.”). Thus, it is not necessary
4 that the class representative should have personally incurred all of the damages suffered by each of
5 the other class members. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.

6 Plaintiff contends, and Defendant does not dispute for settlement purposes, that Plaintiff’s
7 claims are typical of class members’ claims because they arose from the same factual basis and are
8 based on the same legal theories. (Yeremian Decl., ¶¶ 95-96; Gramajo Decl., ¶¶ 2-4, 9-14, 17-19).

9 **D. Adequacy of Class Counsel and Class Representatives**

10 Class Counsel are experienced in class actions, have represented their clients zealously and
11 have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 79-82, 95-96; Lindsay Decl., ¶¶ 3-12). The
12 Class Representative’s interests are aligned with those of the Class Members, he has suffered the
13 same injuries, and has no conflicts of interest. (Yeremian Decl., ¶¶ 86-91, 97-98; Gramajo Decl.,
14 ¶¶ 2-4, 9-14). Class Counsel and the Class Representative are adequate.

15 **E. Predominance and Superiority**

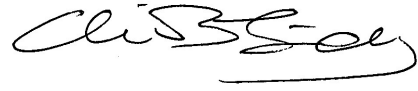
16 Individual issues do not predominate over those common to the class, as addressed above.
17 (Yeremian Decl., ¶¶ 99-100). Additionally, class proceedings are superior to individualized
18 actions, as there is little interest or incentive for Class members to individually control the
19 prosecution of separate actions. If Class members were forced to litigate their claims individually,
20 it would result in as many as 1,100 individual actions against Defendant, and the cost of litigating
21 each such case against Defendant would easily exceed the value of any relief that could be
22 obtained. (Yeremian Decl., ¶¶ 101-103). Class proceedings are superior to individual ones.

23 **10. CONCLUSION**

24 For all of the foregoing reasons Plaintiff respectfully requests that this Court grant
25 preliminary approval of the Settlement Agreement; provisionally certify the proposed Class for
26 settlement purposes; approve Plaintiff as the Class Representative and his counsel as Class
27 Counsel; approve the proposed form of the Class Notice and plan for administration; and schedule
28 the final settlement approval hearing by entering the concurrently provided [Proposed] Order.

1 DATED: November 5, 2021

DAVID YEREMIAN & ASSOCIATES, INC.

2 

3 By _____

David Yeremian

Alvin B. Lindsay

Attorneys for Plaintiff Ovidio G Gramajo

Rodas and the Settlement Class