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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

EDUARDO DIAZ GALAN, an individual,
on behalf of himself and others similarly
situated,

Plaintiff,

vs.

ELITE COMFORT SOLUTIONS, LLC, a
Delaware limited liability company, and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 20STCV35875

CLASS ACTION

Assigned for All Purposes To:
Hon. Carolyn B. Kuhl
Dept.: 12 Spring Street Courthouse

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

*[Filed concurrently with Notice of Motion and
Unopposed Motion; the Declarations of David
Yeremian, Alvin Lindsay, and Eduardo Diaz
Galan; and [Proposed] Order]*

Date: January 12, 2022
Time: 10:00 a.m.
Location: Department 12

Complaint Filed: September 18, 2020
First Amended Complaint: December 23, 2020
Trial Date: None Set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Eduardo Diaz Galan (“Plaintiff”), on behalf of himself and others similarly
3 situated and employed by Defendant Elite Comfort Solutions, LLC (“Defendant”) (collectively,
4 “the parties”), without opposition from Defendant, respectfully requests preliminary approval of
5 the parties’ Joint Stipulation for Class Action Settlement and Release of All Claims (“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 This is a class and PAGA action against Defendant, which custom designs polyurethane
10 foam technology, such as is used in mattresses and couches, and maintains manufacturing,
11 warehousing and shipping facilities in California. Plaintiff was employed in the shipping and
12 receiving department and as a fork lift operator at Defendant’s facilities in Commerce, California.
13 (See Declaration of David Yeremian in support of Motion for Preliminary Approval (“Yeremian
14 Decl.”), ¶ 10). On September 18, 2020, Plaintiff filed his putative Class Action Complaint against
15 Defendant, and the operative First Amended Complaint entered December 22, 2020 alleges the
16 following eleven causes of action against Defendant: (1) Failure to Pay Minimum Wages; (2)
17 Failure to Pay Wages and Overtime Under Labor Code § 510; (3) Meal Period Liability Under
18 Labor Code § 226.7; (4) Rest-Break Liability Under Labor Code § 226.7; (5) Violation of Labor
19 Code § 226(a); (6) Violation of Labor Code § 221; (7) Violation of Labor Code § 204; (8)
20 Violation of Labor Code § 203; (9) Failure to Reimburse Necessary Business Expenditures Under
21 Labor Code § 2802; (10) Violation of Business & Professions Code § 17200 *et seq.*; and (11)
22 Penalties Under Labor Code § 2698, *et seq.* (Yeremian Decl., ¶¶ 11-12).

23 Class counsel provides further detail of the procedure and background that has led to the
24 present settlement. (Yeremian Decl., ¶ 10-14). Without opposition from Defendant, Plaintiff
25 requests that the Court grant preliminary approval of the parties’ Settlement Agreement, at
26 **Exhibit A** to the concurrently filed Yeremian Declaration, and the Class Notice provided at
27 **Exhibit A** to the Settlement. Defendant’s records establish there are approximately **305** Total
28 Class Members satisfying the following Class definition: “all current and former employees of

1 Defendant, classified as non-exempt or hourly-paid workers, who worked for Defendant in
2 California for at least one shift at any time during the period starting four years before the
3 commencement of this action (September 18, 2016) through and including September 30, 2021.”
4 The Settlement further defines the Released PAGA Claims and the PAGA Period. (Yeremian
5 Decl., Exhibit A, Settlement, ¶¶ 1.3, 1.22-1.25, 1.29).

6 The parties agreed to schedule a mediation for June 15, 2021, and after engaging in
7 substantial investigation and extensive negotiations with the assistance of a respected third-party
8 neutral, Tripper Ortman, Esq., the parties reached an agreement on the general terms for settling
9 Plaintiff’s class-wide and PAGA claims against Defendant. The parties entered into a
10 Memorandum of Understanding detailing the general terms of their proposed Settlement.
11 (Yeremian Decl., ¶¶ 12-14, Exhibit A, Settlement, ¶¶ 2.2, 2.3). The terms of the Settlement were
12 then memorialized in the Settlement Agreement before the Court for preliminary approval. (*Id.*).

13 The agreed upon non-reversionary “Total Settlement Amount” is **\$350,000.00**, inclusive of
14 all fees and costs. (Yeremian Decl., ¶ 34). All **305** Class Members will automatically receive a
15 settlement share unless they opt out and will divide, on a *pro-rata* basis, a Net Distribution Fund of
16 approximately **\$188,833.00** if all allocations are approved. The estimated average gross individual
17 settlement payment to the Class members, using a straight average, is **\$619.12**. (Yeremian Decl.,
18 ¶¶ 39, 71). The Total Settlement Amount of \$350,000.00 therefore represents a recovery for the
19 Class members of approximately **11.39%** of the total maximum liability exposure Plaintiff
20 estimated Defendant could face on the class claims. (*Id.* at ¶ 72).

21 The proposed Settlement is fair, reasonable, and adequate, and in the best interests of the
22 Class. Plaintiff, with the consent of Defendant, respectfully requests that this Court issue an Order
23 in the form provided herewith: (1) preliminarily approving the proposed class-wide settlement of
24 this action; (2) approving the form and method for providing class-wide notice; (3) directing that
25 notice of the proposed settlement be given to the class; (4) appointing Plaintiff Eduardo Diaz
26 Galan as Class Representative for settlement purposes only; (5) appointing David Yeremian and
27 Alvin B. Lindsay of David Yeremian & Associates, Inc. as Class Counsel for settlement purposes
28 only; and (6) scheduling a hearing date for Final Approval of the Settlement and Fees and Costs.

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

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

3 Plaintiff's operative First Amended Complaint alleges, *inter alia*, that Plaintiff generally
4 worked work weeks totaling from 40 to 60 hours. Defendant regularly required Plaintiff and the
5 Class members to work shifts of ten hours, and Defendant also frequently required shifts of twelve
6 or more hours. Plaintiff has also alleged he was scheduled to start his shifts at certain times, but
7 was required to clock out only after his assigned tasks for the work shift were completed.
8 Defendant utilized finger print scanners in its timekeeping systems for employee Class members to
9 record timekeeping entries. These systems were capable of recording hours worked to the minute,
10 but Defendant instead followed a uniform policy and practice of rounding down timekeeping
11 entries to at least the nearest quarter hour to the substantial detriment of Plaintiff and the employee
12 Class members, at least as to the regular hours recorded. (Yeremian Decl., ¶ 17).

13 Plaintiff's operative First Amended Complaint has also alleged that Defendant utilized
14 timekeeping systems and procedures which resulted in inaccurate or incomplete records of clock in
15 and out times for work shifts and meal periods, including by rounding hours down to the detriment
16 of the Employees. Also, Plaintiff and the Class members were required to wait in line when
17 entering the facilities to pass through a mandatory health screening including having their
18 temperatures taken. Plaintiff alleged they were required to do so before clocking in, and therefore
19 were under Defendant's control while waiting for and undergoing screenings before they could
20 enter the facilities for each shift. Plaintiff also asserted the above off the clock work and rounding
21 impacted when employees should have been paid at the applicable overtime rates, as they began
22 incurring overtime later than they should have during a work shift. (Yeremian Decl., ¶ 18).

23 Plaintiff also alleged that job demands and work requirements and management pressure
24 required Plaintiff to work through long shifts without taking a meal break, and when he was able to
25 do so, they were often shortened to less than 30 minutes or were otherwise interrupted by work
26 demands or commenced after five hours into a work shift. Plaintiff further asserted rest period
27 violations for failure to provide all breaks or not providing them duty-free. (Yeremian Decl., ¶¶ 19,
28 75; *see also* ¶¶ 16-22, 48-72 for further summary of claims).

Defendant denies all of Plaintiff's Class and PAGA claims, and contends, among other things, it has complied at all times with all applicable laws and asserted that the Settlement Class Members were properly compensated for all time worked and were otherwise treated at all times in compliance with all applicable laws. (Yeremian Decl., ¶¶ 21-22; Exhibit A, Settlement, ¶ 2.4-2.6).

After extensive investigation and discovery, including exchange of comprehensive informal discovery and analysis of relevant documents and data, Class Counsel believed that this case was appropriate for resolution *via* mediation. Given the high level of risk present for both sides, and the substantial uncertainty and expense of protracted litigation, the parties elected to mediate Plaintiff's claims and explore settlement, which they achieved. (Yeremian Decl., ¶¶ 12-33; Exhibit A, Settlement, ¶¶ 2.4-2.6).

B. Investigation and Discovery

Before filing, Class Counsel investigated and researched the circumstances and facts underlying the pertinent issues and the law applicable thereto. (Yeremian Decl., ¶¶ 12-33, 51-72; Exhibit A, Settlement, ¶¶ 2.2, 2.4, 2.5). This required thorough discussions and interviews between Class Counsel and Plaintiff, in addition to the above described research into the various legal issues involved in the case. After filing the lawsuit, Class Counsel conducted a thorough investigation of the facts and claims giving rise to the action, including: (1) conducting formal and informal discovery and conferring with defense counsel about same; (2) reviewing and analyzing time and pay records as well as employment related policies; (3) Plaintiff's personnel file and other documentation; (4) interviewing Plaintiff and potential Class members; (5) researching the applicable law and potential defenses; (6) constructing damage models based on interpretations of California law; and (7) reviewing information provided by Defendant in response to discovery and in advance of the mediation. (Yeremian Decl., ¶¶ 23-31, 91-102; Exhibit A, Settlement, ¶¶ 2.2-2.7).

Upon agreeing to schedule mediation, and leading up to their agreement, the parties conducted discovery regarding the claims and defenses and the items Plaintiff believed were required to file a motion for class certification and complete a constructive and meaningful mediation. (Yeremian Decl., ¶¶ 12-14, 23-32). In addition to the documents and data produced in formal discovery, Plaintiff provided a comprehensive listing of data and items required to which

1 Defendant responded, including by producing all relevant policy related documents and
2 timekeeping and payroll documents. (*Id.*). Plaintiff's counsel and Defendant's counsel also
3 exchanged class-wide data and numbers, including the total numbers of Class members, work
4 weeks, pay periods, average wage rates, etc., which counsel used for estimating potential liability
5 exposure. (*Id.* at a ¶ 28-31). After conducting the initial investigation, Class Counsel determined
6 Plaintiff's claims were suited for class action adjudication based on what they believed was a
7 common course of conduct affecting similarly situated employees. (*Id.* at ¶¶ 23, 32, 72, 101-102;
8 Exhibit A, Settlement, ¶¶ 2.2-2.7).

9 **C. Mediation and Settlement Efforts**

10 On **June 15, 2021**, the parties completed their mediation with Tripper Ortman, Esq., and
11 with his assistance entered into a Memorandum of Understanding detailing the general terms of
12 their proposed Settlement. (Yeremian Decl., ¶¶ 13, 32-33; Exhibit A, Settlement, ¶ 2.2). Mr.
13 Ortman is a respected and highly experienced mediator in wage and hour class actions. The
14 mediation took place only after the parties exchanged extensive informal information, documents,
15 and data. During the mediation, the parties discussed all aspects of the case, including the risks of
16 litigation and the risks to both parties of proceeding with a motion for class certification as well as
17 the law relating to meal periods and rest breaks and off the clock work. (Yeremian Decl., ¶¶ 12-14,
18 32, 48-72). Upon completion of the mediation and formulating the general details of their class-
19 wide settlement, the parties agreed to a Memorandum of Understanding setting forth the material
20 terms of their Settlement, which were later memorialized in the Settlement Agreement now before
21 the Court for preliminary approval. (*Id.* at ¶¶ 13, 32).

22 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks
23 and delays posed by further litigation, and Class Counsel's own prior litigation experience, Counsel
24 believes that the recovery for each Class Member is fair and reasonable taking into consideration
25 the amounts received in other wage and hour class actions, the risks inherent in litigation of this
26 genre, and the reasonable tailoring of each Class Member's claim to the settlement award he or she
27 will receive. (Yeremian Decl., ¶ 33). Based on the settlement negotiations, which were extensive
28 and conducted in good faith and at arm's length between attorneys with substantial experience

litigating wage and hour cases, the Settlement was the product of a non-collusive settlement process and compromises in the interest of reaching a full and complete settlement. (Yeremian Decl., ¶¶ 12-14, 23-30; Exhibit A, Settlement, ¶¶ 2.2-2.7).

3. THE PROPOSED SETTLEMENT, TERMS, AND NOTICE

Defendant has agreed to settlement on a non-reversionary basis for a Total Settlement Amount of \$350,000.00. (Yeremian Decl., ¶ 34; Exhibit A, Settlement, ¶ 1.38). The Settlement Agreement defines the “Class” as: “all current and former employees of Defendant, classified as non-exempt or hourly-paid workers, who worked for Defendant in California for at least one shift at any time during the period starting four years before the commencement of this action (September 18, 2016) through and including September 30, 2021.” Defendant estimates and believes that as of March 15, 2021, there were a total of 305 Class Members (“Total Class Members”). The Settlement further defines the Released PAGA Claims and the PAGA Period. (Yeremian Decl., ¶ 35; Exhibit A, Settlement, ¶¶ 1.3, 1.8, 1.22-1.25, 1.29).

“Individual Settlement Payment” is the amount payable to Class Members from the Net Distribution Fund, and excludes any amounts distributed to Settlement Class Members pursuant to PAGA. All Class Members who do not submit a timely and valid Request for Exclusion will receive an Individual Settlement Payment. Class Members are not eligible to receive any compensation other than an Individual Settlement Payment. The Individual Settlement Payment shall be calculated and apportioned based on the number of Workweeks each Class Member worked during the Class Period as an employee of Defendant. (Yeremian Decl., ¶ 37; Exhibit A, Settlement, ¶¶ 1.18, 3.11.3, 3.11.4, 3.11.4.1 – 3.11.4.4).

The Aggrieved Employees are those Class members employed during the period of September 18, 2019 through September 30, 2021. The “Aggrieved Employee Payment” is 25% of the \$10,000 PAGA Settlement, meaning that \$2,500 will be divided amongst the aggrieved employees according to their PAGA Payment Ratio. (Yeremian Decl., ¶ 37; Exhibit A, Settlement, ¶¶ 1.23, 1.24, 1.25, 3.11.6, 3.11.7).

The “PAGA Payment Ratio” means the respective Workweeks during the PAGA Period for each Aggrieved Employee divided by the sum total of the Workweeks for all Aggrieved

1 Employees during the PAGA Period. The Individual Payments to the Aggrieved Employees from
2 the \$2,500 Aggrieved Employee Payment allocated to them under the PAGA Settlement will be
3 paid to each based on their PAGA Payment Ratio. Aggrieved Employees cannot opt-out of the
4 PAGA Released Claims and will automatically receive a payment for the amount of each
5 individual's PAGA Settlement Payment. (Yeremian Decl., ¶ 38; Exhibit A, Settlement, ¶¶ 1.23,
6 3.11.6, 3.11.7).

7 The "Net Distribution Fund" is the Total Settlement Amount, less the amount that the
8 Court awards for Plaintiff's Service Award (\$10,000), Class Counsel Fees Award (\$116,667),
9 PAGA Settlement (\$10,000), Class Counsel Costs Award (\$12,000), Settlement Administration
10 Costs (\$12,500), and any Payroll Taxes. (Yeremian Decl., ¶ 35; Exhibit A, Settlement, ¶ 1.19).

11 If the Court approves all requested allocations and awards above, the Net Distribution Fund
12 is estimated to be **\$188,833.00**. For the approximately **305** estimated Class Members (if no
13 exclusions), the average gross individual settlement payment share, using a straight average, is
14 \$619.12. Any amounts not approved by the Court as a Class Representative Payment, or Class
15 Counsel Fees and Costs, or Settlement Administration costs or for the PAGA claim will be added
16 back to Net Settlement Amount to be distributed to the Settlement Class Members who are Class
17 participants. The parties have selected ILYM Group, Inc. as the Settlement Administrator.
18 (Yeremian Decl., ¶ 39; Exhibit A, Settlement, ¶ 1.36; *see also* Exhibit A thereto, Class Notice).

19 For the Individual Settlement Payments paid in exchange for the Participating Class
20 Member Released Claims, twenty percent (20%) of each will represent unpaid wages and the
21 remaining eighty percent (80%) will represent penalties and interest. (Yeremian Decl., ¶ 40;
22 Exhibit A, Settlement, ¶¶ 3.11.4.4, 3.11.5, 3.11.6, 3.11.7).

23 The Effective Date of the Agreement is defined as the date by which this Settlement is
24 finally approved and the Court's Final Approval Order becomes binding. The Final Approval
25 Order becomes binding on the date of final approval by the Court if no Class Member timely and
26 properly intervenes or files a motion to vacate the Judgment under Code of Civil Procedure § 663
27 before the entry of Judgment. The Settlement further addresses the effective date in the event there
28 is a successful intervention or appeal. (Yeremian Decl., ¶ 41; Exhibit A, Settlement, ¶ 1.15).

1 Any checks issued to Class Members and Aggrieved Employees shall remain valid and
2 negotiable for 120 days from the date of their issuance and will become void on the 121st day after
3 mailing, i.e., the Void Date. (Yeremian Decl., ¶ 42; Exhibit A, Settlement, ¶ 3.11.3). The Parties
4 agree that any unclaimed funds as a result of the failure to cash Individual Settlement Payment
5 checks by the Void Date shall escheat to the California State Controller's Office for deposit in the
6 Unclaimed Property Fund in the name of the Class Member. (*Id.*).

7 Regarding the Released Claims, as of the date of the Judgment "all claims actually asserted
8 or which could have been asserted in the Action by the Class Members against the Released
9 Parties, arising during the Class Period, based on the facts alleged in the operative Complaint" will
10 be released by the participating Class Members, and the settlement provides further description of
11 the release claims (Yeremian Decl., ¶ 43; Exhibit A, Settlement, ¶ 1.28). Similarly, the "Released
12 PAGA Claims" are defined as follows: "Upon the Effective Date, the Released Parties shall be
13 entitled to a release from the State of California and the Aggrieved Employees only as to all PAGA
14 claims based on the alleged facts and legal claims arising during the PAGA Period at the time of
15 final approval by Plaintiff in the Action and Plaintiff's notice letter to the LWDA..." and also lists
16 out further details of the released claims. (Yeremian Decl., ¶ 44; Exhibit A, Settlement, ¶ 1.29).

17 The parties have selected ILYM Group, Inc. as the Settlement Administrator. (Yeremian
18 Decl., ¶ 39, Exhibit A, Settlement, ¶¶ 1.35-1.36; *see also* Exhibit A thereto, Class Notice). The
19 Settlement Agreement budgets up to \$12,500.00 for Administration costs. (*Id.*). Notice of the
20 Settlement will be provided by the Administrator to the Settlement Class in the form of the Class
21 Notice attached to the Settlement as Exhibit A. (Yeremian Decl., ¶ 45; Exhibit A, ¶ 1.21; and
22 Settlement Class Notice at Exhibit A thereto). The Class Notice includes a summary of the case
23 and settlement terms and provides Class Members with instructions on how to exclude themselves
24 and object to the settlement, and addresses the deadlines and procedures for doing so. (Yeremian
25 Decl., ¶¶ 45-47; Exhibit A, Settlement, ¶¶ 1.21, 1.31, 3.10.6, 3.10.7, and Class Notice).

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

27 California Rule of Court 3.769 requires court approval of the settlement of class action
28 lawsuits. Preliminary approval is merely the first of three steps that comprise the approval

1 procedure for settlements of class actions. *See* Manual for Complex Litigation, Second §30.44
2 (1993); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The second approval step is
3 dissemination of notice of the settlement to all Class Members. *Id.* The third step is a final
4 settlement approval hearing, at which evidence and argument concerning the fairness, adequacy,
5 and reasonableness of the settlement may be presented and Class Members may be heard. *Id.*

6 The determinations of whether a settlement should be preliminarily approved requires,
7 “basic information about the nature and magnitude of the claims in question and the basis for
8 concluding that the consideration being paid for the release of those claims represents a reasonable
9 compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008). However, the
10 record need not contain an explicit statement of the maximum theoretical amount that the class
11 could recover. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399,
12 409 (2010) (“*Kullar* does not,... require any such explicit statement of value; it requires a record
13 which allows “an understanding of the amount that is in controversy and the realistic range of
14 outcomes of the litigation.”). Nonetheless, Class Counsel with the assistance of comprehensive
15 class data and numbers and a timekeeping and payroll sampling performed a potential liability
16 exposure analysis in advance of mediation, which the parties addressed in detail with the mediator.
17 (Yeremian Decl., ¶¶ 12-14, 23-32, 51-72, 96-102; Exhibit A, Settlement, ¶¶ 2.2-2.7). “If the
18 proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has
19 no obvious deficiencies, does not improperly grant preferential treatment to class representatives
20 or segments of the class, and falls within the range of possible approval, then the court should
21 direct that notice be given to the class members of a formal fairness hearing, at which evidence
22 may be presented in support of and in opposition to the settlement.” Manual for Complex
23 Litigation, Second § 30.44, at 229.

24 In deciding whether to approve a proposed class action settlement, the Court must find that
25 a proposed settlement is “fair, adequate, and reasonable” and falls within the “range of approval.”
26 *Dunk*, 48 Cal.App.4th at 1801-02. The trial court considers all relevant factors, such as “the
27 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,
28 the risk of maintaining class action status through trial, the amount offered in settlement, the

1 extent of discovery completed and the stage of the proceedings, the experience and views of
2 counsel, the presence of a governmental participant, and the reaction of the class members to the
3 proposed settlement.” *Id.* The instant settlement satisfies all of these requirements.

4 **5. THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR APPROVAL**

5 The Court’s decision to preliminarily approve a settlement is granted great deference, as an
6 exercise within its broad discretion. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-
7 235 (2001). Applying the above factors, the proposed settlement provides a substantial benefit to
8 the Class. It is fair, reasonable, and adequate, and should be preliminarily approved.

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

10 The proposed settlement was reached as a result of arm’s length negotiations after the
11 completion of substantial discovery and the exchange of necessary class data. (Yeremian Decl., ¶¶
12 2, 12-14, 23-33, 48-72, 91-102; Exhibit A, Settlement, ¶¶ 2.2-2.7). The negotiations have been, at
13 all times, adversarial and non-collusive in nature. *See*, 4 Newberg on Class Actions § 13:45 (5th
14 ed.) (due to the preference of settlement over litigation, “a court will presume that a proposed class
15 action settlement is fair when certain factors are present, particularly evidence that the settlement
16 is the product of arms-length negotiation, untainted by collusion.”). While Plaintiff believes in the
17 merits of his case, he and counsel also recognized the inherent risks of litigation and understood
18 the benefit of the Settlement Class receiving funds immediately, as opposed to risking an
19 unfavorable decision on class certification, or then at trial and appeal, that would take several
20 more years to litigate. (Yeremian Decl., ¶¶ 12-14, 23-30; 32; 73-76, 86; Exhibit A, Settlement, ¶¶
21 2.4-2.7). Assistance from a well-respected mediator ensured negotiations were non-collusive and
22 well-informed.

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

24 As discussed above, the parties engaged in substantial informal discovery before the
25 Settlement was reached to allow them to fully evaluate the class claims and Defendant’s defenses.
26 (Yeremian Decl., ¶¶ 12-14, 23-33, 48-72, 91-102; Exhibit A, Settlement, ¶¶ 2.2-2.6). This
27 litigation has reached the stage where the parties have a clear view of the strengths and
28 weaknesses of their cases sufficient to support the settlement.

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

2 Experienced counsel, operating at arm's length, have weighed the strengths of the case
3 and examined all the issues and risks of litigation and endorse the proposed settlement. Class
4 Counsel are experienced in class actions, have represented their clients zealously, and have no
5 conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 73-79, 80-84, 96; Declaration of Alvin Lindsay
6 ("Lindsay Decl.") filed concurrently herewith, ¶¶ 3-12). Class counsel submits the Settlement is
7 fair, adequate and reasonable in view of the risks and other considerations addressed, and is well-
8 suited for final approval upon completion of the administration process. (Yeremian Decl., ¶¶ 2, 9,
9 14, 26, 31-34, 48; Exhibit A, Settlement, ¶¶ 2.2-2.4; Lindsay Decl., ¶ 12).

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

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

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

14 As with all litigation, there was risk that Plaintiff would not prevail on the merits of his
15 class claims. (Yeremian Decl., ¶¶ 12-14, 23-30; 32; 48-72, 77-80, 86; Exhibit A, Settlement, ¶¶
16 2.4-2.7). Class counsel has addressed the strengths of each of the main class claims, Defendant's
17 arguments against liability, and the estimated potential liability exposure Defendant faced on
18 each. (Yeremian Decl., ¶¶ 48-72). For example, Plaintiff contends he and the other class members
19 were not properly provided meal and rest periods. (Yeremian Decl., ¶¶ 52-56). Defendant
20 contended that Plaintiff and other class members were provided with the opportunity to take
21 proper meal and rest periods, on-duty breaks were not required, and its policies were lawful. (*Id*;
22 *see also, Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1028-29).

23 Plaintiff also alleged he was not paid for all hours worked, including overtime pay, due to
24 Defendant's policy and practice of requiring off the clock work and unlawful rounding or paying
25 at incorrect rates of pay. (Yeremian Decl., ¶¶ 50-51). Defendant again argued these claims were
26 not suitable for class treatment, they did not require off the clock work, and individualized issues
27 predominated. (*Id.*). If Defendant prevailed, there would be no recovery.

1 There were also risks in proving liability for failure to provide accurate wage statements
2 under Labor Code § 226 and failure to pay all wages at termination under Labor Code § 203.
3 (Yeremian Decl., ¶¶ 57-63). These derivative claims require that the underlying claims be proven
4 first, and there are conflicting interpretations as to whether alleged meal and rest claims can even
5 provide the predicate violations for inaccurate wage statement and waiting time penalties claims.¹

6 Defendant also disputed liability for the underlying wage and meal and rest claims, and
7 penalties under Labor Code § 203 are available only if “an employer willfully fails to pay...any
8 wages of an employee who is discharged or quits...” With these penalties, there is always the risk
9 that the trier of fact will not find Defendant’s actions willful. There was also risk associated with
10 the PAGA claim given the Court’s discretion to award a lesser amount. *See*, Labor Code §
11 2699(e)(2). Plaintiff’s counsel addresses these risks. (Yeremian Decl., ¶¶ 60-67).

12 While Plaintiff believes and continues to believe this is a strong case for certification,
13 there is risk and significant expense associated with class certification proceedings. As set forth
14 above, Defendant disputed liability and the anticipated class certification motion, arguing
15 significant legal uncertainties are associated with wage and hour cases, which can be factually
16 complex and require protracted litigation to resolve. Plaintiff alleges there were company-wide
17 policies that affected the employees uniformly, and which could be established using
18 representative testimony and company documents that would not require separate mini-trials on
19 liability, but Defendant vigorously contested liability and would have presented several
20 significant defenses to the wage claims as well as to class certification. (Yeremian Decl., ¶¶ 2, 12-
21 14, 23-32, 48-72, 91-102; Exhibit A, Settlement, ¶¶ 2.4-2.7).

22 Finally, in class actions, decertification is always a possibility, and there is always a risk
23 that a trial of this magnitude can become unmanageable. (Yeremian Decl., ¶¶ 12-14, 23-30; 32;
24 73-76, 80-82, 102; Exhibit A, Settlement, ¶¶ 2.2-2.7). Cases like *Duran v. U.S. Bank Nat. Assn.*,
25 59 Cal. 4th 1, 34 (2014) address the complexity of using statistical samples in class actions, and
26

27 ¹ *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 decertification is a real risk that Class Counsel must take into account. (*See also*, Yeremian Decl.,
2 ¶ 75). A class trial would have also required expert witnesses, the accrual of extensive litigation
3 costs, and commitment of extensive further time and financial resources. Finally, given the
4 complexity and unsettled nature of the issues, it is likely that any outcome at trial would have
5 resulted in a lengthy and costly appeal. An appeal would result in further delay for the class
6 members who have already waited years for resolution in this matter. (*Id.* at ¶ 76). Risk and legal
7 uncertainty must be dealt with in any litigation, and this Settlement was the product of
8 compromise accounting for those risks and that uncertainty.

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

10 In light of the uncertainties and risks of certification and litigation, the parties agreed to a
11 compromise settlement of **\$350,000.00**. Class Counsel estimated **\$3,072,268.29** in potential
12 liability exposure to Defendant for Plaintiff's main claims for damages and penalties, and the
13 Maximum Settlement Amount of **\$350,000.00** therefore represents a recovery for the Class
14 members of approximately **11.39%** of the total estimated maximum liability exposure. (Yeremian
15 Decl., ¶¶ 71-72). Under the Settlement, if the Court approves all requested allocations and
16 awards, the Net Distribution Fund is estimated to be **\$188,833.00** if all allocations are approved.
17 For the approximately **304** estimated Settlement Class Members (if no exclusions), the average
18 gross individual settlement payment is **\$619.12**. (Yeremian Decl., ¶¶ 39, 71).

19 Plaintiff and Class counsel submit this is an excellent result and the Settlement is fair,
20 reasonable, and certainly advantageous to the Class. (Yeremian Decl., ¶¶ 2, 9, 14, 23, 31-32, 48;
21 Exhibit A, Settlement, ¶¶ 2.4-2.6; Lindsay Decl., ¶ 12). Each Settlement Class Member will be
22 compensated using a formula based on the total number of workweeks during the Class Period or
23 pay periods during the PAGA Period. (Yeremian Decl., ¶¶ 37-42, Exhibit A, Settlement, ¶¶ 1.18,
24 3.11.3, 3.11.4, 3.11.4.1 – 3.11.4.4). Basing the size of the award on Settlement Class Members'
25 work weeks during the Class Period or pay periods during the PAGA period ensures that those
26 with more valuable potential claims receive more money. All Settlement Class Members will
27 enjoy benefits under the same formula, and none are singled out for special treatment, save for
28

1 Plaintiff's requested representative enhancement payment. (Yeremian Decl., ¶¶ 85-90; *see also*
2 concurrently filed Declaration of Eduardo Diaz Galan ("Diaz Decl."), ¶¶ 2-18).

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

4 In deciding whether to approve the settlement, the Court must balance these risk factors
5 against an "understanding of the amount in controversy and the realistic range of outcomes of the
6 litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130, 133; *Munoz v. BCI*
7 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-09. The court "must stop
8 short of the detailed and thorough investigation that it would undertake if it were actually trying
9 the case" *Munoz*, at 408. Plaintiff's counsel used the comprehensive data and documents
10 provided to perform an analysis of the potential liability exposure Defendant faced on Plaintiff's
11 main class-wide claims, establishing the realistic upper range of the outcome here. (Yeremian
12 Decl., ¶¶ 12-14, 23-32, 48-72, 91-102; Exhibit A, Settlement, ¶¶ 2.2-2.5). As noted above, the
13 Maximum Settlement Amount represents a recovery of approximately **11.39%** of the total
14 maximum liability exposure Plaintiff estimated. (Yeremian Decl., ¶¶ 39, 71-72).

15 The fact remains there was a very real prospect that nothing would be recovered if
16 litigation continued and class certification was ultimately denied. At the same time, further
17 litigation would require the expenditure of significant time and financial resources, and there is
18 always the possibility of adverse developments in the law and the likelihood of extended battles in
19 both the trial court and the courts of appeal. Settlement is a prudent compromise that benefits the
20 Class Members promptly and eliminates such concern.

21 **6. THE NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS MEMBERS**

22 To be deemed proper, a Notice must provide the class members with sufficient information
23 to make an informed decision as to whether to accept or object to the settlement. *Mullane v.*
24 *Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. The notice must apprise the class
25 members of the pendency of the action; reasonably convey information regarding the settlement
26 and the class members' rights, entitlements, and obligations; and afford class members the
27 opportunity to present their objections. *Id.* The Notice (at Yeremian Decl., Exhibit A, Settlement,
28 Exhibit A thereto) provides all the information a reasonable person would need to make a fully

1 informed decision about the settlement. It will notify all Class members of the terms of the
2 settlement, of its effect on their rights, of their options as Class members (i.e., participate, object,
3 opt out, and dispute work weeks), and of the consequences of and procedures for exercising those
4 options. (Yeremian Decl., ¶¶ 2, 39, 45-47; Exhibit A, Settlement, Exhibit A thereto, Class Notice).

5 The standard for determining the adequacy of notice is whether it has “a reasonable chance
6 of reaching a substantial percentage of the class members.” *Cartt v. Superior Court* (1975) 50
7 Cal.App.3d 960, 974. Here, the Notice will be sent via first-class mail to each of the 305 Class
8 members at their addresses from Defendant’s records. (Yeremian Decl., ¶¶ 77-78; Exhibit A,
9 Settlement, ¶¶ 1.35, 1.36, 3.4, 3.10.3, 3.10.3, 3.10.5, 3.10.6, 3.10.7). If any Notice Packets are
10 returned undeliverable without a forwarding address, the Claims Administrator will use the
11 national change of address database and perform a skip trace to locate the Class member and mail
12 a new Notice to the correct address. (*Id.*). The Class Notice (at Settlement, Exhibit A) should be
13 approved as the best and most practicable way to ensure the greatest possible number of Class
14 members will receive notice.

15 **7. CLASS REPRESENTATIVE ENHANCEMENT IS FAIR AND REASONABLE**

16 “At the conclusion of a class action, the class representatives are eligible for a special
17 payment in recognition of their service to the class.” 5 Newberg on Class Actions § 17:1 (5th ed.).
18 Plaintiff requests a reasonable enhancement payment for his effort and initiative in bringing and
19 helping to prosecute this class action. Plaintiff has dedicated significant time and effort to these
20 proceedings. (Yeremian Decl., ¶¶ 85-90; Diaz Decl., ¶¶ 2-18). Plaintiff’s courage in proceeding
21 with his class-wide claims should not be underestimated. By suing Defendant, Plaintiff contends
22 he increased his risk of retaliation by prospective employers, who must choose between an
23 applicant who has never sued a prior employer and one who has. (Yeremian Decl., ¶ 87; Diaz
24 Decl., ¶¶ 14-15). Plaintiff contends this risk is particularly real in the information age, where
25 employers can perform background checks of prospective employees, sometimes with the stroke
26 of a key. (*Id.*).
27
28

1 Plaintiff has devoted a substantial amount of time to helping Class Counsel effectively
2 develop and prosecute this action at every stage of the litigation. (Yeremian Decl., ¶¶ 85-89; Diaz
3 Decl., ¶¶ 2-14). Both before and after filing, Plaintiff conferred with Class Counsel to discuss
4 every aspect of this case. He provided Class Counsel with information about Defendant and the
5 industry, reviewed documents, identified witnesses, consulted Class Counsel throughout the
6 litigation, helped complete discovery and provide responses, and participated in the mediation
7 process and reviewed and signed the settlement agreement after several conferences with Class
8 Counsel. (*Id.*)

9 Plaintiff has spent a significant amount of time with Class Counsel detailing his knowledge
10 of Defendant's practices. He has diligently, adequately, and fairly represented the Class members,
11 and has not placed his interests above any member of the putative Class. This sort of payment to a
12 Class representative has been a common feature of settlements negotiated by Class Counsel and
13 has been routinely approved by trial courts. The representative enhancement award payment in the
14 amount of **\$10,000.00** to the Class Representative is fair and reasonable. (Yeremian Decl., ¶¶ 85-
15 90; Exhibit A, Settlement, ¶ 15; Diaz Decl., ¶¶ 2-18).

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

17 Class Counsel respectfully requests, without opposition from Defendant, an award of
18 attorneys' fees in an amount not to exceed one-third of the Total Settlement Amount (i.e. up to
19 **\$166,667.00**), and for an award of reasonable costs and expenses in an amount not to exceed
20 **\$12,000.00**, subject to approval by the Court. (Yeremian Decl., ¶¶ 80-84; Settlement, ¶¶ 13-14).

21 Class counsel submits it has the requisite experience, knowledge, and resources to serve as
22 Class counsel and to zealously represent the Class. (Yeremian Decl., ¶¶ 2, 9, 14, 23, 31-32, 48;
23 Lindsay Decl., ¶¶ 3-12). Plaintiff's counsel has incurred substantial fees and costs thus far in the
24 litigation, including approximately \$9,216.00 in litigation costs, and will provide further details
25 regarding hourly rates, lodestar, and hours, and will document expenses incurred, in support of
26 final approval and its fees and costs motion. (Yeremian Decl., ¶¶ 83-84).

1 **9. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

2 Certification is appropriate when the moving party has demonstrated the existence of an
3 ascertainable class and a well-defined community of interest among the class. *See, e.g., Brinker*
4 *Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. Defendant does not dispute,
5 for settlement purposes only, that all of the elements for class certification are met here. Defendant
6 does not concede that certification is appropriate outside of this Settlement and preserve all rights
7 to oppose certification if, for any reason, the settlement does not become effective. (Yeremian
8 Decl., ¶ 91, Exhibit A, Settlement Agreement, ¶ 2.6).

9 **A. There Is A Numerous and Ascertainable Class**

10 Whether a class is ascertainable is determined by examining the class definition, the size of
11 the class and the means available for identifying class members. *See, Vasquez v. Superior Court*
12 (1971) 4 Cal. 3d 800, 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.
13 App. 3d 1263, 1271. Defendant’s records at the time of the mediation reflected approximately **305**
14 total Class members. (Yeremian Decl., ¶ 92). Defendant does not dispute that at least 305 Class
15 Members are ascertainable and sufficiently numerous. (Yeremian Decl., ¶¶ 92-93).

16 **B. There Is a Well-Defined Community of Interest**

17 A community of interest is established by predominant common issues of law and fact. *See*
18 *Vasquez*, 4 Cal. 3d at 811. It “does not depend upon an identical recovery,...The mere fact that
19 separate transactions are involved does not of itself preclude a finding of the requisite community
20 of interest so long as every member of the alleged class would not be required to litigate numerous
21 and substantial questions to determine his individual right to recover...” *Id.* at 809.

22 Plaintiff contends, and Defendant does not dispute for settlement purposes only, that
23 common issues of fact and law predominate as to each of the claims alleged by Plaintiff.
24 (Yeremian Decl., ¶¶ 98-99). California courts show “no hesitancy” in inferring class-wide
25 causation, injury, and damages when a common course of action has been shown. *B.W.I. Custom*
26 *Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350. This inference ““eliminates
27 the need for each class member to prove individually the consequences of the defendants’ actions
28

1 to him or her.” *Id.* at 1351 (quoting *Rosack v. Volvo of America Corp* (1982) 131 Cal. App. 3d
2 741, 753).

3 This action involves, *inter alia*, a determination about Defendant’s alleged failure to
4 provide meal and rest periods, failure to pay wages and overtime due to allegedly common off the
5 clock work policies, the resulting failure to pay final wages when required, the failure to provide
6 accurate paystubs, and largely derivative claims under the UCL and PAGA. (Yeremian Decl., ¶¶
7 2, 12-14, 23-32, 51-72). Plaintiff contends these practices affected Class members in the same way
8 and present questions that are suitable for common adjudication because all Class members were
9 subject to the same employment policies and practices, which applied uniformly to all Class
10 members. The outcome of litigation on this matter depends upon questions that are common to
11 Class members. (Yeremian Decl., ¶¶ 98-99). While Defendant maintained otherwise, these issues
12 will not be decided on the basis of facts peculiar to each Class member, but rather on facts
13 common to them all, and liability can be determined on a class-wide basis. (*Id.*)

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

15 A class representative’s claims are typical when they arise from the same event, practice,
16 or course of conduct that gives rise to the claims of other putative class members, and if their
17 claims rest on the same legal theories. The class representative’s claims must be “typical” but not
18 necessarily identical to the claims of other class members. It is sufficient that the representative is
19 similarly situated so that he or she will have the motive to litigate on behalf of all class members.
20 *Classen v. Weller* (1983)145 Cal.App.3d 27, 47; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*
21 (1987) 191 Cal.App.3d 1341, 1347 (“[I]t has never been the law in California that the class
22 representative must have identical interests with the class members.”). Thus, it is not necessary
23 that the class representative should have personally incurred all of the damages suffered by each of
24 the other class members. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.

25 Plaintiff contends, and Defendant does not dispute for settlement purposes only, that
26 Plaintiff’s claims are typical of class members’ claims because they arose from the same factual
27 basis and are based on the same legal theories. (Yeremian Decl., ¶¶ 94-95).

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

2 Class Counsel are experienced in class actions, have represented their clients zealously and
3 have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 96; Lindsay Decl., ¶¶ 3-12). The Class
4 Representative's interests are aligned with those of the Class Members, he has suffered the same
5 injuries, and has no conflicts of interest. (Yeremian Decl., ¶¶ 85-89; Diaz Decl., ¶¶ 5, 10-11).
6 Class Counsel and the Class Representative are adequate.

7 **E. Predominance and Superiority**

8 Individual issues do not predominate over those common to the class, as addressed above.
9 (Yeremian Decl., ¶¶ 99-100). Additionally, class proceedings are superior to individualized
10 actions, as there is little interest or incentive for Class members to individually control the
11 prosecution of separate actions. If Class members are forced to litigate their claims individually, it
12 would result in 305 individual actions against Defendant, and the cost of individually litigating
13 each such case against Defendant would easily exceed the value of any relief that could be
14 obtained. (Yeremian Decl., ¶¶ 100-102). Class proceedings are superior to individual ones.

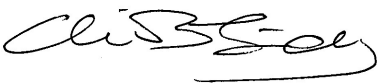
15 **10. CONCLUSION**

16 Plaintiff respectfully requests that this Court grant preliminary approval; provisionally
17 certify the proposed Class for settlement purposes; approve Plaintiff as the Class Representative
18 and his counsel as Class Counsel; approve the proposed form of the Class Notice and plan for
19 administration; and schedule the final settlement approval hearing by entering the concurrently
20 provided [Proposed] Order.

21
22 DATED: December 17, 2021

DAVID YEREMIAN & ASSOCIATES, INC.

23
24 By



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