

Alexei Kuchinsky State Bar No. 279405
KUCHINSKY LAW OFFICE, P.C.
220 Montgomery Street, Suite 2100
San Francisco, CA 94104
Tel.: (628) 200-0902/ Fax.: (628) 200-0907
Email: ak@kuchinskylawoffice.com

Attorney for Plaintiff LUIS FRANCO and the Proposed Class

Janelle Carney (201570)
Janelle@JanelleCarneyLaw.com
JANELLE CARNEY – ATTORNEY AT LAW, APC
14758 Pipeline Ave., Suite E
Chino Hills, CA 91709
Telephone: (909) 521-9609/ Fax: (909) 393-0471

Attorneys for Plaintiff ARIN ESRAELIAN, as an individual,
and on behalf of all employees similarly situated

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
Tel. (213) 488-6555/ Fax (213) 488-6554

Attorneys for Plaintiff DANIEL RODAS,
(Additional Plaintiff's Counsel listed on next page)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

LUIS FRANCO, individually, on behalf of
himself and all other similarly situated
employees,

Plaintiff,

vs.

The Goodyear Tire and Rubber Company, an
Ohio corporation, and Does 1-5

Defendants.

CASE NO.: 22CV393403

Consolidated with:

Esraelian Case No.: 21STCV44620 and

Rodas Case No.: 21STCV28702

**DECLARATION OF ALEXEI
KUCHINSKY, ESQ IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT**

Hearing Date: February 1, 2023

Time: 1:30 p.m.
Department: 3
Judge: Hon. Patricia M. Lucas

ARIN ESRAELIAN, as an individual, and on
behalf of all similarly situated employees,

Plaintiff,

v.

THE GOODYEAR TIRE & RUBBER
COMPANY, and DOES 1-50, inclusive,

Defendants.

DANIEL RODAS, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

THE GOODYEAR TIRE & RUBBER
COMPANY, an Ohio corporation; and DOES 1
through 50, inclusive,

Defendants

I, Alexei Kuchinsky, declare as follows:

1. I am an attorney licensed to practice law in the state of California. I am the principal attorney at Kuchinsky Law Office, P.C., counsel for Plaintiff Luis Franco in this case. I submit this declaration in support of Plaintiff's motion seeking preliminary approval of a proposed class settlement with Defendant The Goodyear Tire & Rubber Company ("Good Year" or Defendant"). Based on my personal knowledge of the facts stated herein, if called as a witness, I could and would testify competently thereto.

I. FACTUAL AND PROCEDURAL BACKGROUND

2. This is a wage-and-hour class action brought by Plaintiff on behalf of himself and the class of all other similarly situated current and former non-exempt hourly employees of Defendant for various Labor Code violations. The gravamen of Plaintiff's complaint is that

1 Defendant failed to pay its non-exempt hourly employees all premiums for non-compliant meal
2 and rest breaks. In addition, Plaintiff alleges that any meal and rest break premiums paid by
3 Defendant to its employees at an unlawful lower *base* rate instead of the *regular* rate of
4 compensation, which should have included the non-discretionary SPIFF bonuses. Plaintiff also
5 seeks to recover for himself and other aggrieved employees all applicable civil penalties under
6 the Private Attorneys General Act of 2004, California Labor Code section 2698 *et. seq.*
7 (“PAGA”).

8 **A. Nature of the Action**

9 3. Defendant is in business of providing automotive and tire services to the general public in
10 California. It operates a network of auto service centers in California. Defendant employed
11 Plaintiff Franco as a service advisor from 2009 through January 18, 2022 at two service centers
12 located at 486 N Winchester Blvd, San Jose, California and 3146 Stevens Creek Blvd, San Jose,
13 California. For services provided, Franco was paid hourly compensation ranging from \$16 to \$19
14 plus a nondiscretionary bonus, known as SPIFF.

15 4. On July 21, 2021, Plaintiff filed a class action in Santa Clara Superior Court pursuant to
16 California Code of Civil Procedure Section 382, on behalf of the following class:

17 All individuals currently or formerly employed by Defendants in
18 California as hourly non-exempt employees at any commencing four
19 years prior to the filing of this Complaint to the final disposition of
20 this case (the “*Class*” or “*Class Members*” and the “*Class Period*”).
(Complaint ¶29)

21 5. On behalf of the purported Class Members, Plaintiff seeks to recover (1) underpaid
22 premiums for non-compliant meal and rest breaks, (2) unpaid premiums for non-compliant rest
23 periods; (3) waiting time penalties; (4) statutory penalties for failure to provide accurate wage
24 statements; and (5) all applicable civil penalties. The Complaint alleges that Defendants have had
25 a consistent policy of paying meal and rest period premiums at the base rate and not the blended
26 rate in violation of Labor Code §§ 226.7 and 512. Specifically, Defendants failed to include into
27 meal and rest break premium payments the hourly value of any nondiscretionary earnings (such
28 as nondiscretionary bonuses). Meal break premiums cannot be paid at an employee’s base
hourly rate. Plaintiff also alleged that this unlawful practice resulted in Defendant’s issuing to its

employees non-compliant wage statements in violation of California Labor Code section 226.

6. On March 2, 2022, Defendant removed this *Franco* Action to the United States District Court – Northern District of California, resulting in *Luis Franco v. The Goodyear Tire & Rubber Company, et. al.* (N. Cal. Jan 18, 2022, Case No. 5:22-cv-01320 -CRB). Pursuant to the Parties’ stipulation, on April 18, 2022, the District Court stayed the *Franco* action, pending the resolution of a few other related state and federal actions¹ that alleged similar or identical claims.

B. Investigation and Settlement Negotiations

7. Following the exchange and extensive review of relevant documents and class data, on April 22, 2022, the Parties engaged in a full-day mediation with experienced wage and hour class action mediator Steve Rottman, Esq. The case did not settle that day, but through continued arms-length negotiations through Mr. Rottman, it eventually resulted in a global settlement of all class and PAGA claims alleged in *Rodas*, *Rodas-PAGA*, *Esraelian*, and *Esraelian-PAGA*, including Plaintiff Franco’s class and PAGA claims.

8. Pursuant to the terms of the Class Settlement, in September 2022, all above-referenced federal district court actions were remanded to state courts for settlement purposes, including this *Franco* Action. As part of the settlement agreement in all matters, on November 2, 2022, Plaintiffs filed the above-captioned Consolidated Complaint for settlement purposes only.

II. PLAINTIFF’S COUNSEL’S EXPERIENCE IN HANDLING COMPLEX WAGE-AND-HOUR LITIGATION

9. I am a member in good standing of the State Bar of California and have been since 2011. I am admitted to practice in the state of California and the United States District Courts for the Northern, Central, and Southern Districts of California. I am a member of the Labor and Employment Law Section of the State Bar of California. I earned a bachelor’s degree from San Francisco State University (*Summa Cum Laude*), and I am a graduate of the University of

¹ *Daniel Rodas v. The Goodyear Tire & Rubber Co.*, (C.D. Cal. August 4, 2021, Case No. 2:21-CV-07526 VAP); *Daniel Rodas v. The Goodyear Tire & Rubber Co.*, (L.A. Superior Court, Sep. 24, 2021, Case No.: 21STCV35255); *Arin Esraelian v. The Goodyear Tire & Rubber Co.*, (C.D. Cal. December 8, 2021, Case No. 2:22-cv-00413-JFW-JPR); *Arin Esraelian v. The Goodyear Tire & Rubber Co.*, (L.A. Superior Court, Jan 28, 2022, Case No.: 22STCV03534).

California Davis School of Law.

10. I have represented employees and employers in litigation resulting in both settlements and taking cases to verdict. I have extensive experience handling wage-and-hour cases, including claims like those asserted in this action. I have litigated various wage-and-hour legal issues, including unpaid off-the-clock time and overtime, independent contractor misclassification, exempt misclassification, and unpaid premiums for missed meal and rest breaks. My knowledge of the applicable wage-and-hour laws is evidenced by my representation of thousands of employees, in litigation in California and federal courts. During the past ten years, I have handled over three hundred employment cases, including multi-plaintiff, class, and representative actions. Some of these actions include the following class actions in which I was approved class counsel:

- *Ahuja v. IMS, et.al.*, RG21106403 (Cal. Super. Ct., Cnty. of Alameda, November 22, 2022) (a class action on behalf of misclassified mobile examiners for failure to pay overtime)
- *Shetty v. ILSC (San Francisco), LLC.*, CGC-19-581622 (Cal. Super. Ct., Cnty. of San Francisco, August 2022) (a class and PAGA action on behalf of 94 misclassified workers for failure to pay wages)
- *Brooks v. Ceva Logistics, U.S., Inc., et.al.*, RG19016919 (Cal. Super. Ct., Cnty. of Alameda, October 2021) (a class action on behalf of 31 warehouse workers for failure to pay overtime)
- *Sanchez v. Exam One Worldwide, inc, et. al.*, 17CV308382 (Cal. Super. Ct., Cnty. of Santa Clara, July 2020) (a class action on behalf of 450 mobile examiners for failure to pay wages)
- *Matsui v. Chinese Hospital Association, Inc.*, CGC-19-577901 (Cal. Super. Ct., Cnty. of San Francisco, June 2020) (a class and PAGA action on behalf of 145 nurses for failure to pay wages)
- *Sherman v. Harris Restaurant, Inc.*, CGC-20-582732 (Cal. Super. Ct., Cnty. of San Francisco, March 2020) (a representative PAGA action on behalf of 50 front-of-house employees for failure to pay wages)
- *Alkhamaisi v. Katmai Government Services, LLC*, 3:18-cv-00115 (S.D. Cal. Aug. 20, 2019) (class counsel in a collective FLSA and class action on behalf of 450 employees for failure to pay wages)
- *Atiqi v. Parsons Government Services, Inc.*, 5:14-CV-00628 (C.D. Cal. Aug. 22, 2017) (class counsel in a class action on behalf of 1,930 employees for failure to pay wages)
- *Hillman v. Lexicon Consulting, Inc.*, 5:16-cv-01186, (C.D. Cal. Oct. 12, 2017) (class counsel in a collective FLSA and class action for failure to pay wages on behalf of 190 employees)

- *Graham. v. Amazon Logistics, Inc.*, RG17852953 (Cal. Super. Ct., Cnty. of Alameda, May 2018) (a representative PAGA action on behalf of 64 delivery drivers for failure to pay wages)

III. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

11. As more fully discussed in the Memorandum of Points and Authorities in Support of Plaintiffs' Motion For Preliminary Approval of Class Settlement ("Preliminary Approval Motion"), each of the requirements for class certification is met. For settlement purposes only, Defendant does not oppose Plaintiffs' contentions regarding provisional certification of the Class.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND THEREFORE QUALIFIES FOR PRELIMINARY APPROVAL

12. I believe the proposed settlement is fair, reasonable, and adequate in light of the risk of further litigation. In my view, the settlement compares favorably to the uncertainties associated with continued litigation regarding the contested issues in this case, as explained below. Indeed, if the parties were unable to resolve the claims in mediation, the parties would likely continue to vigorously litigate these multiple lawsuits. Protracted litigation would likely delay any possible recovery.

13. Plaintiff's Counsel estimate that the theoretical potential maximum recovery is approximately \$7,024,400. Here, Defendant agreed to pay to the common fund of \$3,500,000 which represents approximately 50% of the theoretical maximum recovery. On average, a class member will receive approximately \$976 after attorneys' fees, costs, incentive payment, administrative costs, and civil penalties to the LWDA are deducted. Based on my experience, the proposed settlement amount represents an excellent result for employees and warrants the court approval of this class settlement.

A. The Risk Associated with Proving Defendant's Liability

14. Plaintiffs' claims are strongly disputed and proving Defendant's liability involves great risk due to various legal and factual uncertainties.

1 *i. Minimum Wage and Overtime Claims*

2 15. Defendant disputes minimum wage and overtime liability on the ground that it is not
3 required to pay for work hours that were not reported. Defendant maintains that under its
4 timekeeping policies, all employees were required to report all hours worked, including off-the-
5 clock hours.

6 16. With respect to Plaintiffs' minimum wage claim, Defendant contends that even if the
7 employees performed any off-the-clock work, their average hourly rate was always above the
8 applicable statutory minimum wage rate when the daily earnings are averaged out over all hours
9 worked, including allegedly unpaid off-the-clock hours.

10 *ii. Meal and Rest Break Claims*

11 17. Defendant contends that it has maintained lawful meal and rest period policies pursuant
12 to which all employees were given an opportunity to take meal and rest periods and that it paid
13 the section 226.7 premiums when missed breaks were reported. Through informal investigation,
14 I confirmed that Defendant's electronic timekeeping system kept track of employees' missed
15 meal periods. It is unclear to what extent Defendant attempted to ensure that the section 226.7
16 premiums for missed meal periods were paid. Defendant also produced to my office Plaintiff
17 Franco's payroll and time records showing that the premiums were paid for some missed
18 periods. Based on this practice, Defendant contends that if there were any missed and unpaid
19 meal periods, Defendant was not liable under Labor Code section 512 because such missed meal
20 periods were never reported. Plaintiff disputes this contention.

21 18. With respect to rest break claim, I anticipate Defendant to argue that Plaintiff and all
22 other employees had enough time to take a ten-minute rest period, and that its employees often
23 had periods of "down time" during which it was possible for them to take rest periods. Or if
24 Plaintiff or other employees did not take rest periods, it was their own personal decision or fault
25 because they could have simply asked another co-worker or manager to cover their breaks.

26 19. Certifying off-the-clock and meal or rest break classes is always a hard-fought battle. I
27 anticipate Defendant to argue that all claims are not suitable for adjudication on a class-wide
28 basis and that the following individual issues will predominate over any potential common issues

1 and will require an individualized finding of liability for each Class Member:

- 2 • Whether an employee worked off-the-clock and whether management knew about
- 3 it;
- 4 • whether an employee was relieved from all work-related duties and free from
- 5 Defendant's control during meal and rest breaks. *See Augustus v. ABM Sec.*
- 6 *Servs., Inc.*, No. S224853 (Cal. Dec. 22, 2016); and
- 7 • whether an employee voluntarily decided not to take meal and rest periods for
- 8 personal reasons.

9 20. Therefore, there is a risk that a trial of this magnitude would become unmanageable due
10 to various individual issues.

11 21. Additionally, assuming liability is established, Plaintiff may face difficulty with proving
12 damages, namely, the exact number of workdays during which rest breaks were taken or missed
13 because there are no time records for rest periods. This is especially problematic given that
14 Plaintiff admits that during some workdays, meal and rest breaks were taken timely and during
15 some shifts Plaintiff received premiums for missed meal period.

16 22. Furthermore, proving up individual damages would likely require costly representative
17 testimony analyzed by experts on both sides, and Defendants would likely dispute the application
18 of *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, and *Duran v. U.S. Bank Nat. Assn.*
19 (2014) 59 Cal.4th 1 regarding any evidentiary showing and Trial Plan with respect to both
20 liability and damages. Moreover, decertification is always a possibility, thereafter, making
21 appellate proceedings almost certain regardless of which side prevailed at trial.

22 **B. The Settlement is the Product of Informed, Arm's-length Negotiations**

23 23. Here, the proposed Settlement Agreement is a product of arm's-length negotiations.
24 Negotiations, while cordial, were adversarial. The parties engaged in substantial informal
25 discovery, which permitted Plaintiffs' counsel to make an informed assessment of the likelihood
26 of succeeding on Plaintiff's claims. The information informally provided was sufficient for
27 Plaintiff's counsel to fully evaluate the value of each claim. For example, my co-counsel and I
28 reviewed and analyzed class data and relevant documents, including the named Plaintiff's time-

1 sheets and wage statements to determine the maximum potential recovery for each class claim,
2 including unpaid and underpaid premiums for missed meal and rest periods, unreimbursed work-
3 related expenses, and statutory penalties under California Labor Code section 226. Therefore,
4 the class data provided by Defendant and the investigation conducted before mediation were
5 sufficient to fully evaluate liability and damages for each class claim.

6 **C. The Proposed Plan of Allocation is Fair and Reasonable**

7 24. The proposed plan of allocation compensates the Settlement Class Members based on the
8 number of weeks worked by each class member (Settlement, §64). This is the most fair and
9 appropriate method as it accurately represents the amount of work and time spent by each Class
10 Member, provided all class members earned approximately the same hourly rates. Therefore, the
11 work-week method should be approved as a fair, practical, and most-precise unit for measuring
12 employees' individual shares of the class settlement.

13 **D. The Proposed Notice of Class Action Settlement and Procedure are**
14 **Appropriate.**

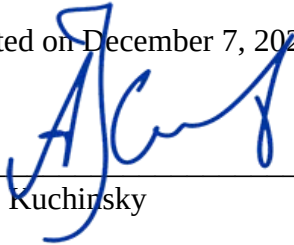
15 25. The proposed Notice of Class Action Settlement ("Notice") provides all the information a
16 reasonable person would need to make an informed decision about the settlement. The Notice
17 provides i) an accurate summary of the terms of the settlement, ii) an estimated individual
18 settlement payment, iii) an explanation of how the allocation was calculated and iv) how to
19 dispute the data used in calculating individual settlement payment. It informs Class Members
20 that their rights may be affected by the settlement, that they may participate in, object to, or opt
21 out of the settlement. It provides the procedure for Class Members to opt out and the procedure
22 for Class Members to object to the Settlement. It notifies Class Members of the Final Approval
23 Hearing and how to obtain additional information.

24 26. The Settlement Agreement provides that Settlement Administrator shall send the Class
25 Settlement Notice to Class Members via First Class U.S. Mail, using the most current, known
26 mailing address for each Class Member. Any mailing returned to the Settlement Administrator as
27 undeliverable shall be sent to the forwarding address. If no forwarding address is provided, the
28 Settlement Administrator will use skip-trace search and resend the Notice to ensure the Notice is

1 sent to the maximum number of Class Members possible. (Settlement, ¶ 75)

2
3 I declare under penalty of perjury under the laws of the United States and the State of
4 California that the foregoing is true and correct.

5
6 Executed on December 7, 2022, in San Francisco, California.

7
8 
9 _____
10 Alexei Kuchinsky
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28