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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN FRANCISCO**

13 DIEGO ORNELAS, an individual, on behalf
of himself and others similarly situated,

14 Plaintiff,

15 vs.

16 NATIONAL STORAGE AFFILIATES
17 TRUST, a Maryland real estate investment
trust; INTANDEM HUMAN RESOURCES,
18 LLC, a Colorado limited liability company;
STORAGE MANAGEMENT AND
19 LEASING CO., LLC, a Florida limited
liability company; ISTOREAGE JV, LLC, a
20 Delaware limited liability company; and
DOES 1 through 50, inclusive,

21 Defendants.
22

Case No.: CGC-18-571421

CLASS ACTION

Assigned for Law and Motion Purposes To:
Hon. Ethan P. Schulman
Dept.: 302, Civic Center Courthouse

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

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

Date: August 19, 2020
Time: 9:30 a.m.
Department 302

Complaint Filed: November 19, 2018
First Amended Complaint: March 28, 2019
Trial Date: None Set

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

07/28/2020
Clerk of the Court

BY: JUDITH NUNEZ
Deputy Clerk

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. INTRODUCTION..... 1

2. FACTUAL BACKGROUND, DISCOVERY, AND MEDIATION 4

 A. Plaintiff’s Claims and Defendants’ Denials 4

 B. Investigation and Discovery 5

 C. Mediation and Settlement Efforts 6

3. THE PROPOSED SETTLEMENT, TERMS, AND NOTICE 7

4. THE THREE-STEP APPROVAL PROCESS 10

5. THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR APPROVAL 11

 A. The Settlement Is the Result of Serious, Informed, Non-Collusive Negotiations 11

 B. The Parties Engaged In Extensive Discovery and Investigation..... 11

 C. Class Counsel Are Experienced Class Action and Employment Attorneys 12

 D. The Presence of a Governmental Participant 12

 E. The Strength of Plaintiff’s Case and the Risks and Cost of Further Litigation. 12

 F. The Amount Offered in Settlement and Method of Allocation are Fair 14

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

6. THE NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS MEMBERS 15

7. CLASS REPRESENTATIVE ENHANCEMENT IS FAIR AND REASONABLE..... 16

8. THE REQUESTED ATTORNEYS’ FEES AND COSTS ARE REASONABLE..... 17

9. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE 17

 A. There Is A Numerous and Ascertainable Class..... 18

 B. There Is a Well-Defined Community of Interest..... 18

 C. The Named Plaintiff’s Claims Are Typical..... 19

 D. Adequacy of Class Counsel and Class Representatives..... 19

 E. Predominance and Superiority 19

10. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

1

2

3 *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341 18-19

4 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004 12, 17

5 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960 16

6 *Classen v. Weller* (1983) 145 Cal.App.3d 27 19

7 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794..... 10-11

8 *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal. 4th 1 13

9 *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 13

10 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116 10, 15

11 *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950) 15

12 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399 10, 15

13 *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094..... 13

14 *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263 18

15 *Rosack v. Volvo of America Corp* (1982) 131 Cal. App. 3d 741 18

16 *Stewart v. San Luis Ambulance, Inc.* (9th Cir. 2017) 878 F.3d 883..... 13

17 *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800 18

18 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224 11, 19

Statutes

19

20 28 U.S.C. § 1331 2

21 28 U.S.C. § 1441(a)..... 2

22 Business & Professions Code § 17200 *et seq.* 1, 18

23 Code of Civil Procedure § 382..... 1, 10

24 Labor Code § 203 1, 13

25 Labor Code § 221 1

26 Labor Code § 226(a) 1, 13

27 Labor Code § 226.7 1, 4

28 Labor Code § 510..... 1

1	Labor Code §§ 2698, <i>et seq.</i> ("PAGA").....	1, 5, 8, 13, 18
2	Labor Code § 2699(e)(2).....	13
3	Labor Code § 2699(l)(2)	12
4	Labor Code § 2802.....	1
5	Other Authorities	
6	California Rule of Court 3.769.....	1, 10
7	Manual for Complex Litigation, Second § 30.44 (1993)	10
8	4 Newberg on Class Actions § 13:45 (5th ed.)	11
9	5 Newberg on Class Actions § 17:1 (5th ed.)	16

10
11
12
13
14
15
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff DIEGO ORNELAS (“Plaintiff”), on behalf of himself and all other similarly
3 situated employees of Defendants, NATIONAL STORAGE AFFILIATES TRUST (“NSAT”),
4 INTANDEM HUMAN RESOURCES, LLC (“InTandem”), STORAGE MANAGEMENT AND
5 LEASING CO., LLC (“SMLC”), and ISTOREAGE JV, LLC (“iStorage”) (collectively,
6 “Defendants”) (with Plaintiff, “the parties”), without opposition from Defendants, respectfully
7 requests preliminary approval of the parties’ Joint Stipulation of Class Action Settlement
8 (“Settlement” or “Settlement Agreement”) pursuant to California Code of Civil Procedure § 382
9 and Rule 3.769 of the California Rule of Court.

10 **1. INTRODUCTION**

11 Defendants operate a network of storage facilities. Plaintiff has alleged he was jointly
12 employed by Defendants as a non-exempt hourly employee at Defendants’ facilities operating
13 under the iStorage brand in Moreno Valley, California., and alleges he and the other similarly
14 situated Class members and aggrieved employees were employed there and at the other iStorage
15 facilities operated by Defendants in California. (*See* Declaration of David Yeremian in support of
16 Motion for Preliminary Approval (“Yeremian Decl.”), ¶ 10). Plaintiff then filed his Class Action
17 Complaint on **November 19, 2018** in San Francisco County Superior Court alleging ten causes of
18 action against Defendants for (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and
19 Overtime Under Labor Code § 510; (3) Failure to Pay Wages Under the FLSA, 29 U.S.C. §§ 206,
20 207; (4) Meal Period Liability Under Labor Code § 226.7; (5) Rest Break Liability Under Labor
21 Code § 226.7; (6) Violation of Labor Code § 226(a); (7) Violation of Labor Code § 221; (8)
22 Violation of Labor Code § 203; and (9) Failure to Reimburse Necessary Business Expenditures
23 under Labor Code § 2802; and (10) Violation of Business and Professions Code § 17200 *et seq.*
24 (Yeremian Decl., ¶ 11).

25 After submitting a Notice Letter to the LWDA on **November 16, 2018** and exhaustion of
26 the notice period under the PAGA, on **March 28, 2019**, Plaintiff filed a First Amended Complaint
27 adding an eleventh cause of action for Penalties Under Private Attorneys General Act, Labor Code
28 § 2698 *et seq.* (“PAGA”), and Defendants have answered. (Yeremian Decl., ¶¶ 11-12).

1 On **December 26, 2018**, Defendant InTandem removed this Action to the Northern
2 District of California Court (ND Cal Case No.: 3:18-cv-07717-MMC) pursuant to 28 U.S.C. §§
3 1331 and 1441(a), alleging federal question jurisdiction. (Yeremian Decl., ¶ 12). In connection
4 with the initial Case Management Conference in federal court, the parties informed the Court they
5 had agreed to conduct a mediation with Jeff Ross, Esq, a well-respected wage and hour class
6 action mediator, on **December 3, 2019**. They then stipulated to their proposed case management
7 dates taking this action through conditional certification of Plaintiff's FLSA claims by **May 3,**
8 **2020**, and to reflect their agreed upon mediation date. (Yeremian Decl., ¶ 13). Following initial
9 discovery for mediation, Plaintiff agreed to voluntary dismissal of the FLSA claims so the parties
10 could focus their efforts on litigating and resolving the California class claims. The parties entered
11 into a stipulated dismissal of Plaintiff's Third Cause of Action under the FLSA on **January 29,**
12 **2020**. (Yeremian Decl., ¶ 14).

13 Following dismissal of the FLSA claims, on **January 30, 2020**, the Court also ordered the
14 case remanded back to San Francisco County Superior Court. The case file was transferred from
15 Northern District of California to San Francisco County on **February 3, 2020**. On **March 3, 2020**,
16 the Court issued its Order Setting Case Management Conference assigning the Action to Dept. 610
17 for case management purposes and setting a CMC for **April 15, 2020** in Department 610. The
18 CMC has been continued a number of times, and a further conference is presently scheduled for
19 **September 30, 2020** to allow the parties time to file the present motion. Plaintiff requests that the
20 Court advance and set this further CMC to coincide with the hearing on the present motion for
21 preliminary approval of the Settlement Agreement on **August 19, 2020**. (Yeremian Decl., ¶ 15).

22 On **December 3, 2019**, the Parties participated in a private mediation with well-respected
23 wage and hour class action mediator Jeff Ross, Esq., In advance of mediation, the parties agreed to
24 and conducted comprehensive informal discovery. This included an exchange of documents and
25 records samplings, and detailed Class data for the California class, including class numbers, work
26 weeks and pay periods worked, and average pay rates. (Yeremian Decl., ¶ 16).

27 Without opposition from Defendants, Plaintiff requests that the Court grant preliminary
28 approval of the parties' Settlement Agreement, at **Exhibit A** to the concurrently filed Declaration of

1 David Yeremian (“Yeremian Decl.”), and the Class Notice provided at **Exhibit 1** to the Settlement.
2 Defendants’ records establish there are approximately **89** Settlement Class members satisfying the
3 following Class definition: all individuals who are or previously were employed by Defendants or
4 predecessor entities as non-exempt, hourly employees at Defendants’ storage facilities within the
5 State of California during the time period of **November 19, 2014** and **February 3, 2020** (the “Class
6 Period”). “Class Members” or “Settlement Class Members” or the “Settlement Class” is defined as
7 any person who is a member of the Class to does not opt out of the Settlement by requesting
8 exclusion. (Yeremian Decl., ¶¶ 36-37; Exhibit A, Settlement, ¶¶ A.3, A.5, A.7, A.8, D.2 - D.5).

9 After engaging in substantial investigation and extensive negotiations with the assistance of
10 a respected third-party neutral, Jeffrey Ross, Esq., the parties formulated the general details of their
11 class-wide settlement, which they later memorialized in a Memorandum of Understanding setting
12 forth the material terms for settling all claims alleged on a class-wide, non-reversionary basis. The
13 terms of the Settlement were subsequently memorialized in the Settlement Agreement now before
14 the Court for preliminary approval. The agreed upon Total Settlement Amount is **\$400,000.00**,
15 inclusive of all fees and costs. (Yeremian Decl., ¶¶ 13, 24-34). All **89** Settlement Class Members
16 will automatically receive a settlement share unless they opt out and will divide, on a *pro-rata*
17 basis, a Net Settlement Amount of approximately **\$219,166.66**, if all allocations are approved. The
18 estimated average gross individual settlement payment to the Class members, using a straight
19 average, is **\$2,462.54**. (Yeremian Decl., ¶¶ 36-37, 71-72). The Total Settlement Amount of
20 **\$400,000** is **39.45%** of the total maximum liability exposure Class Counsel estimated (i.e.
21 \$1,013,981.26) for Plaintiff’s main claims. (*Id.* at ¶¶ 71-72).

22 The proposed settlement reflected in the Joint Stipulation of Class Action Settlement
23 (“Settlement” or “Settlement Agreement”) is fair, reasonable, and adequate, and in the best
24 interests of the Class. Plaintiff, with the consent of Defendants, respectfully requests that this
25 Court issue an Order in the form provided herewith: (1) preliminarily approving the proposed
26 class-wide settlement of this action; (2) approving the form and method for providing class-wide
27 notice; (3) directing that notice of the proposed settlement be given to the class; (4) appointing
28 Plaintiff Diego Ornelas as Class Representative for settlement purposes only; (5) appointing David

1 Yeremian and Alvin B. Lindsay of David Yeremian & Associates, Inc. and Emil Davtyan of the
2 Davtyan Law Firm as Class Counsel for settlement purposes only; and (6) scheduling a hearing
3 date for Final Approval of the Settlement and Plaintiff's Application for attorneys' fees and costs.

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

5 **A. Plaintiff's Claims and Defendants' Denials**

6 Plaintiff's operative First Amended Complaint alleges that he and the Class members were
7 either not paid by Defendants for all hours worked or otherwise were not paid at the appropriate
8 minimum, regular and overtime rates. Plaintiff also contends that Defendants failed to pay Plaintiff
9 and the Class members all wages owed to them for all hours worked, including by unlawful under-
10 recording of hours worked resulting in off the clock work and by failing to incorporate non-
11 discretionary, performance based bonuses into the overtime rate calculation. (Yeremian Decl., ¶
12 19). Plaintiff further alleged that, in order to count money and prepare the office for opening,
13 Plaintiff and the Class members were required by Defendants to arrive at work at least ten minutes
14 before the opening, while they were not permitted to clock in until no earlier than two minutes
15 before that opening or the start of their shifts. Plaintiff further alleges that the Class members had
16 to boot up the computer to clock in, thus resulting in further uncompensated work time. Plaintiff
17 alleges that he and the Class members were generally asked to work shifts over eight hours in a
18 day and to work over forty hours in a work week, but they were not paid at the appropriate
19 overtime rate for all such hours, including by being required to perform work duties and tasks
20 without pay and while off-the-clock, and Defendants miscalculated and underpaid overtime by
21 failing to account for bonuses in the regular rate used to calculate overtime payments. (*Id.* at ¶ 20).

22 Plaintiff also alleged that Defendants automatically deducted from the hours worked by
23 Plaintiff and the Class an unpaid meal break for one hour on these shifts, despite requiring them to
24 remain on duty and responsive to customer demands and inquiries. Plaintiff has therefore alleged
25 that he and the Class members were not provided with all required meal periods and rest break,
26 and those they did receive were interrupted by customer demands or were otherwise not off-duty
27 and timely. Plaintiff also argued that the Employee Handbook impermissibly required employees
28 to not postpone or delay customer service for the purposes of breaks. (Yeremian Decl., ¶ 21).

1 Plaintiff further alleged Defendants failed to reimburse necessary business expenses and
2 asserted other derivative claims deriving from the above alleged violations, including for failure to
3 provide accurate itemized wage statements and failure to timely pay all wages and pay all wages at
4 termination or separation, and for unfair competition and the above-addressed PAGA claims.
5 (Yeremian Decl., ¶¶ 19, 22-23).

6 Defendants deny all of Plaintiff's Class and PAGA claims, and contend, among other
7 things, they have complied at all times with all applicable laws and asserted that the Settlement
8 Class Members were properly compensated for all time worked, and otherwise treated at all times
9 in compliance with all applicable laws. (Yeremian Decl., ¶ 27, Exhibit 1, Settlement, ¶ B.3).

10 Defendants contend that they maintained legally-compliant policies and that they have
11 properly, timely and fully paid all earned wages, they did not require employees to work without
12 pay, nor did Defendants have knowledge of any purported work performed off-the-clock.
13 Defendants also argued they authorized and permitted timely meal and rest breaks, and that, to the
14 extent an individual employee did not take a provided break, employees waived their right to them
15 and to seek relief herein. Defendants also asserted that they have provided accurate wage
16 statements and neither Plaintiff nor any of the putative class members are entitled to any penalties
17 for alleged inaccurate wage statements. (Yeremian Decl., ¶¶ 46-72; Ex. A, Settlement, ¶ B.3).

18 After extensive investigation and informal discovery, including analysis of relevant
19 documents and other gathered data and after relying upon assessment by Plaintiff's statistical
20 analysis expert, Class Counsel believed that this case was appropriate for resolution *via* mediation.
21 Given the high level of risk present for both sides, and the substantial uncertainty and expense of
22 protracted litigation, the parties elected to mediate Plaintiff's claims and explore settlement, which
23 they achieved. (Yeremian Decl., ¶¶ 24-33; Exhibit A, Settlement, ¶ B.2).

24 **B. Investigation and Discovery**

25 Before filing, Class Counsel investigated and researched the circumstances and facts
26 underlying the pertinent issues and the law applicable thereto. (Yeremian Decl., ¶¶ 24-33; 46-72;
27 Exhibit A, Settlement, ¶¶ B.1, B.2). This required thorough discussions and interviews between
28 Class Counsel and Plaintiff, in addition to the above described research into the various legal issues

1 involved in the case. (Yeremian Decl., ¶¶ 86-91). After filing the lawsuit, Class Counsel conducted
2 a thorough investigation of the facts and claims giving rise to the action, including: (1) conducting
3 informal and formal discovery, and meeting and conferring with defense counsel about same; (2)
4 reviewing and analyzing time and pay records as well as employment handbooks, Plaintiff's
5 personnel file, relevant policies and other documentation; (3) interviewing class members; (4)
6 researching the applicable law and potential defenses; (5) constructing damage models based on
7 interpretations of California law; and (6) reviewing other relevant information provided by
8 Defendants in advance of the mediation. (*Id.* at ¶ 25; Exhibit A, Settlement, ¶ B.1).

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 Defendants responded, including by
14 producing all relevant policy related documents. Plaintiff also used informal discovery to establish
15 that NSA operates its iStorage brand nationally. Plaintiff agreed to limit the Class members to
16 individuals who worked for NSA at iStorage locations in California (*Id.* at ¶ 29). Plaintiff's counsel
17 and Defendants' counsel also exchanged Class-wide data and numbers, including the total numbers
18 of Class members, work weeks, pay periods, average wage rates, etc., and Plaintiff's expert
19 reviewed the documents and data and provided summaries and recommendations to Class Counsel.
20 (*Id.* at a ¶ 29-32). After conducting the initial investigation, Class Counsel determined Plaintiff's
21 claims were suited for class action adjudication based on what they believed was a common course
22 of conduct affecting a similarly situated group of employees. (*Id.* at ¶¶ 33, 46-72, Exhibit A,
23 Settlement, ¶¶ B.1, B.2).

24 **C. Mediation and Settlement Efforts**

25 On **December 3, 2019**, the parties mediated this case with Jeff Ross, Esq. in Oakland,
26 California. Mr. Ross is a respected and highly experienced mediator in wage and hour class actions
27 under California law. This took place only after the parties exchanged extensive informal
28 information, documents, and data. During the mediation, the parties discussed all aspects of the

1 case, including the risks of litigation and the risks to both parties of proceeding with a motion for
2 class certification as well as the law relating to meal periods and rest breaks and rounding and off
3 the clock work. (Yeremian Decl., ¶¶ 14-15, 32). Upon completion of the mediation and
4 formulating the general details of their class-wide settlement, the parties agreed to a Memorandum
5 of Understanding setting forth the general terms, which were later memorialized in the Settlement
6 Agreement now before the Court for preliminary approval. (*Id.* at ¶¶ 16, 32).

7 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
8 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Counsel
9 believes that the recovery for each Class Member is fair and reasonable taking into consideration
10 the amounts received in other wage and hour class actions, the risks inherent in litigation of this
11 genre, and the reasonable tailoring of each Class Member’s claim to the settlement award he or she
12 will receive. (Yeremian Decl., ¶ 33). Further, and based on the settlement negotiations, which were
13 extensive and conducted in good faith and at arm’s length between attorneys with substantial
14 experience litigating wage and hour cases, the Settlement was the product of a non-collusive
15 settlement process and compromises in the interest of reaching a full and complete settlement. (*Id.*;
16 Exhibit 1, Settlement, ¶¶ B.1, B.2).

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

18 Defendants have agreed to pay a Total Settlement Amount of **\$400,000.00** on a non-
19 reversionary basis to settle and release all claims asserted by Plaintiff and the Class. (Yeremian
20 Decl., ¶ 34; Exhibit 1, Settlement, ¶ A.33, D.2). The Settlement Agreement defines the Class as all
21 individuals who are or previously were employed by Defendants or predecessor entities as non-
22 exempt, hourly employees at Defendants’ storage facilities within the State of California during
23 the time period of **November 19, 2014** and **February 3, 2020** (the “Class Period”). (Yeremian
24 Decl., ¶ 36; Exhibit A, Settlement, ¶¶ A.3, A.5, A.7, A.8, D.2 - D.5). The “Class Participants” are
25 the Settlement Class members who do not request exclusion. (*Id.*). Defendants’ records establish
26 approximately **89** Settlement Class Members. (Yeremian Decl., ¶¶ 26, 37, 71, 93).

27 The Net Settlement Amount for the Settlement Class will constitute the total sum from
28 which Settlement Class Members will be paid. The Net Settlement Amount is the Total Settlement

1 Amount less the following: Court-approved Settlement Administration Costs (up to \$7,500.00 to
2 JND), payment to the LWDA under PAGA (i.e. \$15,000 or 75% of \$20,000), Class Counsel's
3 Court-approved attorneys' fees (up to one-third of the Total Settlement Amount, \$133,333.34) and
4 litigation costs and expenses (up to \$15,000.00), and any Court-approved Enhancement Award, or
5 Class Representative Service Payment (up to \$10,000.00) for the Class Representative. (Yeremian
6 Decl., ¶ 35; Exhibit A, Settlement, ¶¶ A.20, A.29, A.31, A.33, D.2 - D.5). The remaining sum after
7 all these deductions will represent the Net Settlement Amount, which will be used to calculate the
8 settlement share that each Settlement Class Member will receive after the Effective Date, which is
9 referred to as the Class Participant's Individual Settlement Payment. (*Id.* at ¶¶ A.18, D.6).

10 If the Court approves all requested allocations and awards above, the Net Settlement
11 Amount is estimated to be **\$219,166.66**. For the approximately **89** estimated Settlement Class
12 Members, the average gross individual settlement payment, using a straight average, is **\$2,462.54**.
13 (Yeremian Decl., ¶ 37). Any amounts not approved by the Court as a Class Representative Service
14 Payment, or Attorneys' Fees and Costs, or Settlement Administration costs or for the PAGA claim
15 will be added back to the Net Settlement Amount to be distributed to the Settlement Class
16 Members who are Class Participants. (*Id.* at Settlement, ¶ D.5).

17 Each Class Participant's "Individual Settlement Payment" will be based on the ratio of each
18 Class Participant's Individual Workweeks to the Total Workweeks. The Individual Settlement
19 Payment will be calculated by dividing the Class Participant's Individual Workweeks by the Total
20 Workweeks and multiplying by the Net Settlement Amount. A portion of this resulting amount
21 will be subject to tax withholdings. (Yeremian Decl., ¶ 38, Exhibit A, Settlement, ¶¶ A.18, A.19,
22 A.34; D.6). Each Individual Settlement Payment will be allocated 50% for settlement of the unpaid
23 wages claims and 50% for civil and/or statutory penalties and interest. (Yeremian Decl., ¶ 39;
24 Exhibit A, Settlement, ¶ D.8). The "Effective Date" of this Agreement shall be the first court day
25 after the last date by which a notice of appeal of the Judgment to the California Court of Appeals
26 may be timely filed, if none is filed, and the Settlement provides further details. (Yeremian Decl., ¶
27 39; Exhibit A, Settlement, ¶ A.15). The distribution of Settlement Payments to Settlement Class
28 Members will occur no later than the first regular business date that is ten court days after the

1 Effective Date (the “Settlement Proceeds Distribution Deadline”). (*Id.* at Settlement, ¶ E).

2 The checks for individual settlement payments mailed to Settlement Class Members will
3 remain negotiable for 180 days. Any settlement checks that are not claimed or not negotiated
4 within one hundred and eighty (180) calendar days after the distribution of Settlement Payments to
5 Settlement Class Members shall be void and the funds not disbursed as a result, and will instead be
6 paid to the State Controller’s Office Unclaimed Property Fund to be held in the name of the Class
7 Member and in accordance with the procedures set forth in CCP §1520. (Yeremian Decl., ¶ 40,
8 Exhibit A, Settlement, ¶ E).

9 Upon final approval and as of the Effective Date, all Class Members will release
10 Defendants and the “Released Parties” from the “Released Claims,” which are defined as all
11 claims, causes of action, damages, wages, benefits, expenses, premiums, penalties, debts,
12 liabilities, demands, obligations, attorneys’ fees, costs, and any other form of relief or
13 remedy...which Plaintiff or any Class Participant has against the Released Parties or any of them
14 for any acts occurring during the Class Period which are based on, arise out of, relate to, or are
15 covered by any of the facts, or any of the factual allegations, in the Action, ...” (Yeremian Decl., ¶
16 41-42; Exhibit A, Settlement, ¶¶ A.27(a)-(b), A.28; D.9). The Settlement and Notice provide
17 further details on the release, and Plaintiff will provide a general release and a Section 1542 waiver
18 specific to all his claims rather than just those articulated in the pleadings. (*Id.* at ¶ D.4, D.4(a)-(c)).

19 The parties have selected JND Settlement Administrators as the Settlement Claims
20 Administrator. (Yeremian Decl., ¶ 26, 37, 77; Exhibit A, Settlement, ¶¶ A.30, A.31, A.33; C.3,
21 C.4; Exhibit 1 thereto, Class Notice). Based on a quote from JND, the Settlement Agreement
22 budgets up to \$7,500.00 for its services. (*Id.*). Notice of the Settlement will be provided by the
23 Administrator to the Settlement Class in the form of the Class Notice attached to the Settlement as
24 Exhibit A. (Yeremian Decl., ¶ 43; Exhibit A, ¶¶ A.6, A.21; C.4, C.5; and Settlement Class Notice
25 at Exhibit 1 thereto). The Class Notice includes a summary of the case and settlement terms and
26 provides Class Members with instructions on how to exclude themselves, dispute their
27 workweeks, and object to the settlement, and addresses the deadlines and procedures for doing so.
28 (Yeremian Decl., ¶¶ 43-45; Exhibit A, Settlement, Exhibit 1 thereto, Class Notice).

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

2 California Rule of Court 3.769 requires court approval of the settlement of class action
3 lawsuits. Preliminary approval is merely the first of three steps that comprise the approval
4 procedure for settlements of class actions. *See* Manual for Complex Litigation, Second §30.44
5 (1993); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The second approval step is
6 dissemination of notice of the settlement to all Class Members. *Id.* The third step is a final
7 settlement approval hearing, at which evidence and argument concerning the fairness, adequacy,
8 and reasonableness of the settlement may be presented and Class Members may be heard. *Id.*

9 The determinations of whether a settlement should be preliminarily approved requires,
10 “basic information about the nature and magnitude of the claims in question and the basis for
11 concluding that the consideration being paid for the release of those claims represents a reasonable
12 compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008). However, the
13 record need not contain an explicit statement of the maximum theoretical amount that the class
14 could recover. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399,
15 409 (2010) (“*Kullar* does not, ... require any such explicit statement of value; it requires a record
16 which allows “an understanding of the amount that is in controversy and the realistic range of
17 outcomes of the litigation.”). Nonetheless, Class Counsel and Plaintiff’s expert performed a
18 potential liability exposure analysis in advance of mediation, which the parties addressed in detail
19 with the mediator. (Yeremian Decl., ¶¶ 16-17, 24-32, 46-72). “If the proposed settlement appears
20 to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies,
21 does not improperly grant preferential treatment to class representatives or segments of the class,
22 and falls within the range of possible approval, then the court should direct that notice be given to
23 the class members of a formal fairness hearing, at which evidence may be presented in support of
24 and in opposition to the settlement.” Manual for Complex Litigation, Second § 30.44, at 229.

25 In deciding whether to approve a proposed class action settlement under California Code
26 of Civil Procedure § 382 and the California Rules of Court, the Court must find that a proposed
27 settlement is “fair, adequate, and reasonable” and falls within the “range of approval.” *Dunk*, 48
28 Cal.App.4th at 1801-02. The trial court considers all relevant factors, such as “the strength of

1 plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of
2 maintaining class action status through trial, the amount offered in settlement, the extent of
3 discovery completed and the stage of the proceedings, the experience and views of counsel, the
4 presence of a governmental participant, and the reaction of the class members to the proposed
5 settlement." *Id.* The instant settlement satisfies all of these requirements.

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

7 The Court's decision to preliminarily approve a settlement is granted great deference, as an
8 exercise within its broad discretion. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-
9 235 (2001). Applying the above factors, the proposed settlement provides a substantial benefit to
10 the Class. It is fair, reasonable, and adequate, and should be preliminarily approved.

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

12 The proposed settlement was reached as a result of arm's length negotiations after the
13 completion of substantial discovery and the exchange of necessary class data. (Yeremian Decl., ¶¶
14 16-17, 24-32). The negotiations have been, at all times, adversarial and non-collusive in nature.
15 *See*, 4 Newberg on Class Actions § 13:45 (5th ed.) (due to the preference of settlement over
16 litigation, "a court will presume that a proposed class action settlement is fair when certain factors
17 are present, particularly evidence that the settlement is the product of arms-length negotiation,
18 untainted by collusion."). While Plaintiff believes in the merits of his case, he and counsel also
19 recognized the inherent risks of litigation and understood the benefit of the Settlement Class
20 receiving funds immediately, as opposed to risking an unfavorable decision on class certification,
21 or then at trial and appeal, that would take several more years to litigate. (Yeremian Decl., ¶¶ 24,
22 27, 32-33, 43, 46-70, 73-76). Assistance from a well-respected mediator ensured negotiations were
23 non-collusive and well-informed.

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

25 As discussed above, the parties engaged in substantial informal discovery before the
26 Settlement was reached to allow them to fully evaluate the class claims and Defendants' defenses.
27 (Yeremian Decl., ¶¶ 16-17, 24-32, 76). This litigation has reached the stage where the parties have
28 a clear view of the strengths and 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, 84, 97; Declaration of Alvin Lindsay (“Lindsay
6 Decl.”) filed concurrently herewith, ¶¶ 3-12). Class counsel submits the Settlement is fair,
7 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., ¶¶ 28,
9 37, 71-74, 78-82; Settlement, ¶¶ B.1, B.2; 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., ¶ 18).

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., ¶¶ 24, 27, 32-33, 43, 46-70, 73-76). Class counsel has addressed
16 the strengths of each of the main class claims, Defendants’ arguments against liability, and the
17 estimated potential liability exposure Defendants faced on each. (Yeremian Decl., ¶¶ 46-72). For
18 example, Plaintiff contends he and the other class members were not properly provided meal and
19 rest periods. (Yeremian Decl., ¶¶ 50-56). Defendants contend that Plaintiff and other class
20 members were provided with the opportunity to take proper meal and rest periods, on-duty breaks
21 were not required, and its policies were lawful, and the lack of records for rest periods created
22 individualized issues. (*Id.* at ¶ 53; *see also, Brinker Restaurant Corp. v. Superior Court* (2012) 53
23 Cal. 4th 1004, 1028-29).

24 Plaintiff also alleged he was not paid for all hours worked, including overtime pay, due to
25 Defendants’ policy and practice of requiring off the clock work and miscalculating overtime.
26 (Yeremian Decl., ¶¶ 48-49). Defendants again argued these claims were not suitable for class
27 treatment, they did not require off the clock work, and they did not miscalculate overtime or the
28 regular rate. (*Id.*). If Defendants 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 Defendants 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 Defendants’ 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., ¶¶ 62-67, 69-72).

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, Defendants 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 Defendants vigorously contested liability and would have presented several
20 significant defenses to the wage claims as well as to class certification. (Yeremian Decl., ¶¶ 24,
21 27, 46-70, 72, 73-76; Exhibit A, Settlement, ¶¶ B.1, B.2, B.3).

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., ¶¶ 22, 75, 100, 103).
24 Cases like *Duran v. U.S. Bank Nat. Assn.*, 59 Cal. 4th 1, 34 (2014) address the complexity of
25 using statistical samples in class actions, and decertification is a real risk that Class Counsel must

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 12441167–68 (2012), “the Court held that a
meal-period violation is not tied to the nonpayment of wages.”).

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

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

9 In light of the uncertainties and risks of certification and litigation, the parties agreed to a
10 compromise settlement of **\$400,000.00**. Plaintiff estimated the total liability exposure that
11 Defendants could face on the main class claims to be **\$1,013,981.26**. (Yeremian Decl., ¶¶ 71-72).
12 Under the Settlement, each of the approximately **89** Class Members will receive on average
13 payment of **\$2,462.54**, and the Maximum Settlement Amount of \$400,000.00 represents a
14 recovery for the Class members of **39.45%** of the total maximum liability exposure Plaintiff
15 estimated. (*Id.* at ¶¶ 37, 71-72). Any amounts not approved by the Court will be added back to the
16 Net Settlement Amount to be distributed to the Settlement Class Members who do not opt-out.
17 (Yeremian Decl., ¶ 37, Exhibit A, Settlement, ¶ D.5).

18 Plaintiff and Class counsel submit this is an excellent result and the Settlement is fair,
19 reasonable, and certainly advantageous to the Class. (Yeremian Decl., ¶¶ 24, 26, 27, 32, 41, 46,
20 64-66, 70, 74, 95-97). Each Settlement Class Member will be compensated using a formula based
21 on the total number of workweeks he/she held a non-exempt position with Defendants during the
22 Class Period. (Yeremian Decl., ¶ 38, Exhibit A, Settlement, ¶¶ A.18, A.19, A.34; D.6). Basing the
23 size of the award on Settlement Class Members' work weeks during the Class Period ensures that
24 those with more valuable potential claims receive more money. All Settlement Class Members
25 will enjoy benefits under the same formula, and none are singled out for special treatment, save
26 for Plaintiff's requested representative enhancement award and Service Payment. (Yeremian
27 Decl., ¶¶ 86-91).

28

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

2 In deciding whether to approve the settlement, the Court must balance these risk factors
3 against an “understanding of the amount in controversy and the realistic range of outcomes of the
4 litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130, 133; *Munoz v. BCI*
5 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-09. The court “must stop
6 short of the detailed and thorough investigation that it would undertake if it were actually trying
7 the case” *Munoz*, at 408. Plaintiff’s counsel used the comprehensive data and documents
8 provided to perform an analysis of the potential liability exposure Defendants faced on Plaintiff’s
9 main class-wide claims, establishing the realistic upper range of the outcome here. (Yeremian
10 Decl., ¶¶ 14-16, 24-32, 46-72, 74). As noted above, the Gross Settlement Amount represents a
11 recovery of approximately 39% of the total maximum liability exposure Plaintiff estimated.
12 (Yeremian Decl., ¶¶ 37, 71-72).

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

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

20 To be deemed proper, a Notice must provide the class members with sufficient information
21 to make an informed decision as to whether to accept or object to the settlement. *Mullane v.*
22 *Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. The notice must apprise the class
23 members of the pendency of the action; reasonably convey information regarding the settlement
24 and the class members’ rights, entitlements, and obligations; and afford class members the
25 opportunity to present their objections. *Id.* The Notice (at Yeremian Decl., Exhibit A, Settlement,
26 Exhibit 1 thereto) provides all the information a reasonable person would need to make a fully
27 informed decision about the settlement. It will notify all Class members of the terms of the
28 settlement, of its effect on their rights, of their options as Class members (i.e., participate, object,

1 opt out, and dispute work weeks), and of the consequences of and procedures for exercising those
2 options. (Yeremian Decl., ¶¶ 43-45, 77-79; Exhibit A, Settlement, ¶¶ A.6, A.21; C.4, C.5; and
3 Settlement Class Notice at Exhibit 1 thereto). The Notice also directs Class members who have
4 questions or concerns to contact the settlement administrator or Class Counsel. (*Id.* at ¶ 37, 78).

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 Packet will be sent via first-class mail to each of the 89
8 Class member to their addresses from Defendants’ records. (Yeremian Decl., ¶ 77; Exhibit A,
9 Settlement, ¶ C.5). If any Notice Packets are returned undeliverable without a forwarding address,
10 the Claims Administrator will use the national change of address database and perform a skip trace
11 to locate the Class member and mail a new Notice to the correct address. (*Id.*). The Class Notice
12 (at Settlement, Exhibit 1) should be approved as the best and most practicable way to ensure the
13 greatest possible number of Class members will receive notice.

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

15 “At the conclusion of a class action, the class representatives are eligible for a special
16 payment in recognition of their service to the class.” 5 Newberg on Class Actions § 17:1 (5th ed.).
17 Plaintiff requests a reasonable service award as an enhancement payment for his effort and
18 initiative in bringing and helping to prosecute this class action. Plaintiff has dedicated significant
19 time and effort to these proceedings. (Yeremian Decl., ¶¶ 86-91). Plaintiff’s courage in proceeding
20 with his class-wide claims should not be underestimated. By suing Defendants, Plaintiff contends
21 he increased his risk of retaliation by prospective employers, who must choose between an
22 applicant who has never sued a prior employer and one who has. (Yeremian Decl., ¶ 88). Plaintiff
23 contends this risk is particularly real in the information age, where employers can perform
24 background checks of prospective employees, sometimes with the stroke of a key. (*Id.*).

25 Plaintiff has devoted a substantial amount of time to helping Class Counsel effectively
26 develop and prosecute this action at every stage of the litigation. (Yeremian Decl., ¶¶ 86-91). Both
27 before and after filing, Plaintiff conferred with Class Counsel to discuss every aspect of this case.
28 He provided Class Counsel with information about Defendants and the industry, reviewed

1 documents, identified witnesses, consulted Class Counsel throughout the litigation, helped
2 complete discovery, has spoken with many Class Members, and participated in the mediation
3 process and reviewed and signed the settlement agreement after several conferences with Class
4 Counsel. (*Id.*)

5 Plaintiff has spent a significant amount of time with Class Counsel detailing his knowledge
6 of Defendants' practices. He has diligently, adequately, and fairly represented the Class members,
7 and has not placed his interests above any member of the putative Class. This sort of payment to a
8 Class representative has been a common feature of settlements negotiated by Class Counsel and
9 has been routinely approved by trial courts. The representative enhancement award in the amount
10 of **\$10,000.00** to the Class Representative is fair and reasonable. (Yeremian Decl., ¶¶ 86-91;
11 Exhibit A, Settlement, ¶ D.4).

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

13 Class Counsel respectfully requests, without opposition from Defendants, an award of
14 attorneys' fees incurred in connection with the prosecution of this action not to exceed one-third
15 (1/3) of the Total Settlement Amount (i.e. up to \$133,333.34), and an award of reasonable costs
16 and expenses not to exceed \$15,000.00, subject to approval by the Court. (Yeremian Decl., ¶¶ 81-
17 85; Exhibit A, Settlement, ¶ D.5).

18 Class counsel submits it has the requisite experience, knowledge, and resources to serve as
19 Class counsel and to zealously represent the Class. (Yeremian Decl., ¶¶ 3-9, 84, 97; Lindsay Decl.,
20 ¶¶ 3-12). Plaintiff's counsel has incurred substantial fees and costs thus far in the litigation, and
21 will provide further details regarding hourly rates, lodestar, and hours, and will document
22 expenses incurred, in support of final approval and its fees and costs motion. (Yeremian Decl., ¶
23 84).

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

25 Certification is appropriate when the moving party has demonstrated the existence of an
26 ascertainable class and a well-defined community of interest among the class. *See, e.g., Brinker*
27 *Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. Defendants do not dispute, for
28 settlement purposes only, that all of the elements for class certification are met here. Defendants

1 do not concede that certification is appropriate outside of this Settlement and preserve all rights to
2 oppose certification if, for any reason, the settlement does not become effective. (Yeremian Decl.,
3 ¶ 92, Exhibit A, Settlement Agreement, ¶¶ B.3, C.2).

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

5 Whether a class is ascertainable is determined by examining the class definition, the size of
6 the class and the means available for identifying class members. *See, Vasquez v. Superior Court*
7 (1971) 4 Cal. 3d 800, 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.
8 App. 3d 1263, 1271. Defendants do not dispute, for settlement purposes, that at least 89 Class
9 Members are ascertainable and sufficiently numerous. (Yeremian Decl., ¶¶ 93-94).

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

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

16 Plaintiff contends, and Defendants do not dispute for settlement purposes only, that
17 common issues of fact and law predominate as to each of the claims alleged by Plaintiff.
18 (Yeremian Decl., ¶¶ 99-100). California courts show “no hesitancy” in inferring class-wide
19 causation, injury, and damages when a common course of action has been shown. *B.W.I. Custom*
20 *Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350. This inference ““eliminates
21 the need for each class member to prove individually the consequences of the defendants’ actions
22 to him or her.”” *Id.* at 1351 (quoting *Rosack v. Volvo of America Corp* (1982) 131 Cal. App. 3d
23 741, 753).

24 This action involves, *inter alia*, a determination about Defendants’ alleged failure to
25 provide meal and rest periods, failure to pay wages and overtime due to allegedly common and
26 unlawful rounding and off the clock work policies, the resulting failure to pay final wages when
27 required, the failure to provide accurate paystubs, and largely derivative claims under the UCL and
28 PAGA. (Yeremian Decl., ¶¶ 19-23, 46-70). Plaintiff contends these practices affected class

1 members in the same way and present questions that are suitable for common adjudication because
2 all Class members were subject to the same employment policies and practices, which applied
3 uniformly to all Class members. The outcome of litigation on this matter depends upon questions
4 that are common to Class members. (Yeremian Decl., ¶¶ 99-100). While Defendants maintained
5 otherwise, these issues will not be decided on the basis of facts peculiar to each Class member, but
6 rather on facts common to them all, and liability can be determined on a class-wide basis. (*Id.*)

7 **C. The Named Plaintiff's Claims Are Typical**

8 A class representative's claims are typical when they arise from the same event, practice,
9 or course of conduct that gives rise to the claims of other putative class members, and if their
10 claims rest on the same legal theories. The class representative's claims must be "typical" but not
11 necessarily identical to the claims of other class members. It is sufficient that the representative is
12 similarly situated so that he or she will have the motive to litigate on behalf of all class members.
13 *Classen v. Weller* (1983)145 Cal.App.3d 27, 47; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*
14 (1987) 191 Cal.App.3d 1341, 1347 ("[I]t has never been the law in California that the class
15 representative must have identical interests with the class members."). Thus it is not necessary that
16 the class representative should have personally incurred all of the damages suffered by each of the
17 other class members. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.

18 Plaintiff contends, and Defendants do not dispute for settlement purposes only, that
19 Plaintiff's claims are typical of class members' claims because they arose from the same factual
20 basis and are based on the same legal theories. (Yeremian Decl., ¶¶ 95-96).

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

22 Class Counsel are experienced in class actions, have represented their clients zealously and
23 have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 79-82, 95-96; Lindsay Decl., ¶¶ 3-12). The
24 Class Representative's interests are aligned with those of the Class Members, he has suffered the
25 same injuries, and has no conflicts of interest. (Yeremian Decl., ¶¶ 86-91, 97-98). Class Counsel
26 and the Class Representative are adequate.

27 **E. Predominance and Superiority**

28 Individual issues do not predominate over those common to the class, as addressed above.

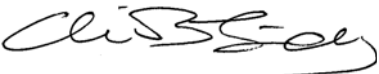
1 (Yeremian Decl., ¶¶ 99-100). Additionally, class proceedings are superior to individualized
2 actions, as there is little interest or incentive for Class members to individually control the
3 prosecution of separate actions. If Class members are forced to litigate their claims individually, it
4 would result in 89 individual actions against Defendants, and the cost of individually litigating
5 each such case against Defendants would easily exceed the value of any relief that could be
6 obtained. (Yeremian Decl., ¶¶ 101-103). Class proceedings are superior to individual ones.

7 **10. CONCLUSION**

8 For all of the foregoing reasons Plaintiff respectfully requests that this Court grant
9 preliminary approval; grant Plaintiff leave to file the First Amended Complaint on the terms set
10 forth in the Settlement Agreement; provisionally certify the proposed Class for settlement
11 purposes; approve Plaintiff as the Class Representative and his counsel as Class Counsel; approve
12 the proposed form of the Class Notice and plan for administration; and schedule the final
13 settlement approval hearing by entering the concurrently provided [Proposed] Order.

14
15 DATED: July 27, 2020

DAVID YEREMIAN & ASSOCIATES, INC.

16 By 
17 David Yeremian
18 Alvin B. Lindsay
19 Attorneys for Plaintiff Diego Ornelas
20 and the Settlement Class