DAVID YEREMIAN & ASSOCIATES, INC.
David Yeremian (SBN 226337)
david@yeremianlaw.com
Alvin B. Lindsay (SBN 220236)
alvin@yeremianlaw.com
535 N. Brand Blvd., Suite 705
Glendale, California 91203
Telephone: (818) 230-8380
Facsimile: (818) 230-0308

Attorneys for Plaintiff SELINA RANGEL,
on behalf of herself and others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

SELINA RANGEL, an individual, on behalf of herself and others similarly situated, Plaintiff, vs. W.W. GRAINGER, INC., an Illinois Corporation; and DOES 1 through 10, inclusive, Defendants.	Case No.: CV-18-003041 CLASS ACTION Assigned for All Purposes To: Hon. John D. Freeland, Dept. 23 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF JOINT STIPULATION OF SETTLEMENT OF CLASS ACTION AND SETTLEMENT AGREEMENT** *[Filed concurrently with Motion for Preliminary Approval; Declarations of David Yeremian and Alvin B. Lindsay; and [Proposed] Order]* Date: March 26, 2020 Time: 8:30 a.m. Location: Department 23 Complaint Filed: September 24, 2018 First Amended Complaint: February 28, 2019 Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff SELINA RANGEL ("Plaintiff"), on behalf of herself and all other similarly situated employees of Defendant W.W. GRAINGER, INC. ("Defendant") (collectively, "the parties"), without opposition from Defendant, respectfully requests preliminary approval of the parties' Joint Stipulation of Settlement of Class and PAGA Action and Settlement Agreement ("Settlement") pursuant to California Code of Civil Procedure § 382 and Rule 3.769 of the California Rule of Court.

1. INTRODUCTION

Plaintiff and the putative Class Members were employed by Defendant at its California distribution center facilities, including those in Mira Loma, California and in Patterson, California where Plaintiff worked. (*See* Declaration of David Yeremian in support of Unopposed Motion for Preliminary Approval ("Yeremian Decl."), ¶ 10). Plaintiff filed her Class action complaint against Defendant in Stanislaus County Superior Court on **September 24, 2018**. (*Id*. at ¶ 11).

Plaintiff's operative First Amended Class Action Complaint, filed on **February 28, 2019**, alleges ten causes of action against Defendant for (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and Overtime Under Labor Code § 510; (3) Meal Period Liability Under Labor Code § 226.7; (4) Rest Break Liability Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6) Violation of Labor Code § 221; (7) Violation of Labor Code § 204; (8) Violation of Labor Code § 203; (9) Violation of Business and Professions Code § 17200 *et seq*.; and (10) for penalties under the Private Attorneys General Act ("PAGA"), Labor Code §§ 2698, *et seq*. (Yeremian Decl., ¶¶ 11, 13).

Defendant removed this action to the Eastern District of California pursuant to 28 U.S.C. § 1332(a) after answering, and the parties, through their counsel, conferred and stipulated to stay the action pending completion of a mediation. (Yeremian Decl., ¶¶ 12-15). They also conducted informal discovery for mediation, and thereafter stipulated to remand these proceedings back to this honorable Court on **October 25, 2019**. (*Id*. at ¶¶ 16-17).

Without opposition from Defendant, Plaintiff requests that the Court grant preliminary approval of the parties' Settlement Agreement, at **Exhibit 1** to the concurrently filed Declaration of

David Yeremian ("Yeremian Decl."), and the Class Notice provided at **Exhibit A** to the Settlement. Defendant's records establish there are **1,316** Settlement Class members satisfying the following definition: "all current and former employees of Defendant in California who were employed at any time during the Class Period as non-exempt, hourly employees at Defendant's SFDC and LADC distribution centers within the State of California." (Yeremian Decl., ¶ 34; Exhibit 1, Settlement, ¶¶ 5, 55(b)). The "Class Period" is defined as "the time period from **September 24, 2014** through the date of the Court's order approving Plaintiff's Motion for Preliminary Approval, or **March 27, 2020**, whichever date occurs first." (Settlement, at ¶ 6).

After engaging in substantial investigation and extensive negotiations with the assistance of a respected third-party neutral, Tripper Ortman, Esq., the parties entered into a Memorandum of Agreement and general terms for settling all claims alleged on a class-wide, non-reversionary basis for a Gross Settlement Amount ("GSA") of **$2,150,000.00**, inclusive of all fees and costs. (Yeremian Decl., ¶¶ 16, 24-33). All **1,316** Settlement Class Members will automatically receive a settlement share unless they opt out and will divide, on a *pro-rata* basis, a Net Settlement Amount ("NSA") of approximately **$1,284,773.33**, if all allocations are approved. The estimated average gross individual settlement payment to the Class members, using a straight average, is **$976.27**. (Yeremian Decl., ¶¶ 36, 66).

The proposed settlement reflected in the Joint Stipulation of Settlement of Class and PAGA Action and Settlement Agreement ("Stipulation" or "Settlement Agreement") is fair, reasonable, and adequate, and in the best interests of the Class. (Yeremian Decl., ¶¶ 24, 26, 27, 32, 41, 46, 64-66, 70, 74, 95-97). Plaintiff, with the consent of Defendant, respectfully requests that this Court issue an Order in the form provided herewith: (1) preliminarily approving the proposed class-wide settlement of this action; (2) approving the form and method for providing class-wide notice; (3) directing that notice of the proposed settlement be given to the class; (4) appointing Plaintiff Selina Rangel as Class Representative for settlement purposes only; (5) appointing David Yeremian and Alvin B. Lindsay of David Yeremian & Associates, Inc. as Class Counsel for settlement purposes only; and (6) scheduling a hearing date for Final Approval of the settlement and Plaintiff's Application for attorneys' fees and costs.

2. FACTUAL BACKGROUND, DISCOVERY, AND MEDIATION

A. Plaintiff's Claims and Defendant's Denials

Plaintiff alleged she and the Class generally worked five days per work week, with shifts generally ranging from eight to ten hours for full time employees. Plaintiff's distribution center operated through multiple shifts, and Plaintiff was generally assigned to work the graveyard shift. The Complaint further alleges that employees were required to work and remain under Defendant's control without being paid, including by allegedly requiring off the clock work, allegedly not paying for time under Defendant's control during security screenings, allegedly rounding of hours to employees' detriment, and allegedly by not accurately recording all hours worked, at both regular and overtime rates. (Yeremian Decl., ¶¶ 18-20). Plaintiff alleged she and the Class members were required to clock in early so they could walk to be at start up meetings or their workstations, as allegedly required by Defendant, by the start of their shift, all allegedly without compensation due to unlawful rounding, its snap forward policy, and by requiring security screenings while off the clock. (*Id*.). Plaintiff alleged the security screening usually took anywhere from 3-5 minutes to complete and it took further time to go to the break room and then proceed to the start-up, with the whole process generally taking 15 minutes or so to complete. (*Id*. at ¶ 20).

Plaintiff further alleged that Defendants did not record actual time punches in and out for work shifts and meal periods, and that employees were allegedly required to wait in line to input shift and meal period start and end times into a computer terminal at some point during or after their scheduled shift. (Yeremian Decl., ¶ 21). Plaintiff also alleges that provided meal periods were untimely and Class members were not authorized and permitted to take their required rest breaks. Plaintiff also alleged that meal periods and rest breaks were impermissibly shortened due to the great distances the class members were required to walk to get to the break room or to pass through security and exit the building and return, and Plaintiff and the Class members were allegedly required to perform work duties and remain under Defendant's control during meal periods and rest breaks, including by logging into the company's timekeeping computers to input shift and break start and end times. (*Id*. at ¶ 22). Plaintiff further alleges that Defendant generally neglected to provide second meal periods on shifts over ten hours. By allegedly requiring security

screenings, Plaintiff also alleged that Defendant prevented Plaintiff and the Class members from leaving the facilities during breaks, or else unlawfully shortened them. (*Id*.). Plaintiff also alleges that Defendant generally neglected to provide second meal periods on shifts over ten hours. Plaintiff also alleged the Class members were not provided with accurate wage statements, allegedly received unlawful deductions from their wages, and allegedly were not paid all wages owed upon termination. Plaintiff also sought restitution under California's Unfair Competition Law and penalties under PAGA. (*Id*.).

Defendant denies Plaintiff's class claims, asserts that it maintained compliant policies and practices, and vigorously contests liability, the amount of claimed damages, Plaintiff's alleged entitlement to damages and penalties, and the propriety of class certification due to the alleged predominance of individualized issues and the unmanageability of the claims. (Yeremian Decl., ¶ 26; Ex. A, Settlement, ¶¶ 36, 38). Defendant contends that during the relevant time period, it provided compliant opportunities to meal and rest breaks, and maintained legally-compliant policies which included policies prohibiting off-the-clock work and paying for all hours worked, and that any time rounding was proper and legal. Defendant contends that it has properly, timely and fully paid all earned wages, it did not require employees to work without pay, nor did Defendant have knowledge of any purported work performed off-the-clock. Defendant also argued it authorized and permitted timely meal and rest breaks, and that employees waived their right to them and to seek relief herein. Defendant also asserted that it has provided accurate wage statements and neither Plaintiff nor any of the putative class members are entitled to any penalties for alleged inaccurate wage statements. (Yeremian Decl., ¶¶ 24, 26, 32, 41, 47-66, 67-70, 74, 86; Settlement, ¶ 36, 38).

After extensive investigation and informal discovery, including analysis of relevant documents and other gathered data, and after relying upon assessment by Plaintiff's statistical analysis expert, 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., ¶¶ 14-16, 24-32, 74; Settlement, ¶ 35).

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., ¶¶14-16, 24-32, 46-66, 74; Exhibit A, Settlement, ¶ 36). 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. (*Id*. at ¶¶ 80-85). After filing the lawsuit, Class Counsel conducted a thorough investigation of the facts and claims giving rise to the action, including: (1) conducting informal discovery, and meeting and conferring with defense counsel about same; (2) reviewing and analyzing time and pay records as well as employment handbooks, Plaintiff's personnel file, relevant policies and other documentation; (3) interviewing class members; (4) researching the applicable law and potential defenses; (5) constructing damage models based on interpretations of California law; and (6) reviewing other relevant information provided by Defendant in advance of the mediation. (*Id*. at ¶ 25).

Upon agreeing to schedule mediation, and leading up to their agreement, the parties conducted informal discovery and exchanged details 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., ¶ 27). Defendant's counsel and Plaintiff's counsel worked together to agree on terms for informal discovery in advance of mediation. Plaintiff provided a comprehensive listing of data and items required. Defendants produced much of the requested information, including a 20% sampling of timekeeping and payroll data for the periods of September of 2014 through **July 1, 2019**. This included over 200,000 lines of timekeeping data and corresponding payroll records, which the timekeeping records reflecting final edited punches and the payroll records reflecting all amounts paid to Plaintiff and the Class members. (*Id*. at ¶ 28). Document production also included the following: Timekeeping and payroll records for Plaintiff, sample wage statements, and Plaintiff's personnel file documents. Defendant also produced documents representing the universe of applicable policy documents that Defendants are relying upon in their defense to the class-wide claims. (*Id.* at ¶ 29).

They included the following: (1) Alternative work week document which appear to be proposals (Defendants have provided nothing indicating any implementation); (2) Kronos Timekeeping presentation slides; (3) Meal and Break Laws and Policy document and chart; (4) Defendants' productivity policy; (5) Company Policy and Procedures Presentation; (6) Kronos training presentation (Team Member Townhall); (7) SFDC Rest and Meal Breaks Policy; (8) SFDC Time Entry Policy; and (9) Meal and Rest Policy Notice to Employees of Grainger; and (10) Selected pages from Defendants' Employee Handbook. (Yeremian Decl., ¶ 29). Plaintiff's counsel and Defendant's counsel also exchanged Class-wide data and numbers, including the total numbers of Class members, work weeks, pay periods, average wage rates, etc., and Plaintiff's expert reviewed the timekeeping records sampling to provide summary data regarding the numbers and types of potential meal period violations. (*Id*. at a ¶ 30-31). After conducting the initial investigation, Class Counsel determined Plaintiff's claims were suited for class action adjudication based on what they believed was a common course of conduct affecting a similarly situated group of employees. (*Id.* at ¶¶ 24, 26, 27, 32, 41, 46, 64-66, 70, 74, 95-97).

C. Mediation and Settlement Efforts

The conferences of counsel, and the parties' comprehensive discovery and interviews with putative Class Members eventually led the parties to agree to attempt to amicably resolve the action through private mediation, and they scheduled a mediation session with well-respected wage and hour mediator, Tripper Ortman, Esq. for **October 9, 2019**. (Yeremian Decl., ¶¶ 16, 31-32). During the mediation, the parties discussed all aspects of the case, including the risks of litigation and the risks to both parties of proceeding with a motion for class certification as well as the law relating to meal periods and rest breaks and rounding and off the clock work and regular rate calculation for overtime. (*Id*.). Upon completion of the mediation, the parties agreed to a Memorandum of Agreement setting forth the general terms of their Settlement, which were later memorialized in the Settlement Agreement now before the Court for preliminary approval. (*Id*.).

From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks and delays posed by further litigation, and Class Counsel's own prior litigation experience, Counsel believes that the recovery for each Class Member is fair and reasonable taking into consideration

the amounts received in other wage and hour class actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Class Member's claim to the settlement award he or she will receive. (Yeremian Decl., ¶¶ 24, 26, 27, 32, 41, 46-47, 64-66, 70, 74, 95-97). Further, and based on the settlement negotiations, which were extensive 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. (*Id.*).

3. THE PROPOSED SETTLEMENT, TERMS, AND NOTICE

Defendant has agreed to pay the Maximum Settlement Amount of **$2.15 million** on a non-reversionary basis to settle and release all claims asserted by Plaintiff in the operative complaint on behalf of the proposed Class. (Yeremian Decl., ¶ 33; Exhibit 1, Settlement, ¶ 15). The Settlement Agreement defines the "Class Members" or "Class" as "all current and former employees of Defendant in California who were employed at any time during the Class Period as non-exempt, hourly employees at Defendant's SFDC and LADC distribution centers within the State of California," and the "Class Period" is defined as "the time period from **September 24, 2014** through the date of the Court's order approving Plaintiff's Motion for Preliminary Approval, or **March 27, 2020**, whichever date occurs first." (Yeremian Decl., ¶ 34; Exhibit 1, Settlement, ¶¶ 5-6). Defendant's records establish **1,316** Settlement Class Members. (*Id.*).

The "Net Settlement Amount" ("NSA") is the Gross Maximum Settlement Amount less Class Counsel Fees (up to and not to exceed thirty-three percent (33.33% or $716,666.67) of the Maximum Settlement Amount) and Expenses (not to exceed $10,000.00) approved by the Court, the Class Representative's Enhancement Payment of $7,500.00 to be approved by the Court, the LWDA Payment, the Claims Administration Costs of $18,500.00, and any required employer payroll taxes and other required employer withholdings on the portion of the ISP allocated to wages, including but not limited to Defendant's FICA and FUTA contributions (estimated at $37,560). (Yeremian Decl., ¶ 35, Settlement, ¶¶ 16, 51(c) – 51(f); Exhibit A, Class Notice, ¶ 7). From the Maximum Settlement Amount, $100,000.00 will be allocated to PAGA penalties of which $75,000.00 will be deemed payment for the State of California Labor Workforce

Development Agency ("LWDA") share of PAGA Penalties. (Settlement, at ¶ 14(e)). This payment represents the 75% amount allocated to PAGA Penalties that will be paid to the LWDA, and the remaining 25% ($25,000.00) of the PAGA Penalties will remain included in the NSA. (*Id*.).

If the Court approves all requested allocations and awards above, the NSA is estimated to be **$1,284,773.33**. For the **1,316** Settlement Class Members, the average gross individual settlement payment, using a straight average, is **$976.27**. Any amounts not approved by the Court as a Class Representative Service Award, or Attorneys' Fees and Costs, or Settlement Administration costs or for the PAGA claim will be added back to the NSA to be distributed to the Settlement Class Members. (Yeremian Decl., ¶ 36; Exhibit 1, Settlement, ¶¶ 51(c)(ii), 51(d)(iii)).

The NSA will be distributed to Settlement Class Members who do not timely opt out of the Settlement Agreement on a *pro rata* basis, meaning the Individual Settlement Payments or Settlement Shares to the Settlement Class members (i.e. those who do not opt out) will be paid from the NSA based on a settlement ratio calculation. (Yeremian Decl., ¶ 37; Exhibit 1, Settlement, ¶¶ 14, 21, 51(b)(i)). Using the Class Data, the Settlement Administrator will calculate the total Qualified Workweeks for all Settlement Class Members ("SCMs"). The respective Qualified Workweeks for each SCM will be divided by the total Qualified Workweeks for all SCMs, resulting in the Payment Ratio for each individual SCM. Each SCM's Payment Ratio will then be multiplied by the NSA to calculate each SCM's estimated Individual Settlement Payment ("ISP"). (*Id*.). Each Individual Settlement Payment is allocated 50% as wages subject to IRS Form W-2 reporting and applicable taxes/withholdings, and 50% as penalties and interest for which an IRS Form 1099 will be issued. (Yeremian Decl., ¶ 38; Exhibit 1, Settlement, ¶ 51(b)(ii)).

Any checks issued to Settlement Class Members shall remain valid and negotiable for one hundred and eighty (180) days after the date they are issued. In the event an Individual Settlement Payment check has not been cashed within one hundred and eighty (180) days, all such checks shall be voided and funds associated with such voided checks, plus any accrued interest that has not otherwise been distributed, shall be awarded to the American Red Cross (www.redcross.org), a nonprofit, humanitarian organization that provides emergency assistance, disaster relief, and disaster preparedness education in the United States. (Yeremian Decl., ¶ 39; Exhibit 1, Settlement,

¶ 51(b)(iv).

The Settlement Class Members who do not opt out will agree to a Release, which is an agreement to waive, fully release and forever discharge the Releasees from any and all Released Claims unless they timely and validly opt-out of the Settlement Agreement. (Yeremian Decl., ¶ 40; Exhibit 1, Settlement, ¶ 26). The Class Released Claims encompass "all claims and causes of action raised or that reasonably could have been raised in the operative complaint (the FAC) based upon the facts, legal theories, and causes of action alleged in the Lawsuit for the time period from **September 24, 2014** through the date of Preliminary Approval of this Settlement Agreement, or **March 27, 2020**, whichever date occurs first…" (*Id*.).

Notice of the Settlement Agreement will be provided to the Settlement Class in the form of the Class Notice attached to the Settlement as Exhibit A. (Yeremian Decl., ¶ 42; Exhibit 1, Settlement and Class Notice at Exhibit A thereto). The Class Notice includes a summary of the case and settlement terms and provides Class Members with instructions on how to exclude themselves, dispute their workweeks, and object to the settlement, and addresses the deadlines and procedures for doing so. (Yeremian Decl., ¶¶ 42-44, 71-73; Exhibit 1, Settlement, ¶¶ 29, 50(h), 50(h)(v); Exhibit A thereto, Class Notice).

The parties have selected CPT Group, Inc. as the Settlement Claims Administrator, and request the Court's approval. (Yeremian Decl., ¶ 36; Exhibit 1, Settlement, ¶¶ 31, 49, 50, 51(f), 54(a)); Exhibit A, Class Notice). CPT Group has provided a not to exceed administration quotation of $18,500.00. (*Id*.).

4. THE THREE-STEP APPROVAL PROCESS

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

The determinations of whether a settlement should be preliminarily approved requires, "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 133 (2008). However, the record need not contain an explicit statement of the maximum theoretical amount that the class could recover. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles,* 186 Cal. App. 4th 399, 409 (2010) ("*Kullar* does not,… require any such explicit statement of value; it requires a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."). Nonetheless, Class Counsel and Plaintiff's expert performed a potential liability exposure analysis in advance of mediation, which the parties addressed in detail with the mediator. (Yeremian Decl., ¶¶ 14-16, 24-32, 46-66, 74). "If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement." Manual for Complex Litigation, Second § 30.44, at 229.

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

5. THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR APPROVAL

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

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

The proposed settlement was reached as a result of arm's length negotiations after the completion of substantial discovery and the exchange of necessary class data. (Yeremian Decl., ¶¶ 14-16, 24-32, 74). The negotiations have been, at all times, adversarial and non-collusive in nature. *See*, 4 Newberg on Class Actions § 13:45 (5th ed.) (due to the preference of settlement over litigation, "a court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion."). While Plaintiff believes in the merits of his case, she and counsel also recognized the inherent risks of litigation and understood the benefit of the Settlement Class receiving funds immediately, as opposed to risking an unfavorable decision on class certification, or then at trial and appeal, that would take several more years to litigate. (Yeremian Decl., ¶¶ 24, 26, 32, 41, 47-66, 67-70, 74, 86). Assistance from a well-respected mediator ensured negotiations were non-collusive and well-informed.

B. The Parties Engaged In Extensive Discovery and Investigation

As discussed above, the parties engaged in substantial informal discovery before the Settlement was reached to allow them to fully evaluate the class claims and Defendant's defenses. (Yeremian Decl., ¶¶ 14-16, 24-32, 74). This litigation has reached the stage where the parties certainly have a clear view of the strengths and weaknesses of their cases sufficient to support the settlement.

C. Class Counsel Are Experienced Class Action and Employment Attorneys

Experienced counsel, operating at arm's length, have weighed the strengths of the case and examined all the issues and risks of litigation and endorse the proposed settlement. Class Counsel are experienced in class actions, have represented their clients zealously, and have no

conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 77-78, 92; Declaration of Alvin Lindsay ("Lindsay Decl.") filed concurrently herewith, ¶¶ 3-12). Class counsel submits the Settlement is fair, adequate and reasonable in view of the risks and other considerations addressed, and is well-suited for final approval upon completion of the administration process. (Yeremian Decl., ¶¶ 24, 26, 27, 32, 41, 46, 64-66, 70, 74, 95-97; Exhibit 1, Settlement, ¶¶ 36-38; Lindsay Decl., ¶ 12).

D. The Presence of a Governmental Participant

After Plaintiff provided notice of his claims under the PAGA and the LWDA did not respond, Plaintiff filed his First Amended Complaint adding a tenth cause of action under the PAGA on **February 28, 2019**. Class Counsel will be submitting the Settlement Agreement to the LWDA concurrently with the filing of this motion pursuant to Labor Code § 2699(l)(2). (Yeremian Decl., ¶ 13).

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

As with all litigation, there was risk that Plaintiff would not prevail on the merits of her class claims. (Yeremian Decl., ¶¶ 24, 26, 32, 41, 47-66, 67-70, 74, 86). Class counsel has addressed the strengths of each of the main class claims, Defendant's arguments against liability, and the estimated potential liability exposure Defendant faced on each. (Yeremian Decl., ¶¶ 47-66). For example, Plaintiff contends she and the other class members were not properly provided meal and rest periods. (Yeremian Decl., ¶¶ 49-53). Defendant contends that Plaintiff and other class members were provided with the opportunity to take proper meal and rest periods, on-duty breaks were not required, and its policies were lawful, and the lack of records for rest periods created individualized issues. (*Id.*; *see also, Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1028-29).

Plaintiff also alleged she was not paid for all hours worked, including overtime pay as applicable, due to Defendant's time rounding policy and the security screening requirements. (Yeremian Decl., ¶¶ 47-48). Defendant again argued these claims were not suitable for class treatment, it need not compensate screening time, it did not require off the clock work, and any rounding policy was neutral on its face and in application and did not disfavor the employees over time. (*Id.*). If Defendant prevailed, there would be no recovery.

There were also risks in proving liability for failure to provide accurate wage statements under Labor Code § 226 and failure to pay all wages at termination under Labor Code § 203. (Yeremian Decl., ¶¶ 54-58). These derivative claims require that the underlying claims be proven first, and there are conflicting interpretations as to whether alleged meal and rest claims can even provide the predicate violations for inaccurate wage statement and waiting time penalties claims.[1]

Additionally, Defendant disputed liability for the underlying wage and meal and rest claims, and penalties under Labor Code § 203 are available only if "an employer willfully fails to pay…any wages of an employee who is discharged or quits…" With these penalties, there is always the risk that the trier of fact will not find Defendant's actions willful. There was also risk associated with the PAGA claim given the Court's discretion to award a lesser amount. *See*, Labor Code § 2699(e)(2). Plaintiff's counsel addresses these risks. (Yeremian Decl., ¶¶ 56-70).

While Plaintiff believes and continues to believe this is a strong case for certification, there is risk and significant expense associated with class certification proceedings. As set forth above, Defendant disputed liability and the anticipated class certification motion, arguing significant legal uncertainties are associated with wage and hour cases, which can be factually complex and require protracted litigation to resolve. Plaintiff alleges there were company-wide policies that affected the employees uniformly, and which could be established using representative testimony and company documents that would not require separate mini-trials on liability, but Defendant vigorously contested liability and would have presented several significant defenses to the wage claims as well as to class certification. (Yeremian Decl., ¶¶ 24, 26, 32, 41, 47-66, 67-70, 74, 86; Ex. A, Settlement, ¶ 37, 39).

Finally, in class actions, decertification is always a possibility, and there is always a risk that a trial of this magnitude can become unmanageable. (Yeremian Decl., ¶¶ 67-70, 86-97). Cases like *Duran v. U.S. Bank Nat. Assn.*, 59 Cal. 4th 1, 34 (2014) address the complexity of using statistical samples in class actions, and decertification is a real risk that Class Counsel must

[1] *See, Stewart v. San Luis Ambulance, Inc.*, 878 F.3d 883, 887 (9th Cir. 2017) (recognizing that the "*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.").

take into account. (Yeremian Decl., ¶¶ 26, 30, 67-70). A class trial would have also required expert witnesses, the accrual of extensive litigation costs, and commitment of extensive further time and financial resources. Finally, given the complexity and unsettled nature of the issues, it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. An appeal would result in further delay for the class members who have already waited years for resolution in this matter. (*Id.* at ¶ 70). Risk and legal uncertainty must be dealt with in any litigation, and this Settlement was the product of compromise accounting for those risks and that uncertainty.

F. <u>The Amount Offered in Settlement and Method of Allocation are Fair</u>

In light of the uncertainties and risks of certification and litigation, the parties agreed to a compromise settlement of **$2.15 million**. Plaintiff estimated the total liability exposure that Defendant could face on the main class claims would be several multiples more than the settlement amount. (Yeremian Decl., ¶ 66). Under the Settlement, each of the approximately **1,316** Class Members will receive on average **$976.27**, and the Maximum Settlement Amount of $2.15 million is within the range of reasonableness to be deserving of final approval. (*Id.* at ¶ 36, 66). Any amounts not approved by the Court will be added back to the NSA to be distributed to the Settlement Class Members who do not opt-out. (Yeremian Decl., ¶¶ 36, 79, Exhibit 1, Settlement, ¶¶ 51(c)(ii), 51(d)(iii)).

Plaintiff and Class counsel submit this is an excellent result and the Settlement is fair, reasonable, and certainly advantageous to the Class. (Yeremian Decl., ¶¶ 24, 26, 27, 32, 41, 46, 64-66, 70, 74, 95-97). Each Settlement Class Member will be compensated using a formula based on the total number of weeks he/she held a non-exempt position with Defendant during the Class Period. (Yeremian Decl., ¶ 37, Exhibit 1, Settlement, ¶¶ 14, 21, 51(b)(i)). Basing the size of the award on Settlement Class Member's workweeks during the Class Period ensures that those with more valuable potential claims receive more money. All Settlement Class Members will enjoy benefits under the same formula, and none are singled out for special treatment, save for Plaintiff's requested representative enhancement award. (Yeremian Decl., ¶¶ 80-85).

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

In deciding whether to approve the settlement, the Court must balance these risk factors against an "understanding of the amount in controversy and the realistic range of outcomes of the litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130, 133; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-09. The court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case …." *Munoz*, at 408. Plaintiff's counsel used the comprehensive data and documents provided to perform an analysis of the potential liability exposure Defendant faced on Plaintiff's main class-wide claims, establishing the realistic upper range of the outcome here and that the settlement amount is reasonable. (Yeremian Decl., ¶¶ 14-16, 24-32, 46-66, 74).

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

6. THE NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS MEMBERS

To be deemed proper, a Notice must provide the class members with sufficient information to make an informed decision as to whether to accept or object to the settlement. *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. The notice must apprise the class members of the pendency of the action; reasonably convey information regarding the settlement and the class members' rights, entitlements, and obligations; and afford class members the opportunity to present their objections. *Id.* The Notice (at Yeremian Decl., Exhibit 1, Settlement, Exhibit A) provides all the information a reasonable person would need to make a fully informed decision about the settlement. It will notify all Class members of the terms of the settlement, of its effect on their rights, of their options as Class members (i.e., participate, object, opt out, and dispute work weeks), and of the consequences of and procedures for exercising those options. (Yeremian Decl., ¶¶ 42-44, 71-73). The Notice also directs Class members who have questions or

concerns to contact the settlement administrator, CPT Group, or Class Counsel. (*Id.*; Settlement, Exhibit A, Class Notice).

The standard for determining the adequacy of notice is whether it has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. Here, the Notice Packet will be sent via first-class mail to each of the 1,316 Class member to their addresses from Defendant's records. (Yeremian Decl., ¶ 71; Exhibit 1, Settlement, ¶¶ 17, 50(c)). If any Notice Packets are returned undeliverable without a forwarding address, the Claims Administrator will use the national change of address database and perform a skip trace to locate the Class member and mail a new Notice to the correct address. (*Id.* at ¶ 50(d)). The Class Notice (Settlement, Exhibit A) should be approved as the best and most practicable way to ensure the greatest possible number of Class members will receive notice.

7. CLASS REPRESENTATIVE ENHANCEMENT IS FAIR AND REASONABLE

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 Newberg on Class Actions § 17:1 (5th ed.). Plaintiff requests a reasonable service award as an enhancement payment for his effort and initiative in bringing and helping to prosecute this class action. Plaintiff has dedicated significant time and effort to these proceedings. (Yeremian Decl., ¶¶ 80-85). Plaintiff's courage in proceeding with his class-wide claims should not be underestimated. By suing Defendant, Plaintiff contends she increased her risk of retaliation by prospective employers, who must choose between an applicant who has never sued a prior employer and one who has. (Yeremian Decl., ¶ 82). Plaintiff contends this risk is particularly real in the information age, where employers can perform background checks of prospective employees, sometimes with the stroke of a key. (*Id.*).

Plaintiff has devoted a substantial amount of time to helping Class Counsel effectively develop and prosecute this action at every stage of the litigation. (Yeremian Decl., ¶¶ 80-85). Both before and after filing, Plaintiff conferred with Class Counsel to discuss every aspect of this case. She provided Class Counsel with information about Defendant and the industry, reviewed documents, identified witnesses, consulted Class Counsel throughout the litigation, helped complete discovery, has spoken with many Class Members, and participated in the mediation

process and reviewed and signed the settlement agreement after several conferences with Class Counsel. (*Id.*)

Plaintiff has spent a significant amount of time with Class Counsel detailing her knowledge of Defendant's practices. She has diligently, adequately, and fairly represented the Class members, and has not placed her interests above any member of the putative Class. This sort of payment to a Class representative has been a common feature of settlements negotiated by Class Counsel and has been routinely approved by trial courts. The representative enhancement award in the amount of $7,500.00 to the Class Representative is fair and reasonable.

8. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE

Class Counsel respectfully requests, without opposition from Defendant, an award of Class Counsel Fees and Expenses consisting of: (1) up to thirty-three percent, i.e. $716,666.67, of the Gross Settlement Amount for attorneys' fees; and (2) up to $10,000.00 for reimbursement of Class Counsel's reasonably incurred costs. (Yeremian Decl., ¶¶ 75-79; Exhibit 1, Settlement, ¶ 51(d)).

Class counsel submits it has the requisite experience, knowledge, and resources to serve as Class counsel and to zealously represent the Class. (Yeremian Decl., ¶¶ 3-9, 77-78, 92; Lindsay Decl., ¶¶ 3-12). Plaintiff's counsel has incurred substantial fees and costs thus far in the litigation, and will provide further details regarding hourly rates, lodestar, and hours, and will document expenses incurred, in support of final approval and its fees and costs motion. (Yeremian Decl., ¶¶ 78-79).

9. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

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

A. There Is A Numerous and Ascertainable Class

Whether a class is ascertainable is determined by examining the class definition, the size of the class and the means available for identifying class members. *See, Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263, 1271. Defendant does not dispute, for settlement purposes only, that 1,316 Class Members are ascertainable and sufficiently numerous. (Yeremian Decl., ¶¶ 87-89).

B. There Is a Well-Defined Community of Interest

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

Plaintiff contends, and Defendant does not dispute for settlement purposes only, that common issues of fact and law predominate as to each of the claims alleged by Plaintiff. (Yeremian Decl., ¶¶ 89-90, 93-94). California courts show "no hesitancy" in inferring class-wide causation, injury, and damages when a common course of action has been shown. *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350. This inference "'eliminates the need for each class member to prove individually the consequences of the defendants' actions to him or her.'" *Id.* at 1351 (quoting *Rosack v. Volvo of America Corp* (1982) 131 Cal. App. 3d 741, 753).

This action involves, *inter alia*, a determination about Defendant's alleged failure to provide meal and rest periods, failure to pay wages and overtime due to allegedly common and unlawful rounding and off the clock work policies, the resulting failure to pay final wages when required, the failure to provide accurate paystubs, and largely derivative claims under the UCL and PAGA. (Yeremian Decl., ¶¶ 18-23, 46-66, 89-90). Plaintiff contends these practices affected class members in the same way and present questions that are suitable for common adjudication because all Class members were subject to the same employment policies and practices, which applied uniformly to all Class members. The outcome of litigation on this matter depends upon questions

that are common to Class members. (Yeremian Decl., ¶¶ 89-90, 93-94). While Defendant maintained otherwise, Plaintiff alleges that these issues will not be decided on the basis of facts peculiar to each Class member, but rather on facts common to them all, and liability can be determined on a class-wide basis. (*Id.*)

C. The Named Plaintiff's Claims Are Typical

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

Plaintiff contends, and Defendant does not dispute for settlement purposes only, that Plaintiff's claims are typical of class members' claims because they arose from the same factual basis and are based on the same legal theories. (Yeremian Decl., ¶¶ 89-90).

D. Adequacy of Class Counsel and Class Representatives

Class Counsel are experienced in class actions, have represented their clients zealously and have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 77-78, 92; Lindsay Decl., ¶¶ 3-12). The Class Representative's interests are aligned with those of the Class Members, she has suffered the same injuries, and has no conflicts of interest. (Yeremian Decl., ¶¶ 80-85, 89-92). Class Counsel and the Class Representative are adequate.

E. Predominance and Superiority

Plaintiff alleges that individual issues do not predominate over those common to the class, as addressed above. (Yeremian Decl., ¶¶ 93-97). Additionally, Plaintiff alleges that class proceedings are superior to individualized actions, as there is little interest or incentive for Class

members to individually control the prosecution of separate actions. If Class members are forced to litigate their claims individually, it would result in over 1,300 individual actions against Defendant, and the cost of individually litigating each such case against Defendant could easily exceed the value of any relief that could be obtained. (Yeremian Decl., ¶¶ 95-97). Plaintiff thus alleges that Class proceedings are superior to individual ones.

10. CONCLUSION

For all of the foregoing reasons, the parties respectfully request that this Court grant preliminary approval; provisionally certify the proposed Class for settlement purposes; approve Plaintiff as the Class Representative and her counsel as Class Counsel; approve the proposed form of the Class Notice and plan for administration; and schedule the final settlement approval hearing by entering the concurrently provided [Proposed] Order.

DATED: March 4, 2020

DAVID YEREMIAN & ASSOCIATES, INC.

By _____
David Yeremian
Alvin B. Lindsay
Attorneys for Plaintiff Selina Rangel
and the Settlement Class