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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PATRICIA HERNANDEZ, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

FRED M. BOERNER MOTOR CO., a
California corporation; and DOES 1 through
100,

Defendants.

Case No. 19STCV28136

*[Assigned for all purposes to Hon. William F.
Highberger, SSC-10]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: August 11, 2020
Time: 1:30 p.m.
Dept.: SSC-10

Complaint Filed: August 12, 2019
Trial Date: None Set

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on
3 August 11, 2020 at 1:30 p.m. in Department SSC-10 of the above entitled Court, located at 312 N.
4 Spring Street, Los Angeles, California 90012, Plaintiff Patricia Hernandez (“Plaintiff”), individually
5 and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

- 6 1. Preliminary approval of the proposed class settlement of this lawsuit;
7 2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification
8 of the following Settlement Class defined as follows:

9 All current and former non-exempt, hourly, employees of Defendant Fred M.
10 Boerner Motor Co. who worked in California at any time from August 12, 2015
11 through September 2, 2020 or the date the Court grants preliminary approval,
12 whichever is earlier.

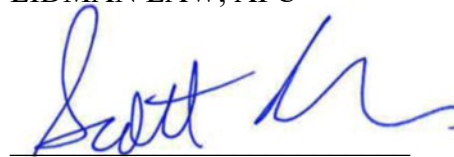
- 13 3. Preliminary appointment of Plaintiff Patricia Hernandez as Class Representative;
14 4. Preliminary appointment of Scott M. Lidman, Elizabeth Nguyen, and Milan Moore of
15 Lidman Law, APC and Paul K. Haines of Haines Law Group, APC as Class Counsel;
16 5. The scheduling of a hearing to consider whether the Settlement should be finally approved
17 and to permit a service award to Plaintiff, Settlement Administration costs, civil penalties
18 payable to the California Labor Workforce Development Agency, and attorneys’ fees and
19 costs to Class Counsel;
20 6. Appointment of Phoenix Settlement Administrators (“Phoenix”) as the third-party
21 Settlement Administrator for mailing notices; and
22 7. Approval of the proposed Notice Packet (which is comprised of the Notice of Pendency of
23 Class Action and Proposed Settlement and Notice of Individual Settlement Award) and an
24 order that it be disseminated to the proposed Settlement Class Members as provided in the
25 Settlement Agreement.
26 8. Leave to file the First Amended Complaint Class and Representative Action Complaint,
27 which is attached as Exhibit A to the Settlement.
28

1 This Motion is based on this notice of motion, the memorandum of points and authorities, the
2 declarations of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, Paul K. Haines, Plaintiff Patricia
3 Hernandez, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached
4 thereto, the pleadings and other papers filed in this action, and on any further oral or documentary
5 evidence or argument presented at the time of hearing.

6
7 Dated: July 16, 2020

Respectfully Submitted,
LIDMAN LAW, APC

8
9
10 By:



Scott M. Lidman
Attorney for Plaintiff
PATRICIA HERNANDEZ

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Patricia Hernandez (“Plaintiff”) brought this class and representative action against
4 Defendant Fred M. Boerner Motor Co. (“Boerner Motor” or “Defendant”) alleging various wage and
5 hour and related violations. Plaintiff’s primary allegations are that Boerner Motor: (1) failed to provide
6 all legally required meal periods; (2) failed to authorize and permit all legally required rest periods; (3)
7 failed to provide accurate, itemized wage statements; (4) failed to timely pay all wages upon
8 termination; (5) engaged in unlawful business practices; and (6) is liable for civil penalties under the
9 Labor Code Private Attorneys General Act of 2004 (“PAGA”).

10 Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary,
11 class action settlement,¹ in which Boerner Motor has agreed to pay Two Hundred Sixty-Two Thousand
12 Dollars and Zero Cents (\$262,000.00) to the following Settlement Class:

13 All current and former non-exempt, hourly, employees of Defendant Fred M.
14 Boerner Motor Co. who worked in California at any time from August 12, 2015
15 through September 2, 2020 or the date the Court grants preliminary approval,
16 whichever is earlier.

17 Significantly, Settlement Class members do not need to file a claim to benefit from the
18 Settlement because all Settlement Class members will automatically receive a payment unless they
19 affirmatively opt-out. There are approximately 46 Settlement Class members, rendering the average
20 payment to participating Settlement Class members to be approximately **\$2,878.62**.²

21 The Settlement was reached only after the parties mediated the action with Steven G. Mehta, a
22 well-respected wage and hour class action mediator. In connection with mediation, Boerner Motor
23 produced a sampling of timekeeping and payroll records for the putative class, as well as applicable
24

25 ¹ The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Scott M. Lidman as
26 Exhibit 1. The proposed First Amended Class and Representative Action Complaint (“FAC”) is attached
27 to the Settlement as Exhibit A. The proposed Notice Packet (which consists of the Notice of Pendency
28 of Class Action and Proposed Settlement and Notice of Individual Settlement Award) is attached to the
Settlement.

² This amount includes the PAGA Allocation for each Settlement Class member.

documents regarding its wage and hour policies, and other information. After extensive research and analysis, including a detailed analysis of Boerner Motor's potential exposure by Plaintiff's retained expert who holds a Ph.D. in economics, a full-day mediation was held on May 5, 2020. The Parties agreed on a class-wide resolution, subject to approval by this Court, and memorialized the agreement in a Memorandum of Understanding at the mediation. Since mediation, the Parties finalized the terms of settlement and executed the Settlement that is now submitted for this Court's preliminary approval.

If the Settlement is approved, Boerner Motor will pay a non-reversionary Gross Settlement Amount ("GSA") of \$262,000.00. After deducting requested administration costs, Plaintiff's service award, attorneys' fees and costs, and payment of PAGA penalties, the remaining Net Settlement Amount ("NSA") of approximately \$129,916.67 will be distributed to all Settlement Class members who do not opt-out of the Settlement. In addition, 25% of the \$10,000.00 PAGA Amount (or \$2,500) will be distributed to the employees as well.

This proposed Settlement is well-within the range of possible approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the tangible monetary benefits to be received by the Settlement Class. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. THE PARTIES, PROCEDURAL HISTORY, DISCOVERY, AND ARMS-LENGTH NEGOTIATIONS

1. The Parties

According to its website, Boerner Motor sells new and used trucks, parts and accessories as both a wholesaler and retailer. *See* Declaration of Scott M. Lidman ("Lidman Decl."), ¶ 10. Plaintiff was employed by Boerner Motor as a non-exempt employee from approximately July 2017 until approximately September 2017, at which time Plaintiff alleges she was wrongfully terminated. *See* Declaration of Patricia Hernandez ("Hernandez Decl."), ¶ 2. During her employment, Plaintiff worked at Boerner Motor's facility in Huntington Park, California as Customer Service Representative. *Id.*

2. Procedural History

On August 12, 2019 Plaintiff filed a putative class action complaint against Boerner Motor in

1 Los Angeles County Superior Court. Lidman Decl., ¶ 10. Pursuant to the terms of the Settlement,
2 subject to Court approval, the Parties stipulated to allow Plaintiff to file a First Amended Complaint
3 Class and Representative Action Complaint adding the following causes of action for: (1) Defendant’s
4 failure to provide accurate, itemized wage statements and (2) civil penalties under the Labor Code
5 Private Attorneys General Act of 2004 (“PAGA”). Lidman Decl., ¶ 10, Exhibit 1 (Settlement, Exh. A).
6 Therefore, in order to effectuate the terms of the Settlement, Plaintiff also seeks leave from the Court
7 to file the First Amended Complaint Class and Representative Action Complaint, which is attached as
8 Exhibit A to the Settlement.

9 **3. Discovery**

10 After agreeing to participate in early mediation, Boerner Motor informally produced a sampling
11 of time records and payroll data for the putative class, as well as its wage and hour policies and other
12 relevant documents and information relevant to the claims alleged in advance of mediation. Lidman
13 Decl., ¶ 11. Plaintiff retained an expert to conduct an analysis of the payroll data and time records
14 produced by Defendant. After the detailed review of the payroll and time records and other documents
15 and policies produced by Boerner Motor, Class Counsel drew on their extensive experience in similar
16 cases to assess the strengths and weaknesses of Plaintiff’s case. *Id.* This discovery allowed the parties
17 to assess the merits and value of Plaintiff’s claims and Boerner Motor’s defenses thereto, if a settlement
18 could not be reached.

19 **4. Arms-Length Negotiations**

20 On May 5, 2020 after extensive research and analysis, including a detailed analysis of
21 Defendant’s potential exposure by Plaintiff’s retained expert who holds a Ph.D. in economics, a full-
22 day mediation was held with Steven G. Mehta, a well-respected wage and hour class action mediator.
23 Lidman Decl., ¶ 12. During mediation, the parties vigorously debated their opposing legal positions,
24 the likelihood of certification of Plaintiff’s claims, and the legal basis for the claims and defenses. *Id.*
25 After a full day mediation, the Parties reached agreement and executed a Memorandum of
26 Understanding (“MOU”). Thereafter, the Parties signed the Stipulation of Settlement (“Settlement”).
27 *Id.*
28

1 **III. ARGUMENT**

2 **A. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES**

3 California Rule of Court 3.769 conditions settlement of a class action on court approval, which
4 is generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of
5 Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322 requires trial
6 court to determine “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v.*
7 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 requires the trial court to determine “whether a
8 proposed settlement is fundamentally fair, adequate, and reasonable”).

9 As further explained below, the Settlement Class satisfies the criteria for certification of a
10 settlement class under California law because: (1) the Settlement Class is so numerous that joinder
11 would be impractical; (2) common questions of law and fact predominate over individual questions
12 such that class certification is the most efficient and desirable way to maintain this litigation; (3)
13 Plaintiff’s claims are typical of the claims of absent Settlement Class members; and (4) Plaintiff and
14 her counsel will fairly and adequately represent Settlement Class members’ interest. *See* Cal. Civ. Proc.
15 § 382.

16 **1. Numerosity is Satisfied.**

17 Here, the proposed Settlement Class consists of approximately 46 members, and is therefore
18 sufficiently numerous as to make joinder impracticable. *See* Lidman Decl., ¶ 14; *See, e.g., Bowles v.*
19 *Sup. Ct.* (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently
20 numerous). Thus, numerosity is satisfied.

21 Further, a class is “ascertainable” where the members “may be readily identified without
22 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
23 *Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed Settlement Class
24 is defined as: “All current and former non-exempt, hourly, employees of Defendant Fred M. Boerner
25 Motor Co. who worked in California at any time from August 12, 2015 through September 2, 2020 or
26 the date the Court grants preliminary approval, whichever is earlier.” Lidman Decl., ¶ 14.

27 //

28 //

1 **2. Commonality is Satisfied.**

2 The focus in a certification dispute is not the merits, but rather on what types of questions,
3 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
4 *Court (Rocher)* (2004) 34 Cal.4th 319, 327.

5 Here, Settlement Class members’ claims arise from Boerner Motor’s common, uniform policies
6 and practices that applied to Settlement Class members during the class period. Lidman Decl., ¶ 15.
7 Specifically, Plaintiff alleged that Boerner Motor’s common and uniform policies and practices resulted
8 in the following violations: (1) failure to provide all legally required meal periods; (2) failure to
9 authorize and permit all legally required rest periods; (3) failure to provide accurate, itemized wage
10 statements; (4) failure to timely pay all wages upon termination; (5) unlawful business practices; and
11 (6) liability for civil penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).

12 As a result of the common and uniform policies and practices that applied to all Settlement
13 Class members, their claims involve common questions of law and fact, including but not limited to:

- 14 1. Whether Boerner Motor provided all legally compliant meal periods;
15 2. Whether Boerner Motor authorized and permitted all legally required rest periods;
16 3. Whether Boerner Motor failed to furnish accurate, itemized wage statements;
17 4. Whether Boerner Motor failed to timely pay all wages owed upon termination; and
18 5. Whether Boerner Motor’s conduct constituted unlawful and/or unfair business practices.

19 These alleged practices result in common questions as to the affected Settlement Class
20 members. *See e.g., Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726.

21 **3. Typicality is Satisfied.**

22 The typicality requirement is satisfied where class representatives have claims that are typical
23 of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d
24 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same goods as the putative
25 class in a consumer class action).

26 Here, Plaintiff’s claims are typical of those held by the members of the proposed Settlement
27 Class. First, Plaintiff was employed by Boerner Motor during the Class Period as a non-exempt
28 employee and was subject to Boerner Motor’s wage and hour policies at issue in this case. *See*

1 Hernandez Decl., ¶ 2. Second, Plaintiff was injured by the same challenged policies that injured the
2 Settlement Class as a whole. For example, Plaintiff asserts that she, like the members of the Classes,
3 was not provided with all required meal periods, was not authorized and permitted to take all required
4 rest periods, did not receive meal and rest period premium wages when she was not provided compliant
5 meal or rest periods, was not provided with accurate, itemized wage statements, and was not paid all
6 of her wages owed upon termination of employment. *Id.* Given that Boerner Motor’s policies and
7 practices applied to all non-exempt employees, Settlement Class members possess a similar interest
8 and have suffered similar alleged injuries as Plaintiff. Accordingly, because Plaintiff’s claims and
9 those of the Settlement Class all arise from the same conduct, typicality is satisfied.

10 **4. Adequacy is Satisfied.**

11 The adequacy requirement examines conflicts of interest between named parties and the
12 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Services* 155
13 (2007) Cal.App.4th 676, 697.

14 Here, there are no apparent conflicts of interest between Plaintiff and the Settlement Class she
15 seeks to represent. Indeed, Plaintiff’s interests are aligned with those of the Settlement Class members,
16 as they all seek monetary relief under the same facts and legal theories. Additionally, Class Counsel
17 does not have any conflict of interest with the Settlement Class. *See McGhee v. Bank of America* (1976)
18 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class Counsel were
19 not qualified and the named plaintiff had no interests antagonistic to those of the proposed class).

20 Further, Class Counsel also have extensive experience in wage and hour class action litigation
21 and have vigorously litigated this case. *See* Lidman Decl., ¶¶2-8; Declaration of Elizabeth Nguyen
22 (“Nguyen Decl.”), ¶¶ 2-8; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 2-8; Declaration of Milan
23 Moore (“Moore Decl.”), ¶¶ 2-4.

24 **B. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
25 **PROPOSED CLASS ACTION SETTLEMENT BECAUSE IT IS FAIR,**
26 **ADEQUATE, AND REASONABLE**

27 Settlement is the preferred means of dispute resolution, particularly in complex class action
28 litigation. *See In re Syncor ERISA Litig.* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in

evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement agreement was negotiated at arm's-length by class counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g. Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

1. The Preliminary Approval Standard is Met

To make a fairness determination, the Court should consider several factors, including: “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, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 230, 245. As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. The Strength of Plaintiff’s Case

Although Plaintiff maintains that her claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described below, Boerner Motor presented multiple defenses to Plaintiff’s claims, both on the merits and class certification. Thus, while Plaintiff was prepared to litigate these claims through certification, and ultimately trial, success was far from certain.

b. Risk, Expenses, Complexity, and Duration of Further Litigation

Although the parties engaged in significant informal discovery throughout this action, the parties still had significant discovery to complete in formal litigation had the matter not settled. Lidman Decl., ¶ 32. Moreover, Plaintiff still had to file for class certification, and faced the prospect of appeals in the wake of a disputed class certification ruling for Plaintiff and/or an adverse summary judgment ruling. *Id.* Even if the classes sought to be certified by Plaintiff were in fact certified, the parties would incur considerably more attorneys’ fees and costs through a possible decertification motion, trial, and possible

1 appeal. *Id.* This Settlement avoids those risks and the accompanying expense. Thus, this factor
2 supports preliminary approval.

3 **c. Risk of Maintaining Class Action Status**

4 Plaintiff had not yet filed her motion for class certification and as such, the extent to which
5 Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a
6 risk that there would not be a certified class at the time of trial.

7 **d. Overview of the Settlement Agreement**

8 If the Court approves this Settlement, Boerner Motor will pay a Gross Settlement Amount
9 ("GSA") of \$262,000.00. Lidman Decl., ¶ 13, Exh. 1 (Settlement, ¶ 5). Significantly, this Settlement
10 is **non-reversionary**, and no Settlement Class member will have to submit a claim form to receive a
11 Settlement Award. *Id.* (Settlement at ¶ 5.C). Each Settlement Class member will automatically receive
12 a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id.* The monetary terms
13 of the Settlement are summarized below:

Gross Settlement Amount ("GSA"):	\$262,000.00
Minus Court-approved attorneys' fees (1/3 of GSA):	\$87,333.33
Minus Court-approved, verified costs (up to):	\$22,000.00
Minus Court-approved Class Representative Service Award (up to):	\$6,500.00
Minus Settlement Administration Costs:	\$6,250.00
Minus PAGA payment:	\$10,000.00
Net Settlement Amount ("NSA"):	\$129,916.67

20 Defendant shall pay the Gross Settlement Amount within thirty (30) calendar days after the
21 "Effective Date" which is defined as the latter of: (a) the Court's final approval of the settlement if no
22 objections by or on behalf of Class Members have been filed and not withdrawn; (b) the time for appeal
23 has expired if an objection has been filed and no appeal has been filed or withdrawn; or (c) the final
24 resolution of any appeal that has been filed ("Effective Date"). *See* Settlement ¶ 5. B.

25 After deducting amounts for the Court-approved attorneys' fees and verified costs, Service
26 Award to Plaintiff, Settlement Administrator costs, and the PAGA payment, the Settlement requires
27 Boerner Motor to pay a Net Settlement Amount ("NSA") of at least **\$129,916.67** to all Settlement Class
28

members who do not timely opt out. This amount does not include the \$2,500.00 PAGA Amount to be paid to the Settlement Class members. Lidman Decl., ¶ 13, Exh. 1.

According to Boerner Motor, there are approximately 46 total Settlement Class members. Lidman Decl., ¶ 14. Thus, the average Individual Settlement Awards (assuming all Settlement Class members worked the same length of time) is projected to be approximately **\$2,878.62**. *Id.* The Individual Settlement Awards shall be determined as follows:

- i. Eighty-Five Percent (85%) of the Net Settlement Amount, not including the PAGA Amount, shall be allocated to Settlement Class members who worked during the Class Period, as follows: each participating Settlement Class member shall receive a proportionate settlement share based upon the number of workweeks worked during the Class Period, the numerator of which is the Settlement Class member's total workweeks worked during the Class Period, and the denominator of which is the total workweeks worked by all Settlement Class members who worked during the Class Period. *See* Settlement, ¶ 6.B.i.
- ii. Wage Statement Amount: Ten Percent (10%) of the Net Settlement Amount, not including the PAGA Amount, shall be designated as the "Wage Statement Amount." Each participating Settlement Class member who was employed by Boerner Motor at any time from August 12, 2018 through September 2, 2020 or preliminary approval, whichever is earlier, shall receive a portion of the Wage Statement Amount proportionate to the number of workweeks worked during the period August 12, 2018 through September 2, 2020 or preliminary approval, whichever is earlier, the numerator of which is the Settlement Class member's gross number of workweeks worked during this time period, and the denominator of which is the total number of workweeks worked by all participating Settlement Class members during this time period. *See* Settlement, ¶ 6.B.ii.
- iii. Waiting Time Amount: Five Percent (5%) of the Net Settlement Amount, not including the PAGA Amount, shall be designated as the "Waiting Time Amount. Each participating Settlement Class member who was separated from employment with Boerner Motor at any time between August 12, 2016 through September 2, 2020 or

preliminary approval, whichever is earlier, shall receive a portion of the Waiting Time Penalty Amount. The Waiting Time Penalty amount shall be divided equally between all Settlement Class members who were separated from their employment between August 12, 2016 through September 2, 2020 or preliminary approval, whichever is earlier. *See* Settlement, ¶ 6.B.iii.

- iv. PAGA Amount: Two Thousand Five Hundred Dollars and Zero Cents (\$2,500.00), of the Gross Settlement Amount has been designated as the “PAGA Amount” as described above. Each participating Settlement Class member who was employed by Boerner Motor at any time from August 12, 2, 2018 through September 2, 2020 or preliminary approval, whichever is earlier, shall receive a portion of the PAGA Amount proportionate to the number of workweeks that he or she worked during this time period. Each Settlement Class member who worked during this time period shall receive a portion of the PAGA Amount, and which will be calculated by multiplying the PAGA Amount by a fraction, the numerator of which is the participating Settlement Class members’ number of workweeks worked during this time period, and the denominator of which is the total number of workweeks worked by all Settlement Class members who do not opt out of the Settlement during this time period. *See* Settlement, ¶ 6.B.iv.

Settlement Class members will have forty-five (45) calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶ 11.C. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Boerner Motor included within the Settlement, for the period August 12, 2015 through September 2, 2020 or the date the Court grants preliminary approval, whichever is earlier. *See* Settlement, ¶ 4.

e. The Parties Engaged in Fair and Honest Negotiations.

This Settlement was a result of serious, informed, non-collusive negotiations with the assistance of a mediator. In connection with mediation, Boerner Motor produced a sampling of timekeeping and payroll data. Plaintiff retained an expert to conduct an analysis of the payroll data and time records produced by Boerner Motor to calculate Defendant’s potential exposure for Plaintiff’s claims. Lidman

Decl., ¶ 11. After the detailed review of the payroll and time records and other documents and policies produced by Boerner Motor, Class Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff's claims and Boerner Motor's defenses thereto, if a settlement could not be reached. *Id.*

On May 5, 2020, the parties participated in a full-day mediation with Steven G. Mehta, a preeminent wage and hour class action mediator. Lidman Decl., ¶¶ 11-12. During mediation, the parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, as well as the legal basis for the claims and defenses. The Parties agreed on a class-wide resolution and memorialized the agreement in a Memorandum of Understanding at the mediation. Since mediation, the Parties finalized the terms of settlement and executed the Settlement. Lidman Decl., ¶ 12, Exhibit 1.

Thus, the proposed Settlement is entitled to an initial presumption of fairness as it is the result of: factual investigation and data analysis; the exchange of substantial information and class data, including timekeeping and payroll records; arm's length negotiations by counsel; and mediation before an experienced wage and hour class action mediator. *See* Lidman Decl., ¶¶ 11-12; *See Kullar, supra*, 168 Cal.App.4th at 130. In addition, the parties attended a full-day mediation, and worked collaboratively in the following weeks to finalize the Settlement. *Id.* Thus, these factors support preliminary approval.

Further, there are no deficiencies in the Settlement. The Settlement does not grant preferential treatment to the class representative or segments of the class (except for appropriate allocations based on the applicable and differing statutes of limitations for the various claims), and is within the range of possible approval, as discussed in detail below. The Settlement will provide monetary relief to Settlement Class members. The amounts proposed for Class Counsel's attorneys' fees and costs, and service award are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

f. Amount Offered in Settlement Given Realistic Value of Claims

Meal Period Violations: Plaintiff alleges that she and Settlement Class members were not

1 provided with all legally-required off-duty first meal periods beginning before the end of the fifth hour
2 of work. Lidman Decl., ¶ 16. Specifically, Plaintiff alleges that due to Boerner Motor's work demands,
3 Plaintiff was typically not provided an uninterrupted meal period as she was often asked to perform tasks
4 during a given meal period. Plaintiff alleges that Boerner Motor imposed such a high demand on
5 Plaintiff and other non-exempt employees, that Plaintiff and other non-exempt employees would often
6 have to wait until there was a lull in assignments before being permitted to take a meal period. *Id.*
7 Furthermore, despite starting her scheduled shift at approximately 8:00 a.m., Plaintiff alleges that she
8 was often not permitted to take her meal break until 1:30 p.m., well after the end of her fifth hour of
9 work. *Id.* Therefore, Plaintiff calculated Boerner Motor's maximum exposure for the alleged meal
10 period violations at approximately \$285,870.34 (36,568 shifts 6.0 hours or greater x 53% violation rate
11 x 14.75 [average hourly rate]).

12 Boerner Motor counters that it has always provided non-exempt employees with an opportunity
13 to take legally compliant meal periods, and any non-compliant meal periods reflected in employee
14 timekeeping records were solely the result of employee choice, rather than any policy or practice of
15 Boerner Motor. Lidman Decl., ¶ 17. Boerner Motor points out that under *Brinker Restaurant Corp. v.*
16 *Superior Court* (2012) 53 Cal. 4th 1004, it is only required to "provide" the opportunity to take meal
17 periods, not "ensure" meal periods are taken, and that they have always done so. *Brinker, supra*, 53
18 Cal.4th at 1038 (rejecting "ensure" standard). Finally, Boerner Motor contends Plaintiff's meal period
19 claim is not suited for class certification, since individual inquiries would be required to assess which
20 employees took non-compliant meal periods, how many meal periods were non-compliant or missed,
21 and the reasons why a particular employee took a non-compliant meal period or missed a meal period
22 during a particular shift. *Id.* Accordingly, Plaintiff discounted the maximum exposure by 20% for the
23 risk of non-certification, and an additional 20% to account for Boerner Motor's defenses on the merits
24 to arrive at an estimated exposure of \$182,957.02. *Id.*

25 Rest Period Violations: Plaintiff alleges that she and other Settlement Class members were not
26 separately compensated for required rest periods. Lidman Decl., ¶ 18. Specifically, Plaintiff alleges
27 that while working for Defendant, she was unable to take a 10-minute rest period for every 4-hour
28 period worked, or *major fraction thereof*, due to the work demands. Further, Plaintiff alleges that the

1 policy stated in the employee handbook failed to permit and authorize legally complaint rest periods.
2 Accordingly, Plaintiff calculated Boerner Motor's maximum exposure at \$550,189.75 (37,301 shifts
3 over 3.5 hours x \$14.75 [average hourly rate]). *Id.*

4 Boerner Motor contends it has always maintained and enforced lawful rest period policies and
5 practices, and that Settlement Class Members were authorized and permitted to take all off-duty rest
6 periods in compliance with California law. Lidman Decl., ¶ 19. Further, Boerner Motor argues that
7 Plaintiff's rest period claims are inherently unsuited for class treatment as it requires an individualized
8 inquiry into whether each Settlement Class member was in fact authorized and permitted to take a
9 compliant rest period, which would devolve into an unmanageable series of mini-trials. *Id.*
10 Accordingly, Plaintiff discounted the maximum exposure by 20% for the risk of non-certification, and
11 an additional 30% to account for Boerner Motor's defenses on the merits to arrive at an estimated
12 exposure of \$308,106.26. *Id.*

13 Wage Statement Violations: Plaintiff further alleges that Boerner Motor issued inaccurate wage
14 statements in violation of Labor Code § 226 as a result of the alleged unpaid meal and rest period
15 premium wages described above. Lidman Decl., ¶ 20. Specifically, Plaintiff contends that this conduct
16 violated Labor Code § 226(a) because the wage statements issued to Settlement Class Members did not
17 include all hours worked and the rate at which they were being paid. *Id.* Therefore, Plaintiff calculated
18 Boerner Motor's maximum exposure for wage statement violations at approximately \$142,800.00
19 (($\$50.00 \times 28$ current employees) + ($\$100.00 \times 1,414$ subsequent wage statements)). *Id.*

20 Boerner Motor argues that meal and rest period claims cannot support a claim for wage statement
21 penalties after *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. App. 5th 444 and *Kirby v.*
22 *Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (see, e.g., *Jones v. Spherion Staffing*, No. LA-CV-
23 11-06462-JAK(JCx) (C.D. Cal. 2012) 2012 WL 3264081 at **8-9). Lidman Decl., ¶ 21. Boerner Motor
24 further argues that its alleged wage statement violations could not be shown to be "knowing and
25 intentional," and that Plaintiff cannot show that she or any other employee "suffer[ed] injury" as a result
26 of the alleged wage statement violations, as required by Lab. Code § 226(e) for imposition of penalties.
27 Lidman Decl., ¶ 21. As such, Plaintiff discounted the calculated exposure by 40% for a risk of non-
28 certification and an additional 30% for a risk of being unsuccessful on the merits to arrive at an estimated

1 total of \$59,976.00. *Id.*

2 Waiting Time Penalties: Plaintiff alleges that Boerner Motor is also liable for waiting time
3 penalties under Labor Code section 203 as a result of its failure to pay all wages. Lidman Decl., ¶ 22.
4 Based on the data provided by Boerner Motor, there were approximately 16 Settlement Class members
5 who have separated their employment with Boerner Motor during the relevant time period who could be
6 entitled to waiting time penalties. *Id.* Therefore, Plaintiff calculated Boerner Motor’s maximum
7 exposure for waiting time penalties at approximately \$56,640.00 (16 former employees x \$14.75
8 [average regular rate] x 30 days x 8 hours/day). *Id.*

9 Boerner Motor asserts it has strong defenses to the waiting time claim because there exist good-
10 faith disputes as to Plaintiff’s underlying claims, precluding imposition of penalties. Lidman Decl., ¶
11 23. *See also* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude
12 imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding
13 that “good faith dispute” over whether employee was exempt precluded imposition of waiting time
14 penalties over contested wages owed). *Id.* Accordingly, Plaintiff discounted the maximum exposure by
15 30% for the risk of non-certification, and an additional 30% to account for Boerner Motor’s defenses on
16 the merits to arrive at an estimated exposure of approximately \$27,753.60. *Id.*

17 PAGA Civil Penalties: Plaintiff also seeks civil penalties under the PAGA as a result of the
18 foregoing alleged Labor Code violations. Lidman Decl., ¶ 24. Plaintiff calculated Boerner Motor’s
19 exposure at \$144,200.00 (1,442 pay periods x \$100 initial violation rate). *Id.*; *see Amaral v. Cintas*
20 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate applies until employer
21 is notified that it is violating a Labor Code provision).

22 Boerner Motor argues that Plaintiff’s PAGA claim will fail for the same reasons that her
23 underlying claims will fail. Lidman Decl., ¶ 25; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th
24 1136, 1147 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also
25 fail.”). Boerner Motor also maintains that, given its good faith defenses, this Court would exercise its
26 discretion to substantially reduce any PAGA penalties if it were to find Boerner Motor liable for any of
27 Plaintiff’s claims. Lidman Decl., ¶ 25; *see* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt.,*
28 *Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien*

1 *Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA
2 penalties from \$2.8 million to \$500,000). *Id.* Therefore, Plaintiff discounted the maximum exposure
3 figure by 30% for a risk of being unsuccessful on the merits, and an additional 40% to account for the
4 possibility of this Court reducing penalties, to arrive at an estimated exposure of \$60,564.00. *Id.*

5 **g. The Settlement Is Within the Range of Possible Approval**

6 Using these estimated figures for each of the claims described above, Plaintiff predicted the
7 realistic total recovery for the Settlement Class would be approximately \$639,356.88. Lidman Decl., ¶
8 26. The proposed settlement of \$262,000.00 therefore represents approximately 40.9% of the
9 reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is appropriate as the
10 settlement will provide tangible monetary relief to Settlement Class members, and will still provide an
11 average recovery to Settlement Class members of over \$2,800.

12 The proposed settlement reflects approximately 40.9% of the estimated recovery the Settlement
13 Class could reasonably expect in light of the significant litigation risks, and will provide tangible
14 monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure
15 recovered in this case exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan.*
16 *Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement
17 representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459
18 (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm.*
19 *Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“it is well-settled law that a proposed
20 settlement may be acceptable even though it amounts to only a fraction of the potential recovery that
21 might be available to the Settlement Class members at trial”). Thus, Plaintiff submits that the proposed
22 settlement is within the range of possible approval, such that notice should be provided to the
23 Settlement Class so that they can consider the Settlement. The Court will have the opportunity to again
24 assess the reasonableness of the Settlement after the Settlement Class has had the opportunity to opt-
25 out or object.

26 **h. The Experience and Views of Counsel**

27 “Parties represented by competent counsel are better positioned than courts to produce a
28 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises*

1 *Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent,
2 experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class
3 actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See*
4 Lidman Decl., ¶¶ 2-8; Nguyen Decl., ¶¶ 2-8; Haines Decl., ¶¶ 2-8. Class Counsel conducted an in-
5 depth review of Boerner Motor's policies and timekeeping and payroll records, with the assistance of
6 a retained expert with a Ph.D. in economics, and drew on their extensive experience in similar cases to
7 assess the strengths and weaknesses of Plaintiff's case. *See* Lidman Decl., ¶¶ 10-27. The Settlement
8 was also reached with the assistance of an experienced and respected wage and hour class action
9 mediator. *Id.* This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*,
10 168 Cal.App.4th at 130.

11 **i. Attorneys' Fees and Costs**

12 California courts recognize an appropriate method for awarding attorneys' fees in class actions
13 is to award a percentage of the "common fund" created as a result of a settlement. *See e.g., Laffitte v.*
14 *Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 506 (holding "the percentage of fund method survives in
15 California class action cases"). Class Counsel's request for fees of one-third of the GSA is well within
16 the range of reasonableness, and indeed is considered the typical rate for common fund settlements.
17 Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the
18 circumstances of the case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

19 Here, Class Counsel will also apply for an attorneys' fees award of one-third of the GSA, which
20 is currently estimated to be \$87,333.33, and up to \$22,000.00 in verified costs reimbursement. *See*
21 Settlement, ¶ 7; Lidman Decl., ¶ 27. Plaintiff submits the requested fee is fair compensation for
22 undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis.
23 *Id.* Further, Plaintiff has provided written approval of the split of attorneys' fees in this action. Lidman
24 Decl., ¶ 28. Class Counsel has incurred substantial attorney fees conducting pre-filing investigation,
25 analyzing Plaintiff's claims, conducting legal research, reviewing Boerner Motor's documents and
26 policies, analyzing Settlement Class members' timekeeping data and payroll records, reviewing Boerner
27 Motor's financial documents, preparing for and attending mediation, negotiating and revising the long-
28 form Settlement, preparing this Motion, and otherwise litigating the case. Lidman Decl., ¶ 27. Class

1 Counsel expect to expend additional attorney time in attending the hearing on this Motion, overseeing
2 the Notice process and fielding questions from Settlement Class members, preparing the final approval
3 papers and attending the Final Approval hearing. *Id.*

4 Class Counsel submits that the request for attorneys' fees is reasonable when viewed as an
5 overall percentage of the settlement in light of the substantial risks, significant work undertaken, the
6 extremely positive results obtained for the class, and the efficiency with which the Parties conducted
7 the litigation. Should the Court grant preliminary approval, Class Counsel will seek an award of
8 attorneys' fees and verified litigation costs at the time of seeking final approval of the Settlement, which
9 will include a lodestar analysis.

10 **j. Administration Costs**

11 Phoenix Settlement Administrator's fees and expenses are estimated not to exceed \$6,250.00.
12 See Declaration of Jodey Lawrence in support of Plaintiff's Motion for Preliminary Approval filed
13 concurrently herewith ("Lawrence Decl."). This request is reasonable in light of the proposed class size
14 of approximately 46 Settlement Class members and the costs and expenses associated with
15 administering the notices and distributing the awards.

16 **k. Class Representative Service Award**

17 "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate
18 class representatives for work done on behalf of the class [and] to make up for financial or reputational
19 risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th
20 1380, 1393-94.

21 Here, as part of the Settlement, Plaintiff will separately apply for a service award at the time of
22 seeking final approval of the proposed class action settlement in the amount of \$6,500.00 for her
23 services to the Settlement Class. Lidman Decl., ¶ 29, Exh. 1 (Settlement, ¶ 8); Hernandez Decl., ¶¶ 3-
24 9. As will be fully briefed at the time of final approval, Plaintiff's requested service award is intended
25 to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
26 providing substantial factual information and documents to Class Counsel, attending multiple meetings
27 with Class Counsel to discuss the claims and theories at issue in the litigation, as well as the significant
28 risks Plaintiff undertook by agreeing to serve as the named plaintiff in this case, and the fact that

Plaintiff has agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Lidman Decl., ¶ 29; Hernandez Decl., ¶¶ 3-8; Settlement ¶ 4.

I. PAGA Civil Penalties

The parties have agreed to a PAGA award of \$10,000.00 and in accordance with California Labor Code section 2699(i), the LWDA will receive 75% of the amount attributable to PAGA penalties – or \$7,500.00. Settlement ¶ 5.C.(5). This \$7,500.00 represents roughly 2.9% of the \$262,000.00 Gross Settlement Amount and is in line with the zero to two percent range for PAGA claims approved by Courts. *See, e.g., In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent, or \$20,000); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent, or \$1,500); *Nordstrom Comm’n Cases*, 186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action claims and PAGA claims under which no money was allocated to the PAGA claims).

m. Payroll Taxes

The Settlement provides that the employer’s share of payroll taxes shall be paid separately from, and in addition to, and the Gross Settlement Amount. Settlement ¶ 5.D.

n. Uncashed Funds

The Settlement provides that Settlement Class members with 180 days from the date the Settlement Administrator mails the checks and any funds remaining after 180 days escheat to the California Secretary of State-Unclaimed Property Fund under the unclaimed property laws in the name of the Settlement Class member. Settlement ¶ 6.E. As all settlement funds will be distributed to the Settlement Class members, there will be no residue and it is unnecessary to designate *cy pres* recipients.

C. SETTLEMENT IS DEVOID OF OBVIOUS DEFICIENCIES

Preliminary approval of the Settlement is also warranted because there are no obvious deficiencies. The Settlement will provide monetary relief to participating Settlement Class members. The amounts proposed for Class Counsel’s attorneys’ fees and costs, and service award are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

1 **D. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**
2 **NOTICE TO SETTLEMENT CLASS MEMBERS**

3 Before the final approval hearing, the Court requires adequate notice of the settlement be given
4 to all class members. This Court should order distribution to the Settlement Class of the proposed
5 Notice Packet (which is comprised of the Notice of Pendency of Class Action and Proposed Settlement
6 and Notice of Individual Settlement Award) by first-class regular U.S. Mail, postage prepaid, using
7 last known mailing address information provided by Boerner Motor. *See* Settlement, ¶ 11, Exh. B.
8 The Notice Packet will be mailed in Spanish and English. This manner of giving notice is the “best
9 notice practicable” under the circumstances because it provides “individual notice to all members who
10 can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156,
11 173. Here, Plaintiff proposes that the Settlement be administered by Phoenix, an experienced class
12 action settlement administrator. *See generally* Lawrence Decl. and attached exhibits. Settlement Class
13 members’ addresses will be ascertainable through Boerner Motor’s personnel and payroll records,
14 which Boerner Motor will provide to Phoenix within fifteen (15) calendar days of preliminary approval
15 of the Settlement. *See* Settlement ¶ 11.A. Within ten (10) business days of receipt of the Settlement
16 Class members’ addresses, Phoenix will run the addresses through the United States Postal Service
17 Notice of Change of Address database (which provides updated addresses for any individual who has
18 moved in the previous four years and has notified the U.S. Postal Service of a forwarding address) and
19 mail the notices to Settlement Class members. *See* Settlement ¶ 11.B. To the extent that any notices
20 are returned, Phoenix will perform a “skip trace” to track any Class Member’s current mailing address.
21 *See* Settlement ¶ 11.F.

22 The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d) because
23 it advises Settlement Class members of the nature of the claims, basic contentions and denials of the
24 parties, and the key terms of the Settlement, the 45-day deadline to opt-out or object to the Settlement
25 and the procedures by which to do so, explains the recovery formula and expected recovery amount
26 for each Settlement Class member, provides them the opportunity to contest their total workweeks/
27 total pay periods included in the notice, and advises them that they will be bound by the terms of the
28 Settlement if they do not opt-out. *See* Lidman Decl., Exh. 1 (Settlement, Exh. B). The proposed Notice

1 Packet will also notify Settlement Class members of the final approval hearing date and provides
2 Settlement Class members the contact information for Class Counsel, and advises Settlement Class
3 members that they may enter an appearance through counsel if they wish to. This manner of giving
4 notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of
5 reaching Settlement Class members.

6 **E. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

7 Finally, this Court should set a hearing for final approval of the Settlement on a date
8 appropriately scheduled to follow the deadline by which Settlement Class members must file objections
9 to the Settlement or opt-out. *See* California Rule of Court 3.769.

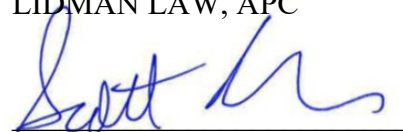
10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve
12 the proposed Settlement, provisionally certify the Settlement Class, and enter the Proposed Order
13 Granting Preliminary Approval of Class Action Settlement submitted concurrently herewith.

14
15 Dated: July 16, 2020

Respectfully submitted,
LIDMAN LAW, APC

16
17 By:



18 Scott M. Lidman
19 Attorney for Plaintiff
20 PATRICIA HERNANDEZ
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