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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, inclusive,

Defendants.

Case No. 19STCV28136

*[Assigned for All Purposes to Hon. William F.
Highberger, SSC-10]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT,
CLASS REPRESENTATIVE'S SERVICE
AWARD, AND ATTORNEYS' FEES AND
COSTS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Date: December 10, 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 December 10, 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. Confirming the certification of the Settlement Class for settlement purposes under Section
7 382 of the California Code of Civil Procedure;
- 8 2. Confirming the appointment of Plaintiff Patricia Hernandez as Class Representative for
9 settlement purposes;
- 10 3. Confirming the appointment of Scott M. Lidman, Elizabeth Nguyen, and Milan Moore of
11 Lidman Law, APC and Paul Haines of Haines Law Group, APC, as Class Counsel for
12 settlement purposes;
- 13 4. Granting final approval of the Stipulation of Settlement (“Settlement”);
- 14 5. Approving an award of \$87,333.33 in attorneys’ fees to Class Counsel;
- 15 6. Approving an award of \$19,471.94 in costs to Class Counsel;
- 16 7. Approving an award of \$6,250.00 in costs to Phoenix Settlement Administrators (“Phoenix”)
17 for its settlement administration services;
- 18 8. Approving a service award of \$6,500.00 to Plaintiff Patricia Hernandez for her services as
19 Class Representative;
- 20 9. Approving an award of \$7,500.00 to the Labor & Workforce Development Agency
21 (“LWDA”); and
- 22 10. Entering final judgment in the form of the [Proposed] Order Granting Final Approval of
23 Class Action Settlement and Final Judgment filed concurrently herewith.

24 This Motion is made on the following grounds: (1) the Settlement Class continues to meet the
25 requirements for class certification for settlement purposes only under Code of Civil Procedure § 382;
26 (2) Plaintiff and Class Counsel continue to be adequate representatives of the Settlement Class; (3) the
27 Settlement is a fair, adequate, and reasonable compromise of disputed wage and hour claims; (4) the
28 requested awards of attorneys’ fees and costs, service award, LWDA payment, and settlement

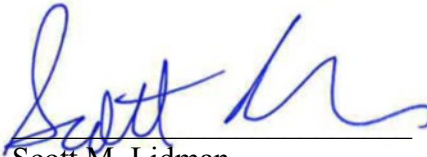
1 administration costs are all fair, adequate, and reasonable; and (5) in light of the foregoing, the
2 [Proposed] Order Granting Final Approval of Class Action Settlement and Final Judgment submitted
3 concurrently herewith should be entered so as to give finality to, and allow for disbursements from, the
4 Settlement.

5 This Motion is based on this Notice; the attached Memorandum of Points and Authorities; the
6 supporting declarations of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, Paul K. Haines, Patricia
7 Hernandez, and Elizabeth Kruckenberg of Phoenix Settlement Administrators, and the exhibits attached
8 thereto; the Settlement Agreement; all other pleadings and papers on file in this action; and on any
9 further oral or documentary evidence or argument presented at the time of hearing.

10
11 Dated: November 16, 2020

Respectfully submitted,
LIDMAN LAW, APC

12
13
14 By:



Scott M. Lidman
Attorney for Plaintiff
PATRICIA HERNANDEZ

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I. INTRODUCTION

Plaintiff Patricia Hernandez (“Plaintiff”) submits this memorandum of points and authorities in support of her motion for final approval of the class action settlement (the “Settlement”) with Defendant Fred M. Boerner Motor Co. (“Boerner Motor” or “Defendant”) on behalf of the Settlement Class defined as: “all current and former non-exempt, hourly, employees of Defendant Fred M. Boerner Motor Co. who worked in California at any time from August 12, 2015 through August 11, 2020.”

In this non-reversionary Settlement, all participating Settlement Class members will receive **automatic** payments without the need to submit a claim form, resulting in an average settlement payment of approximately \$2,753.97 to each participating Settlement Class member. This is a favorable resolution of the highly disputed wage and hour claims in this case and the significant litigation risks that Plaintiff faced.

Since this Court granted preliminary approval on August 11, 2020, nothing has changed to impact the propriety, fairness, adequacy and reasonableness of the Settlement. In addition, after receiving notice of the Settlement and of their projected Settlement payments, no Settlement Class members have opted out or objected to the Settlement.

As explained below, the Court should grant Plaintiff's motion in its entirety because: (1) the Settlement Class continues to meet the requirements for class certification for settlement purposes under Code of Civil Procedure § 382; (2) the Settlement warrants final approval because it is a fair, adequate, and reasonable compromise of the disputed claims in this case; and (3) the amounts requested for Class Counsel's attorneys' fees and costs, Plaintiff's Class Representative Service Award, payment to the Labor Workforce Development Agency ("LWDA"), and settlement administration costs are all fair, adequate, and reasonable.

In light of the foregoing, Plaintiff respectfully requests that this Court enter the [Proposed] Order Granting Final Approval of Class Action Settlement and Final Judgment submitted concurrently herewith.

//

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2019, Plaintiff filed a putative class action complaint against Defendant in Los Angeles County Superior Court. *See* Declaration of Scott M. Lidman (“Lidman Decl.”), ¶ 10. On August 14, 2020, Plaintiff filed a First Amended Class and Representative Action Complaint (“FAC”). *Id.* In the FAC, Plaintiff alleges that Defendant: (1) failed to provide all legally required meal periods; (2) failed to authorize and permit all legally required rest periods; (3) failed to provide accurate, itemized wage statements; (4) failed to pay all wages owed upon termination; (5) engaged in unlawful business practices; and (6) is liable for civil penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”). *Id.*

A. Plaintiff’s Claims

As explained in detail in the Motion for Preliminary Approval, Plaintiff’s primary theories of liability are related to Defendant’s alleged unlawful wage and timekeeping policies and practices and its failure to provide Settlement Class members all legally complaint duty-free meal and rest periods. Lidman Decl., ¶¶ 11-25. Specifically, Plaintiff alleges that she and Settlement Class members were not provided with all legally-required off-duty first meal periods beginning before the end of the fifth hour of work. Lidman Decl., ¶ 11. Plaintiff alleges that due to Boerner Motor’s work demands, Plaintiff was typically not provided an uninterrupted meal period as she was often asked to perform tasks during a given meal period. Plaintiff alleges that Boerner Motor imposed such a high demand on Plaintiff and other non-exempt employees, that Plaintiff and other non-exempt employees would often have to wait until there was a lull in assignments before being permitted to take a meal period. *Id.* Furthermore, despite starting her scheduled shift at approximately 8:00 a.m., Plaintiff alleges that she was often not permitted to take her meal break until 1:30 p.m., well after the end of her fifth hour of work. *Id.*

In addition, Plaintiff alleges that she and other Settlement Class members were not separately compensated for required rest periods. Lidman Decl., ¶ 13. Specifically, Plaintiff alleges that while working for Boerner Motor, she was unable to take a 10-minute rest period for every 4-hour period worked, or *major fraction thereof*, due to the work demands. Further, Plaintiff alleges that Boerner Motor’s policy stated in Boerner Motor’s employee handbook failed to permit and authorize legally complaint rest periods. *Id.*

1 Plaintiff also alleges that Boerner Motor failed to comply with Labor Code § 226(a) which
2 requires that wage statements provide the hours worked and the rate at which they are being paid.
3 Lidman Decl., ¶ 15. As a result of the alleged unpaid meal and rest period premium wages described
4 above, Plaintiff alleges that Boerner Motor issued inaccurate wage statements in violation of Labor
5 Code § 226, failed to pay all wages to Settlement Class members upon their separation of employment,
6 and is thus liable for civil penalties under the Labor Code Private Attorney General Act (“PAGA”).
7 Lidman Decl., ¶¶ 15-19.

8 As explained *infra* and in Plaintiff’s Motion for Preliminary Approval, Boerner Motor denies
9 Plaintiff’s claims and asserts several affirmative defenses, both on the merits and with respect to class
10 certification.

11 **B. Mediation and Settlement**

12 In connection with mediation, Defendant produced a sampling of time records and payroll data,
13 as well as its wage and hour policies and other relevant documents and information. Lidman Decl., ¶
14 22. Plaintiff retained an expert who holds a Ph.D. in economics, to conduct an analysis of the payroll
15 data and time records produced by Defendant to calculate Defendant’s potential exposure for each of
16 Plaintiff’s claims. *Id.* After the detailed review of the payroll and time records and other documents
17 and policies produced by Defendant, Class Counsel drew on their extensive experience in similar cases
18 to assess the strengths and weaknesses of Plaintiff’s case. *Id.* This discovery allowed the parties to
19 assess the merits and value of Plaintiff’s claims and Defendant’s defenses thereto, if a settlement could
20 not be reached. *Id.*

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

1 **C. Preliminary Approval of Settlement**

2 Plaintiff submitted the Settlement to the Court with her Motion for Preliminary Approval on
3 July 17, 2020. Lidman Decl., ¶ 24. Plaintiff served the proposed Settlement Agreement on July 17,
4 2020. *Id.* at ¶ 38. On August 11, 2020, the Court issued an order Granting Preliminary Approval of
5 the Settlement. *Id.*, Exh. A (Order Granting Preliminary Approval). On October 16, 2020, Plaintiff
6 served the Order Granting Preliminary Approval on the LWDA. *Id.* at ¶ 38.

7 On September 15, 2020, the Settlement Administrator mailed the Court-approved Class Notice
8 of Pendency and Settlement of Class Action and Notice of Individual Settlement Award to Settlement
9 Class members. The last day for Settlement Class members to submit disputes, objections, and/or
10 requests for exclusion was October 30, 2020. See Declaration of Elizabeth Kruckenberg of Phoenix
11 (“Kruckenberg Decl.”), ¶ 8. As of the date of this filing, there have been **no objections, no disputes,**
12 and **no opt-outs** received. *Id.*, ¶¶ 13-15. Plaintiff now respectfully submits the Settlement for this
13 Court’s final approval.

14 **III. SUMMARY OF THE SETTLEMENT AND NOTICE PROCESS**

15 **A. Settlement Class Definition**

16 The Settlement Class encompasses “all current and former non-exempt, hourly, employees of
17 Defendant Fred M. Boerner Motor Co. who worked in California at any time from August 12, 2015
18 through August 11, 2020.” Lidman Decl., ¶ 25.

19 **B. Monetary Terms of the Settlement**

20 The Settlement provides for Defendant to pay a Gross Settlement Amount (“GSA”) of Two
21 Hundred Sixty-Two Thousand Dollars and Zero Cents (\$262,000.00) to the Settlement Class.
22 Kruckenberg Decl., ¶ 16. The Net Settlement Amount is the amount remaining from the GSA after
23 deducting requested attorneys’ fees (\$87,333.33) and verified costs (\$19,471.94), proposed Class
24 Representative Service Award to Plaintiff (\$6,500.00), Settlement Administration costs (\$6,250.00),
25 and PAGA payment to the Labor and Workforce Development Agency (“LWDA”) (\$7,500.00). *Id.*
26 Based on these requested amounts, the Net Settlement Amount is calculated to be approximately
27 \$134,944.73. *Id.*

1 From the Net Settlement Amount, the Settlement Administrator will calculate each Settlement
2 Class member's Individual Settlement Award based on the following formula:

3 Eighty-Five Percent (85%) of the Net Settlement Amount, not including the PAGA Amount,
4 shall be allocated to Settlement Class members who worked during the Class Period, as follows: each
5 participating Settlement Class member shall receive a proportionate settlement share based upon the
6 number of workweeks worked during the Class Period, the numerator of which is the Settlement Class
7 member's total workweeks worked during the Class Period, and the denominator of which is the total
8 workweeks worked by all Settlement Class members who worked during the Class Period. *See*
9 Settlement, ¶ 6.B.i.

10 Ten Percent (10%) of the Net Settlement Amount, not including the PAGA Amount, shall be
11 designated as the "Wage Statement Amount." Each participating Settlement Class member who was
12 employed by Boerner Motor at any time from August 12, 2018 through August 11, 2020, shall receive
13 a portion of the Wage Statement Amount proportionate to the number of workweeks worked during
14 the period August 12, 2018 through August 11, 2020, the numerator of which is the Settlement Class
15 member's gross number of workweeks worked during this time period, and the denominator of which
16 is the total number of workweeks worked by all participating Settlement Class members during this
17 time period. *See* Settlement, ¶ 6.B.ii.

18 Five Percent (5%) of the Net Settlement Amount, not including the PAGA Amount, shall be
19 designated as the "Waiting Time Amount." Each participating Settlement Class member who was
20 separated from employment with Boerner Motor at any time between August 12, 2016 through August
21 11, 2020, shall receive a portion of the Waiting Time Penalty Amount. The Waiting Time Penalty
22 amount shall be divided equally between all Settlement Class members who were separated from their
23 employment between August 12, 2016 through August 11, 2020. *See* Settlement, ¶ 6.B.iii.

24 Two Thousand Five Hundred Dollars and Zero Cents (\$2,500.00), of the Gross Settlement
25 Amount has been designated as the "PAGA Amount" as described above. Each participating Settlement
26 Class member who was employed by Boerner Motor at any time from August 12, 2018 through August
27 11, 2020, shall receive a portion of the PAGA Amount proportionate to the number of workweeks that
28 he or she worked during this time period. Each Settlement Class member who worked during this time

1 period shall receive a portion of the PAGA Amount, and which will be calculated by multiplying the
2 PAGA Amount by a fraction, the numerator of which is the participating Settlement Class members'
3 number of workweeks worked during this time period, and the denominator of which is the total number
4 of workweeks worked by all Settlement Class members who do not opt out of the Settlement during
5 this time period. *See* Settlement, ¶ 6.B.iv.

6 Payments to Settlement Class members will be classified as Sixty-Seven percent (67%) as
7 penalties and interest to be reported on a 1099 form, and Thirty-Three percent (33%) as unpaid wages
8 to be reported on a W-2 form. Settlement, ¶ 6.D.

9 Defendant will pay the employer's share of payroll taxes separately from, and in addition to,
10 the Gross Settlement Amount. *See* Settlement, ¶ 5.D; Kruckenberg Decl., ¶ 17.

11 **C. Summary of Notice Process**

12 ***1. Mailing of Notice Packets***

13 On August 26, 2020, Defendant provided Phoenix with data files with the following
14 information: Settlement Class Member names, last known addresses, phone numbers, social security
15 numbers, the dates of employment, and the number of Workweeks worked by each Settlement Class
16 member while employed during the Class Period. Kruckenberg Decl., ¶ 6. After performing address
17 updates and verifications, Phoenix mailed the Class Notice of Pendency and Settlement of Class Action
18 and Notice of Individual Settlement Award to the 49 Settlement Class members on September 15, 2020.
19 *Id.* at ¶¶ 7-8. Following the initial mailing, one (1) Notice Packet was returned to Phoenix as
20 undeliverable. *Id.* at ¶ 9. As a result of a Skip Trace, forwarding address provided by the Post Office,
21 or re-mail requests from Counsel or Settlement Class members, two (2) Notice Packets were re-mailed.
22 *Id.* at ¶ 11. As of the date of filing this final approval motion, zero (0) Notice Packets remain
23 undeliverable. *Id.* at ¶ 12.

24 The deadline for Settlement Class members to submit objections, requests for exclusion, or
25 disputes was October 30, 2020. Kruckenberg Decl., ¶ 8. As of the date of this filing, there were no
26 objections, no disputes, and no Settlement Class members have elected to opt-out of the Settlement.
27 *Id.* at ¶¶ 13-15. Accordingly, as of the date of this Motion, the participation rate amongst the Settlement
28

Class members is 100% and the average estimated payment is \$2,753.97, with the highest estimated payment to a Settlement Class member being \$3,895.11. *Id.*, ¶¶ 13-18.

D. Timing of Payments

Under the terms of the Settlement, the Gross Settlement Amount shall be paid by Defendant, as follows: Defendant will deposit with the Settlement Administrator the gross amount of Two Hundred Sixty-Two Thousand Dollars and Zero Cents (\$262,000.00) within thirty (30) calendar days after the Effective Date.¹ *See* Settlement, ¶ 5.B.

Within ten (10) calendar days following Defendant's deposit of the Gross Settlement Amount with the Settlement Administrator, the Settlement Administrator will calculate Settlement Award amounts and provide the same to counsel for review and approval. Within seven (7) calendar days of approval by counsel, the Settlement Administrator will prepare and mail Individual Settlement Awards, less applicable taxes and withholdings, to participating Settlement Class members. The Settlement Administrator shall simultaneously pay the withholdings to the applicable authorities with the necessary reports, submitting copies to Defendant's counsel. *See* Settlement, ¶ 6.C.

After disbursement, Settlement Class members will have 180 days to cash their checks. *See* Settlement, ¶ 6.E. Funds remaining unclaimed will be distributed to the California State Controller's Office – Unclaimed Property Fund in the name of the Settlement Class member. *Id.*; Lidman Decl., ¶ 28.

IV. ARGUMENT

A. This Court Should Confirm its Conditional Certification of the Settlement Class for Settlement Purposes Because It Meets All of the Requirements for Class Certification Under Code of Civil Procedure § 382

Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest, and questions of law and fact common to the class predominate over

¹ Effective Date is defined as the latter of: (a) the Court's final approval of the settlement if no objections by or on behalf of Class Members have been filed and not withdrawn; (b) the time for appeal has expired if an objection has been filed and no appeal has been filed or withdrawn; or (c) the final resolution of any appeal that has been filed.

1 questions unique to individual class members; (3) the representative's claims are typical of the class'
2 claims; and (4) the representative will fairly and adequately represent the class' interests. *See Richmond*
3 *v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

4 Here, this Court found that the Settlement Class meets all the requirements for class certification
5 for settlement purposes when it granted preliminary approval of the Settlement on August 11, 2020.
6 *See Lidman Decl.*, ¶ 26; Exh. A. After the Court entered an order granting preliminary approval, no
7 events have occurred to cast doubt on the propriety of this determination. In fact, the reaction of the
8 Settlement Class members thus far to the Settlement has been strongly in support of the Settlement. No
9 Settlement Class members have objected to any portion of the Settlement and no Settlement Class
10 members have elected to opt-out of the Settlement. *See Kruckenberg Decl.*, ¶¶ 13-15. This Court
11 should therefore confirm its conditional certification of the Settlement Class.

12 **B. This Court Should Finally Approve the Settlement Because it is a Fair, Adequate,**
13 **and Reasonable Compromise of Disputed Wage and Hour Claims**

14 California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v. Superior*
15 *Court*, 62 Cal.App.3d 231, 236 (1976). Unlike individual settlements, class action settlements involve
16 a court approval process that exists to prevent fraud, collusion, and unfairness to class members.
17 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-79 (1980). This
18 approval process consists of preliminary settlement approval, notice being given to class members, and
19 a final fairness and approval hearing being held, at which class members have the opportunity to be
20 heard with respect to the settlement. *Id.* Now that notice has been provided to the Settlement Class,
21 Plaintiff respectfully requests that the Court finally approve the Settlement as fair, adequate, and
22 reasonable.

23 ***1. The Settlement was Reached at Arm's Length Bargaining, Through***
24 ***Experienced Counsel and an Experienced Mediator, and Was Based on***
25 ***Sufficient Information to Intelligently Negotiate a Fair Settlement in Light of***
26 ***the Claims Asserted and Risks of Continued Litigation***

27 A settlement is presumptively fair where it is reached through arm's length bargaining, based
28 on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is

1 experienced in similar litigation, and the percentage of objectors to the settlement is small. *Dunk v.*
2 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996). In deciding whether to approve a proposed
3 settlement, a trial court has broad powers to determine if the proposed settlement is fair under the
4 circumstances of the case. *Mallick v. Superior Court*, 89 Cal.App.3d 434, 438 (1979). In exercising
5 these powers, the overriding concern is to ensure that a proposed settlement is “fair, adequate, and
6 reasonable.” *Dunk, supra*, 48 Cal.App.4th at 1801 (internal quotations omitted). Relevant factors for
7 the Court to consider include, but are not limited to:

8 [T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of
9 further litigation, the risk of maintaining class action status through trial, the amount
10 offered in settlement, the extent of discovery completed and the stage of the
11 proceedings, the experience and views of counsel, the presence of a governmental
12 participant, and the reaction of the class members to the proposed settlement.

13 *Id.* These factors require balancing, are non-exhaustive and, as such, trial courts should tailor the factors
14 to each case and give due regard to “what is otherwise a private consensual agreement between the
15 parties.” *Id.*

16 “In the context of a settlement agreement, the test is not the maximum amount plaintiffs might
17 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the
18 circumstances.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001). Because
19 settlements inherently involve compromise, even settlements providing for substantially narrower relief
20 than likely would be obtained if the suit were successfully litigated can be reasonable because, “the
21 public interest may indeed be served by a voluntary settlement in which each side gives ground in the
22 interest of avoiding litigation.” *Id.* (quoting *Air Lines Stewards, etc., Local 550 v. American Airlines,*
23 *Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)).

24 Here, the Settlement resulted from extensive arm’s length settlement negotiations between
25 qualified and experienced counsel, with the assistance of a well-respected mediator, and is fair,
26 adequate, and reasonable for all Settlement Class members. While Plaintiff maintains that her claims
27 are meritorious, Plaintiff acknowledges that her position includes substantial risks and uncertainty,
28 which justifies a downward departure from the maximum exposure that Plaintiff’s calculated each

1 claim carried.

2 As detailed in Plaintiff's Motion for Preliminary Approval, there is significant risk of non-
3 certification and/or not prevailing on the merits with respect to each of Plaintiff's claims. For example,
4 with respect to Plaintiff's meal period claim, Boerner Motor counters that it has always provided
5 employees with the opportunity to take legally compliant meal periods, and any non-compliant meal
6 periods reflected in employee timekeeping records were solely the result of employee's choice, rather
7 than any policy or practice of Defendant. Lidman Decl., ¶ 12. Boerner Motor further points out that
8 under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, it is only required to
9 "provide" the opportunity to take meal periods, not "ensure" meal periods are taken, and that it has
10 always done so. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting "ensure" standard). Finally, Boerner
11 Motor maintains Plaintiff's meal period claim is not suited for class certification, since individual
12 inquiries would be required to assess which employees took non-compliant meal periods, how many
13 meal periods were non-compliant or missed, and the reasons why a particular employee took a non-
14 compliant meal period or missed a meal period during a particular shift. *Id.*

15 As for Plaintiff's rest period claim, Boerner Motor contends it has always maintained and
16 enforced lawful rest period policies and practices, and that Settlement Class members were provided
17 with all off-duty rest periods in compliance with California law. Lidman Decl., ¶14. Further, Boerner
18 Motor argues that Plaintiff's rest period claim is inherently unsuited for class treatment as it requires
19 an individualized inquiry into whether each Settlement Class member was in fact authorized and
20 permitted to take a compliant rest period, which would devolve into an unmanageable series of mini-
21 trials. *Id.*

22 As for Plaintiff's claim for wage statement penalties, Boerner Motor argues the alleged wage
23 statement violations could not be shown to be "knowing and intentional," and that meal and rest period
24 violations cannot serve as a basis for wage statement penalties. Boerner Motor further argues that
25 Plaintiff cannot show that they or any other employee "suffer[ed] injury" as a result of the alleged wage
26 statement violations, as required by Lab. Code § 226(e) for imposition of penalties. Lidman Decl., ¶
27 16.

28 As for Plaintiff's claim for waiting time penalties, Boerner Motor asserts it has strong defenses

1 to the waiting time claim because there exist good-faith disputes as to Plaintiff's underlying claims,
2 precluding imposition of penalties. Lidman Decl., ¶ 18; *see also* 8 Cal. Code Regs. § 13520 (a "good
3 faith dispute that any wages are due will preclude imposition of waiting time penalties"); *Kao v. Joy*
4 *Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that "good faith dispute" over whether employee
5 was exempt precluded imposition of waiting time penalties over contested wages owed.

6 Lastly, since Plaintiff's PAGA claim is a derivative claim based on the underlying claims,
7 Boerner Motor asserts the PAGA claim would fail with those claims. Lidman Decl., ¶ 20. Boerner
8 Motor also maintains that given its good faith defenses, this Court would exercise its discretion to
9 substantially reduce any PAGA penalties if it were to find Boerner Motor liable for any of Plaintiff's
10 claims. *Id.*

11 These considerations, not only bore heavily on the negotiations leading to the Settlement, but
12 also confirm that the Settlement is fair, adequate, and reasonable compromise in view of the risks of
13 further litigation. Lidman Decl., ¶ 21. As detailed in Plaintiff's Motion for Preliminary Approval,
14 Plaintiff carefully vetted the claims at issue and conducted a detailed liability analysis of class-wide
15 data to arrive at the calculated damages figures. Thus, while these risks are far from exhaustive, they
16 demonstrate that the Settlement is fair, adequate, and reasonable in view of them. *Id.*

17 **2. The Settlement Fairly, Reasonably, and Adequately Compensates Class**
18 **Members Because Each Participating Class Member Will Be Paid Based on**
19 **the Extent of His or Her Injury**

20 Individual settlement payments will be calculated based on the number of weeks worked by
21 each Settlement Class member during the Class Period. *See* Settlement, ¶ 5.B. This method of
22 distribution compensates Settlement Class members based on the estimated extent of their injuries, as
23 Settlement Class members who worked more weeks, would have been subject to more of the alleged
24 wage and hour violations than those who worked fewer weeks. Thus, the formula for compensating
25 Settlement Class members is fair, adequate, and reasonable, as it is tethered to the damages and
26 penalties that could be recovered by them.

1 **3. *The 100% Participation Rate and Absence of Any Objections Further***
2 ***Confirms That the Settlement is Fair, Adequate, and Reasonable***

3 Class members' response to a settlement is relevant in evaluating whether it merits final
4 approval. *Dunk, supra*, 48 Cal.App.4th at 1801. The lack of objections and lack of requests for
5 exclusion supports a fairness presumption. *See 7-Eleven Owners for Fair Franchising v. Southland*
6 *Corp.* (2000) 85 Cal.App.4th 1135, 1152-53 (finding 9 objections and 80 opt-outs from a class of 5,454
7 showed a "particularly impressive" favorable response from class members). Here, as of the filing of
8 this Motion, not a single Settlement Class member has objected to the Settlement and no Settlement
9 Class members have elected to opt-out of the Settlement. In addition, none of the 49 Notice Packets
10 were returned undeliverable. Kruckenberg Decl., ¶¶ 8-12. The extremely favorable response of the
11 Settlement Class further confirms that the Settlement is fair, adequate, and reasonable.

12 **C. The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the**
13 **Common Fund Confirmed by a Lodestar Cross-Check**

14 Plaintiff and the Settlement Class, as the prevailing parties in settlement, are entitled to recover
15 their attorneys' fees and costs for their wage claims. *See* Lab. Code §§ 218.5, 226(e) and 2699(g). A
16 fee award is justified where the legal action has produced its benefits by way of a voluntary settlement.
17 *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Community for Independent*
18 *Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983). When a settlement results in a common fund for
19 the benefit of a class, class counsel may be awarded fees as a percentage of the common fund. *See*
20 *Wershba, supra*, 91 Cal.App.4th at 254 (recognizing the "percentage of recovery" method).

21 Further, Plaintiff has provided written approval of the split of attorneys' fees in this action.
22 Lidman Decl., ¶ 36.

23 The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480,
24 506 (2016), that "[t]he percentage of fund method survives in California class action cases."
25 Specifically, the *Laffitte* Court held:

26 The recognized advantages of the percentage method—including relative ease of
27 calculation, alignment of incentives between counsel and the class, a better
28 approximation of market conditions in a contingency case, and the encouragement it

1 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
2 litigation—convince us the percentage method is a valuable tool that should not be
3 denied our trial courts.”

4 *Id.* at 503 (internal citation omitted); *see also, e.g., Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) (“when
5 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or
6 plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
7 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh*, 32 Cal.3d 621, 627
8 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court
9 acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-*
10 *Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for
11 calculating attorneys’ fees more accurately reflects the results achieved for the putative class than the
12 lodestar method and “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their
13 expected recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite*
14 *Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3rd Cir. 2005) (“The percentage-of-recovery
15 method is generally favored in common fund cases because it allows courts to award fees from the fund
16 ‘in a manner that rewards counsel for success and penalizes it for failure.’”) (citation omitted).

17 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
18 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
19 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed to
20 bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte* at 503-06. While a
21 trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold further that
22 trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here;
23 they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
24 reasonableness of a requested percentage fee.”)

25 Here, Class Counsel’s fee request of \$87,333.33 (one-third of the Gross Settlement Amount) is
26 fair and reasonable based on a percentage of the recovery confirmed with a lodestar cross-check. First,
27 “regardless whether the percentage method or the lodestar method is used, fee awards in class actions
28 average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, n.11 (2008);

1 *see also, e.g., Cicero v. DirectTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486 at * 7 (C.D. Cal. July
2 27, 2010) (observing that “30-50% [is] commonly awarded in cases in which the common fund is
3 relatively small” and that in California, “courts usually award attorneys' fees in the 30-40% range in
4 wage and hour class actions...”); *Williams v. Costco Wholesale Corp.*, No. 02-cv-2003 IEG (AJB),
5 2010 WL 2721452 at * 6 (S.D. Cal. July 7, 2010) (collecting cases where courts awarded between
6 33.33% and 40% in attorneys’ fees in wage and hour class actions). This is also consistent with Class
7 Counsel’s experience in similar wage and hour class action matters. *See* Lidman Decl., ¶ 34. Thus,
8 the percentage sought by Class Counsel here (the same percentage sought by class counsel in *Laffitte*)
9 is reasonable.

10 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
11 multiplying the number of hours reasonably expended by each attorney or legal staff member by their
12 reasonable hourly rates. *See, e.g., Serrano v. Priest* 20 Cal.3d 25, 48 (1977). The court then enhances
13 this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty and difficulty
14 of the case, its contingent nature, and the degree of success achieved. *Id.* at 49; *Ketchum v. Moses*, 24
15 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001) (“There
16 is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase
17 or decrease a lodestar calculation”).

18 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
19 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland*
20 *v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition for L. County*
21 *Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of
22 ~2.04). In class actions such as this one, where the value of the benefit conferred to the class “can be
23 monetized with a reasonable degree of certainty,” a court may “adjust the lodestar in comparison to a
24 percentage of the common fund to ensure that the fee awarded is reasonable and within the range of
25 fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases*, 175
26 Cal.App.4th 545, 557 (2009). In doing so, “the court determines, retrospectively, whether the litigation
27 involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned
28 lodestar in order to approximate the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*,

1 Cal.5th at 503-05.

In this case, Class Counsel have a lodestar of \$119,555.50 without the use of any multiplier. Therefore, the lodestar is actually higher than the \$87,333.33 fee request. Lidman Decl., ¶ 32. A general summary showing the number of hours of work performed by each attorney and paralegals is set forth below. The billing rates used are reasonable especially in light of the hourly rates identified based on years of experience in the *Laffey* Matrix, submitted concurrently herewith. *Id.*, at ¶ 33, Exh. C.

Name	Rate	Hours	Pre-Multiplier Lodestar
Scott M. Lidman (22nd Year Attorney)	\$750	53.5	\$40,125.00
Elizabeth Nguyen (15th Year Attorney)	\$650	61.2	\$39,780.00
Paul K. Haines (14th Year Attorney)	\$650	16.4	\$10,660.00
Milan Moore (5th Year Attorney)	\$400	12.2	\$4,880.00
Romina Tamiry (1 st Year Attorney)	\$295	70.4	\$20,768.00
Paralegals	\$175	19.1	\$3,342.50
Total Lodestar			\$119,555.50

The fee award requested here is justified because Class Counsel achieved a significant monetary recovery for the Settlement Class in an uncertain and risky case, while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys' fees). First, Class Counsel negotiated a substantial recovery for the Settlement Class, resulting in a current participation rate of 100%, and not a single Settlement Class member has objected to the Settlement or to Class Counsel's requested fees as of the date of this filing. *See* Kruckenberg Decl., ¶¶ 13-15. Additionally, the *average* settlement payment in this case of approximately \$2,753.97 is in line with, and above, settlement payments in similar wage and hour class action settlements. *See, e.g., Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. 2008) (wage and hour class action settlement approved where average class member recovery was

approximately \$60); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *18 (E.D. Cal. 2012) (finding that average payment to class members of less than \$200 was a “good” result); *Williams v. Centerplate, Inc.*, Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428, at *4 (S.D. Cal. 2013) (granting final approval of class action settlement where average recovery for each class member was approximately \$108). The fact that Class Counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of the results achieved.

As discussed above, this case presented significant risk as to both class certification and merits considerations. Accordingly, it is fair and reasonable to account for these risks in compensating Class Counsel. Class Counsel should also be compensated for the risks involved in undertaking this litigation and expending considerable effort, all while working on a pure contingency basis. Since undertaking representation of Plaintiff, Class Counsel have borne all the costs of litigation without receiving any compensation for over one year of work. Lidman Decl., ¶ 31. During this time, Class Counsel have expended \$18,435.94 in actual costs, have devoted substantial time to this litigation, and expect to incur approximately \$1,036 in future costs for filing the instant motion, filing the final declaration regarding distribution of settlement, CaseAnywhere fees for approximately four quarters following final approval until case closure, service and messenger fees, postage fees, and/or LACourtConnect costs for future court appearances. Lidman Decl., ¶ 29, Exh. B. Class Counsel’s efforts have included conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal research, reviewing Defendant’s documents and policies, analyzing Settlement Class members’ timekeeping data and payroll records, creating a comprehensive damages model, preparing for and attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing the Motions for Preliminary and Final Approval, overseeing the settlement administration process, communicating with Settlement Class members, and otherwise litigating this case. *See* Lidman Decl., ¶ 28. Moreover, Class Counsel have expended time, effort, and money that they could have expended on less risky cases instead. Given the considerable potential for adverse outcomes in this case, including, but not limited to losing on class certification and/or merits issues, the contingent risk borne by Class Counsel was great. Lidman Decl., ¶¶ 30-33.

1 Class Counsel’s previous experience in litigating wage and hour class actions also supports the
2 reasonableness of the fee request. Class Counsel are well-versed in plaintiff and defense-side wage
3 and hour class action litigation, with substantial experience litigating claims for unpaid wages, expense
4 reimbursement, and related penalties. *See* Lidman Decl., ¶¶ 3-8; Declaration of Elizabeth Nguyen
5 (“Nguyen Decl.”), ¶¶ 3-8; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 3-8. They have been
6 certified as class counsel in numerous other cases. *Id.* Class Counsel’s experiences in similar matters
7 was integral in evaluating the strengths and weaknesses of the case against Defendant and the
8 reasonableness of the Settlement. *See* Lidman Decl., ¶ 32. Practice in the narrow field of wage and
9 hour litigation requires skill and knowledge concerning the rapidly evolving substantive state and
10 federal law, as well as the procedural law of class action litigation. *Id.* Because it is reasonable to
11 compensate Class Counsel commensurate with their skill, reputation, and experience, a fee award of
12 one-third of the Gross Settlement Amount is reasonable.

13 Other factors also show that the fee amount requested in this case is reasonable under the
14 circumstances. This case involved nuanced legal issues including questions surrounding Defendant’s
15 requirement to “provide” meal periods, “authorize and permit” rest periods, and the propriety of
16 statutory penalties, to name just a few. Lidman Decl., ¶¶ 11-30. Thus, Class Counsel’s requested fee
17 award is fair, reasonable, and adequate and should be approved.

18 **D. The Requested Cost Amount Warrants Final Approval as Fair, Adequate, and**
19 **Reasonable**

20 As discussed above, Class Counsel has incurred a total of \$19,471.94² in litigation costs.
21 Lidman Decl., ¶ 29, Exh. B. Class Counsel’s request is fair, adequate, and reasonable, as all of these
22 costs are documented and reasonably incurred. *See* Lidman Decl., ¶ 29, Exh. B. Moreover, the costs
23 Plaintiff seeks are the types of costs routinely approved by courts. *See, e.g., Harris v. Marhoefer*, 24
24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover “those out-of-pocket expenses that would normally
25 be charged to a fee paying client”); *Ashker v. Sayre*, No. 05-03759 CW, 2011 WL 825713, at * 3 (N.D.
26 Cal. 2011)(“costs of reproducing pleadings, motions and exhibits are typically billed by attorneys to
27

28 ² This amount includes the anticipated costs of \$1,036 for filing fees, CaseAnywhere fees, service and messenger fees, postage fees, and/or LACourtConnect costs for future court appearances.

1 their fee-paying clients” and are reimbursable); *Trustees of Const. Industry & Laborers Health and*
2 *Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006) (legal research costs are
3 reimbursable); *In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal.
4 2007) (mediation expenses, consultant and expert fees, legal research, copies, postage, filing fees,
5 messenger and overnight delivery costs are reimbursable). Because the expense reimbursements
6 requested by Class Counsel were reasonably incurred, and no Settlement Class member has objected
7 to them, Plaintiff respectfully requests the Court should grant the request for actual costs incurred.

8 **E. The Court Should Finally Approve the Requested Administration Costs**

9 Plaintiff also requests that the Court approve \$6,250.00 in administration costs to the Settlement
10 Administrator, Phoenix. As detailed in the declaration of Elizabeth Kruckenberg on Behalf of Phoenix
11 submitted herewith, Phoenix performed duties in connection with this Settlement that were integral in
12 effectuating the Settlement and the Notice process. Among other things, Phoenix calculated each
13 Settlement Class member’s individual settlement payment, updated addresses contained in the class
14 data supplied by Defendant, formatted Notice Packets for mailing, mailed Notice Packets to all 49 Class
15 Members, kept the parties informed of any objections or requests for exclusion, and have otherwise
16 administered the Settlement. *See* Kruckenberg Decl., ¶¶ 2-19. For these reasons, Phoenix’s requested
17 costs are fair, reasonable, and adequate, and should be finally approved.

18 **F. This Court Should Finally Approve Plaintiff’s Requested Service Award Because**
19 **It Is Fair, Adequate, and Reasonable in View of Plaintiff’s Efforts and the Risks**
20 **that She Assumed on Behalf of the Class**

21 Courts routinely approve service payments to compensate named plaintiffs for the services they
22 provide and the risks they incur during class action litigation. *See, e.g., Bell v. Farmers Ins. Exchange*,
23 115 Cal.App.4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for their efforts in
24 bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
25 \$50,000 service payment).

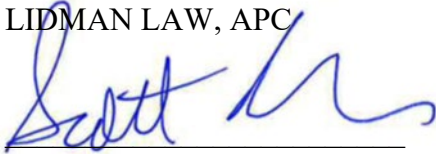
26 Here, Plaintiff seeks a service award of \$6,500.00 and believe this request is reasonable given
27 Plaintiff’s efforts in this case and the risks she undertook on behalf of Settlement Class members.
28 Lidman Decl., ¶ 37; Declaration of Patricia Hernandez (“Hernandez Decl.”), ¶¶ 5-9. Plaintiff gathered

documents for use in the lawsuit, and attended several meetings with Class Counsel discussing the case, the merits, the defenses, and the overall fairness of the settlement reached. *See* Lidman Decl., ¶ 37; Hernandez Decl., ¶¶ 5-9. Moreover, after receiving notice of the proposed Class Representative Service Award for Plaintiff, no Class Member has objected to the proposed award, as of the date of this filing. *See* Kruckenberg Decl., ¶ 15. Thus, the service award to Plaintiff is appropriate and justified as part of the Settlement and should be finally approved.

V. CONCLUSION

For the reasons stated herein, Plaintiff respectfully submits that this Court should grant Plaintiff's motion in its entirety and adopt the [Proposed] Order Granting Final Approval of Class Action Settlement and Final Judgment submitted herewith.

Dated: November 16, 2020

Respectfully submitted,
LIDMAN LAW, APC

By: _____
Scott M. Lidman
Attorney for Plaintiff
PATRICIA HERNANDEZ