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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ALMA BARRIGA, as an individual and on behalf of all others similarly situated, Plaintiff, vs. DUCOMMUN INCORPORATED, a Delaware corporation; DUCOMMUN AEROSTRUCTURES, INC., A Delaware corporation; and DOES 1 through 100, Defendants.	Case No. CIVSB 2028738 **CLASS ACTION** *[Assigned for all purposes to the Hon. David S. Cohn, Dept. S26]* **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: July 18, 2022 Time: 10:00 a.m. Dept.: S26 Action Filed: December 16, 2020 Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on July 18, 2022 at 10:00 a.m., or as soon thereafter as the matter may be heard in Department S26 of the above-entitled Court, located at 247 W. Third Street, San Bernardino, CA 92415, Plaintiff Alma Barriga ("Plaintiff") will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:

   > All current and former non-exempt employees who worked for Defendant Ducommun Aerostructures, Inc. in California at any time from December 16, 2016 through August 29, 2021 ("Class Period") and who did not sign an individual settlement and release.

3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Haines Law Group, APC as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice and Notice of Estimated Settlement Award (together, the "Notice Packet"), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement Agreement; and
7. The scheduling of a hearing to consider whether the class settlement should be finally approved and to award an amount for a Class Representative Enhancement Award to Plaintiff, and attorneys' fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declarations of Paul K. Haines and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declaration of Plaintiff; the pleadings and other papers filed in this action; and on any further oral or documentary evidence or argument presented at the time of hearing.

Dated: June 29, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

Paul K. Haines
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Alma Barriga ("Plaintiff") seeks preliminary approval of a class action settlement agreement ("Settlement") with Defendants Ducommun Incorporated and Ducommun Aerostructures, Inc. ("Docummun" or "Defendants"). The Settlement resolves a class and representative action pending before this Court (the "Action"), in which Plaintiff alleges that Ducommun (i) underpaid overtime wages by failing to include bonuses and other payments in employees' "regular rate of pay"; (ii) failed to provide all meal periods, and (iii) failed to authorize and permit all rest periods. Plaintiff further alleges that as a result of these violations, Ducommun failed to provide accurate itemized wage statements, failed to pay all final wages, and is liable for Private Attorneys General act ("PAGA") civil penalties.

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, common-fund class action Settlement,[1] in which Ducommun has agreed to pay $935,260.00 to the following Settlement Class, estimated to consist of 130 individuals:

> All current and former non-exempt employees who worked for Defendant Ducommun Aerostructures, Inc. in California at any time from December 16, 2016 through August 29, 2021 (the "Class Period") and who did not sign an individual settlement and release.

The Settlement was reached after the parties engaged in mediation with Francis "Tripper" Ortman, Esq., an experienced wage and hour class action mediator. In connection with mediation, Ducommun provided Plaintiff with extensive informal discovery, including timekeeping and payroll records for a sampling of putative class members; relevant wage and hour policies; hire and termination dates for all putative class members; and other data and documents. After extensive research and investigation, including a detailed analysis of Ducommun's potential exposure made with the assistance of Plaintiff's expert economist who holds a Ph.D. in economics, the parties attended a full-day mediation with Mr. Ortman on October 4, 2021. The parties did not reach a resolution at mediation; however, over the following weeks the parties continued their negotiations with the mediator's assistance. The parties eventually reached a settlement in principle, and continued their negotiations to resolve the finer terms of the settlement, ultimately resulting in the Settlement.

[1] The Settlement is attached as Exhibit 1 to the Haines Declaration. The Class Notice and Notice of Estimated Settlement Award are attached as Exhibits A and B, respectively, to the Settlement.

Notably, Settlement Class members are not required to submit a claim form to receive a payment ("Settlement Award") from the Settlement. After deductions for proposed settlement administration costs, attorneys' fees and costs, Plaintiff's incentive award, and the LWDA's share of PAGA civil penalties, the average Settlement Award is estimated to be at least ***$4,192.36***, an excellent result. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

Ducommun is a global provider of manufacturing and engineering solutions for customers in the aerospace, defense, and industrial markets, with three locations in California. *See* Declaration of Paul K. Haines ("Haines Decl."), ¶ 12. Plaintiff is a former non-exempt Ducommun employee who worked for Ducommun during the Class Period. *Id*.

On December 16, 2020, Plaintiff filed the instant action, alleging claims for failure to pay overtime wages, meal and rest period violations, wage statement penalties, waiting time penalties, and a claim for unfair competition. Haines Decl., ¶ 13. On February 22, 2021, Plaintiff filed the operative First Amended Complaint adding a claim for PAGA civil penalties. *Id*.

B. PLAINTIFF'S CLAIMS AND DUCOMMUN'S DEFENSES

1. Unpaid Overtime Based on Miscalculation of "Regular Rate"

Plaintiff alleges that Ducommun failed to pay all overtime wages to Plaintiff and other Settlement Class members by failing to include the value of all non-discretionary remuneration, including bonuses and shift differentials, into the "regular rate" of pay. Haines Decl., ¶ 18; 29 U.S.C. 207(e) ("regular rate" includes "all remuneration for employment"); *Huntington Mem'l Hosp. v. Superior Court*, 131 Cal.App.4th 893, 902-903 (2005) (payments included in calculation of regular rate are generally consistent under state and federal law).

Ducommun contends the vast majority of additional payments at issue are discretionary bonuses, discretionary end-of-year gifts, and/or percentage-of-total-earnings bonuses and thus need not be included in the regular rate. Haines Decl., ¶ 18; *see also* 29 C.F.R. § 778.211 (discretionary bonuses need not be included in regular rate); 29 C.F.R. § 778.200(a)(1) (excluding from regular rate "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency."); 29 C.F.R. § 778.210 (bonuses calculated based on a percentage of employee's total compensation need not be included in regular rate calculation). Even if the Court found some of the bonuses should have been included in the regular rate, Ducommun argues, the amount of underpayment would be minimal and much lower than the amount Plaintiff alleges. Haines Decl., ¶ 18. Ducommun also contends that differences in amount, type, and frequency of bonuses paid to employees would require hundreds of mini-trials and render class certification of this claim inappropriate. *Id*.

2. Meal Period Claim

Plaintiff alleges that Ducommun often failed to provide full 30-minute meal periods, since employees were required to be back at their work stations by the time a bell rang at the 30-minute mark. Haines Decl., ¶ 19. Plaintiff also alleges that Ducommun failed to provide second meal periods on shifts over 10 hours. *Id*.

Ducommun argues it maintained legally-compliant meal period policies throughout the Class Period, for both first and second meal periods, and that under *Brinker* it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken. Haines Decl., ¶19; see *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (rejecting "ensure" standard). Ducommun further argues that its timekeeping records reflect a very high compliance rate for first meal periods, and that employees have executed declarations attesting that they always received proper meal periods, which demonstrate that Ducommun takes it meal period obligations seriously and consistently relieves employees of all duty for timely, 30-minute meal periods. Haines Decl., ¶ 19. Any failure by employees to take a timely, full 30-minute meal period is the result of employee choice, Ducommun argues, not any Ducommun policy or practice. *Id*. Ducommun further points to its meal break schedule, which advises employees that they have a 6-minute window to return from lunch after the 30-minute meal period. *Id*. Ducommun also argues that its Kronos timekeeping system automatically pays meal period premiums whenever required; if an employee clocks out late for lunch, or clocks back in early from lunch, the system is programmed to ask the employee why they clocked out late or clocked back in early, and if the employee responds that it was required of them by management, a meal period premium is paid. *Id*. With respect to second meal periods, Ducommun points to second meal period waivers signed by its employees as evidence that it does, in fact, provide second meal periods on shifts over 10 hours, and that any employee's failure to take a second meal period is a result of waiver, not any policy or practice of Ducommun. *Id*. Lastly, Ducommun argues individualized inquiries would be required to determine whether individual employees in different departments missed a meal period or did not receive a compliant meal period on each individual shift, and why any meal period was otherwise non-compliant or missed, thereby precluding certification of this claim. *Id*.

3. **<u>Rest Period Claim</u>**

Plaintiff alleges that Ducommun failed to authorize and permit all required rest periods, including third rest periods on shifts over 10 hours. Haines Decl., ¶ 20. Ducommun argues that in practice, it has always authorized and permitted the proper number and duration of rest periods, and that this is demonstrated through its written break schedules which provide for third rest periods on shifts over 10 hours, as well as through employee declarations, which attest that employees always receive all required rest periods. *Id*. Thus, Ducommun argues, any failure by employees to take a rest period is the result of employee choice rather than a Ducommun policy or practice. *Id*. Finally, Ducommun argues this claim is not amenable to class treatment as individualized inquiries would be required to determine whether individual employees missed a rest period on any particular shift, and if so, why the rest period was missed, resulting in a series of unmanageable mini-trials. *Id*. This manageability issue is especially present with respect to rest periods, Ducommun argues, since rest periods are not – and need not be – recorded. *Id*.

4. **<u>Claims Under Labor Code §§ 203, 226, and the PAGA</u>**

As a result of its alleged failure to pay all wages, Plaintiff asserts that Ducommun failed to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively. Haines Decl., ¶¶ 21-23. Plaintiff also alleges Ducommun failed to include all applicable rates of pay on employee wage statements. *Id*., ¶ 21. Finally, Plaintiff seeks civil penalties under the PAGA based on the aforementioned claims. *Id*., ¶ 23.

Ducommun argues Plaintiff's derivative claims fail for the same reasons as her underlying claims. Ducommun further asserts it has strong, good-faith defenses to Plaintiff's underlying claims, precluding imposition of waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a "good faith dispute that any wages are due will preclude imposition of waiting time penalties"); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding "good faith dispute" precluded imposition of waiting time penalties). Haines Decl., ¶ 22. Ducommun further contends any alleged wage statement violations could not be shown to be "knowing and intentional," particularly given its good-faith defenses; that Plaintiff cannot show she or others "suffer[ed] injury" due to alleged wage statement violations, as required by Lab. Code § 226(e); and that wage statements always accurately reflected amounts *paid* to employees. *Id.*, ¶ 21; *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) ("The purpose of section 226 is to '*document* the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages.'") (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)). As for the direct wage statement claim, Ducommun argues no employee could demonstrate "injury" based on an alleged failure to include rates of pay, since an employee would simply need to perform the "simple math" of dividing the amount paid by the hours worked, in order to arrive at the rate of pay. Haines Decl., ¶ 21; *Hernandez v. BCI Coca-Cola Bottling Co.*, 554 Fed. Appx. 661, 662 (9th Cir. 2014) ("Wage Statements comply with § 226(a) when a plaintiff employee can ascertain the required information by performing simple math, using figures on the face of the wage statement.")

Finally, Ducommun contends Plaintiff's PAGA claim fails because the underlying claims fail. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). Ducommun further maintains that given its good-faith defenses, the Court would substantially reduce PAGA civil penalties even if it were to find in favor of Plaintiff on her underlying claims. Haines Decl., ¶ 23; *see also* Cal. Labor Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court's discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because "the evidence showed…defendants took their obligations…seriously and attempted to comply with the law"); *Fleming v. Covidien, Inc.*, No.

ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer was "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

C. DISCOVERY AND MEDIATION

In preparation for mediation, the parties engaged in significant informal discovery. Ducommun produced timekeeping and payroll records for approximately 25% of putative class members; its relevant wage and hour policies; a class list which each putative class member's hire date and termination date; and other relevant information. Haines Decl., ¶ 14. Plaintiff hired a labor economist with a Ph.D. in economics to assist in analyzing and extrapolating the data produced by Ducommun. *Id*. This discovery allowed the parties to assess the merits and value of Plaintiff's claims and Ducommun's defenses, as well as the chances for class certification. *Id*.

The parties attended a full-day mediation on October 4, 2021 with Mr. Ortman. Haines Decl., ¶ 15. The parties vigorously debated their legal positions, the likelihood of certification of Plaintiff's claims, and the legal bases for the claims and defenses. *Id.* The parties did not reach resolution at mediation. *Id*. However, over the next several weeks, the parties continued their negotiations with Mr. Ortman's assistance and agreed to a settlement in principle. *Id*. The parties then negotiated the finer terms of the settlement, ultimately resulting in the Settlement. *Id*.

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, Ducommun will pay a non-reversionary Gross Settlement Amount ("GSA") of $935,260.00, with no claims process required for Settlement Class members to receive payment. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount ("GSA"):	$935,260.00
• Minus Court-approved attorneys' fees (one-third):	$311,753.33
• Minus Court-approved verified costs (up to):	$25,000.00
• Minus Court-approved Incentive Award:	$7,500.00
• Minus Amount Paid Set Aside as PAGA penalties:	$50,000.00
• Minus estimated settlement administration costs:	$8,500.00
Net Settlement Amount ("NSA"):	$532,506.67
• PLUS 25% "PAGA Amount" to Settlement Class:	$12,500.00
Total Amount Paid to Settlement Class members:	**$545,006.67**

1. <u>The Settlement Provides for Reasonable Monetary Payments</u>

After deducting amounts for a court-approved incentive award, administration costs, attorneys' fees and costs, and PAGA payment to the LWDA, Ducommun will pay at least $545,006.67 to Settlement Class members. *See* Settlement, § 3(D). Ducommun represents there are approximately 130 Settlement Class members. *Id.*, § 1. Thus, the average Settlement Award is estimated to be **$4,192.36**. Haines Decl., ¶ 17. Payments will be distributed as follows: (i) first, 75% of the NSA will be paid to all participating Settlement Class member, based on their proportionate number of workweeks worked for Ducommun Aerostructures, Inc. in California during the Class Period; second, (ii) 15% of the NSA will be designated the "Waiting Time Amount" and will be distributed equally to all participating Settlement Class members whose employment with Ducommun Aerostructures, Inc. ended at any time from December 16, 2017 through August 29, 2021; third, (iii) the remaining 10% of the NSA will be designated the "Wage Statement Amount" and will be distributed to all participating Settlement Class members who worked for Ducommun Aerostructures, Inc. at any time from December 16, 2019 through August 29, 2021, based on their proportionate number of pay periods worked in California during that time period; and finally, (iv) in addition to the NSA, $12,500.00 of the GSA is designated the "PAGA Amount," and will be distributed to all Settlement Class members who worked for Ducommun Aerostructures, Inc. during the PAGA Period (December 16, 2019 to August 29, 2021), based on the proportionate number of pay periods worked in California during the PAGA Period. *See* Settlement, § 4(B).

Payments from the NSA will be treated as one-third wages to be reported on a Form W-2, and as one-third interest and one-third penalties to be reported on a Form 1099. *See* Settlement, § 4(E). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* Ducommun will pay the employer's share of payroll taxes on the amount designated as "wages" separate from, and in addition to, the GSA. *Id.*, §§ 3(E), 4(C). Settlement Class members will have 60 days from the Notice mailing to object or request to opt-out, or submit disputes, thereby providing ample time to review the Notice without unduly delaying the Settlement. *See id.*, § 9(C)-(E).

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Participating Settlement Class members will be bound by the Settlement, and shall release all wage and hour claims that were pled in the operative complaint in the Action, or that could have been pled based on the facts alleged in the operative complaint in the Action, based on their employment with Ducommun Aerostructures, Inc. during the Class Period ("California Released Claims"). *See* Settlement, § 2(A). All Settlement Class members (regardless whether they opt out) who worked for Ducommun Aerostructures, Inc. in California during the PAGA Period will release all claims for PAGA civil penalties based on the facts alleged in Plaintiff's operative complaint. *See id*. Plaintiff has also agreed to a general release of claims, subject to a waiver of Cal. Civil Code § 1542. *Id.*, § 2(B).

2. <u>Attorneys' Fees and Costs, Incentive Award, and PAGA Payment</u>

At final approval, Plaintiff will separately apply for a Class Representative Incentive Award in the amount of $7,500. *See* Settlement, § 3(D)(3). "[I]ncentive awards are fairly typical in class action cases…and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at final approval, Plaintiff's requested payment is in recognition of the time and effort she expended on behalf of the Settlement Class, including providing factual information and documents to counsel, identifying potential witnesses, attending meetings with counsel to discuss the claims and theories at issue in the litigation, and otherwise actively participating in the prosecution of this case. Haines Decl., ¶ 26. Plaintiff respectfully submits that this requested payment is well within the range of permissible approval. *See, e.g., Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 at *10 (E.D. Cal. May 17, 2011) (approving $7,500 award to each of <u>five</u> named plaintiffs from $505,058.60 settlement).

The parties have also designated $50,000 of the GSA as PAGA penalties, of which $37,500 (75%) will be paid to the LWDA, with the remaining $12,500.00 (25%) distributed to Settlement Class members (*see* Settlement, § 3(D)(5)), consistent with the PAGA's requirement that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to aggrieved employees (Cal. Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of $7,500 to LWDA from $6.9 million settlement).

At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA (currently estimated at $311,753.33), and up to $25,000 in litigation costs. *See* Settlement, § 3(D)(4). Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Plaintiff's counsel have incurred substantial attorneys' fees conducting pre-filing investigation; analyzing Plaintiff's claims; conducting legal research; analyzing timekeeping, payroll, and other data with Plaintiff's expert to create a comprehensive damages model; preparing for and attending mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Haines Decl., ¶ 25. Further, Plaintiff's counsel will incur significant future attorneys' fees in overseeing the Notice process, fielding phone calls from Settlement Class members, preparing the Final Approval Motion and supporting documents, and appearing at the Final Approval Hearing. *Id.*

It is appropriate to award attorneys' fees as a percentage of the "common fund" created by the settlement. *Laffitte v. Robert Half Int'l, Inc.,* 1 Cal.5th 480 (2016) (holding "the percentage of fund method survives in California class action cases"). Counsel's request for fees of one-third of the GSA is well within the range of reasonableness and is typical for common fund settlements. *See Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have awarded percentage fees in the range of 20% to 50%). As will be fully briefed at final approval, counsel submit their request for fees is reasonable in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions class action settlements on court approval, which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role is to ensure the settlement agreement taken as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a presumption of fairness when a settlement is negotiated at arm's length by counsel. *See, e.g.*, *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. <u>Standard for Preliminary Approval</u>

To make a fairness determination, the Court should consider several factors, including: "the strength of Plaintiff's 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.*, 48 Cal.App.4th 1794, 1801 (1996). "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.*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. <u>The Strength of Plaintiff's Case</u>

Although she maintains her claims are meritorious, Plaintiff acknowledges there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described in section II.B., *supra,* Ducommun presented multiple defenses to Plaintiff's claims, both on the merits and to class certification. While Plaintiff was prepared to litigate her claims through class certification and ultimately trial, success was far from certain.

b. <u>Risk, Expense, Complexity, and Duration of Further Litigation</u>

Although the parties engaged in significant informal discovery, they had not completed formal written and deposition discovery, which would have required expenditure of substantial time and resources. Haines Decl., ¶ 27. Plaintiff also still had to file for class certification. *Id*. Even if Plaintiff obtained certification, the parties would incur considerable attorneys' fees and costs through a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id*. This settlement avoids those risks and the accompanying expense. *Id.* Thus, this factor supports preliminary approval.

c. Risk of Maintaining Class Action Status

Plaintiff had not yet filed her class certification motion, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk there would not be a certified class at trial, or if there were, that it would consist of a significantly smaller group of employees than the proposed Settlement Class, and the expected recovery would be significantly reduced. Thus, this factor supports preliminary approval.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a fair and reasonable monetary recovery for the Settlement Class for disputed claims. With the assistance of a retained economist with a Ph.D., Plaintiff conducted an analysis of potential damages due to Ducommun's allegedly unlawful policies and practices. Plaintiff's analyses of realistic expected recoveries for each theory of liability are set forth below:

Underpaid Overtime Due to Regular Rate Miscalculation: **$164,427**

Plaintiff alleges that Ducommun failed to include certain bonuses and other payments in employees' regular rate of pay and therefore underpaid employees' overtime compensation in pay periods where employees received these types of compensation and also worked overtime. Haines Decl., ¶ 18. Based on Plaintiff's review and extrapolation of the payroll records produced by Ducommun, and assuming that every category of compensation at issue should have been incorporated into the "regular rate," Plaintiff estimated that Ducommun employees were underpaid by approximately $365,393 during the Class Period. *Id*. But as noted above, Ducommun argues that the bonuses in question were discretionary, were gifts, and/or were calculated based on a percentage of total compensation, and therefore did not need to be included in the regular rate of pay pursuant to the relevant regulations. *Id*. Ducommun also argues that differences among employees in type, frequency, and amount of bonuses would create individualized issues that would make a class unmanageable. *Id*. Based on these defenses, Plaintiff discounted the maximum exposure by 25% for risk of non-certification, and by an additional 40% for risk of losing on the merits or failing to recover the full amount sought, to arrive at a realistic exposure of $164,427. *Id.*

<u>Meal Period Violations</u>*:* **$421,044**

Plaintiff's analysis and extrapolation of Ducommun's timekeeping data revealed that there were approximately 64,788 shifts with first and/or second meal period violations on shifts worked by Settlement Class members during the Class Period. Haines Decl., ¶ 19. Plaintiff further calculated that the average rate of pay for putative class members during the Class Period was approximately $29.54. *Id*. Thus, Plaintiff estimated Ducommun's maximum exposure for meal period violations at $1,913,838. *Id*. As noted above, however, Ducommun argues it has always maintained legally-compliant meal period policies and provided compliant meal periods to Settlement Class members; that it was only required to *provide* meal periods, not ensure they were taken; the timekeeping records reflect a high compliance rate for first meal periods; that employees executed second meal period waivers, and any meal period violations reflected in the timekeeping records were the result of employee choice, rather than any policy or practice of Ducommun; that Ducommun's timekeeping system automatically pays premiums when required; and that employees signed declarations attesting to always receiving proper meal periods. *Id.* Ducommun also contends that this claim would not be certified due to the individualized inquiries that would be required to determine whether individual employees received a short meal period or missed a meal period on each individual shift, and why any meal period was short or missed. *Id.* Given these defenses, Plaintiff discounted Ducommun's maximum exposure by 45% to account for the risk of non-certification, and an additional 60% for risk of losing on the merits or failure to recover the full amount sought, to arrive at an estimated total of $421,044. *Id*.

<u>Rest Period Violations</u>*:* **$217,951**

Plaintiff alleges Ducommun failed to authorize and permit legally-compliant rest periods, including by failing to authorize and permit third rest periods on shifts over 10 hours. Haines Decl., ¶ 20. Plaintiff's analysis of Ducommun's timekeeping data revealed approximately 42,161 shifts over 10 hours worked by Settlement Class members during the Class Period. *Id*. Plaintiff thus estimated Ducommun's exposure at $1,245,436 (42,161 * $29.54 rest period premium). *Id*.

As noted above, however, Ducommun contends it has always maintained legally-compliant rest period policies and authorized and permitted all rest periods to Settlement Class members, and that its rest breaks schedules as well as employee declarations evidence that rest periods were properly scheduled. Haines Decl., ¶ 20. Further, Ducommun argues this claim is not amenable to class treatment as individualized inquiries would be required to determine whether employees missed a rest period on each relevant shift, and why each rest period was missed on tens of thousands of shifts spanning several years and several different supervisors. *Id*. In light of these defenses, Plaintiff discounted Ducommun's maximum exposure by 50% to account for the risk of non-certification, and an additional 65% for risk of losing on the merits or failure to recover the full amount sought, to arrive at an estimated exposure of approximately $217,951. *Id*.

<u>Wage Statement Penalties</u>: **$68,478**

Based on information provided by Ducommun, there were approximately 3,913 pay periods worked by Settlement Class members within the one-year liability window under Labor Code § 226. Haines Decl., ¶ 21. In calculating Ducommun's exposure, Plaintiff assumed she could recover the "initial" wage statement penalty of $50 for each violation, for a total of $195,650 (3,913 pay periods * $50) in potential penalties. *Id.*; *see also* Lab. Code § 226(e) (providing $50 penalty for "initial" violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until employer has been notified it violated Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying "initial" $50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim). However, given Ducommun's arguments that no violations occurred, that class members suffered no "injury," and that any alleged violations were not "knowing and intentional," as well as risks associated with Plaintiff's underlying claims discussed above, Plaintiff discounted the maximum exposure by 30% for risk of non-certification, and by an additional 50% for risk of being unsuccessful on the merits, for an estimated realistic exposure of $68,478. Haines Decl., ¶ 21.

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<u>Waiting Time Penalties</u>: **$183,135**

Based on Plaintiff's analysis of the data provided by Ducommun, there were approximately 82 employees who separated their employment with Ducommun since December 16, 2017. Haines Decl., ¶ 22. Plaintiff further estimated an average waiting time penalty of $7,090 ($29.54 * 8 hours * 30 days), and thus calculated Ducommun's maximum waiting time penalty exposure as approximately $581,380 (82 * $7,090). *Id.* As noted above, however, Ducommun asserts it has strong, good-faith defenses to Plaintiff's underlying claims, and that any failure to pay wages was therefore not "willful" as a matter of law. *Id.* Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome Ducommun's defenses, both as to class certification and as to the merits, to her underlying claims. Based on these defenses, Plaintiff discounted Ducommun's maximum exposure by 30% for risk of non-certification and by an additional 55% for risk of being unsuccessful on the merits, to arrive at an estimated realistic exposure of $183,135. *Id*.

<u>PAGA Civil Penalties</u>: **$63,860**

Plaintiff estimated a maximum PAGA exposure of $391,300, based on 3,913 pay periods at the $100 "initial" violation rate under Lab. Code § 2699(f). Haines Decl., ¶ 23; *Amaral*, 163 Cal.App.4th at 1209. However, these penalties derive from Plaintiff's underlying claims, each of which Ducommun vigorously disputes. *Green v. Lawrence Service Co.*, No. LA-CV-12-6155-JAK (VBKx), 2013 WL 3907506 at *5, fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim's success is determined by merits of underlying claims). In addition, Ducommun argued that even if Plaintiff were to prevail on some of her underlying claims, she could not show a violation in each pay period. For example, Ducommun contends Plaintiff would not be able to show an overtime underpayment and short or missed meal period for *every* employee in *every* pay period in the PAGA Period. Ducommun further argues that the PAGA grants trial courts discretion to reduce PAGA civil penalties (Lab. Code § 2699(e)(2)), and that the Court would reduce penalties significantly given Ducommun's good-faith defenses. *Id*. Thus, Plaintiff discounted the maximum figure by 50% for risk of losing on the merits and/or not recovering a PAGA penalty for each pay period, and by an additional 60% for risk of the Court reducing penalties, to arrive at an estimated realistic exposure of $63,860. *Id.*; *see also, e.g.*, *Fleming*, 2011 WL 7563047 at *4 (reducing PAGA penalties by more than 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just $5 per pay period).

Using these estimated figures, Plaintiff predicted the realistic total recovery for the Settlement Class would be approximately $1,118,895. Haines Decl., ¶ 24. The proposed settlement of $935,260 thus represents over 83% of Plaintiff's reasonably forecasted recovery. *Id.* Preliminary approval is therefore appropriate as the Settlement will provide significant monetary relief to the Settlement Class.

e. <u>The Experience and Views of Counsel</u>

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience litigating wage and hour class actions from both the plaintiff and defense side, and have been appointed class counsel in numerous cases alleging similar claims. *See* Haines Decl., ¶¶ 3-10. Counsel conducted an in-depth review of Ducommun's policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiff's claims. Haines Decl., ¶¶ 14-15, 18-23. The Settlement was also reached with the assistance of Mr. Ortman, a respected wage and hour class action mediator. *Id.*, ¶ 15. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

2. <u>The Preliminary Approval Standard Is Met</u>

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

a. <u>The Settlement Is Within the Range of Possible Approval</u>

As noted, the Settlement reflects over 83% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations, and a full-day mediation with an experienced mediator. Thus, the Settlement is entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiff carefully vetted the claims at issue, and conducted a detailed analysis of the relevant data and information with the help of a retained expert. Haines Decl., ¶¶ 18-23. Thus, this factor strongly supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the Settlement is warranted because there are no obvious deficiencies. The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees, costs, Plaintiff's incentive award, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification of a settlement class under California law because: 1) the individuals in the Settlement Class are ascertainable and numerous; 2) common questions of law and fact predominate; 3) Plaintiff's claims are typical of the claims of the Settlement Class; and 4) Plaintiff and her counsel will fairly and adequately represent the interests of the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked for Ducommun Aerostructures, Inc. in California during the Class Period and who did not sign an individual settlement and release. Thus, they can be readily identified from Ducommun's records. Ducommun represents there are approximately 130 Settlement Class members, rendering it impracticable to bring them all before the Court. *See* Settlement, § 1. Thus, numerosity is satisfied.

2. **Common Issues of Law and Fact Predominate**

The focus on certification is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated primarily on Ducommun's alleged failure to properly calculate the regular rate, and allegedly unlawful meal and rest period policies/practices. Such claims are commonly held proper for class certification. *See, e.g., Leyva v. Medline Industries, Inc*., 716 F. 3d 510, 514 (9th Cir. 2013) (directing district court to certify regular rate claim); *Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

3. **The Named Plaintiff's Claims Are Typical**

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff was employed by Ducommun as a non-exempt employee in California during the Class Period, and she was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. Plaintiff asserts that Ducommun failed to pay her all of her earned overtime wages due to its failure to include bonuses in her regular rate of pay, that Ducommun failed to provide her with legally-compliant meal periods and failed to authorize and permit all required rest periods, and that she received inaccurate wage statements and was not paid all final wages at termination as a result. *See* Declaration of Alma Barriga, ¶¶ 2-4. Thus, typicality is satisfied.

4. **Plaintiff and Her Counsel Will Adequately Represent the Settlement Class**

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and her counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiff or her counsel and the Settlement Class. *See McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation, as noted above.

C. <u>THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE</u>

The Court should order distribution of the proposed Notice by U.S. Mail, in English and Spanish, using last known mailing addresses provided by Ducommun. *See* Settlement, §§ 7, 9. This is the "best notice practicable" under the circumstances as it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff proposes the Settlement be administered by Phoenix Settlement Administrators, an experienced class action settlement administrator. *See* Jodey Lawrence Declaration and exhibits. Settlement Class members' addresses will be ascertainable through Ducommun's records. Phoenix will also run all addresses through the U.S. Postal Service National Change of Address database and/or perform "skip traces" to obtain current addresses. *See* Settlement, § 9(B) & (F).

The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims; the basic contentions and denials of the parties and the key terms of the Settlement; the 60-day deadline to opt out, object, or submit a dispute and the procedures by which to do so; explains the recovery formula and expected recovery amount for each Settlement Class member; and explains the releases of claims included in the Settlement. *See* Haines Decl., Exh. A to Exh. 1. The proposed Notice also includes the final approval hearing date and time, and provides contact information for Class Counsel and the administrator in the event Settlement Class members have any questions about the Settlement. *Id.* This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members.

D. <u>THE COURT SHOULD SET A FINAL APPROVAL HEARING</u>

Finally, the Court should set a hearing for final approval of the settlement on a date appropriately scheduled to follow Settlement Class members' response deadline. *See* Cal. Rule of Court 3.769.

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V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve the proposed Settlement, provisionally certify the Settlement Class, and enter the Proposed Order submitted concurrently herewith.

Dated: June 29, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________________
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