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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

CRISTINA CATALANO, as an individual on behalf of herself and on behalf of all others similarly situated,

Plaintiff,

v.

BEVERLY HILLS HOTEL MANAGEMENT LLC, a Delaware limited liability company; MR. C MANAGER, LLC, a New York limited liability company; BHR TRS BEVERLY HILLS LLC, a Delaware limited liability company; BRAEMAR HOTELS & RESORTS, INC., a Maryland corporation; REMINGTON LODGING & HOSPITALITY, LLC, a Delaware limited liability company; ASHFORD TRS BEVERLY HILLS LLC, a Delaware limited liability company; and DOES 1-100, inclusive,

Defendants.

CASE NO. 22STCV18139
(Related to Case No. 22STCV2226949)

Assigned for All Purposes to:
Hon. William F. Highberger
Dept. SSC-10

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR ATTORNEY'S FEES AND COSTS

[Filed Concurrently with Notice of Motion and Motion; Declarations of Sepideh Ardestani and Lluvia Islas; [Proposed] Order]

Date: April 19, 2024
Time: 10:30 a.m.
Dept.: SSC-10

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I. INTRODUCTION

Plaintiff and Class Representative Cristina Catalano seeks final approval of a non-reversionary class action settlement resolving wage and hour claims on behalf of 257 individuals who worked for defendant Mr. C Manager, LLC ("Mr. C") in the State of California as non-exempt employees during the period of March 22, 2019 to August 5, 2021. The proposed $200,000 total settlement provides about $83,083 in cash payments to the Class, with an average award of about $323, plus additional amounts payable under PAGA. The remaining balance will cover a modest service award to Plaintiff, settlement administration costs, civil penalties to the state, and reasonable attorney's fees and costs. The parties and their counsel finalized the settlement after extensive and difficult arms-length negotiations overseen by an experienced and highly-regarded mediator. The Court conditionally certified the Class and preliminarily approved the settlement on September 21, 2023. Since then, the Court-approved notice form was mailed to the Class Members on January 4, 2024, and they reacted very favorably to the settlement. As of the filing of this motion, there are no objections, and no class member has requested exclusion.

Class Counsel secured an excellent settlement with Defendant after some two years of investigation, litigation, and settlement negotiation and administration, all without any compensation for services rendered or costs expended. The class notice duly informed the class members that Class Counsel would request attorney's fees not to exceed 33.33% of the Gross Settlement Amount, along with reimbursement of no more than $14,000 for actual costs incurred litigating this matter. As of the filing of this motion, *not one Class Member objected* to the proposed fee award. Consistent with the Settlement and notice, Plaintiff now respectfully requests the Court award Class Counsel's fees in the amount of $66,666.66 and costs in the amount of $14,000.00, as described in the Declaration of Sepideh Ardestani ("Ardestani Decl.") filed herewith. The requested attorney's fees are well within the range of reasonableness, especially considering the complex and risky nature of this litigation, the contingent risk assumed, the three-plus year delay in payment and, when subjected to a lodestar crosscheck, results in a base lodestar that is slightly higher than the actual fee request.

Accordingly, on behalf of herself and the Settlement Class, Plaintiff respectfully requests the Court grant this motion, give full and final approval to the settlement, grant Class Counsel's request for attorney's fees and costs, and enter judgment accordingly.

II. BACKGROUND/LITIGATION HISTORY

The details of the procedural and factual background of this matter were outlined in the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about August 16, 2023). To re-familiarize the Court with this litigation, Defendant Mr. C Defendant owns and operates hotels, residences and restaurants in Los Angeles, California, Coconut Grove, Florida and Jumeirah, Dubai. Plaintiff was employed by Defendant as a non-exempt restaurant server from April 2019 through December 2021.[1] Plaintiff worked at the restaurant located inside Mr. C's hotel in Los Angeles, where her duties included bartending, taking food and beverage orders, and clearing and setting up tables. [Declaration of Sepideh Ardestani ("Ardestani Decl."), ¶ 2.]

Plaintiff alleges a Mr. C engaged in a number of Labor Code violations. First, she alleges Defendant failed to pay all wages due by requiring employees to work off-the-clock by donning and doffing their uniforms and filling out time sheets by hand before clocking in and after clocking out, and by rounding off time punches such that it resulted an underpayment of wages. She also alleges Defendant underpaid employees for overtime wages by failing to correctly calculate the "regular rate of pay" for purposes of determining the correct overtime rate. She next contends meal and rest break violations, particularly because breaks frequently were "on-duty" as Mr. C required her and other employees to take work-related phone calls and text messages during their breaks. Finally, she claims Mr. C failed to reimburse for the use of employee cell phones for work-related texts and calls from Defendant. [Ardestani Decl., ¶ 3.]

Based on these allegations, on June 1, 2022, Plaintiff filed a class action complaint (the "Class Action Lawsuit") on behalf of herself and all current and former non-exempt employees who worked for Mr. C. during the Class Period, seeking recovery for the alleged failure to pay

[1] Mr. C settled a prior class action with a settlement period ending on March 18, 2019, and it subsequently sold its Los Angeles hotel and restaurant on August 5, 2021. Accordingly, the class period in this case runs from March 19, 2019 through August 5, 2021. (Agreement, § 9, 26.)

minimum and overtime wages, premium wages in lieu of meal and rest periods, failure to issue accurate itemized wage statements, failure to reimburse business expenses and timely pay all wages upon separation of employment. Also named as defendants were Beverly Hills Hotel Management LLC, BHR TRS Beverly Hills LLC, Braemar Hotels & Resorts, Inc., Remington Lodging & Hospitality, LLC and Ashford TRS Beverly Hills LLC ("BHHM Defendants"). The BHHM Defendants filed a motion to compel arbitration, which was granted, and compelled Plaintiff's individual wage and hour claims against the BHHM Defendants to arbitration and dismissed her class claims with respect to those defendants. Plaintiff did not enter into an arbitration agreement with Mr. C. [Ardestani Decl., ¶ 4.]

After exhausting all required administrative remedies, on August 18, 2022, Plaintiff filed a PAGA-only representative action complaint (the "PAGA Action Lawsuit") against Mr. C and the BHHM Defendants based on the same alleged Labor Code violations. Once again, Plaintiff's individual representative claims were sent to arbitration and the representative PAGA claims as to the BHHM Defendants were stayed pending the outcome in *Adolph v. Uber Technologies.* [Ardestani Decl., ¶ 5.]

After addressing the arbitration issues, Plaintiff and Mr. C engaged in numerous meet and confer discussions regarding discovery, potential law and motion, and potential ADR. Ultimately, the Parties agreed to mediation and also agreed to an informal exchange of information to facilitate meaningful settlement discussions. The Parties then retained Warren Jackson, Esq., a well-respected neutral with extensive experience mediating wage and hour class actions. On June 1, 2023, Plaintiff and Mr. C participated in a mediation with Mr. Jackson and after a full day of negotiations, the Parties reached agreement on all major issues. The Court preliminarily approved the settlement on September 21, 2023. [Ardestani Decl., ¶¶ 6-7.]

Class Notices were mailed to class members on January 4, 2024, and Class Members have until February 18, 2024 to opt out or object to the proposed settlement. [Declaration of Lluvia Islas ("Islas Decl."), ¶¶ 7-9.]

III. <u>THE PROPOSED SETTLEMENT TERMS</u>

Under the settlement, Mr. C will pay $200,000.00 into a common fund, the Gross

Settlement Amount or GSA. Attorney's fees of up to 33.33% of the GSA ($66,666.66), litigation costs of up to $14,000, an enhancement award of $7,500 for the plaintiff, settlement administration costs of $8,750.00, and a payment of $20,000 for PAGA civil penalties (of which $15,0000 (75%) will go to the Labor & Workforce Development Agency for its share of the PAGA penalties and $5,000 (25%) will be paid to PAGA Employees[2]), all will be paid from the GSA. The remainder of approximately $83,083 will be allocated to the Participating Class Members based on their total weeks worked during the Class Period. No portion of the GSA will revert to Mr. C. [Ardestani Decl., ¶ 8.]

A. Certification of the Settlement Class

The Court conditionally certified a settlement class including all all current and former non-exempt, California, hourly paid employees of Defendant Mr. C Manager, LLC at any time from March 22, 2019, through August 5, 2021. The Settlement Administrator ultimately mailed class notices to 257 individuals identified as members of the Class. [Islas Decl., ¶ 5.] Nothing has changed to require reconsideration of the Court's certification of the Settlement Class.

B. The Benefit Conferred on the Settlement Class

As noted, the settlement obligates Mr. C to pay $200,000 to resolve the claims of the Settlement Class, inclusive of attorney's fees and costs. Approximately $83,083 from the GSA will be distributed to the Participating Class Members, with additional amounts going to PAGA Employees for their portion of the PAGA payment. This is a cash settlement that <u>does not</u> require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining eighty percent will be allocated to penalties and interest. Mr. C will pay any and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not cashed, will be forwarded to the State Controller's Unclaimed

[2] "PAGA Employees" means all current and former non-exempt employees of Defendant from March 22, 2019, through August 5, 2021 (the "PAGA Period").

Property Fund. [Ardestani Decl., ¶ 9.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on his or her total weeks worked for Mr. C in California during the Class Period while employed in a non-exempt position. Thus, each Class Member's Individual Settlement Share will be calculated using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory penalties under applicable law. These methods are intended to ensure each Class Member receives a portion of the available settlement funds corresponding to the relative value of his or her potential claims. The proposed allocation provides a reasonable way to compensate Class Members based on the amount of time they worked for Mr. C and the number of instances they missed a meal break, were not provided compensation in lieu of such missed breaks, or lost wages due to the alleged regular rate miscalculation, etc. [Ardestani Decl., ¶ 10.] The average class payment will be about $323, and the maximum class payment will be over $1,050. The average PAGA payment will be about $65. [Islas, Decl., ¶ 11-12.]

C. <u>Settlement Administration</u>

Phoenix Settlement Administrators, as the Court-approved Settlement Administrator, mailed the Notice Packet to the Class members after making all reasonable effort to ascertain the best mailing address, including running each address through the National Change of Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Islas Decl., ¶¶ 3-6.] The Class Notice, previously approved by the Court, duly informed Class Members of the settlement terms, including the estimated relief each Class Member will receive, the amounts to be requested for attorney's fees and the class representative enhancement awards, and the right to opt out of or object to the settlement. [Islas Decl., ¶ 5; Exh. A.] Phoenix mailed 257 Notice Packets on January 4, 2024. [Islas Decl., ¶ 5.] Ultimately, zero Notice Packets were deemed undeliverable, representing a 100% success rate. [Islas Decl., ¶ 6.] The response window for opting out of or objecting to the settlement expired on February 18, 2024.[3] [Islas Decl., ¶¶ 7-9.] As of the filing of this motion, Phoenix

[3] Extended to March 3, 2024 for remailed notices.

has received zero requests for exclusion (for a 100% participation rate), and zero objections to the settlement. No disputes have been submitted regarding the information used to calculate class member settlement shares. [Islas Decl., ¶¶ 7-9.]

D. Release of Claims

All Participating Class Members will release Mr. C from all claims alleged in the operative complaint, or that could have been brought based on the factual allegations in the operative complaint, including PAGA claims, during the Class Period. The release is limited to the claims that were actually pleaded or could have been pleaded based on the alleged facts in the operative complaint. No claims against the BHHM Defendants are being released. [Ardestani Decl., ¶ 11.]

E. PAGA Claims and Notice to the LWDA

The Parties allocated $20,000 from the settlement to civil penalties under PAGA, and Plaintiff respectfully requests that the Court approve this amount as fair, reasonable and adequate. Consistent with PAGA, $15,000 from this amount will be paid to the LWDA as the state's share of the civil penalties, and the remaining $5,000 will be distributed to the 77 individuals eligible to receive a PAGA payment. [Islas Decl., ¶ 12.] As required by Labor Code section 2699(*l*)(2), Plaintiff gave notice of the settlement and the final approval hearing to the LWDA via its online portal. [Ardestani Decl., ¶ 12; Exh. 1.]

V. ARGUMENT

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly compromised, the settlement of a class action requires court approval. Cal. Rule of Court 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to determine whether, under the totality of circumstances, the settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

On a motion for final approval, the trial court is charged with determining whether, in light of the total circumstances of the action and the response of the class members to the proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that determination and may consider a number of relevant factors, including: the strength of plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of further litigation; the amount offered in settlement; the extent of discovery and stage of the proceedings; the experience and opinion of counsel; and the reaction of class members to the settlement. Id. In light of the strong judicial policy favoring the settlement of class actions, courts·generally apply a presumption of fairness to a proposed class action settlement when: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

A. The Proposed Settlement Merits Final Approval

The proposed settlement of this action warrants final approval under the standards summarized above. The settlement is fair, reasonable and adequate, and represents a favorable resolution of highly disputed claims. Further, the settlement was overwhelmingly approved by the class members, as there were no objections and no class members opted out.

1. The Settlement Is the Product of Arm's-Length, Informed Negotiations

The settlement is not the result of fraud or collusion. Rather, the proposed settlement was reached following arm's-length negotiations presided over by Louis Marlin, Esq., a highly respected and well-known mediator with extensive experience mediating wage and hour class actions. [Ardestani Decl., ¶ 7.] Moreover, Plaintiff and her counsel were well-informed about the facts and the law, and counsel Zachary M. Crosner, Jamie Serb, and Sepideh Ardestani have years of litigation experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Ardestani Decl., ¶¶ 28-34.] Defendant likewise was represented by highly-qualified and experienced defense counsel. Both sides advocated vigorously for their clients, and nothing was "left on the table."

2. The Class Reacted Favorably to the Settlement

The settlement was well-received by the class. As of the filing of this motion, no objections have been filed, and zero Class Members requested exclusion. [Islas Decl., ¶¶ 7-8.] As many courts recognize, class member reaction to the settlement is one of the most important factors to consider in determining if final approval should be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

3. The Settlement Is Fair and Reasonable Considering the Benefits Conferred, the Case Value, and Significant Litigation Risks

The proposed settlement involves a substantial sum of money that, when distributed, will confer meaningful monetary benefits on the Class Members. As described above, each individual award will be based on an allocation consistent with the nature of the claims asserted and will fairly and equitably allocate the available funds in relation to the degree of damage each Class member incurred. While Class members who worked for only a short period of time will receive relatively small sums, those with longer tenures and who worked more hours and shifts throughout the class period will receive appropriately larger awards.

Prior to settlement, the parties engaged in extensive formal and informal discovery to facilitate settlement discussions. As a result, Plaintiff reviewed payroll records, personnel policies/handbooks, meal break policies, personnel files, and a random sampling of paystubs and time records produced by Mr. C. Defendant provided documents and information reflecting the estimated total number of workweeks and pay periods they worked, and average hourly pay rates, among other relevant data. Plaintiff also had that information reviewed by a consulting expert to assist with calculating potential violation rates and potential damages. Plaintiff's counsel is confident they obtained sufficient information to enable them to understand the law and facts of this case and make an informed decision regarding the proposed settlement and whether it is in the best interests of the class. [Ardestani Decl., ¶¶ 6, 13.]

First, Plaintiff contends Defendant failed to provide legally compliant meal and rest breaks. Specifically, as to meal breaks, Plaintiff contends she and other Class Members were regularly called and/or sent text messages by their supervisor during their meal periods to, for example, come back to work as the restaurant was busy. Per Plaintiff, her expert's review of the sampling of time records corroborates her argument, as that analysis suggests there were some 8,600 meal period violations during the Class Period - 49% were short, 30% were late, 1.7% first meal periods were not taken, and 8.8% of second meal periods were not taken. Plaintiff claims this violates Labor Code sections 512, 226.7, and the applicable IWC Wage Orders, as well as Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004 and Augustus v. ABM Security Serv., Inc. (2016) 2 Cal.5th 257 for failure to provide all required meal periods and within the required time frames. [Ardestani Decl., ¶ 14.]

Defendant denies Plaintiff's contentions, claiming it made meal and rest breaks available to Class Members in compliance with California law. Defendant contends its meal and rest break policies are lawful and that its policies and practices comport with the flexibility the *Brinker* court held was integral to California's meal and rest period requirements. Per Mr. C, Class Members were frequently reminded to take all meal and rest breaks, and Defendant contends its time records demonstrate that Class Members took duty-free, timely meal and rest breaks. Mr. C also emphasized it paid hundreds of meal period premiums for documented violations. Finally, Defendant argues that Plaintiff's meal and rest break claims are not susceptible to common proof, as the claims would require individualized inquiry, including whether there was an unlawful companywide policy, whether employees had the opportunity to take meal and rest periods, whether they voluntarily chose to forego their meal and rest periods, and whether Defendant ever prevented them from taking meal and rest periods. Accordingly, Defendant contends these claims are vulnerable to a ruling that class treatment is not appropriate. Without taking into consideration any of Defendant's defenses to certification or on the merits, Plaintiff estimates Mr. C faces around **$85,000** in damages for documented but unpaid meal period violations and **$762,000** in damages under on the rest period claims based on a 100% violation rate. (Ardestani Decl., ¶ 15.)

Plaintiff further contends she and Class Members often had to work off-the clock, as she claims she and other employees had to don and doff uniforms at the hotel before/after clocking in/out, and after clocking out also had to fill out paper timesheets (in addition to clocking in/out electronically) for purposes of tracking hours and tips. This time was certainly not "de minimis" and was also not compensated by Defendant. Troester v. Starbucks Corp. (2018) 5 Cal. 5th 829; Frlekin v. Apple Inc. (2020) 8 Cal. 5th 1038. Lastly, Plaintiff contends Mr. C rounded off employee time punches such that the employees, over time, lost compensable hour work and corresponding pay. Based on expert analysis of all Class Member time records, rounding occurred throughout the Class Period. Employees' clock in punches were rounded approximately 0.8 minutes/shift which resulted in underpayment of minimum wages. [Ardestani Decl., ¶ 16.]

In response, Mr. C argued its timekeeping and payroll policies are fully compliant with California law, and that it captured and paid for all hours worked at the correct hourly rates. On the rounding claim, Defendant also emphasized time rounding policies are permissible under California law if they are "fair and neutral" on their face and "used in such a manner that will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal. App. 4th 889, 907. Defendant thus argued that the rounding benefited employees just as much as it penalized them and, accordingly, any rounding essentially was neutral in effect. Without considering any of Defendant's defenses to certification or on the merits, Plaintiff's experts estimated the "off the clock" exposure at about **$215,000**, based on one hour of off the clock work per shift. [Ardestani Decl., ¶ 17.]

On the expense reimbursement claims, Defendant failed to reimburse Plaintiff and Class Members for the use of their personal cell phones, as Plaintiff alleges supervisors contacted employees on their personal cell phones for purposes of group messaging, and receiving work-related calls. Defendant did not reimburse employees for the cost associated with the use of the personal cellular phones for Defendant's benefit. *Cochran v. Schwan's Home Serv.* (2014) 228 Cal.App.4th 1137. Per Defendant, however, there would not be any conceivable need for employees to use their personal phones at work and, to the extent they did so it would be purely for personal convenience and therefore not reimbursable. Without taking into consideration any of Defendant's defenses to certification or on the merits, Plaintiff's experts calculated Defendant's maximum exposure for this claim at **$52,680** in damages based on $20/month in unreimbursed expenses. [Ardestani Decl., ¶ 18.]

As a result of the above alleged violations, Plaintiff also derivatively alleged Mr. C failed to provide accurate wage statements and failed timely pay all wages that were due and owing upon separation of employment. Should the primary claims for unpaid wages fail, Plaintiff's derivative claims for wage statement penalties and waiting time penalties would also fail. Defendant also contends it would not be liable for waiting time penalties because a "good faith dispute" exists over the payment of past wages. Cal. Code Regs. Tit. 8 § 13520; Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiff would have to prove it "willfully" failed to pay Class Members appropriate wages due upon separation of employment. Without taking into consideration any of Defendant's defenses to certification or on the merits, Plaintiff calculated Defendant's maximum exposure for wage statement penalties at **$30,300** for violations within the limitations period, and waiting time penalties at **$896,000** for 231 terminated employees within the limitations period. [Ardestani Decl., ¶ 19.]

As far as potential PAGA liability, the theoretical civil penalties likely are around **$141,500** should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at issue. [Ardestani Decl., ¶ 20.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on Defendant's various defenses on the merits and also accounted for the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of $5 per pay period after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial). Accordingly, the Parties allocated $20,000 to PAGA penalties.

Plaintiff submits this amount is reasonable under the circumstances and in line with comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of $5,000 PAGA penalty from $370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a $7,500 PAGA payment reasonable when measured against the overall settlement of $345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement").

Thus, Plaintiff and her counsel discounted the value of the class claims consistent with the risks discussed above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and substantial risks – settlement on the proposed terms and without prolonged and costly litigation was in the best interests of the class. The overall $200,000 recovery represents a significant percentage of Defendant's potential exposure, and given Defendant's multi-layered defenses and all other potential risks of continued litigation, a total recovery for the class of $200,000, which will result in average award of some $323 per class member, plus additional sums under PAGA, is a significant result well within the range of reasonableness considering all potential outcomes, and it will provide direct monetary awards to all Class Members without further delay. [Ardestani Decl., ¶¶ 21-23.]

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. Wershb*a,* 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court"). Importantly as well, the proposed settlement is non-reversionary and will provide immediate benefits to the Class Members without a claims process. *White*, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf. (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and her counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for the Class.

B. The Class Representative Service Awards Are Justified Given the Risks and Should be Preliminarily Approved

The Agreement provides for a service payment not to exceed $7,500.00 to Plaintiff. Courts routinely approve service payments, or incentive awards, to compensate named plaintiffs for the services they provide and the risks they incur during class litigation. In re Cellphone Fee Termination Cases (2010) 186 Cal. App. 4th 1380, 1393 ("These awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."); Bell v. Farmers Ins. Exch. (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives).

The requested service awards are reasonable in light of the benefits Plaintiff conferred upon the entire Class, resulting in a benefit to all Class Members and the State of California, the time spent assisting counsel with the investigation and prosecution of these claims, commitment to responding to discovery, and consenting to the proposed Agreement. Furthermore, by attaching his name to a lawsuit, Plaintiff also took on the reputational risk that future employers would learn of his participation in this case and unfairly associate them with costly litigation, costing them future employment opportunities. Any future employer could easily perform a simple Google search – an unauthorized simple background check unknown to Plaintiff that can still provide a plethora of information – and conclude Plaintiff isn't worth the risk of hiring. This kind of reputational risk, borne only by Plaintiff alone and no other Class Member, that an incentive award is meant to compensate. Furthermore, in pursuing this action on behalf of the Class, Plaintiff risked a judgment for attorney's fees and costs in the event this matter had been lost. [Ardestani Decl., ¶ 24; Declaration of Cristina Catalano, ¶¶ 2-9.] For these reasons Plaintiff requests an enhancement payment of $7,500. Torchia v. W.W. Grainger, Inc. (E.D. Cal. 2014) 304 F.R.D. 256 (approving $7,500 incentive award); Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000).

VI. SETTLEMENT ADMINISTRATION COSTS

The settlement provides for a payment to Phoenix for its services as the Settlement Administrator. As set forth in the Declaration of Lluvia Islas, Phoenix has performed and will continue to perform its required duties through final distribution of the settlement funds and incurred $8,750 in fees and expenses. [Islas Decl., ¶ 13.] Plaintiff accordingly requests the Court approve payment of $8,750 to Phoenix from the GSA. [Ardestani Decl., ¶ 25.]

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VII. ATTORNEY'S FEES AND COSTS

A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be Approved

This Court has discretion over the amount of attorneys' fees awarded and court approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the marketplace for cases involving significant contingent risk, such as this one. Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S. 947*;* Lealao*,* 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed private bargaining, if it were truly possible, might have reached" in determining a reasonable fee, and a fee award should approximate a "range of fees freely negotiated in comparable litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and justified by the work performed, the benefits obtained, and the contingent risk assumed.

As addressed in detail above, at the time the parties reached the tentative settlement success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that some or all the claims would not be certified for class treatment, as Defendants had strong arguments that its compensation policies were legal and properly compensated the class members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the merits, it undoubtedly would have taken several years to realize any recovery while she pursued class certification, trial, and an almost certain appeal. [Ardestani Decl., ¶¶ 14-19.]

Nonetheless, Plaintiff succeeded and expeditiously obtained the relief she set out to obtain, and the settlement provides substantial cash payments to Class Members, with an average award of about $323, and with a maximum award of over $1,050. Importantly as well, the Class Members have been overwhelmingly supportive of the Settlement as there are no objections and no opt outs to the settlement. [Islas Decl., ¶¶ 7-8, 11.]

B. The Requested Fee Award Is Reasonable and Appropriate

The United States Supreme Court has ruled the parties to a class action properly may negotiate not only the settlement of the action itself but also the payment of attorney's fees. Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983) 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee provisions are the ideal towards which the parties should strive: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." The United States Supreme Court has reemphasized this policy and further stressed trial courts have “a responsibility to encourage agreement" on fees. Blum v. Stenson (1984) 465 U.S. 886, 902 n.19.

As part of the Settlement, Mr. C agreed not to object to an award of no more than 33.33% of the GSA for attorney's fees, or $66,666.66, and up to $14,000 in reimbursement for litigation costs and expenses. Such a fee is commensurate with what the market would provide for similar services and the Court therefore can most certainly enforce the agreement. As California's Court of Appeal has instructed:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.

Lealao, 82 Cal.App.4th at 47.

Here, the parties did not negotiate the inclusion of attorney's fees until after extensive arms-length bargaining regarding relief to the Class was completed. [Ardestani Decl., ¶ 26.] The requested fee and cost award was a product of these arms-length negotiations and fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As a result, the fee agreed to by the parties should be approved.

C. Class Counsel's Fees are Justified When Calculated as a Percentage of the Common Fund

In approving fee applications, courts typically apply either a percentage-of-recovery method or the lodestar method. Laffitte v. Robert Half Int'l., Inc. (2016) 1 Cal.5th 480, 489; Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California Supreme Court recently recognized the advantages and equities of calculating attorney's fees using the percentage-of-the-common-fund method in another wage-and-hour case:

> The recognized advantages of the percentage method-including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal.5th at 503 (citations omitted).

Indeed, both California and federal courts have long recognized an appropriate method for determining the award of attorney's fees is based on a percentage of the total value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund recovered operates to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

In determining a reasonable common fund fee award, courts should also consider the fact that fees serve as an economic incentive for lawyers to bring class action litigation to achieve increased access to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without prosecution on a contingent basis and use of the class action mechanism, the courthouse door would effectively be closed to most class members due to the relatively small size of their individual claims in relation to the enormous time and cost associated with class action litigation.

Here, Class Counsel seek a fee award for their successful prosecution and resolution of this action of no more than 33.33% of the GSA, and specifically $66,666.66. The percentage requested is justified for the reasons set forth further below, and comports with fee awards calculated on a percentage-of-the-benefit basis. Indeed, review of class action settlements shows that courts have historically awarded fees in the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request

To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 137.9 hours of time on this matter, resulting in a modest and very reasonable lodestar of $101,195.

As is fully detailed in the Ardestani Declaration, Class Counsel's efforts included: (1) extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal research, research into similar claims and claims against other employers in the same industry, and attempts to locate and contact other employees of the Defendant; (2) drafting a PAGA notice letter; (3) drafting the initial complaint and related documents; (4) case management, including communications with defense counsel, meeting and conferring/preparing case management statements, etc.; (5) lengthy discussions with defense counsel regarding settlement/mediation and informal discovery needed for meaningful settlement discussions; (6) engaging in substantial informal discovery, including propounding informal discovery “requests” and reviewing documents and other information produced; (7) working with a consulting expert on the analysis of Defendant’s production; (8) drafting a mediation brief and accompanying damages model after review and analysis of defendant’s formal and informal discovery production; (9) attending an all-day mediation; (10) negotiating and drafting the settlement agreement and related documents; (11) drafting the motion for preliminary approval, and attending the hearing; (12) administration of the settlement, including communications with the Settlement Administrator and settlement class members; (13) drafting the motion for reconsideration as to the enhancement award, (14) final approval and attorney's fees, and attending the final approval hearing; and (15) extensive communications with the Plaintiff regarding case status, case investigation and document review, mediation, and settlement terms. Additionally, Class Counsel will incur additional time following final approval to, inter alia, respond to class member inquiries, work with the Settlement Administrator on the distribution of settlement funds, and on the compliance hearing. [Ardestani Decl., ¶ 27, Exh. 2.]

In pursuing this matter, Class Counsel incurred total attorney's fees of $101,195.00, and the lodestar is based on an eminently reasonable number of hours worked to litigate this matter to a successful conclusion (137.9) attorney hours, and the requested attorney hourly rates are reasonable and comport with hourly rates charged by other attorneys with similar experience in this practice area in California. [Ardestani Decl., ¶¶ 28-40.] On a lodestar basis, the fee request of $66,666.66 results in a base lodestar that is higher than the fees requested on a percentage of the recovery basis, and accordingly there is no request for a lodestar multiplier. In fact, the lodestar crosscheck effectively operates to show that the percentage fee request is reasonable since it is smaller than the actual value of the services rendered when valued via traditional hourly billing.

E. <u>The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar Cases</u>.

What has now emerged in most fee award decisions is the recognition that fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In determining an appropriate fee in a common fund case, a Court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate Class Counsel given the nature of the litigation and the performance of counsel. <u>Paul, Johnson, Alston & Hunt v. Graulty</u> (9th Cir. 1989 886 F.2d 268, 272) (the benchmark percentage fee may be adjusted to account for the circumstances involved in a case).

Courts apply a five-part test in calculating a reasonable percentage fee in common fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

1. The Results Achieved.

Class Counsel obtained an excellent result in this case for the Class Members. The Settlement provides real monetary benefits to the Class Members, and the Settlement is particularly advantageous to the Class Member because the proceeds will be distributed shortly as opposed to waiting additional years for a similar, or possibly, less favorable result. Considering many individual claims would be very modest and would not be cost-effective to pursue successfully, the Settlement provided them with fair compensation for their claims. Moreover, the absence of any objection to either the Settlement or the attorney's fee request bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated by the fact that not only one class member opted out. Additionally, the settlement amounts to a substantial percentage of the maximum value of the amount the Class might have obtained if it had tried the case and recovered on all theories seeking recovery of wages and penalties. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." In re Omnivision Techs., Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

2. Class Counsel Bore Considerable Risk.

At the time of filing the complaint, Class Counsel recognized that they would have to expend a substantial amount of time and advance significant costs to prosecute a statewide class action suit with no guarantee of compensation or reimbursement, in the hope of prevailing against a sophisticated company represented by first-rate attorneys. Despite their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks of class certification and the ability to prove class-wide and individual damages. In light of the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant would dig in and attempt to bury their small firm in work. Given the small size of Class Counsel's firm, not receiving any compensation for several years while simultaneously advancing litigation costs posed considerable risk and difficulty. [Ardestani Decl., ¶¶ 41-42.]

3. The Skill Required and the Quality of Work.

Practice in the narrow area of wage and hour litigation requires skill, knowledge and experience. The issues presented in this case required more than just a general appreciation of wage and hour law and class action procedure. This Settlement was possible only because counsel persuaded Defendant that Plaintiff and the putative class had a realistic chance of prevailing on their claims despite Defendant's contrary arguments, and that the case would be pursued through class certification and trial if necessary. In successfully navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a risky and difficult case.

4. The Contingent Nature of the Fee and Risk Assumed

There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249, 1256. The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him to a market fee considering the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this risk in this all or nothing contingent fee case wherein the necessity and financial burden of private enforcement makes the requested award appropriate.

Counsel retained on a contingency fee basis, whether in private matters or in class action litigation, is entitled to a premium beyond their standard, hourly, non-contingent fee schedule to compensate for both the contingent risk assumed and the delay in payment. The simple fact is that despite the most vigorous and competent of efforts, success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875. Indeed, if counsel is not adequately compensated for the risks inherent in difficult class actions, competent attorneys will be discouraged from prosecuting similar cases. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208 Cal.App.3d 279, 287.

Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate the investment of unnecessary time in a case, and the adverse resolution of any one of several difficult issues present in this matter could have doomed the entire effort. As discussed, the attorney's fees in this case were not only contingent but fairly risky, and there was always a distinct possibility Plaintiff's counsel would receive nothing for any number of reasons. [Ardestani Decl., ¶¶ 41-42.] Accordingly, the contingent nature of the fee and the financial burdens on Class Counsel also support the fee requested.

5. Awards in Other Cases

As discussed, the attorney's fees requested by Class Counsel are within the range of fees awarded in comparable cases, as California courts regularly approve class action fee awards amounting to 1/3 of a common fund, as approved by the California Supreme Court in Lafitte. Additionally, review of class action settlements over the past 10 years shows that the courts have historically awarded fees in the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented."). Class Counsel's requested fees equal to 1/3 the gross amount recovered on behalf of the class and are well within the range of reasonableness under either the percentage of the recovery or the lodestar method in light of the contingent risk assumed, the delay in payment, the result achieved, and the overall quality of the representation.

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F. Class Counsel's Costs and Expenses are Reasonable

Plaintiff's counsel also requests reimbursement of actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees, and Plaintiffs' counsel is permitted to recover litigation costs and expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiff's counsel also is entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

As explained in the Ardestani Declaration, Class Counsel incurred a total of $14,144.02 in expenses incurred in connection with this litigation. These expenses include the amounts paid for court filing fees, Case AnyWhere charges, service of process, expert fees, postage, and mediation fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter. These costs were necessary for the successful prosecution of the case and are in reasonable in amount, and Class Counsel accordingly requests they be reimbursed up to the $14,000 cap imposed by the settlement. [Ardestani Decl., ¶¶ 43-44.]

VIII. CONCLUSION

For all the foregoing reasons, Plaintiff Cristina Catalano respectfully requests that the Court grant this motion and grant final approval of the proposed class action settlement and approve the payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of the Settlement Administrator's fees and expenses, approve the requested class representative enhancement payment, approve the award of attorney's fees and costs as requested,

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and enter judgment in this action. Finally, Plaintiff request the Court set a final compliance hearing for April 9, 2025, or a later date convenient for the Court.

Dated: March 20, 2024

CROSNER LEGAL, P.C.

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