LIDMAN LAW, APC
Scott M. Lidman (SBN 199433)
slidman@lidmanlaw.com
Milan Moore (SBN 308095)
mmoore@lidmanlaw.com
2155 Campus Drive, Suite 150
El Segundo, California 90245
Tel: (424) 322-4772
Fax: (424) 322-4775

Attorneys for Plaintiff
CRISTINA CORDERO

HAINES LAW GROUP, APC
Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
2155 Campus Drive, Suite 180
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355

Attorneys for Plaintiff
CRISTINA CORDERO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

CRISTINA CORDERO, as an individual and on behalf of all others similarly situated, Plaintiff, vs. OLDCASTLE APG, INC., a Delaware corporation; OLDCASTLE APG WEST, INC., a Colorado corporation; and DOES 1 through 100, inclusive, Defendants.	Case No. CIVSB2308695 [*Assigned for All Purposes to Hon. Christian Towns, Dept. S-26*] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CLASS REPRESENTATIVE'S SERVICE AWARD, AND ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: January 6, 2025 Time: 8:30 a.m. Dept.: S-26

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

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on January 6, 2025 at 8:30 a.m. in Department S-26 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Cristina Cordero ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Confirming the certification of the Settlement Class for settlement purposes under Section 382 of the California Code of Civil Procedure;
2. Confirming the appointment of Plaintiff Cristina Cordero as Class Representative for settlement purposes;
3. Confirming the appointment of Scott M. Lidman and Milan Moore of Lidman Law, APC and Paul K. Haines of Haines Law Group as Class Counsel for settlement purposes;
4. Granting final approval of the Stipulation of Class Action and PAGA Settlement (herein "Settlement");
5. Approving an award of $336,336.33 in attorneys' fees to Class Counsel;
6. Approving an award of $19,712.78 in costs to Class Counsel;
7. Approving an award of $10,000.00 in costs to Phoenix Settlement Administrators for its settlement administration services;
8. Approving an incentive payment of $7,500.00 to Plaintiff Anita Ramirez for her services as Class Representative;
9. Approving an award of $37,500.00 to the Labor & Workforce Development Agency ("LWDA"); and
10. Entering final judgment in the form of the [Proposed] Order of Final Approval of Class Action Settlement and Final Judgment filed concurrently herewith.

This Motion is based on this notice of motion, the attached memorandum of points and authorities attached hereto, the declarations of Scott M. Lidman, Milan Moore, Plaintiff Cristina Cordero,[1] and

[1] The declaration of Plaintiff Cristina Cordero was originally filed with this Court in connection with the Motion for Preliminary Approval. For the convenience of the Court, Plaintiff has re-filed her declaration with the instant Motion.

Kevin Lee of Phoenix Settlement Administrators, and the exhibits attached thereto, 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: December 11, 2024

Respectfully submitted,
LIDMAN LAW, APC

By: ______________________
Scott M. Lidman
Attorney for Plaintiff
CRISTINA CORDERO

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Cristina Cordero ("Plaintiff") submits this memorandum of points and authorities in support of her motion for final approval of the class action settlement (the "Settlement") with Defendants Defendants Oldcastle APG, Inc. and Oldcastle APG West, Inc. (hereinafter referred to as "Defendants") The Settlement Class is defined as: all current and former non-exempt, hourly employees of Defendants Oldcastle APG, Inc. and Oldcastle APG West, Inc. who worked in California at any time between April 17, 2019 and July 29, 2024.

In this non-reversionary Settlement, the average settlement payment to each Settlement Class Member is approximately $1,182.73. This is a favorable resolution of the highly disputed wage and hour claims in this case and the significant litigation risks that Plaintiff faced. Since this Court granted preliminary approval on July 29, 2024, nothing has changed to impact the propriety, fairness, adequacy and reasonableness of the Settlement. In addition, after receiving notice of the Settlement and of their projected Settlement payments, and as of the date of this filing, no one has opted-out or submitted a written objection to the Settlement.

As explained below, the Court should grant Plaintiff's motion in its entirety because: (1) the Class continues to meet the requirements for class certification for settlement purposes under Code of Civil Procedure section 382; (2) the Settlement warrants final approval because it is a fair, adequate, and reasonable compromise of the disputed claims in this case; and (3) the amounts requested for Class Counsel's attorneys' fees and costs, Plaintiff's Service Award, payment to the Labor Workforce Development Agency ("LWDA"), and settlement administration costs are all fair, adequate, and reasonable. For these reasons, Plaintiff respectfully requests that this Court enter the [Proposed] Order of Final Approval of Class Action Settlement and Final Judgment submitted concurrently herewith.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2023, Plaintiff filed a putative class action complaint against Defendants in San Bernardino County Superior Court. *See* Declaration of Scott M. Lidman ("Lidman Decl."), ¶ 10. On April 17, 2023, Plaintiff sent a letter to the California Labor Workforce Development Agency ("LWDA") regarding Defendants' alleged Labor Code violations and Plaintiff's intent to bring a claim for civil penalties under the Labor Code Private Attorneys General Act ("PAGA"). After exhausting her administrative requirements under the PAGA, Plaintiff filed a First Amended Class and Representative Action Complaint on June 22, 2023 adding one cause of action for civil penalties under the PAGA. As part of the Court granting preliminary approval, Plaintiff was granted leave to file a Second Amended Complaint to add allegations for: (i) miscalculation of regular rates of pay, including for overtime compensation; (ii) failure to properly pay sick pay; and (iii) failure to pay meal period premiums at the regular rate. As such, Plaintiff's operative complaint alleges that Defendants: (1) failed to pay all minimum wages owed; (2) failed to pay all overtime wages owed; (3) failed to provide all legally required meal periods; (4) failed to authorize and permit all legally required rest periods; (5) failed to provide accurate, itemized wage statements; (6) failed to timely pay all wages upon separation of employment; (7) engaged in unlawful business practices; and (8) are liable for civil penalties under the PAGA. *Id*.

A. <u>Plaintiff's Claims</u>

As explained in detail in the Motion for Preliminary Approval, Plaintiff's primary theories of liability are related to Defendants' alleged failure to pay for all time worked and failure to provide Settlement Class Members all legally compliant duty-free meal and rest periods. Lidman Decl., ¶¶ 11-24. Plaintiff alleges that Defendants failed to compensate its non-exempt employees for all time worked because Defendants would keep track of Plaintiff's time worked and would unlawfully round/shave time worked such that Plaintiff would not be fully paid for all time worked. *Id*. at ¶ 11. This time-shaving and/or rounding practice utilized by Defendants was not even-handed over time and would almost exclusively round and shave in Defendants' favor such that Plaintiff was routinely underpaid for all her time worked. *Id*. Additionally, during the relevant time period, Defendants paid their non-exempt employees bonuses and $1.00/hour shift differentials but failed to include these payments in the regular rate, which resulted in a systematic underpayment of overtime wages to Plaintiff and the other non-exempt employees. *Id*.

Plaintiff alleges that she and Settlement Class Members were not provided with all legally-required meal periods in compliance with California law due to Defendants' unlawful meal period policies/practices. Lidman Decl., ¶ 13. Due to Plaintiff's job duties, Plaintiff was often prevented from taking meal periods that commenced before the end of the 5th hour of work and/or which were at least 30 minutes in length. *Id*.

Plaintiff alleges that she and other Settlement Class Members were not authorized and permitted to take all required rest periods due to Defendants' rest period policies/practices which fail to authorize and permit all rest periods for every four hours worked, *or major fraction thereof*. Lidman Decl., ¶ 15. Specifically, Plaintiff worked shifts in excess of 3.5 hours, but was not authorized or permitted to take a ten-minute paid rest period for every four (4) hour period worked, or *major fraction thereof* as a result of the work demands imposed by Defendants. *Id*.

Plaintiff further alleges that Defendants issued inaccurate wage statements in violation of Labor Code § 226 as a result of the alleged unpaid wages and meal and rest period premium wages described above. Lidman Decl., ¶ 17. Specifically, Plaintiff contends that this conduct violated Labor Code § 226(a) because the wage statements issued to Settlement Class Members did not include all hours worked and the rate at which they were being paid. *Id.*

Plaintiff alleges that Defendants are also liable for failing to pay sick pay and meal period premiums at the regular rate. Lidman Decl., ¶ 19. From the data produced, it appears Defendants paid 18,307 meal period premiums during the relevant time. However, the meal period premiums were paid at the base rate of pay and not at the regular rate of pay. *See Jessica Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1252 (The Court held that "regular rate of compensation" under Cal. Lab. Code 226.7(c), like "regular rate of pay" under Cal. Lab. Code 510(a), encompasses all nondiscretionary payments, such that the calculation of premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime pay, must account for not only hourly wages but also for nondiscretionary payments for work performed by the employee.) Therefore, Defendants' liability is not extinguished because it failed to meal period premiums at the correct regular rate of pay, which should have included non-discretionary bonuses in the calculation. *Id*. Further, Labor Code section 246(l) states that "… paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek." Here, Plaintiff alleges that Defendants failed to pay Plaintiff and other former non-exempt employees their sick pay in a manner that fully complies with Labor Code section 246(l) as the bonuses were not included in the rate of pay.

Plaintiff alleges that Defendants are also liable for waiting time penalties under Labor Code section 203 as a result of its failure to pay all wages upon separation of employment. Lidman Decl., ¶ 21. Based on the data provided by Defendants, there were approximately 235 Settlement Class Members who have separated their employment with Defendants during the relevant time period who could be entitled to waiting time penalties. *Id*.

Plaintiff also seeks civil penalties under the PAGA as a result of the foregoing alleged Labor Code violations. Lidman Decl., ¶ 23.

As explained *infra* and in Plaintiff's Motion for Preliminary Approval, Defendants deny Plaintiff's claims and asserts several affirmative defenses, both on the merits and with respect to class certification.

B. <u>Mediation and Settlement</u>

After agreeing to participate in early mediation, Defendants informally produced time records and payroll data for a 20% sampling of the putative class as well as its wage and hour policies and other relevant documents and information relevant to the claims alleged in advance of mediation. Lidman Decl., ¶ 26. Plaintiff conducted an analysis of the payroll data and time records produced by Defendants. After the detailed review of the payroll and time records and other documents and policies produced by Defendants, Class Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id*.

On January 8, 2024, after extensive research and analysis, including a detailed analysis of Defendants' potential exposure by Plaintiff, a full-day mediation was held with Lisa Klerman, a well-respected wage and hour class action mediator. Lidman Decl., ¶ 27. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and defenses, as well as the legal basis for the claims and defenses. *Id*. Ultimately, the Parties agreed in principle on a class-wide resolution. *Id*. Thereafter, in the weeks that followed, the Parties signed the Stipulation of Class Action and PAGA Settlement ("Settlement"). *Id*.

/ /

C. **Preliminary Approval of Settlement**

Plaintiff submitted the Stipulation of Settlement to the Court with her Motion for Preliminary Approval on May 6, 2024. Lidman Decl., ¶ 28. On July 29, 2024, the Court signed an Order Granting Preliminary Approval of the Settlement. *Id*.; Exh. A.

Plaintiff submitted the Settlement and the Court's Order Granting Preliminary Approval of the Settlement to the LWDA via the LWDA's website on May 6, 2024 and July 29, 2024, respectively. *See* Lidman Decl., ¶ 42; Exhs. D and E. Plaintiff will also provide the LWDA with a copy of the instant motion for final approval and supporting documents after the instant motion is filed and will file a supplemental proof of service prior to the hearing. Lidman Decl., ¶ 42.

On August 30, 2024, the Settlement Administrator mailed the Court-approved Notice Packet (which consists of the Notice of Pendency of Class Action and Proposed Settlement and Notice of Settlement Award) in English to the 495 Settlement Class Members, who had until October 29, 2024 to submit disputes, objections, and/or requests for exclusion. *See* Declaration of Kevin Lee of Phoenix Settlement Administrators ("Lee Decl."), ¶ 8. As of the date of this filing, there have been **no objections** and **no opt-outs** received. *Id*. at ¶¶ 13-15.

Plaintiff now respectfully submits the Settlement for this Court's final approval.

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

A. **Settlement Class Definition**

After the preliminary approval was granted, the Settlement Administrator advised the total number of workweeks worked is 31,861 confirming the escalator clause was not triggered. Lee Decl., ¶ 3. As a result, the Settlement Class is defined as: all current and former non-exempt, hourly employees of Defendants Oldcastle APG, Inc. and Oldcastle APG West, Inc. who worked in California at any time between April 17, 2019 and July 29, 2024. Lidman Decl., ¶29.

B. **Monetary Terms of the Settlement**

The Settlement provides for Defendants to pay a Gross Settlement Amount of $1,009,000.00. Lee Decl., ¶ 12. The Net Settlement Amount is the amount remaining from the Gross Settlement Amount after deducting requested attorneys' fees ($336,336.33) and verified costs ($19,712.78), proposed Class Representative Service Award to Plaintiff ($7,500.00), Settlement Administration costs ($10,000.00), and

PAGA payment to the LWDA and to PAGA Employees ($50,000.00). *Id.* Based on these requested amounts, the Net Settlement Amount is calculated to be approximately **$585,450.89**. *Id.*

The Individual Settlement Awards shall be determined as follows:

i. Each participating Settlement Class member shall receive a portion of the Net Settlement Amount proportionate to the number of workweeks that he or she worked as a non-exempt employee during the Class Period, which will be calculated by multiplying the Net Settlement Amount by a fraction, the numerator of which is the Settlement Class member's number of workweeks worked as a non-exempt employee during the Class Period, and the denominator of which is the total workweeks worked as non-exempt employees by all participating Settlement Class members during the Class Period. *See* Settlement, ¶ 6.B.i.

ii. <u>PAGA Amount</u>: Twelve Thousand Five Hundred and Zero Cents ($12,500.00) of the Gross Settlement Amount has been designated as the PAGA Amount as described above. Each PAGA Employee shall receive a portion of the PAGA Amount proportionate to the number of workweeks that he or she worked as a non-exempt employee during this PAGA Period, which will be calculated by multiplying the PAGA Amount by a fraction, the numerator of which is the PAGA Employee's number of workweeks worked as a non-exempt employee during the PAGA Period, and the denominator of which is the total number of workweeks worked as non-exempt employees by all PAGA Employees during the PAGA Period. *See* Settlement, ¶ 6.C.

For purposes of calculating applicable taxes and withholdings, each Settlement Award shall be allocated as follows: 67% as penalties and interest; and 33% as wages. Settlement, ¶ 6.E.

Defendants will pay the employer's share of payroll taxes separately from, and in addition to, the Gross Settlement Amount. *See* Lee Decl., ¶ 15. Defendants agree to deposit the employer's share of payroll taxes with Phoenix Settlement Administrators by the date on which it pays the Gross Settlement Amount.

C. <u>Summary of Notice Process</u>

1. Mailing of Notice Packets

On August 16, 2024, Defendants provided Phoenix with data files containing the names, last known addresses, social security numbers, and workweeks for each Class Member. Lee Decl., ¶ 4. After performing address updates and verifications, Phoenix mailed the Notice Packet to the 494 Settlement Class Members on August 30, 2024 in English and Spanish. *Id.* at ¶ 8. Following the initial mailing, 26 Notice Packets was returned to Phoenix by the Post Office. *Id.* at ¶ 9. After Phoenix performed a Skip Trace, 23 Notice Packets were re-mailed. *Id.* As of the date of filing this final approval motion, 3 Notice

Packets remain undeliverable because no forwarding address was provided and/or no new address could be located through Skip Trace. *Id*.

The deadline for Settlement Class Members to submit objections, requests for exclusion, or disputes was October 29, 2024. Lee Decl., ¶ 8. Then on October 29, 2024, Phoenix received a request to be added to the Class. The additional class member was mailed a class notice and given until December 3, 2024 to submit an objection, request for exclusion or dispute. Lee Decl., ¶ 6.

As of the date of this filing, there were no objections and no opt-outs. *Id*. at ¶¶ 7-9. Accordingly, as of the date of this Motion, the participation rate amongst the 495 Settlement Class Members is 100% and the average estimated payment is $1,182.73 with the highest estimated payment to a Settlement Class Member being $4,341.28 and the lowest estimated payment to a Settlement Class Member being $15.96. *Id*. at ¶¶ 7-13.

D. <u>Timing of Payments</u>

The Gross Settlement Amount shall be deposited by Defendants into a qualified settlement fund set up by the Settlement Administrator for the benefit of participating Settlement Class members and PAGA Employees. Defendants agree to deposit the Gross Settlement Amount with the Settlement Administrator within thirty (30) calendar days after the "Effective Date" which is defined as the latter of: (a) the Court's final approval of the settlement if no objections by or on behalf of Settlement Class members have been filed; (b) the time for appeal has expired if an objection has been filed and no appeal has been filed or withdrawn; or (c) the final resolution of any appeal that has been filed. Settlement ¶ 5.B.

After disbursement, Settlement Class Members will have 180 days to cash their checks. *See* Settlement ¶ 5.E. Funds remaining unclaimed will be distributed to the California State Controller's Office – Unclaimed Property Fund in the name of the Settlement Class Member. *Id*.; Lidman Decl., ¶30.

E. <u>Notice of Judgment</u>

As stated on the Notice of Pendency to Class Action and Proposed Settlement mailed to class members, the final judgment entered by the Court and any changes to the Final Approval hearing date or location will be posted on the Settlement Administrator's website at www.cordero-v-oldcastle-apg.phoenixcases.com. *See* Lee Decl., ¶6, Exh A.

IV. ARGUMENT

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

Under Code of Civil Procedure section 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest, and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the class' claims; and (4) the representative will fairly and adequately represent the class' interests. *See Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470.

Here, this Court found that the Class meets all the requirements for class certification for settlement purposes when it granted preliminary approval of the Settlement on July 29, 2024. *See* Lidman Decl., ¶ 28; Exh. A. After the Court entered an order granting preliminary approval, no events have occurred to cast doubt on the propriety of this determination. In fact, the reaction of the Settlement Class Members thus far to the Settlement has been strongly in support of the Settlement. No Settlement Class Members have objected to any portion of the Settlement and no Settlement Class Member has elected to opt-out of the Settlement. *See* Lee Decl., ¶¶ 13-15. This Court should therefore confirm its conditional certification of the Settlement Class.

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

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

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

A settlement is presumptively fair where it is reached through arm's length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors to the settlement is small. *Dunk v. Ford Motor Co.,* 48 Cal.App.4th 1794, 1802 (1996). In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Superior Court,* 89 Cal.App.3d 434 (1979). In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk*, *supra*, 48 Cal.App.4th at 1801 (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited:

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

Id. These factors require balancing, are non-exhaustive and, as such, trial courts should tailor the factors to each case. *Id*. "In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." *Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th 224, 250 (2001). Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because, "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Id*. (quoting *Air Lines Stewards, etc., Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)).

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

As detailed in Plaintiff's Preliminary Approval Motion, there is significant risk of non-certification and/or not prevailing on the merits with respect to each of Plaintiff's claims. For example, with respect to Plaintiff's unpaid wages claim, Defendants contend that they compensated Settlement Class members for all of their time worked, and any unpaid time was *de minimis* and therefore non-compensable. Lidman Decl., ¶ 12. Defendants further contend that they did not have a rounding policy or practice during the relevant time period. Further, Defendants contend any bonuses paid during the relevant time period were discretionary and did not to be included in the regular rate of pay for overtime purposes. *See* 29 C.F.R. §§778.208, 778.211 (excluding "discretionary" bonuses from the regular rate); *see also* DLSE Manual § 49.1.2.4(3) (bonuses are discretionary, and therefore excludable, if "both the fact that payment is to be made and the amount of the payment" are discretionary). *Id*.

As for Plaintiff's meal period claims, Defendants counter that they have always provided non-exempt employees with an opportunity to take legally compliant meal periods, and any non-compliant meal periods reflected in employee timekeeping records were solely the result of employee choice, rather than any policy or practice of Defendants. Lidman Decl., ¶ 14. Defendants also point out that under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, they are only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken, and that they have always done so. *Brinker*, *supra*, 53 Cal.4th at 1038 (rejecting "ensure" standard). Defendants contend Plaintiff's meal period claim is not suited for class certification and individual inquiries would be required to assess which employees took non-compliant meal periods, how many meal periods were non-compliant or missed, and the reasons why a particular employee took a non-compliant meal period or missed a meal period during a particular shift. *Id*.

As for Plaintiff's rest period claims, Defendants contend they have always maintained and enforced lawful rest period policies and practices, and that Settlement Class Members were authorized and permitted to take all off-duty rest periods in compliance with California law. Lidman Decl., ¶ 16. Defendants argue that Plaintiff's rest period claims are inherently unsuited for class treatment as it requires an individualized inquiry into whether each Settlement Class member was in fact authorized and permitted to take a compliant rest period, which would devolve into an unmanageable series of mini-trials. *Id*.

As for Plaintiff's claim for wage statement penalties, Defendants argue that their alleged wage statement violations could not be shown to be "knowing and intentional," and that Plaintiff cannot show that she or any other employee "suffer[ed] injury" as a result of the alleged wage statement violations, as required by Lab. Code § 226(e) for imposition of penalties. Lidman Decl., ¶ 18.

As for Plaintiff's unpaid sick pay and underpaid meal period premiums claim, Defendants assert they paid meal period premiums and sick pay at the appropriate rate of pay. Lidman Decl., ¶ 20. Defendants also argues that this claim is not suitable for class treatment because it would require individualized determinations.

As for Plaintiff's claim for waiting time penalties, Defendants assert they have strong defenses to the waiting time claim because there exist good-faith disputes as to Plaintiff's underlying claims, precluding imposition of penalties. Lidman Decl., ¶ 22. *See also* 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 that "good faith dispute" over whether employee was exempt precluded imposition of waiting time penalties over contested wages owed). *Id*.

Lastly, since Plaintiff's PAGA claim is a derivative claim based on the underlying claims, Defendants argue that Plaintiff's PAGA claim will fail for the same reasons that her underlying claims will fail. Lidman Decl., ¶ 24. Defendants also maintain that, given their good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendants liable for any of Plaintiff's claims. *Id*.

These considerations, not only bore heavily on the negotiations leading to the Settlement, but also confirm that the Settlement is fair, adequate, and reasonable compromise in view of the risks of further litigation. Lidman Decl., ¶ 25. As detailed in the Preliminary Approval Motion, Plaintiff carefully vetted the claims at issue and conducted a detailed liability analysis of class-wide data to calculate the damages figures. Thus, while these risks are far from exhaustive, they demonstrate that the Settlement is fair, adequate, and reasonable in view of them.

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

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

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

Class members' response to a settlement is relevant in evaluating whether it merits final approval. *Dunk*, *supra*, 48 Cal.App.4th at 1801. The lack of objections and requests for exclusion supports a fairness presumption. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-53 (finding 9 objections and 80 opt-outs from a class of 5,454 showed a "particularly impressive" favorable response from class members). Here, as of the filing of this Motion, not a single Settlement Class Member has objected to the Settlement and no Settlement Class Member have elected to opt-out of the Settlement. In addition, only 3 of the 495 Notice Packets were returned undeliverable. Lee Decl., ¶¶ 8-12. The extremely favorable response of the Settlement Class further confirms that the Settlement is fair, adequate, and reasonable.

C. <u>The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the Common Fund Confirmed by a Lodestar Cross-Check</u>

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

Plaintiff has provided written approval of the split of attorneys' fees in this action. Lidman Decl., ¶ 40.

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

> 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.

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

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

Here, Class Counsel's fee request of $336,336.33 (one-third of the Gross Settlement Amount) is fair and reasonable based on a percentage of the recovery confirmed with a lodestar cross-check. First, "regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, n.11 (2008); *see also*, *e.g.*, *Cicero v. DirectTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486 at * 7 (C.D. Cal. July 27, 2010) (observing that "30-50% [is] commonly awarded in cases in which the common fund is relatively small" and that in California, "courts usually award attorneys' fees in the 30-40% range in wage and hour class actions…"); *Williams v. Costco Wholesale Corp.*, No. 02-cv-2003 IEG (AJB), 2010 WL 2721452 at * 6 (S.D. Cal. July 7, 2010) (collecting cases where courts awarded between 33.33% and 40% in attorneys' fees in wage and hour class actions). This is also consistent with Class Counsel's experience in similar wage and hour class action matters. *See* Lidman Decl., ¶ 32. Thus, the percentage sought by Class Counsel here (the same percentage sought by class counsel in *Laffitte*) is reasonable.

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

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez*, *supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition for L. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to the class "can be monetized with a reasonable degree of certainty," a court may "adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557 (2009). In doing so, "the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market for such services." *Id.* at 556; *see also Laffitte*, 1 Cal.5th at 503-05.

In this case, Class Counsel have a lodestar of **$172,317.50** which results in a multiplier of 1.95 times the $336,336.33 fee request. *See* Lidman Decl., ¶ 36. A general summary showing the number of hours of work performed by each attorney and paralegals is set forth below. The billing rates used are reasonable especially in light of the hourly rates identified based on years of experience in the *Laffey* Matrix, submitted concurrently herewith. Lidman Decl., ¶ 37, Exh. C. Based on the *Laffey* Matrix, the hourly rate for a 25th year attorney is $997, the hourly rate for a 17th year attorney is $829, and the hourly rate for a 7th year attorney is $508. *Id*.

Name	Rate	Hours	Pre-Multiplier Lodestar
Scott M. Lidman (25th Year Attorney)	$900	72.2	$64,980
Paul K. Haines (17th Year Attorney)	$800	20.9	$16,720
Milan Moore (7th Year Attorney)	$650	134.7	$87,555
Paralegals	$175	17.5	$3,062.50
Total Lodestar			**$172,317.50**

The fee award requested here is justified because Class Counsel achieved a significant monetary recovery for the Settlement Class in an uncertain and risky case, while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys' fees).

First, Class Counsel negotiated a substantial recovery for the Settlement Class, resulting in a current participation rate of 100%, and not a single Settlement Class Member has objected to the Settlement or to Class Counsel's requested fees as of the date of this filing. *See* Lee Decl., ¶¶ 13-15. Additionally, the *average* settlement payment in this case of approximately $1,182.73 is in line with, and above, settlement payments in similar wage and hour class action settlements. *See*, *e.g.*, *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. 2008) (wage and hour class action settlement approved where average class member recovery was approximately $60); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *18 (E.D. Cal. 2012) (finding that average payment to class members of less than $200 was a "good" result); *Williams v. Centerplate, Inc.*, Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428, at *4 (S.D. Cal. 2013) (granting final approval of class action settlement where average recovery for each class member was approximately $108). The fact that Class Counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of the results achieved.

As discussed above, this case presented significant risk as to both class certification and merits considerations. Accordingly, it is fair and reasonable to account for these risks in compensating Class Counsel. Class Counsel should also be compensated for the risks involved in undertaking this litigation and expending considerable effort, all while working on a pure contingency basis. Since undertaking representation of Plaintiff, Class Counsel have borne all the costs of litigation without receiving any compensation for over two years. Lidman Decl., ¶ 30. During this time, Class Counsel have expended a total of $19,167.78 in actual costs and have devoted substantial time to this litigation and expect to incur approximately $545.00 in future costs for filing the instant motion, filing the final declaration regarding distribution of settlement, service and messenger fees, postage fees, and/or court costs for future court appearances for a total of $19,712.78. Lidman Decl., ¶ 33; Exh. B. Class Counsel's efforts have included conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, reviewing Defendant's documents and policies, analyzing Settlement Class Members' timekeeping data and payroll records, preparing for and attending mediation, negotiating and revising the long-form Settlement, preparing this Motion, and otherwise litigating the case. *See* Lidman Decl., ¶ 32. Moreover, Class Counsel have expended time, effort, and money that they could have expended on less risky cases instead. Given the considerable potential for adverse outcomes in this case, including, but not limited to losing on class certification and/or merits issues, the contingent risk borne by Class Counsel was great. Lidman Decl., ¶¶ 30-33.

Class Counsel's previous experience in litigating wage and hour class actions also supports the reasonableness of the fee request. Class Counsel are well-versed in plaintiff and defense-side wage and hour class action litigation, with substantial experience litigating claims for meal and rest period violations, and related penalties. *See* Lidman Decl., ¶¶ 3-8. They have been certified as class counsel in numerous other cases. *Id*. Their experience in similar matters was integral in evaluating the strengths and weaknesses of the case against Defendants and the reasonableness of the Settlement. *See* Lidman Decl., ¶ 34. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive state and federal law, as well as the procedural law of class action litigation. *Id*. Because it is reasonable to compensate Class Counsel commensurate with their skill, reputation, and experience, a fee award of one-third of the Gross Settlement Amount is reasonable.

Other factors also show that the fee amount requested in this case is reasonable under the circumstances. This case involved nuanced legal issues including questions surrounding Defendant's requirement to "provide" meal periods and "authorize and permit" rest periods, and the propriety of statutory penalties, to name just a few. Lidman Decl., ¶¶ 11-24. Thus, Class Counsel's requested fee award is fair, reasonable, and adequate and should be approved.

D. <u>The Requested Cost Amount Warrants Final Approval as Fair, Adequate, and Reasonable</u>

Class Counsel seek to be reimbursed a total of $19,712.78[2] in litigation costs. Class Counsel's request is fair, adequate, and reasonable, as all of these costs are documented and reasonably incurred. *See* Lidman Decl., ¶ 33; Exh. B. Moreover, the costs Plaintiff seeks are the types of costs routinely approved by courts. *See, e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client"); *Ashker v. Sayre*, No. 05-03759 CW, 2011 WL 825713, at * 3 (N.D. Cal. 2011)("costs of reproducing pleadings, motions and exhibits are typically billed by attorneys to their fee-paying clients" and are reimbursable); *Trustees of Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co*., 460 F.3d 1253, 1258-59 (9th Cir. 2006) (legal research costs are reimbursable); *In re Immune Response Securities Litigation*, 497

[2] Class Counsel have expended a total of $19,167.78 in actual costs and anticipates incurring costs in the amount of $545.00 for filing fees, service and messenger fees, and/or postage fees.

F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, legal research, copies, postage, filing fees, messenger and overnight delivery costs are reimbursable). Because the expense reimbursements requested by Class Counsel were reasonably incurred, and no Settlement Class Member has objected to them, Plaintiff respectfully requests the Court should grant the request for actual costs incurred.

E. <u>The Court Should Finally Approve the Requested Administration Costs</u>

Plaintiff also requests that the Court approve $10,000.00 in administration costs to the Settlement Administrator, Phoenix. As detailed in the declaration of Kevin Lee on Behalf of Phoenix submitted herewith, Phoenix performed duties in connection with this Settlement that were integral in effectuating the Settlement and the Notice process. Among other things, Phoenix calculated each Settlement Class Member's individual settlement payment, updated addresses contained in the class data supplied by Defendant, formatted Notice Packets for mailing, mailed Notice Packets to all 494 Settlement Class Members in English and Spanish, kept the parties informed of any objections or requests for exclusion, and have otherwise administered the Settlement. *See* Lee Decl., ¶¶ 2-16. For these reasons, Phoenix's requested costs are fair, reasonable, and adequate, and should be finally approved.

F. <u>Plaintiff's Requested Service Award Is Fair, Adequate, and Reasonable in View of Plaintiff's Efforts and the Risks that She Assumed on Behalf of the Class</u>

Courts routinely approve service payments to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation. *See*, *e.g.*, *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294 (N.D. Cal. 1995) (approving $50,000 service payment). In analyzing the requested service payment, courts consider the following factors: the risk, both financial and otherwise, the class representative faced in bringing the suit; the notoriety and personal difficulties encountered by the class representative; the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. *See Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1272; *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 804.

Here, analyzing those factors weigh in favor of approving Plaintiff's requested service award of $7,500.00 because request is reasonable given Plaintiff's efforts in this case and the risks she undertook on behalf of Settlement Class Members. Lidman Decl., ¶ 41; Declaration of Cristina Cordero ("Cordero Decl."), ¶¶ 6-11. Plaintiff provided substantial factual information and documents to Class Counsel, attended multiple meetings with Class Counsel to discuss the claims and theories at issue in the litigation, prepared for and sat for a full day deposition, and was available during the mediation. *See* Lidman Decl., ¶ 41; Cordero Decl., ¶¶ 6-10. The class has benefited from Plaintiff's actions as the average settlement amount is $1,182.73.

Further, Plaintiff understood that the lawsuit is a matter of public record and being part of the lawsuit could stigmatize her and/or affect future employment. Cordero Decl., ¶ 8. Plaintiff also understood the risk that she could be liable for Defendant's costs if she lost the case. *Id*. at ¶ 7. Plaintiff accepted these risks and burdens because she wanted Defendants to compensate their current and former employees for unpaid wages. *Id*. at ¶¶ 7-8. Plaintiff estimates she spent between 8-10 hours on activities related to this case. *Id*. at ¶ 10.

Moreover, after receiving notice of the proposed Class Representative Service Award for Plaintiff, no Settlement Class Member has objected to the proposed award, as of the date of this filing. *See* Gonzalez Decl., ¶ 15. Thus, the service award to Plaintiff is appropriate and justified as part of the Settlement and should be finally approved.

V. <u>CONCLUSION</u>

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

Dated: December 11, 2024

Respectfully submitted,
LIDMAN LAW, APC

By: ______________________
Scott M. Lidman
Attorney for Plaintiff
CRISTINA CORDERO