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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. Jessica Morgan, Dept. S-26*]

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

Date: July 29, 2024
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 July 29, 2024 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. Preliminary approval of the proposed class settlement of this lawsuit;
2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

   > 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 the date of preliminary approval of this Settlement Agreement.
   >
   > For purposes of this Settlement Agreement, the "Class Period" shall mean the time period of April 17, 2019 through the date of preliminary approval of this Settlement Agreement.

3. Granting leave to Plaintiff to file the Proposed Second Amended Complaint attached as Exhibit C to the Settlement Agreement.
4. Preliminary appointment of Plaintiff Cristina Cordero as Class Representative;
5. Preliminary appointment of Scott M. Lidman and Milan Moore of Lidman Law, APC and Paul K. Haines of Haines Law Group, APC as Class Counsel;
6. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit a service award to Plaintiff, Settlement Administration costs, civil penalties payable to the California Labor Workforce Development Agency, and attorneys' fees and costs to Class Counsel;
7. Appointment of Phoenix Settlement Administrators ("Phoenix") as the third-party Settlement Administrator for mailing notices; and
8. Approval of the proposed Notice Packet (which is comprised of the Notice of Pendency of Class Action and Proposed Settlement and Notice of Individual Settlement Award) and an order that it be disseminated to the proposed Settlement Class Members as provided in the Settlement Agreement.

This Motion is based on this notice of motion, the memorandum of points and authorities, the declarations of Scott M. Lidman, Milan Moore, Paul K. Haines, Plaintiff Cristina Codero, and Jodey Lawrence 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: May 6, 2024

Respectfully submitted,
LIDMAN LAW, APC

By: ______________________________
Scott M. Lidman
Attorneys for Plaintiff
CRISTINA CORDERO

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Cristina Cordero ("Plaintiff") brought this class and representative action against Defendants Oldcastle APG, Inc. and Oldcastle APG West, Inc. (hereinafter referred to as "Defendants") alleging various wage and hour violations. Plaintiff's primary allegations are 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 Labor Code Private Attorneys General Act of 2004 ("PAGA").

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, class action settlement,[1] in which Defendants have agreed to pay One Million Nine Thousand Dollars and Zero Cents ($1,009,000.00) to the following Settlement Class:

> 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 the date of preliminary approval of this Settlement Agreement.
>
> For purposes of this Settlement Agreement, the "Class Period" shall mean the time period of April 17, 2019 through the date of preliminary approval of this Settlement Agreement.

Settlement Class members do not need to file a claim and will automatically receive a payment unless they affirmatively opt-out. After deducting administration costs, Plaintiff's service award, attorneys' fees and costs, and PAGA civil penalties payable to the LWDA and the PAGA Employees, the remaining Net Settlement Amount ("NSA") of approximately $585,163.67 will be distributed to all Settlement Class members who do not opt-out. With approximately 436 Settlement Class members, the average payment to each Settlement Class member is currently expected to be approximately **$1,342.12**, which does not include the $12,500.00 PAGA Amount to PAGA Employees.

[1] The Stipulation of Settlement ("Settlement") is attached to the Declaration of Scott Lidman as Exhibit 1. The proposed Notice Packet (which consists of the Notice of Pendency of Class Action and Proposed Settlement and Notice of Individual Settlement Award) is attached to the Settlement as Exhibit A. All defined terms in this motion have the same definitions as used in the Settlement.

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

II. SUMMARY OF THE LITIGATION

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

1. The Parties

Defendants do business by being the largest manufacturer of architectural building products in North America. *See* Declaration of Scott M. Lidman ("Lidman Decl."), ¶ 10. Plaintiff was employed by Defendants as an hourly, non-exempt employee and performed work for Defendants from March 2022 through approximately November 28, 2022. *See* Declaration of Cristina Cordero ("Cordero Decl."), ¶ 2.

2. Procedural History

On April 17, 2023, Plaintiff filed a putative class action complaint against Defendants in San Bernardino County Superior Court. 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 proposed settlement, the Parties agree to stipulate, that Plaintiff be 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. See Settlement, Exhibit C. 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.*

3. **Discovery**

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., ¶ 11. 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.

4. **Arms-Length Negotiations**

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., ¶ 12. 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"). Lidman Decl., ¶ 12, Exh. 1.

III. **ARGUMENT**

A. **CLASS CERTIFICATION FOR SETTLEMENT PURPOSES**

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

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

1. <u>Numerosity is Satisfied.</u>

Here, there are approximately 436 Settlement Class Members. Therefore, numerosity is satisfied. *See* Lidman Decl., ¶ 14; *See, e.g., Bowles v. Sup. Ct.* (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

Further, a class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed 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 the date of preliminary approval of this Settlement Agreement." Lidman Decl., ¶ 14.

In addition, PAGA Employees 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, 2022 and the date of preliminary approval of this Settlement Agreement. *Id*.

2. <u>Commonality is Satisfied.</u>

The focus in a certification dispute is not the merits, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 327. Here, Settlement Class Members' claims arise from Defendants' common, uniform policies and practices that applied to Plaintiff and Settlement Class Members during the class period. Lidman Decl., ¶ 15. As a result of the common and uniform policies and practices that applied to all Settlement Class Members, their claims involve common questions of law and fact, including but not limited to:

1. Whether Defendants properly paid all minimum wages;
2. Whether Defendants properly paid all overtime wages;

3. Whether Defendants provided all legally compliant meal periods;
4. Whether Defendants authorized and permitted all legally required rest periods;
5. Whether Defendants failed to furnish accurate, itemized wage statements;
6. Whether Defendants failed to timely pay all wages owed upon separation; and
7. Whether Defendants' conduct constituted unlawful and/or unfair business practices.

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

3. <u>Typicality is Satisfied.</u>

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

Here, Plaintiff's claims are typical of those held by the Settlement Class. First, Plaintiff was employed by Defendants during the Class Period as a non-exempt employee and was subject to Defendants' wage and hour policies at issue in this case. *See* Cordero Decl., ¶ 2. Second, Plaintiff was injured by the same challenged policies that injured the Settlement Class as a whole. For example, Plaintiff asserts that she, like the Settlement Class, was not paid all legally required minimum wages and overtime wages, was not provided with all required meal periods, was not authorized and permitted to take all required rest periods, did not receive meal and rest period premium wages when he was not provided compliant meal or rest periods, was not provided with accurate, itemized wage statements, and was not paid all of her wages owed upon separation of employment. *Id*. Given that Defendants' policies and practices applied to all non-exempt employees, Settlement Class Members possess a similar interest and have suffered similar alleged injuries as Plaintiff. Accordingly, because Plaintiff's claims and those of the Settlement Class all arise from the same conduct, typicality is satisfied.

4. <u>Adequacy is Satisfied.</u>

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

Here, there are no apparent conflicts of interest between Plaintiff and the Settlement Class he seeks to represent. *See* Cordero Decl., ¶ 11. Indeed, Plaintiff's interests are aligned with those of the Settlement Class Members, as they all seek monetary relief under the same facts and legal theories. *Id*. Additionally, Class Counsel does not have any conflict of interest with the Settlement Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Further, Class Counsel also have extensive experience in wage and hour class action litigation and have vigorously litigated this case. *See* Lidman Decl., ¶¶2-8; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; Declaration of Milan Moore ("Moore Decl."), ¶¶ 2-4.

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

Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court's role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g.*, *Hanlon*, *supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement agreement was negotiated at arm's-length by class counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g. Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

1. **The Preliminary Approval Standard is Met**

To make a fairness determination, the Court should consider several factors, including: "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 230, 245. The Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case for the following reasons.

a. The Strength of Plaintiff's Case

Although Plaintiff maintains that her claims are meritorious, she acknowledges there were substantial risks and uncertainty in proceeding with litigation. As described below, Defendants presented multiple defenses to Plaintiff's claims, both on the merits and class certification. Thus, while Plaintiff was prepared to litigate these claims through certification and trial, success was not certain.

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

Although the parties engaged in informal discovery throughout this action, the parties still had significant discovery to complete in formal litigation had the matter not settled. Lidman Decl., ¶ 34. Moreover, Plaintiff still had to file for class certification, and faced the prospect of appeals in the wake of a disputed class certification ruling for Plaintiff and/or an adverse summary judgment ruling. *Id*. Even if the classes sought to be certified by Plaintiff were in fact certified, the parties would incur considerably more attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Id*. This Settlement avoids those risks and the accompanying expense. Thus, this factor supports preliminary approval.

c. Risk of Maintaining Class Action Status

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

d. Overview of the Settlement Agreement

If the Court approves this Settlement, Defendants will pay a Gross Settlement Amount ("GSA") of $1,009,000.00.[2] Lidman Decl., ¶ 13, Exh. 1 (Settlement, ¶ 4). Significantly, this Settlement is **non-reversionary**, and no Settlement Class member will have to submit a claim form to receive a Settlement Award. *Id.* (Settlement, ¶ 5). Each Settlement Class member will automatically receive a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id*. The monetary terms of the

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[2] Defendants represent that there are an estimated 32,560 workweeks from April 17, 2019 through January 10, 2024 (date of mediation). If the number of workweeks during this period is more than 10% greater than this figure (i.e., if there are 35,816 or more workweeks worked by the settlement Class Members during this period), Defendants shall increase the Gross Settlement Amount on a proportional basis equal to the percentage increase in the number of workweeks worked above the 10%. *See* Settlement ¶ 5.E.

Settlement are summarized below:

Gross Settlement Amount ("GSA"):	**$1,009,000.00**
Minus Court-approved attorneys' fees (1/3 of GSA):	$336,336.33
Minus Court-approved, verified costs (up to):	$20,000.00
Minus Court-approved Class Representative Service Award (up to):	$7,500.00
Minus Settlement Administration Costs:	$10,000.00
Minus PAGA civil penalties:	$10,000.00
Net Settlement Amount ("NSA"):	**$50,000.00**

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. Lidman Decl., ¶ 13, Exh. 1 Settlement ¶ 5.B.

After deducting amounts for the Court-approved attorneys' fees and verified costs, Service Award to Plaintiff, Settlement Administrator costs, and the PAGA civil penalties, the Settlement requires Defendants to pay a Net Settlement Amount ("NSA") of at least **$585,163.67** to all Settlement Class Members who do not timely opt out. This amount does not include the $12,500.00 PAGA Amount to be paid to the PAGA Employees. Lidman Decl., ¶ 13, Exh. 1 (Settlement ¶ 5.C).

According to Defendants, there are approximately 436 total Settlement Class Members. Lidman Decl., ¶ 14. Thus, the average Individual Settlement Awards (assuming there are no opt-outs) is projected to be approximately **<u>$1,342.12, exclusive of any PAGA civil penalties</u>**. *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. PAGA Amount: 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.

Based on these formulas, with approximately 30,396 workweeks during the Class Period, the Settlement equates to about $19.25 per workweek ($585,163.67/30,396). The average individual portion of PAGA Amount is approximately $41.25. There are about 8,005 pay periods during the PAGA Period, which equates to about $1.56 per pay period ($12,500/8,005).

Settlement Class Members will have sixty (60) calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶ 11.D. Those Settlement Class Members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendants included within the Settlement, for the period of April 17, 2019 through the date of preliminary approval. *See* Settlement, ¶ 3. Settlement Class Members who opt-out of Settlement will still receive a portion of the PAGA Amount if they are a PAGA Employee during the PAGA Period.

As this is a non-reversionary Settlement, 100% of the NSA shall be consumed in that if a Settlement Class Member opts-out of the Settlement, the portion allocated to the individual who opts-out shall be added to the NSA and redistributed and allocated to the Settlement Class Members who did not opt-out. *See* Settlement, ¶ 5.C.

e. The Parties Engaged in Fair and Honest Negotiations.

This Settlement was a result of serious, informed, non-collusive negotiations with the assistance of a mediator. In connection with mediation, Defendants produced timekeeping and payroll data for 20% sample. Plaintiff conducted an analysis of the payroll data and time records produced by Defendants to calculate Defendants' potential exposure for Plaintiff's claims. Lidman Decl., ¶ 11.

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

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

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

f. <u>Amount Offered in Settlement Given Realistic Value of Claims</u>

<u>Unpaid Wages</u>: 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. Lidman Decl., ¶ 16. 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. As a result of Defendants' failure to properly track the time worked by Plaintiff and other non-exempt employees, Defendants failed to pay Plaintiff and other non-exempt employees for all minimum and overtime wages owed. *Id*. Plaintiff's expert calculated Defendants' exposure at $159,739. *Id*.

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., ¶ 17. 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). In light of these defenses, Plaintiff discounted the maximum exposure by 60% for the risk of non-certification, and an additional 45% to account for Defendants' defenses on the merits to arrive at an estimated exposure of approximately $35,142.58.

<u>Meal Period Violations</u>: 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., ¶ 18. 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's retained expert calculated Defendants' maximum exposure for meal period violations at **$2,331,354**, which is offset by the amount paid in meal period premiums and based on the following violations: (1) late first lunch; (2) missed first meal period; (3) short first meal break; and (4) missed second meal break on shifts over 10 hours. *Id*.

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., ¶ 19. 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*. Further, Defendants contend that they paid $406,302 in meal period premiums to their non-exempt employees during the relevant time period. Accordingly, Plaintiff discounted the maximum exposure by 40% for the risk of non-certification, and an additional 45% to account for Defendants' defenses on the merits to arrive at an estimated exposure of $769,346.82. *Id*.

Rest Period Violations: 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., ¶ 20. 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's retained expert calculated Defendants' maximum exposure for rest period violations at **$3,205,701**. *Id.*

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., ¶ 21. 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*. Accordingly, Plaintiff discounted the maximum exposure by 65% for the risk of non-certification, and an additional 55% to account for Defendants' defenses on the merits to arrive at an estimated exposure of $504,897.91. *Id*.

Wage Statement Violations: 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., ¶ 22. 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*. Therefore, Plaintiff's retained expert calculated Defendants' maximum exposure at **$731,750**. *Id*.

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., ¶ 23. As such, Plaintiff discounted the calculated exposure by 50% for a risk of non-certification and an additional 55% for a risk of being unsuccessful on the merits to arrive at an estimated total of $164,643.75. *Id.*

<u>Unpaid Sick Pay and Underpaid Meal Peal Period Premiums</u>: Plaintiff alleges that Defendants are also liable for failing to pay sick pay and meal period premiums at the regular rate. Lidman Decl., ¶ 24. 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. Therefore, Plaintiff calculated Defendants' maximum exposure at approximately **$31,901**. *Id.*

Defendants assert they paid meal period premiums and sick pay at the appropriate rate of pay. Lidman Decl., ¶ 25. Defendants also argues that this claim is not suitable for class treatment because it would require individualized determinations. Accordingly, Plaintiff discounted the maximum exposure by 45% for the risk of non-certification, and an additional 50% to account for Defendants' defenses on the merits, to arrive at an estimated exposure of $8,772.78. *Id.*

Waiting Time Penalties: 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., ¶ 26. 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*. Therefore, Plaintiff's retained expert calculated Defendants' maximum exposure at **$1,734,944**. *Id*.

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., ¶ 27. *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). Accordingly, Plaintiff discounted the maximum exposure by 45% for the risk of non-certification, and an additional 40% to account for Defendants' defenses on the merits to arrive at an estimated exposure of approximately $572,531.52. *Id*.

PAGA Civil Penalties: Plaintiff also seeks civil penalties under the PAGA as a result of the foregoing alleged Labor Code violations. Lidman Decl., ¶ 28. Plaintiff calculated Defendants' exposure at approximately **$800,500** (8,005 pay periods x $100 initial violation rate). *Id*.; *see Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision).

Defendants argue that Plaintiff's PAGA claim will fail for the same reasons that her underlying claims will fail. Lidman Decl., ¶ 29; *see Price v. Starbucks Corp*. (2011) 192 Cal.App.4th 1136, 1147 ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). 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. *See* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc*. (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc*. (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from $2.8 million to $500,000). *Id*. Therefore, Plaintiff discounted the maximum exposure figure by 50% for a risk of being unsuccessful on the merits, and an additional 35% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately $260,162.50. *Id*.

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

Using these estimated figures for each of the claims described above, Plaintiff predicted the realistic total recovery for the Settlement Class would be approximately $2,315,497.85. Lidman Decl., ¶ 30. The proposed settlement of $1,009,000.00 therefore represents approximately 44% of the reasonably forecasted recovery for the Settlement Class. *Id*. Preliminary approval is appropriate as the settlement will provide tangible monetary relief to Settlement Class Members, and will still provide an average recovery to Settlement Class Members of <u>*over $1,300.00*</u>.

The proposed settlement reflects approximately 44% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will provide tangible monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Settlement Class members at trial"). Thus, Plaintiff submits the settlement is within the range of possible approval, such that notice should be provided to the Settlement Class so that they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Settlement Class has had the opportunity to opt-out or object.

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

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See*; Lidman Decl., ¶¶ 2-8; Haines Decl., ¶¶ 2-8. Class Counsel conducted an in-depth review of Defendants' policies and timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *See* Lidman Decl., ¶¶ 10-26. The Settlement was also reached with the assistance of an experienced and respected wage and hour class action mediator. *Id*. This factor strongly supports preliminary approval of the Settlement. *See Kullar*, *supra*, 168 Cal.App.4th at 130.

i. <u>Attorneys' Fees and Costs</u>

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

Here, Class Counsel will also apply for an attorneys' fees award of one-third of the GSA, which is currently estimated to be $336,336.33, and up to $20,000 in verified costs reimbursement. *See* Settlement, ¶ 6; Lidman Decl., ¶ 31. Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. *Id*. Further, Plaintiff has provided written approval of the split of attorneys' fees in this action. Lidman Decl., ¶ 32. Class Counsel has incurred substantial attorney fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, reviewing Defendants' 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. Lidman Decl., ¶ 31. Class Counsel expect to expend additional attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding questions from Settlement Class Members, preparing the final approval papers and attending the Final Approval hearing. *Id*.

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

j. Administration Costs

Phoenix Settlement Administrator's fees and expenses are estimated not to exceed $10,000.00. *See* Declaration of Jodey Lawrence in support of Plaintiff's Motion for Preliminary Approval filed concurrently herewith ("Lawrence Decl."). This includes sending the Notice in both English and Spanish due to the nature of Defendants' workforce. This request is reasonable in light of the proposed class size of approximately 436 Settlement Class Members and the costs and expenses associated with administering the notices in Spanish and English and distributing the awards.

k. Class Representative Service Award

"[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Here, as part of the Settlement, Plaintiff will separately apply for a service award at the time of seeking final approval of the proposed class action settlement in the amount of $7,500.00 for her services to the Settlement Class. Lidman Decl., ¶ 33; Settlement, ¶ 5.3.C; Cordero Decl., ¶¶ 3-12. As will be fully briefed at the time of final approval, Plaintiff's requested service award is intended to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including providing substantial factual information and documents to Class Counsel, attending multiple meetings with Class Counsel to discuss the claims and theories at issue in the litigation, participating in the mediation, as well as the significant risks Plaintiff undertook by agreeing to serve as the named plaintiff in this case. *See* Lidman Decl., ¶ 33; Cordero Decl., ¶¶ 3-11.

l. PAGA Civil Penalties

The parties have agreed to a PAGA award of $50,000.00 and in accordance with California Labor Code section 2699(i), the LWDA will receive 75% of the amount attributable to PAGA penalties – or $37,500.00. Settlement ¶ 4.C.5. This $50,000.00 represents roughly 4.9% of the $1,009,000.00 Gross Settlement Amount and is in line with the zero to two percent range for PAGA claims approved by Courts. *See, e.g.*, *In re M.L. Stern Overtime Litig*., No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent, or $20,000); *Hopson v. Hanesbrands, Inc*., No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent, or $1,500); *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action claims and PAGA claims under which no money was allocated to the PAGA claims).

m. <u>Payroll Taxes</u>

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

n. <u>Uncashed Funds</u>

Each member of the Settlement Class who receives a Settlement Award or PAGA Award must cash the check(s) within 180 days from the date the Settlement Administrator mails it/them. Any funds payable to Settlement Class members or PAGA Employees whose checks were not cashed within 180 days after mailing will be given to the Katherine and George Alexander Community Law Center, a cy pres, designated by the Parties. Settlement ¶ 5.E. Neither Parties and/or their respective counsel have any conflicts of interest with the designated *cy pres*.

C. <u>SETTLEMENT IS DEVOID OF OBVIOUS DEFICIENCIES</u>

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

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

Before the final approval hearing, the Court requires adequate notice of the settlement be given to all class members. This Court should order distribution to the Settlement Class of the proposed Notice Packet (which is comprised of the Notice of Pendency of Class Action and Proposed Settlement and Notice of Individual Settlement Award) by first-class regular U.S. Mail, postage prepaid, using last known mailing address information provided by Defendant. *See* Settlement, ¶ 11, Exh. A. The Notice Packet will be mailed in both English and Spanish due to the nature of Defendants' workforce.

This manner of giving notice is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff proposes that the Settlement be administered by Phoenix, an experienced class action settlement administrator. *See generally* Lawrence Decl. and attached exhibits. Class Data will be ascertainable through Defendants' personnel and payroll records, which Defendants will provide to Phoenix within 14 business days of preliminary approval of the Settlement. *See* Settlement ¶ 11.A. Within fourteen 10 business days of receipt of the Settlement Class Members' addresses, Phoenix will run the names of all Settlement Class Members through the United States Postal Service Notice of Change of Address database (which provides updated addresses for any individual who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding address), calculate the estimated Settlement Award for each Settlement Class member, and mail the notices to Settlement Class Members. *See* Settlement ¶ 11.B. To the extent that any notices are returned, Phoenix will perform a "skip trace" to track any Class Member's current mailing address. *See* Settlement ¶ 10.C.

The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d) because it advises Settlement Class Members of the nature of the claims, basic contentions and denials of the parties, and the key terms of the Settlement, the 60-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, provides them the opportunity to contest their total workweeks included in the notice, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Lidman Decl., Exh. 1 (Settlement, Exh. D). The proposed Notice Packet will also notify Settlement Class Members of the final approval hearing date and provides Settlement Class Members the contact information for Class Counsel, and advises Settlement Class Members that they may enter an appearance through counsel if they wish to. Additionally, as stated in the proposed Notice Packet, any changes to the Final Approval hearing date, time, or location will be posted on the Settlement Administrator's website. *Id*. Furthermore, the Settlement Administrator will post the notice of final judgment on its website. *Id*. This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class Members.

E. THE COURT SHOULD SET A FINAL APPROVAL HEARING

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

IV. CONCLUSION

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

Dated: May 6, 2024

Respectfully submitted,
LIDMAN LAW, APC

By: [signature]

Scott M. Lidman
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CRISTINA CORDERO