

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
C.A. No. 1981CV01957

MICH KAREN PIERRE LOUIS, Individually and)
on behalf of all others similarly situated,)

Plaintiff,)

v.)

BAYADA HOME HEALTH CARE, INC., DAVID)
BAIADA and J. MARK BAIADA,)
Defendants.)
_____)

RECEIVED

6/6/2022

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
MOTION FOR APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff Mich Karen Pierre Louis, on behalf of herself and the putative Settlement Class (“Plaintiff”) respectfully submits this memorandum of law in support of entry of a Final Order and Judgment, granting final approval to the settlement entered into, by and between Plaintiff and Defendants BAYADA Home Health Care, Inc. (“BAYADA”), David Baiada and J. Mark Baiada (collectively, “Defendants”) in accordance with the Class Action Settlement Agreement and Release dated December 28, 2021 (the “Agreement”), finding that the Settlement is fair, reasonable and adequate to the Class and should be finally approved and granting Plaintiff’s counsel’s Motion for Award of Attorneys’ fees and Expenses.¹

I. INTRODUCTION

Plaintiff has reached an agreement to settle above-captioned action (the “Action”) on behalf of the Settlement Class against Defendants for a payment of \$22,342 in cash, plus additional

¹ Plaintiff’s Motion forward of Attorneys’ Fees and Expenses is supported by a separate and concurrently filed memorandum

payments of \$50,000 for attorneys' fees, \$1,100 for reimbursement of expenses, the payment of an incentive award to Plaintiff in the sum of \$3,500, and payment of up to \$6,500 for settlement administrative expenses, including class notice (the "Settlement"). The proposed Settlement was the product of extensive, arm's length negotiations. Pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure, Plaintiff now seeks this Court's approval of the Settlement as fair, reasonable and adequate, and Plaintiff also seeks approval of Plaintiff's counsel's application for an award of attorneys' fees and reimbursement of litigation expenses and for payment of the proposed incentive award to the Plaintiff.

The Settlement provides an excellent result for the Class, and it clearly meets the test of constituting a fair, reasonable and adequate settlement, when considering all of the applicable factors. Accordingly, the Settlement should be approved.

On March 30, 2022, this Court entered a Second Amended Order Preliminary Approving Settlement and Providing Notice (the "Second Amended Preliminary Approval Order").² The parties now seek final approval of the Settlement. Under the terms of the proposed Settlement, Defendants will pay the sum of \$22,342 (50% of the Class's maximum single damages recovery)³ directly to Class members, without the necessity of Class members having to file claims. The Settlement also provides for the payment of up to \$50,000 in attorneys' fees and up to \$1,100 in expenses to Plaintiff's counsel, an incentive award to the Plaintiff in the sum of \$3,500, and up to \$6,500 in settlement administrative costs, all of which amounts are to be paid separately from, and in addition to, the Settlement Fund.

² Docket No. 24. On January 19, 2022, the Court entered the Amended Order Preliminarily Approving Settlement and Providing Notice ("Amended Preliminary Approval Order"). Docket No. 21. The Second Amended Preliminary Approval Order was issued due to a change in the final hearing date to June 13, 2022, and it supersedes the Amended Preliminary Approval Order only with respect to the rescheduled hearing date, but in all other respects, the Amended Preliminary Approval Order remains in full force and effect.

³ Referred to herein as the "Settlement Fund."

The Settlement, which was reached only after significant discovery and two or three months of negotiation, represents the product of good faith, arm's-length negotiations between experienced counsel for the settling parties. In entering into the Settlement, the settling parties were fully conversant with the strengths and weaknesses of their claims and defenses and were well-positioned to evaluate the risks of continued litigation versus the fairness and prudence of a resolution. As a result, each of the settling parties believes the Settlement is fair and reasonable.

Accordingly, Plaintiffs request that the Court approve the Settlement as fair, reasonable, and adequate and enter the proposed Final Judgment and Order of Dismissal with Prejudice ("Final Order"), a copy of which is annexed to the parties' Joint Motion for Approval of Class Action Settlement ("Joint Motion") as **Exhibit A**.

II. FACTUAL AND PROCEDURAL BACKGROUND

BAYADA operates an international home health care business from its headquarters in New Jersey, with 360 offices in 23 states and 6 countries, with 10 offices in Massachusetts, and 28,000 employees. Class Action Complaint, ¶¶ 10-11.⁴ BAYADA provides various home health care services, including adult private-duty nursing, personal care and companionship, pediatric services, hospice care, physician services, medication management and health systems solutions. *Id.*, ¶ 12. BAYADA's personal home care employees include home health aides, certified nursing assistants, homemakers and personal companions. *Id.*, ¶ 14.

During the period from approximately March 23, 2017 through approximately June 28, 2018, Plaintiff was employed by BAYADA as a home health aide, working out of BAYADA's office at 2000 Commonwealth Avenue, Newton, Massachusetts 02466. Plaintiff was employed at the rate of \$12.70 per hour and was paid weekly, with each pay period running from Monday

⁴ The individual Defendants, David Baiada and J. Mark Baiada, are, respectively, President and Treasurer of Bayada. *Id.*, ¶ 1.

through the following Sunday. *Id.*, ¶¶ 17-19.⁵ For each pay period while she was employed with BAYADA, Plaintiff received a paper Earnings Statement⁶ by mail that described the services she provided for that week and listed her gross earnings, payroll deductions and net earnings for the current pay period and for the year to date. *Id.*, ¶ 20, Exhibit A; Pierre Louis Dec., ¶ 5.

In or around May of 2018, Plaintiff was reviewing her paper Earnings Statement for the most recent pay period and when she added up the listed and itemized payroll deductions and deducted that total from her gross earnings, she noticed that the difference she got was a higher amount than her net earnings (for both year-to-date and the current pay period). *See id.*, ¶¶ 20-21; Pierre Louis Decl., ¶ 6. In other words, her net earnings appeared to be less than they should be, given the total amount of deductions that were itemized on her earnings statement. *Id.* This, together with further review and investigation, led Plaintiff to the conclusion that BAYADA was taking payroll deductions that were not listed or itemized on her Earnings Statements and that Plaintiff was not being paid the full amount of wages earned. Thus, Plaintiff believed that BAYADA violated the Massachusetts Wage Act (“Wage Act”) in two ways: 1) its failure to pay Plaintiff her full wages earned; and 2) its failure to furnish Plaintiff with an earnings statement⁷ that listed and itemized all payroll deductions taken for the applicable pay periods as required by law. *See* M.G.L., C. 149, § 148.

On June 24, 2019, Plaintiff filed a complaint against BAYADA for violations of the Wage Act with the Fair Labor Division of the Massachusetts Attorney General’s Office (as statutorily required), and on June 27, 2019, the Attorney General’s office responded with a letter authorizing Plaintiff to pursue a private civil action (referred to as a “right to sue” letter). *See* Complaint, ¶

⁵ *See also* Declaration of Mich Karen Pierre Louis in Support of Motion for Settlement Approval (“Pierre Louis Decl.”), ¶¶ 3-4.

⁶ It was later revealed through discovery that Plaintiff’s earnings statements were also posted online.

⁷ The statute uses the terms, “pay slip, check stub or envelope.” M.G.L., c. 149, § 148.

43, Ex. B. Plaintiff then filed the Complaint in this Court on July 9, 2019, alleging violations of the Wage Act (failing to pay full wages owed, and failing to properly list and itemize all earnings deductions on the Earnings Statements). *See id.*, ¶¶ 1, 39. Plaintiff brought this action as a class action under Mass. R. Civ. P. 23 and M.G.L., c. 148, § 150, on behalf of a class defined as “all Home Care Employees employed by Bayada in Massachusetts who were not paid their full wages earned and who had deductions that were not itemized on the employees’ earnings statements taken from their earnings during the applicable limitations period.” *Id.*, ¶¶ 29-37.

After the suit was filed, Plaintiff’s counsel engaged in discussions with Defendants’ counsel about the substance of the allegations in the Complaint and the investigation undertaken by BAYADA. During these discussions, counsel for Defendants told Plaintiff’s counsel that according to BAYADA’s investigation, the failure to list certain itemized deductions on Plaintiff’s paper earnings statements (and the paper earnings statements of other BAYADA home care employees who were employed in Massachusetts) was not intentional but was inadvertent and due to a glitch in Bayada’s payroll management system. Defendants’ counsel also explained that according to BAYADA’s investigation, all of the unlisted deductions were legitimate and properly assessed deductions and that none of the affected employees were improperly denied any wages as a result of the facts alleged in the Complaint. Defendants’ counsel further stated that electronic/online earnings statements for Plaintiff and the affected employees included the deductions that were not listed on the paper earnings statements. During these conversations between counsel, the possibility of settlement was also discussed.

Plaintiff also conducted discovery, both formal and informal, to test and verify the statements and explanations provided by Defendants’ counsel as to the unlisted deductions and to prepare the case for resolution, either by settlement or trial. On October 4, 2019, Plaintiff served

written discovery requests (interrogatories and document requests) on Defendants. Defendants did not provide formal responses to those discovery requests. Instead, over the next several months, the parties discussed and negotiated the production of documents by Defendants concerning the unlisted deductions and the BAYADA employees affected by this issue. As part of this process, BAYADA produced a number of documents, including a copy of one of Plaintiff's online earnings statements, a spreadsheet showing the affected employees (identified by employee number only),⁸ and other related materials. The parties, after further discussions and negotiation, agreed on a sampling procedure whereby Defendants would provide backup documentation for the unlisted deductions and related documents for 20 of the affected employees, to be selected by Plaintiff. Defendants then provided the documentation as agreed, including backup documentation for the sample employees, online earnings statements listing the payroll deductions at issue, and a complete set of Plaintiff's online earnings statements. After the Court entered a jointly proposed confidentiality protective order, Defendants also produced another version of the spreadsheet of data for the proposed Class Members that included the employee names. At or around the end of October, 2020, Defendants' document production was completed (or at least substantially completed), and on November 5, 2020, Plaintiff took a 30(b)(6) deposition of BAYADA. After the conclusion of the deposition, Plaintiff's counsel realized that there were certain questions that were unanswered (*i.e.*, that BAYADA's designated representative was unable to answer) and that some clarification was needed. The parties discussed this issue, and it was agreed that Plaintiff would serve a set of additional interrogatories to elicit the desired information. The interrogatories were then served and answered.

⁸ There were 118 unique employees listed on the spreadsheet provided by Defendants.

After a diligent and comprehensive review, including a review of the documentation and testimony provided by Defendants, Plaintiff concluded that the statements and assertions made by Defendants' counsel regarding the earnings statements were accurate. *i.e.*, that the failure to list certain payroll deductions on employees' paper earnings statements was unintentional and inadvertent (the result of Bayada transitioning to a new payroll system in January of 2018), that the unlisted deductions on the paper statements were legitimate and properly assessed against the employees' wages, that no employees lost any wages as a result of the alleged acts or omissions, and that online earnings statements listing all itemized deductions were available to the affected employees. Stated another way, it became apparent that BAYADA's failure to list certain deductions on the paper earnings statements was a technical violation (failure to provide earnings statements showing all deductions taken from the employee's wages for the applicable pay period) that did not result in any lost wages to Plaintiff or the putative Class Members. According to BAYADA's deposition testimony, there were several types of payroll deductions that were affected by this situation, such as deductions for payroll advances, employee loans, wage garnishments, and insurance premiums for coverage elected by the employee. BAYADA's deposition testimony also revealed that it was Plaintiff's discovery of the discrepancy in her earnings statement and the resulting lawsuit that led Bayada to discover the unlisted deduction issue:⁹

Q: Ok. You may already have alluded to this, but when was the problem with the non-standard deductions discovered?

A: It was discovered in July of 2019.

Q: July 2019. How was it discovered? What caused it to be discovered? If you can tell me that.

A: Well, we received a notice and started to dig into our systems and pull up old records

⁹ See Pierre Louis Decl., ¶¶ 6-7.

and try to determine what happened.

Q: Are you referring to the complaint?

A: Correct.

Deposition of Christopher J. Robbins, Nov. 5, 2020, Tr. at 30:21-31:8.¹⁰

After the completion of discovery, the parties engaged in significant settlement negotiations that ultimately resulted in the settlement being presented for approval.

Plaintiff and her counsel believe that they have conducted a thorough investigation of the claims asserted in the Litigation and that they are in an appropriate position to evaluate the merits of the case and the strengths and weaknesses of the parties' positions in order to achieve a fair and reasonable settlement.

On January 19, 2022 and March 30, 2022, respectively, the Court entered the Amended Preliminary Approval Order and the Second Amended Preliminary Approval Order, preliminarily approving the Settlement, directing notice to the class and setting a date for a final hearing on settlement approval (June 13, 2022).

III. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

In determining whether a class action settlement should be finally approved, courts evaluate whether the settlement is "fair, reasonable and adequate. *Sniffin v. Prudential Ins. Co. of Am.*, 395 Mass. 415, 421 (1985). In evaluating a proposed class action settlement, the determination "is not based on a single inflexible litmus test but, instead, reflects the court's studied review of a wide variety of factors bearing on the central question of whether the settlement is reasonable in light of the uncertainty of litigation." *Rolland v. Cellucci*, 191 F.R.D. 3, 8 (D. Mass. 2000) (citations omitted). Approval of a proposed class action settlement is a matter within

¹⁰ A copy of the Robbins Tr. is annexed to the Pastor Decl. as **Exhibit D**.

the sound discretion of the trial court. *Sniffin*, 395 Mass. at 420-21. “[T]he essence of a settlement is compromise.... Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary’s role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.” *Id.* at 421 (citation omitted). Furthermore, courts have generally recognized that a strong judicial policy favors resolution of litigation short of trial. *E.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”).

Public policy generally favors settlement as a means of resolving disputes. *E.g.*, *Hotel Holiday Inn de Isla Verde v. NLRB*, 723 F.2d 169, 173 (1st Cir. 1983). Indeed, “the law favors class action settlement.” *In re Lupron Mktg. & Sales Practice Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005). By favoring the settlement of class action litigation, the law seeks to minimize the litigation expense on both sides, and to reduce the strain on judicial resources. *E.g.*, *In re Gen. Motors Corp.*, 55 F.3d at 784. “Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public.” *Sniffin*, 395 Mass. at 421.

The proposed Settlement here plainly satisfies the standards for approval. It provides for a Settlement Fund equal to 50% of the total amount of unlisted deductions at issue in this case, with distributions to be made to Class members by direct payment, plus payment of attorneys’ fees and expenses, an incentive award to the named Plaintiff and payment of the costs of settlement administration. Because the Settlement provides for direct payments to Class members, there is no

claims process, making it more convenient for Class members to receive compensation; thus, the settlement is clearly beneficial to the Class. Among other advantages, this process will minimize the amount of unclaimed funds; the only unclaimed funds will be those amounts that remain in the settlement fund after distribution due to uncashed settlement checks.

See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 539-40 (D.N.J. 1997) (“Because establishing liability at trial and prevailing on appeal is not, and never can be, guaranteed, and because the Proposed Settlement is certain and avoids many of the obstacles potentially implicated by a trial, on balance the risks of establishing liability weigh in favor of approving the settlement.”). The proposed Settlement ensures the Settlement Class a substantial benefit, while eliminating further uncertainty, expense, and delay.

A. The Strength of the Case for Plaintiffs Balanced Against the Value of the Settlement Strongly Favors Settlement Approval

The “most important factor” in determining whether a proposed settlement is fair, reasonable, and adequate is “the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Sniffin*, 395 Mass. at 421-22 (quoting *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971)). This factor will weigh in favor of settlement “unless the alleged illegality is a ‘legal certainty.’” *Sniffin*, 395 Mass. at 422 (citations omitted).

Here, the direct pay, cash settlement of \$22,342 is a great result in light of the uncertainty and risk of continued litigation. In order to obtain a judgment for Plaintiff and the Settlement Class, Plaintiff clearly believes that absent a settlement, liability can be established and that Plaintiff is entitled to a judgment on the merits on behalf of herself and the Class. While Plaintiff continues to believe in the merits of her claims, Plaintiff recognizes that there were risks in continued litigation, including that: Plaintiff might not be able to establish liability on her Massachusetts Wage Act claims; even if liability is established, Plaintiff and the Class may not be

able to establish damages (particularly in the absence of any lost wages); the class might not be certified; and even if Plaintiff were able to establish liability and obtain judgment on behalf of a certified class, that judgment might be vacated or reversed on appeal.¹¹ *See, e.g., In re Prudential*, 962 F. Supp. at 539-40 (“Because establishing liability at trial and prevailing on appeal is not, and never can be, guaranteed, and because the Proposed Settlement is certain and avoids many of the obstacles potentially implicated by a trial, on balance the risks of establishing liability weigh in favor of approving the settlement.”). The proposed Settlement ensures the Class a substantial benefit, while eliminating further uncertainty, expense, and delay.

Through settlement negotiations, Plaintiff’s Counsel were able to obtain the settlement, amounting to 50% of the unlisted deductions at issue, in a situation where no Class member lost any wages or salary and where, although Plaintiff could very likely prove a statutory violation, Plaintiff would have a very difficult time proving injury and damages. The recovery of a substantial, certain cash settlement for the Settlement Class (where Class members do not need to submit claims in order to receive payment) supports the fairness, reasonableness, and adequacy of the proposed Settlement.

B. The Settlement Also Satisfies Other Well-Recognized Criteria for Final Approval

Numerous courts have considered other factors in determining whether a proposed class action settlement is fair, reasonable, and adequate: complexity and duration of the litigation; reaction of the class to the settlement; stage of the proceedings; risks of establishing liability; risks of establishing damages; risks of maintaining a class action through trial; reasonableness of the settlement in light of the best possible recovery; reasonableness of the settlement in light of all the attendant risks of litigation; and the ability of the defendants to withstand a greater judgment. *E.g.*,

¹¹ Although such things are impossible to predict, given the unique, or at least unusual nature of this case, a judgment in favor of Plaintiff and the Class would almost certainly be appealed.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). In light of the above factors, the proposed Settlement here is fair, reasonable, and adequate and should be finally approved.

1. Continued Litigation Could Be Long and Expensive

Courts consistently have held that the expense and possible duration of litigation must be considered in evaluating the reasonableness of a settlement. “This factor...captures the probable costs, both in time and money, of continued litigation....” *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *7 (E.D. Pa. Apr. 18, 2005) (internal citations and quotation marks omitted). Here, continued litigation could be expensive and time-consuming, which favors settlement approval. Although this litigation is not necessarily complex and a trial of the Plaintiff’s claims could be reached and completed in a reasonable period of time, any class action litigation involves a certain level of expense and complexity in order to maintain the litigation through judgment. The time and expense involved in a trial of this case is magnified by the fact that there is a small amount of unlisted deductions at issue here (\$44,684.00) and the fact that it is a technical violation, with serious obstacles to proof of injury and damages. And, as noted above, even if Plaintiff prevails at trial, an appeal of the judgment is virtually certain, thus adding to the time and expense of continuing the litigation. Courts recognize that the delay occasioned by the trial, post-trial, and appellate processes would greatly reduce the value of a subsequent recovery. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004). The proposed Settlement, on the other hand, will provide the Settlement Class with a certain, *immediate* recovery of \$22,342 in cash, by direct payment, plus the additional \$50,000 in attorneys’ fees and other amounts Defendant has agreed to pay. Accordingly, this factor strongly supports the proposed Settlement.

2. The Favorable Reaction of the Class Strongly Supports Approval of the Settlement

It is well settled that ‘the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.’” *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (citation omitted). The lack of objections is strong evidence that the proposed settlement is fair, reasonable, and adequate. *E.g.*, *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (noting that “only” 29 objections out of 281 class members “strongly favors settlement”). Here, notices have been mailed to approximately 118 Settlement Class members, and, though the deadline for objections has passed, **there have been no objections to the Settlement and/or Plaintiffs’ request for attorneys’ fees and reimbursement of expenses.** Declaration of Joseph M. Fisher Reporting on Notice Program (“Fisher Decl.”), ¶¶ 11-12.¹² Moreover, upon receipt of the Notice, each Class member would have no doubt about the amount he or she would receive from the Settlement, because each Notice contained an individualized statement telling the Class member the amount of his or her distribution from the Settlement and how that amount was calculated.¹³ This tacit support from Settlement Class Members strongly indicates that they approve of the Settlement. As such, the Court should approve the Settlement as fair, reasonable, and adequate.

3. Plaintiffs Have Thoroughly Investigated their Claims and are Sufficiently Informed to Assess the Benefits of Settlement

This factor, which gauges counsel’s appreciation of the merits of the case based on the stage of the litigation, weighs in favor of the Settlement, even though this case is settling at a fairly early stage. As discussed above, Plaintiff and her counsel have conducted a thorough investigation

¹² The deadline for filing objections was May 27, 2022. *Id.*, ¶ 11.

¹³ The individual distribution amounts to Class members range from \$3.06 to \$2,337.54, and the average distribution amount is \$189.34. See Settlement Agreement, ¶ 5, Amended Exhibit A.

of the claims asserted in the Litigation. Plaintiff's investigation included, among other things: communications between Plaintiff and her counsel and factual research concerning the Defendant, its payroll practices, and the unlisted deductions at issue; legal research with respect to the claims asserted in the Complaint, and the potential defenses thereto; review and analysis of formal and informal discovery requested of and provided by Defendants; and a 30(b)(6) deposition of BAYADA. Through this process, Plaintiff's Counsel secured a strong understanding of the merits of the claims and the potential risks of continued litigation. In addition, because Defendants provided Plaintiff with the total figures for the unlisted deductions at issue and the number and identity of Class members, Plaintiff possessed more than sufficient information, at the time of settlement, as to the potential recoverable damages.

4. Plaintiff Faced Significant Risk in Establishing Injury and Damages

In assessing the fairness, reasonableness, and adequacy of the Settlement, the Court must balance the risks of establishing liability at trial, and in this case, defending any judgment on appeal. As set forth fully above, the risk of failing to establish injury and damages is high, making the immediacy and certainty of a substantial cash recovery for Class Members a preferable alternative in light of the risks of continued litigation. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003) (approving settlement as fair, reasonable, and adequate where "it is highly probable that the Class would attain little or no *recoverable* damages") (italics in original).

5. Plaintiff Faced Risks in Obtaining and Maintaining Class Certification Through Trial and Appeal

Plaintiff believes that this action is suited for class-wide treatment, and that Plaintiff would have successfully moved the Court for class certification. But even in a case like this, where class certification seems very likely, it is not a certainty. In addition, in certain situations, orders granting class certification may be subject to appellate review, under either G.L., c. 231 § 118 or

Mass. R. Civ. P. 64. *See, e.g., Weld v. Glaxo Wellcome, Inc.*, 434 Mass. 81 (2001); *Kwaak v. Pfizer, Inc.*, 71 Mass. App. Ct. 293 (2008). In light of such inherent risks, this factor weighs in favor of the Settlement.

6. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation Support Approval of the Settlement

These two factors, which “ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial,” strongly support approval of the Settlement. *In re Aetna Inc. Sec. Litig.*, 2001 WL 20928, at *11 (E.D. Pa. Jan. 4, 2001). “In making this assessment, the court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing with the amount of the proposed settlement.” *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *16 (E.D. Pa. Aug. 14, 2006) (citations and internal quotation marks omitted). Courts are guided by the fact that “settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court’s view of the merits of the litigation.” *Aetna*, 2001 WL 20928, at *11 (citing *In re Gen. Motors Corp.*).

Here, the settlement amount of \$22,342 is a great result for the Settlement Class in this situation. The Settlement Class Members will “receive immediate monetary relief...without undertaking the risks, costs, and delays of further litigation.” *Meijer*, 2006 WL 2382718, at *16. Furthermore, the Settlement Fund is equivalent to 50% of the total amount of unlisted deductions at issue in this case, according to Defendant’s records. This estimate of recovery, compared to total damages is by any measure, an excellent recovery.

The inherent risks of class action litigation further support settlement approval. In addition to the hurdles associated with establishing liability and class certification described above, even if Plaintiff could secure a judgment, post-judgment motions and appeals (as discussed above) pose additional hurdles that threaten to delay, if not preclude, recovery. Thus, in light of the recovery amount and the risks inherent in continued litigation, the Settlement represents an excellent result for the Settlement Class, and these factors strongly support approval of the Settlement.

7. Defendant's Ability to Withstand a Greater Judgment

This factor considers whether Defendant could withstand a judgment in an amount significantly greater than the proposed settlement, and even in cases where there is no doubt as to a defendant's ability to satisfy a judgment, this factor does not weigh heavily against settlement approval. *Warfarin*, 391 F.3d at 538 (“The fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the...class members are entitled to under the theories of liability that existed at the time the settlement was reached.”). Countless settlements have been approved where a settling defendant has had the ability pay greater amounts. *E.g., id.* at 537-38.

Moreover, other factors that courts often consider in connection with approval of class action settlements lend support to the proposition that the Settlement should be approved. As discussed above, the terms of the proposed Settlement are the product of arm's length negotiations, and Plaintiff has conducted sufficient discovery in order to fully understand the strengths and weaknesses of the claims and to be able to represent the fairness, adequacy and reasonableness of the Settlement. Indeed, the nature of the claims asserted in the Complaint and Plaintiff's understanding of the facts and circumstances underlying the claims were shaped, and in some ways

modified by the information obtained from discovery in this case. Accordingly, this settlement is clearly the product of serious, informed, non-collusive negotiations between the parties.

Furthermore, Plaintiff's counsel have significant experience in class action litigation and have negotiated many substantial class action settlements in state and federal courts in Massachusetts and elsewhere. Here, Plaintiff's counsel have conducted a thorough investigation and, as noted above, substantial discovery, and thus, comprehend "the relative merits of the[] factual and legal contentions," as well as the "considerable risks associated with further litigation...." *In re Rent-Way*, 305 F. Supp. 2d at 509. It is Plaintiff's counsel's informed opinion that, given the uncertainty and further substantial risk and expense of pursuing the Action through contested class certification proceedings, trial and appeal, the proposed Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class.¹⁴

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Having preliminarily certified the Class for Settlement Purposes, the Court should now grant final certification of the following Class for purposes of settlement:

All BAYADA employees who provided home care services on BAYADA's behalf in Massachusetts and who had deductions reflected on their paper earning statements that were not properly itemized on such paper earnings statements from January 1, 2018, through August 2, 2019.

The Settlement Class meets the requirements for class certification for the same reasons considered by the Court in granting preliminary certification. The Class meets the prerequisites of Mass. R. Civ. P. 23(a) – (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation – and it also meets the Rule 23(b) requirements that questions of law and fact predominate over any questions affecting class members individually, and that a class action is

¹⁴ "When the party's attorneys are experienced and knowledgeable about the facts and the claims, their representations to the court that the settlement provides class relief which is fair, reasonable, and adequate should be given significant weight." *Rolland*, 191 F.R.D. at 10.

superior to other methods of adjudicating the claims. *See Weld*, 434 Mass. at 86; *Carpenter v. Suffolk Franklin Sav. Bank*, 370 Mass. 314, 318 (1976).

Numerosity is not seriously in question. According to information provided by BAYADA, there are 118 Class members, resulting in a more than sufficient number for numerosity. Joinder of all class members is impractical, and, accordingly, the numerosity standard is met in this case.

The claims of the Class satisfy both the commonality requirement and the predominance requirement. Here, the interests of all Settlement Class Members are identical. They all relate to deductions taken from their gross weekly pay that were not listed or itemized on their paper earnings statements during the applicable time period. The information provided by Defendants through discovery confirms that all Class members were affected in the exact same manner by the practice alleged in the Complaint; the only difference among the Class members would be the **amount** of unlisted deductions for each person. However, it is well-settled that individual damages issues are not sufficient to defeat predominance and prevent class certification. *See DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 406 (D. Mass. 2017); in addition, the claims of all Class members arise out of the same legal issue: whether the failure to list or itemize these deductions on the earnings statements mailed to employees constituted a violation of the Massachusetts Wage Act, G.L., C. 149, § 148. Moreover, the factual questions are also common to the class, as Plaintiff's claims relate to the common conduct of Defendants. Thus, the claims asserted and factual questions presented in this litigation are sufficiently common such that common issues predominate, and class certification is warranted.

Here, the typicality requirement is satisfied, because the gravamen of the class-wide claims arises from the unlisted and un-itemized deductions, affecting all Class Members equally. As noted above, the Class claims are all based on the same underlying theories, *i.e.*, that the failure to

list and itemize these deductions on the mailed earnings statements was in violation of the Wage Act. In addition, Plaintiff, as a Class representative, has no interests that are adverse or antagonistic to the interests of the Settlement Class. Accordingly, the Court should find that the typicality requirement is met.

Plaintiff is also clearly an adequate representative of the Settlement Class, and Plaintiff's counsel have adequately represented the interests of the Class. Plaintiff's counsel are highly experienced in class action litigation. Plaintiff's counsel negotiated with Defendant at arm's length and achieved for Plaintiff and the Class a significant cash settlement, plus an additional amount for attorneys' fees.¹⁵ Accordingly, the representative parties have fairly and adequately protected the interests of the other Settlement Class Members. Thus, the adequacy requirement is satisfied. Plaintiff's role in discovering the issue at the heart of this action by examining her earnings statement is, without more, sufficient evidence of her commitment to vigorously prosecute this action.

Finally, a class action is superior to other available means of adjudicating this controversy because the potentially small financial interests of absent Settlement Class Members may not justify the financial burden of individually prosecuting claims on their own. Moreover, the expense of the litigation would make it impractical for many, if not most individual Settlement Class Members to prosecute claims on their own.

In addition, the Wage Act has its own class action provision. M.G.L. c. 149, § 150, provides, in pertinent part, that an "employee claiming to be aggrieved by a violation of section[] . . . 148 . . . may . . . institute and prosecute in his own name and on his own behalf, **or for himself and for others similarly situated**, a civil action for injunctive relief, for any damages incurred,

¹⁵ The amount of attorneys' fees to be paid by Defendants was not discussed or negotiated until after the class compensation was agreed upon by the parties.

and for any lost wages and other benefits” (emphasis added). This provision has been held to evidence an essential Massachusetts policy favoring class actions for employment claims. *See Waithaka v. Amazon.com, Inc.*, 966 F. 3d 10, 32 (1st Cir. 2020) (“the SJC would conclude that the right to pursue class relief in the employment context represents the fundamental public policy of the Commonwealth . . . the statutory right to pursue class relief reflects the Commonwealth’s desire to allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights”) (internal quotation marks and citations omitted).

V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that the Settlement Class be certified and that the proposed Settlement be approved by the Court.

Dated: June 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on June 6, 2022 I caused copies of the foregoing Plaintiff's Memorandum in Support of Motion for Approval of Class Action Settlement to be served via email upon counsel for Defendants as follows:

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