

AEGIS LAW FIRM, PC

Samuel A. Wong, State Bar No. 217104
Kashif Haque, State Bar No. 218672
Jessica L. Campbell, State Bar No. 280626
Alexander G.L. Davies, State Bar No. 328125
Jamie M. Loos, State Bar No. 346492
9811 Irvine Center Drive, Suite 100
Irvine, California 92618
Telephone: (949) 379-6250
Facsimile: (949) 379-6251
Email: jloos@aegislawfirm.com

Attorneys for Plaintiffs Sara Simas and Adonte
Donastorg, individually, and on behalf of all others
similarly situated.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

SARA SIMAS AND ADONTE
DONASTORG, individually and on behalf
of all others similarly situated,
Plaintiffs,

vs.

ASPEN DENTAL MANAGEMENT, INC.;
APEO, LLC; and DOES 1 through 20,
inclusive,

Defendants.

Case No. 34-2021-00307317-CU-OE-GDS

*Assigned for All Purposes to:
Hon. Lauri A. Damrell, Department 28*

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
PAGA ACTION SETTLEMENT**

Date: December 15, 2023
Time: 9:00 a.m.
Dept: 28
Reservation ID: A-307317-001

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiffs Sara Simas and Adonte
3 Donastorg (“Plaintiffs”) request that the Court grant preliminary approval of a class and representative
4 action settlement of wage and hour claims, including claims under the California Private Attorneys
5 General Act of 2004, codified at Lab. Code § 2698, *et seq.* (“PAGA”), against Defendant Aspen Dental
6 Management, Inc, and Defendant APEO, LLC (“Defendants”) (collectively, Plaintiffs and Defendants
7 are hereafter referred to as, the “Parties”). The putative class consists of approximately 182 employees
8 of Defendants who were classified as non-exempt and worked within the State of California during the
9 period of March 8, 2017 through December 31, 2022 (“Class Period”) (individually, “Class Member”;
10 collectively, the “Class”). The basic terms of the Class Action Settlement Agreement and Release of
11 Claims (“Settlement Agreement” or “Settlement”)¹ provides for the following:

- 12 (1) A non-reversionary Gross Settlement Amount of \$500,000.00 allocated, in part, to
13 approximately 182 Class Members on a pro rata basis according to the number of
14 weeks each Class Member worked during the Class Period;
- 15 (2) An award of up to one third of the Gross Settlement Amount (currently
16 \$166,666.67.00) and up to \$18,000.00 in reimbursement of costs to Plaintiffs’
17 Counsel for services rendered as counsel on this matter;
- 18 (3) Class Representative Service Awards of up to \$10,000.00 to each Plaintiff;
- 19 (4) Settlement Administration fees and costs of up to \$7,750.00; and
- 20 (5) Allocation of \$50,000.00 for settlement of claims for civil penalties under PAGA.
21 Seventy-five percent (75%) of this payment will be paid to the California Labor
22 and Workforce Development Agency (“LWDA Payment”), and twenty-five
23 percent (25%) will be paid to the Net Settlement Amount for distribution to
24 Aggrieved Employees.

25 _____

26 ¹ A true and correct copy of the fully-executed “Class Action Settlement Agreement and Release of
27 Claims” is attached as **Exhibit 1** to the Declaration of Alexander G.L. Davies in Support of Plaintiffs’
28 Motion for Preliminary Approval of Class and Representative PAGA Action Settlement (“Davies
Decl.”), filed concurrently herewith. Unless otherwise defined herein, all capitalized terms in this Motion
will be used as such terms are defined and used in the Settlement.

1 The Settlement satisfies the criteria for preliminary approval and falls well within the range of
2 reasonableness given the risks and costs of continued litigation. Davies Decl., ¶¶ 13-23. The Settlement
3 was reached through informed, arms-length bargaining at and after mediation between experienced
4 attorneys. *Id.* at ¶ 6. As such, Plaintiffs request that the Court grant preliminary approval of the
5 Settlement, conditionally certify the Class for settlement purposes only, appoint Plaintiff Sara Simas
6 and Plaintiff Adonte Donastorg as the Class Representatives, appoint Plaintiffs' Counsel as Class
7 Counsel, appoint ILYM Group, Inc. as the Settlement Administrator, authorize the Settlement
8 Administrator to send notice of the Settlement, and set a final approval hearing date.

9 **II. SUMMARY OF THE LITIGATION**

10 On September 2, 2021, Plaintiff Sara Simas filed this class action on behalf of Defendants' non-
11 exempt employees and alleged the following claims: (1) failure to pay minimum wages; (2) failure to pay
12 overtime wages; (3) failure to provide meal periods; (4) failure to permit rest breaks; (5) failure to
13 reimburse business expenses; (6) failure to provide accurate wage statements; (7) failure to pay all wages
14 due upon separation of employment; and (8) violation of Business and Professions Code § 17200, *et seq.*,
15 based on the preceding claims. Davies Decl., ¶ 3.

16 On September 2, 2021, before adding a PAGA claim, Plaintiff Sara Simas provided written notice
17 to the LWDA and Defendants regarding Defendants' alleged Labor Code violations, as required by Lab.
18 Code § 2699.3(a). Davies Decl., ¶¶ 4, 43, Ex. 3. The LWDA did not respond to this notice, indicating it
19 did not intend to investigate, thus allowing Plaintiff Sara Simas to bring a PAGA claim against
20 Defendants. *Id.* at ¶ 4. As such, on November 9, 2021, Plaintiff Sara Simas filed a separate Complaint for
21 violation of PAGA in Case No. 34-2021-00311098 in the Sacramento Superior Court. *Id.* On June 13,
22 2022, Plaintiff Sara Simas notified the LWDA of her intent to amend her PAGA Complaint to add Plaintiff
23 Adonte Donastorg. *Id.*

24 After some initial meet and confer discussions, the Parties agreed to attend a private mediation
25 session and engage in an informal exchange of information and documents. *Id.* at ¶ 5. In preparation for
26 mediation, Plaintiffs requested various documents and data regarding Plaintiffs, the Class, and Aggrieved
27 Employees. *Id.* In response, Defendants produced a significant amount of documents and information,
28 including Plaintiffs' personnel records, Plaintiffs' time and pay records, the employee handbooks in effect

1 during the Class Period, other relevant policy documents, Plaintiffs' time and pay records, and Class
2 Members' timekeeping and pay records. *Id.*

3 On October 24, 2022, the Parties attended a mediation session with Tripper Ortman, a respected
4 mediator, and were able to reach a settlement regarding Plaintiffs' class and representative PAGA claims.
5 *Id.* at ¶ 6. The settlement was memorialized in a Memorandum of Understanding and the Parties spent the
6 next several months negotiating the terms of the a longer, more detailed settlement agreement, which was
7 finalized in September of 2023. *Id.* The negotiations were adversarial, conducted at arm's length and
8 tempered by the efforts of both sides to serve the interests of their clients. *Id.*

9 On August 23, 2023, Plaintiff Sara Simas filed a First Amended Complaint in the present putative
10 class action matter to include her PAGA claim and to add Adonte Donastorg as an additional named
11 Plaintiff. *Id.* at ¶ 7. Thereafter, Plaintiffs dismissed the PAGA only action to consolidate the separately
12 filed actions pursuant to the terms of the Parties' Settlement. *Id.* On November 17, 2023, Plaintiffs
13 submitted the Settlement to the LWDA pursuant to Lab. Code § 2699(1)(2). *Id.* at ¶¶ 8, 42, Ex. 2
14 (Confirmation of Submission of Settlement to LWDA).

15 **III. SUMMARY OF THE SETTLEMENT**

16 **A. Terms of Settlement**

17 The Parties agreed to settle the class and representative PAGA claims in exchange for a Gross
18 Settlement Amount of \$500,000.00. Settlement Agreement, § III, ¶ A. The Gross Settlement Amount
19 will be used to make payments for the following: (1) settlement administration costs not to exceed
20 \$7,750.00; (2) Settlement Shares to Class Members; (3) Class Representative Service Awards to each
21 Plaintiff of up to \$10,000.00 each; (4) attorneys' fees to Class Counsel of up to one-third of the Gross
22 Settlement Amount; (5) reimbursement of Class Counsel's litigation costs of up to \$18,000.00; (6) a
23 payment to the LWDA of \$37,500.00; and (7) a payment to Aggrieved Employees of \$12,500.00. *Id.* at
24 § III, ¶ (B)(1-4). Class Members' Settlement Shares will be distributed after final approval of the
25 Settlement and after Defendants fund the Gross Settlement Amount pursuant to the terms of the
26 Settlement Agreement. *Id.* at § III, ¶ (E)(9). Class Members' Settlement Shares will be calculated by
27 comparing the total Workweeks for the Class to each individual Class Member's Workweeks. *Id.* at §
28 III, ¶ (C)(2)(a). With approximately 182 Class Members, the Net Settlement Amount allocates an

1 average of \$1,300.00 per Class Member. The Settlement Administrator will calculate the actual
2 estimated recovery to include in the Class Notice and provide the estimated low and high range of
3 possible recovery at final approval. Settlement Agreement, **Ex. A** (Notice of Class Action Settlement).

4 The Parties have agreed to allocate \$50,000.00 of the Gross Settlement Amount to the resolution
5 of Aggrieved Employees' claims arising under PAGA. Settlement Agreement, § III, ¶ (B)(3). Of this
6 amount, 75% will go to the LWDA and the remaining 25% will be distributed to the Aggrieved
7 Employees which is defined as all employees of Defendants who were classified as non-exempt and
8 worked within the State of California during the period of September 2, 2020 through December 31,
9 2022 (the "PAGA Period"), regardless of whether he or she opts out of the class settlement. Settlement
10 Agreement, § III, ¶¶ B. The PAGA Share will be divided between all Aggrieved Employees in
11 proportion to the number of pay periods that each Aggrieved Employee worked during the PAGA
12 Period. *Id.* at § III, ¶¶ (B)(3).

13 The Settlement Shares to Class Members will be allocated for tax purposes as follows: 33% to
14 wages; 67% to penalties and interest. Settlement Agreement, § III, ¶¶ (C)(3)(a-b). The PAGA Shares to
15 be distributed to Aggrieved Employees are to be considered 100% penalties. *Id.* at § III, ¶¶ (B)(3). The
16 employer-side payroll taxes on the portion allocated to wages will be paid separate from and in addition
17 to the Gross Settlement Amount. *Id.* at § III, ¶ A. No portion of the Gross Settlement Amount will revert
18 to Defendant. *Id.* Within 21 calendar days after the Parties receive notice that the Court has entered an
19 Order Granting Preliminary Approval of the Settlement, Defendants shall provide to the Settlement
20 Administrator the Class Members' names, last known addresses, social security numbers, dates of
21 employment, and workweek data during the Class Period. *Id.* at § III, ¶¶ (E)(2)(a). Funds from uncashed
22 or undeliverable checks will be tendered by the Settlement Administrator to a proposed cy pres recipient,
23 Central American Resource Center – CARECEN – of California, a 501(c)(3) organization dedicated to
24 providing legal services to children and the indigent, thereby leaving no "unpaid residue" within the
25 meaning of California Code of Civil Procedure Section 384. *Id.* at § III, ¶¶ (E)(10).

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B. Proposed Opt-Out and Objection Process

The Settlement Administrator will send Class Members the Notice of Proposed Settlement of Class Action, and Hearing Date for Final Court Approval of Settlement (“Class Notice”) by first-class mail after receipt of a list from Defendants containing Class Members’ names, last-known addresses, social security numbers, dates of employment, and workweek data during the Class Period. *Id.* at § III, ¶¶ (E)(2)(a). The Class Notice provides information regarding the nature of the lawsuit, a summary of the substance of the settlement terms, the formula for calculating the Settlement Shares to Class Members, the individual’s estimated payout, a statement that Class Members who take no action will release their claims and receive settlement checks, instructions regarding how to dispute the calculations, instructions regarding how to request exclusion or object to the Settlement, the date for the final approval hearing, the amounts sought for attorneys’ fees and costs, the Settlement Administration Costs, the Class Representatives’ Service Awards, the PAGA allocation, and information on how to access the court’s website to view the case records. *See* Settlement Agreement, **Ex. A** (Class Notice).

The Class Notice provides instructions for Class Members who choose to exclude themselves from the Settlement. *Id.* To opt out, Class Members are instructed to timely submit a Request for Exclusion to the Settlement Administrator by a specified date (60 days after the date of mailing of the Class Notice). Settlement Agreement § III, ¶¶ (E)(3)(c). Class Members do not need to submit a claim form to participate in the Settlement. *See* Settlement Agreement, **Ex. A** (Class Notice), p. 1. Class Members are informed of how they can object to the Settlement, and the Class Notice informs Class Members of the date, time, and location of the final fairness and approval hearing so that they can appear in person. *Id.* at p. 8. Accordingly, the content of the Class Notice complies with the requirements of Cal. R. Ct. 3.766(d).

If Class Notice packets are returned as undeliverable, the Settlement Administrator will perform a skip-trace or other search, and re-mail the Class Notice with an extended deadline, to opt out or object, of 14 days from the date of remailing or the original deadline, whichever is later. Settlement Agreement, § III, ¶¶ (E)(2)(c). The initial 60-day notice period and extension process ensures the notice program provides due process by giving Class Members enough time to determine whether they want to participate

1 in the Settlement. This means of notice is reasonably calculated to apprise Class Members of the pendency
2 of the action. *See* Cal. R. Ct. 3.766 (d)-(f).

3 **C. Proposed Release**

4 The release to be given by Class Members is limited to (1) the Defendants; (2) any predecessors
5 and successors in interest, companies acquiring any or all of Defendants' assets or capital stock, current
6 or former officers, directors, shareholders, agents, representatives, and employees of Defendants, any
7 client companies of Defendants for which the Class Members serviced while employed by Defendants,
8 any current or former parent corporations, subsidiary corporations, affiliates, and assigns; (3) current or
9 former officers, directors, shareholders, agents, representatives, and employees of Defendants; (4) insurers
10 of any of the foregoing persons or entities; and (5) any entity or individual owning one or more Aspen
11 Dental branded dental practices in California, including but not limited to Judge Dental PC, Pathak-Paudel
12 Dental PC, and SAAB Dental PC ("Released Parties"). Settlement Agreement, § I, ¶¶ (BB). Under the
13 proposed release, Class Members who do not exclude themselves from the Settlement will be deemed
14 to have released or waived the following "Released Class Claims" against the Released Parties during
15 the period of March 8, 2017 through December 31, 2022:

16 "[A]ny and all claims that were alleged in the Complaint or could have been asserted based
17 on the factual allegations asserted in the Action. Specifically, without limitation,
18 Participating Class Members will release claims under Cal. Lab. Code §§ 201, 202, 203, 204,
19 226, 226.7, 510, 512, 558, 1182.12, 1194, 1194.2, 1197, 1198, 2802 and the IWC Wage
20 Orders, and the federal Fair Labor Standards Act ("Released Class Claims"), as well as
21 claims by or on behalf of the State of California or any of its divisions, including the LWDA,
22 under the Private Attorney General Act, Cal. Lab. Code § 2698, et seq. and for unlawful
and/or unfair business practices under Cal. Bus. & Prof. Code § 17200 et seq., to the extent
such claims are predicated on the Released Class Claims; and any claim for attorneys' fees
and costs related to the above-referenced Released Class Claims."

23 *Id.* at § III, ¶¶ (F)(1).

24 Only Plaintiffs will agree to a general release of any and all claims, whether known or unknown,
25 which exist or may exist on Plaintiffs' behalf as of the date of the Settlement, and a waiver of Civ. Code
26 § 1542. *Id.* at § III, ¶¶ (F)(3).

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IV. LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL

A. **Provisional Certification of the Class is Appropriate**

Class certification is appropriate when there exists (1) an ascertainable and sufficiently numerous class, (2) a well-defined community of interest among class members, and (3) when certification would be a fair and efficient means of adjudicating the action, rendering class litigation superior to alternative means. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

1. **The Proposed Class is Numerous and Ascertainable**

Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class consists of all employees of Defendants who were classified as non-exempt and worked within the State of California during the period of March 8, 2017 through December 31, 2022. Settlement Agreement, § I, ¶¶ (C). Defendants’ records show the Class consists of approximately 182 individuals, making joinder of all Class Members impracticable. *Davies Decl.*, ¶ 9. Further, the Class is readily ascertainable from Defendants’ business records because all Class Members are current or former employees of Defendants. *Id.*

2. **A Well-Defined Community of Interest Exists Among Class Members**

“[T]he ‘community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’” *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)).

a. Common Questions Predominate

To assess whether common questions predominate, courts focus on whether the theories of recovery advanced are likely to prove amenable to class treatment. *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 327 (2004). In other words, courts determine whether the elements necessary to establish liability are susceptible of common proof, even if the class members must individually prove their damages. *Brinker, supra*, 53 Cal. 4th at 1021-1022, 1024.

Plaintiffs allege that Defendants maintained uniform employment policies and/or practices that illegally deprived Class Members of lawful wages, meal periods, rest breaks, accurate wage statements,

1 and waiting time pay. Davies Decl., ¶ 10. Plaintiffs' allegations present common legal and factual
2 questions of, *inter alia*, whether Defendants applied the same scheduling, timekeeping, reimbursement,
3 meal period, and rest break policies to all Class Members; whether these policies and practices resulted in
4 Labor Code violations; whether Defendants' conduct was intentional; and whether Class Members are
5 entitled to penalties. *Id.*

6 These common questions could be resolved using Class Members' schedules, time punches, and
7 payroll records, Defendants' representative's testimony, and Class Member declarations. *Id.* Thus, the
8 Court can and should exercise its discretion to grant conditional class certification for settlement purposes.

9 *b. Plaintiffs' Claims are Typical of the Class Claims*

10 The typicality requirement is satisfied when the legal theories and facts supporting Plaintiffs'
11 claims are substantially similar to other class members. *See Classen v. Weller*, 145 Cal. App. 3d 27, 46
12 (1983). Here, Plaintiffs allege that they and other Class Members were employed by Defendants and
13 injured by Defendants' common wage and hour policies and practices, including Defendants'
14 scheduling, timekeeping, reimbursement, meal period, and rest break policies. Davies Decl., ¶ 11.
15 Through documents and information exchanged in informal discovery, including production of
16 hundreds of pages of documents produced by Defendants, Plaintiffs confirmed that these common
17 policies and practices similarly affected Plaintiffs and the Class. *Id.* Thus, Plaintiffs' claims arise from
18 the same employment practices and are based on the same legal theories as those applicable to other
19 Class Members, as further explained in Plaintiffs' exposure analysis below.

20 *c. Plaintiffs and Plaintiffs' Counsel Will Adequately Represent the Interests*
21 *of the Proposed Class*

22 Certification requires adequacy of both the proposed class representative(s) and proposed class
23 counsel. With respect to the class representative(s), a plaintiff must adequately represent and protect the
24 interests of other members of the class and demonstrate that his or her claim is not inconsistent with the
25 claims of other members of the class. *See Capitol People First v. State Dep't of Developmental Servs.*,
26 155 Cal. App. 4th 676, 696-697 (2007). Here, Plaintiffs' interests are coextensive with the interests of
27 the Class. Plaintiffs demonstrated an ability to advocate for the interests of the Class by initiating and
28 pursuing this litigation, gathering documents and information, being available on the day of mediation

1 to answer questions, meeting with their attorneys on several occasions to understand the claims and
2 theories of liability at issue, assisting their attorneys in preparing for mediation, reviewing the proposed
3 settlement agreement to understand its legal effect, and obtaining a fair settlement on behalf of Class
4 Members who stand to recover a substantial amount under the Settlement. Davies Decl. at ¶ 24.

5 Likewise, Aegis Law Firm, PC has expended considerable time and effort on this case and will
6 continue to do so through final approval. *See generally*, Davies Decl. Accordingly, Plaintiffs should be
7 appointed Class Representatives, and the attorneys of Aegis Law Firm, PC should be appointed Class
8 Counsel.

9 **3. A Class Action is Superior to a Multitude of Individual Lawsuits**

10 Class treatment is superior to other methods of adjudication when the probability is small that
11 each class member will come forward to prove his or her claim and when the class approach would deter
12 and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000);
13 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other
14 182 Class Members had shown any interest in bearing the expense and burden of litigating their own
15 claims. Davies Decl., ¶ 24. Thus, a class action is the superior method for seeking relief.

16 **B. The Settlement Meets the Standards for Preliminary Approval**

17 Preliminary approval is warranted if the settlement falls within a “reasonable range.” *See North*
18 *County Contractor’s Ass’n., Inc. v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1089-90 (1994);
19 *Conte & Newberg, Newberg on Class Actions*, § 11.26 (4th ed. 2002). In reviewing the fairness of a
20 class action settlement, due regard should be given to what is “otherwise a private consensual
21 agreement between the parties.” *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389
22 (2010). The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the
23 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,
24 and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*

25 Reasonableness and fairness are presumed where (1) the settlement is reached through “arms-
26 length bargaining”; (2) investigation and discovery are “sufficient to allow counsel and the court to act
27 intelligently”; (3) counsel is “experienced in similar litigation”; and (4) the percentage of objectors “is
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1 small.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996). The Settlement satisfies the first
2 three factors. Plaintiffs will analyze the fourth factor at the final approval stage.

3 **1. The Settlement is Entitled to a Presumption of Fairness**

4 *a. The Settlement is the Result of Arm’s-Length Negotiations*

5 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
6 evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are
7 conducted in good faith. Here, the Settlement was the product of a full day mediation session with a
8 respected mediator after informal discovery. Davies Decl., ¶¶ 5-6. The negotiations were adversarial,
9 conducted at arm’s length and tempered by the efforts of both sides to serve the interests of their clients.
10 *Id.* at ¶ 6. The amount of Plaintiffs’ requested Class Representative Service Awards were not negotiated
11 until after the Parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 25.

12 *b. Plaintiffs’ Counsel Conducted Sufficient Investigation and Discovery*

13 Plaintiffs’ Counsel thoroughly investigated the class claims, applicable law, and potential
14 defenses. *See generally*, Davies Decl. In particular, Plaintiffs’ Counsel assessed the value of the class
15 claims using Defendants’ data and documents produced through informal discovery. Davies Decl., ¶¶
16 5-23. Plaintiffs’ counsel extensively reviewed policy documents, Class Members’ time and pay records,
17 and engaged an expert to quantify the potential exposure to perform a thorough analysis and assess the
18 risks associated with each of the claims. *Id.* Accordingly, Plaintiffs’ Counsel fully understood the
19 strengths and weaknesses of the claims before the Parties reached a settlement. *Id.*

20 *c. Plaintiffs’ Counsel is Experienced in Similar Litigation*

21 Plaintiffs are represented by Aegis Law Firm (“Class Counsel”). Class Counsel prosecute wage
22 and hour class actions on behalf of employees and others who have had their rights violated. Davies
23 Decl., ¶ 27. The attorneys working on this case have been appointed class counsel in many cases,
24 through both contested motions and settlement approval motions. *Id.* at ¶ 28. Thus, Plaintiffs’ Counsel
25 has extensive experience in similar litigation and should be appointed as Class Counsel.

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1 **2. The Settlement is Reasonable Given the Strengths of Plaintiffs’ Claims and**
2 **the Risks and Expense of Litigation**

3 Courts have discretion to approve class settlements by assessing several factors, including the
4 “strength of plaintiffs’ case, risk, expense, complexity and likely duration of further litigation and risk
5 of maintaining the class action through trial.” *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.
6 App. 4th 399, 407 (2010); *see Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008).

7 While Plaintiffs and their counsel believed and continue to believe this is a strong case for
8 certification, the significant risks and expenses associated with class certification and liability
9 proceedings were taken into account. Davies Decl. ¶ 13. To determine if the amount offered at mediation
10 was reasonable, Plaintiffs’ Counsel weighed that figure against many risk factors. *Id.* at ¶ 14. If Plaintiffs
11 continued to prosecute the claims rather than accept a settlement, Plaintiffs would have faced deadlines
12 to file a motion for class certification, had to have engaged in formal written discovery and taken
13 depositions, expended time and resources to resolve disputes, prepared and filed potential dispositive
14 motions and/or discovery motions, and engaged in extensive trial preparation. *Id.* at ¶ 15. An adverse
15 ruling at any one of these stages could have prevented the Class from obtaining any recovery. *Id.*

16 a. Exposure Analysis

17 A settlement does not have to provide 100% of the damages sought to be considered a fair and
18 reasonable settlement. *See Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1991). Rather,
19 compromise is expected:

20 Compromise is inherent and necessary in the settlement process . . . even if “the relief afforded
21 by the proposed settlement is substantially narrower than it would be if the suits were to be
22 successfully litigated,” this is no bar to a class settlement because “the public interest may indeed
be served by a voluntary settlement in which each side gives ground in the interest of avoiding
litigation.”

23 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiffs
24 contend that their claims are based on Defendants’ common, class-wide policies and procedures, and
25 that liability could be determined on a class-wide basis without dependence on individual assessments
26 of liability. Davies Decl., ¶ 12. Although the amount of Defendants’ potential exposure – if proven – is
27 substantial, the legitimate and serious risks of succeeding at class certification and trial compelled a
28 serious consideration of the benefit of a settlement. *Id.* at ¶¶ 13-23.

1 Regular Rate Claim: Plaintiffs’ regular rate claim is based on Defendants’ failure to incorporate
2 non-discretionary bonuses into the regular rate of pay when calculating sick pay, overtime, and
3 premiums during the beginning of the Class Period, despite the clear requirement to do so under Labor
4 Code 246. Davies Decl. ¶ 16. In fact, California has adopted the FLSA standard for calculating the
5 “regular rate” in this content. *See Alonzo v. Mav. Macimus, Inc.* 832 F. Supp. 2d 1122, 1129 (C.D. Cal.
6 2011). Furthermore, Labor Code § 246(L)(1) provides that, “Paid sick time for nonexempt employees
7 shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee
8 uses paid sick time, whether or not the employee actually works overtime in that workweek.” *See* Labor
9 Code § 246(L)(1). Defendants issued certain bonuses and incentive pay such as referral bonuses, sign
10 on bonuses, and onboarding bonuses, but did not begin including such payments in the regular rate of
11 pay when calculating sick pay, overtime, and premiums until sometime in or around December of 2021.
12 Davies Decl. ¶ 16. Plaintiffs’ expert estimated this claim to be worth approximately \$25,707.00. As sign
13 on bonuses are non-discretionary in nature, Plaintiffs estimated a 95% chance of success at both class
14 certification and trial. *Id.*

15 Pre- and Post-Shift Duties: Plaintiffs alleged that Defendants failed to pay Class Members for
16 both required pre- and post-shift duties such as preparing and organizing equipment, attending unpaid
17 semi-monthly pre-shift meetings, and completing necessary paperwork after clocking out for the day
18 but before being permitted to leave the work premises, thereby resulting in unpaid wages due to time
19 spent off-the-clock. *Id.* at ¶ 17. During the liability period, Plaintiffs alleged that Plaintiff Simas and
20 other Class Members in similar positions were also routinely required to conduct calls and respond to
21 work-related inquiries on their off-days or when otherwise clocked out for the day. *Id.* Plaintiffs’ expert
22 calculated the total value of this claim to be approximately \$115,732.00 based on the assumption of
23 thirty minutes of off-the-clock work per pay period. *Id.* However, Defendants argued that it maintained
24 policies of paying for all recorded work and that Defendants were unaware if Class Members were
25 completing tasks prior to clocking in or after clocking out, and/or on their days-off, as they were never
26 instructed to do so. *Id.* Defendants also argued that only a select group of Class Members in advisory
27 positions would ever conceivably have been required to conduct post-shift paperwork and phone calls,
28 and that these claims at most impacted only a handful of employees during the liability period, and was

1 thus not a claim suitable for class-wide treatment. *Id.* Similar to Plaintiffs’ rest break claim as described
2 below, Plaintiffs would likely have needed to obtain Class Members’ declarations and taken depositions
3 to help prove this claim. *Id.* Surely, Defendants would have also obtained competing declarations and
4 taken Class Members’ depositions. As such, this claim could become highly individualized and difficult
5 to certify. *Id.* Therefore, Plaintiffs estimated an approximate 25% chance of success at class certification
6 and an approximate 15% likelihood of prevailing at trial, thereby discounting the claim to approximately
7 \$4,340.00. *Id.*

8 Meal Period Claims: Plaintiffs’ theory of liability for meal period violations was based on
9 Defendants’ facially insufficient meal period policy, which failed to specify the timing for first or second
10 meal periods, as well as Defendants’ common practice of failing to provide timely, uninterrupted meal
11 periods that were at least thirty minutes in length and subsequent failure to pay premiums when the
12 records showed violations. *Id.* at ¶ 18. According to Plaintiffs’ expert, damages could reach \$590,927.00
13 for meal period violations. *Id.* However, Defendants could argue that Class Members had discretion of
14 when to take their meal periods, and that the Class Members could, and often did, choose to waive meal
15 periods voluntarily. *Id.* As such, Plaintiffs estimated a 60% chance of success at class certification and
16 a 50% chance of success at trial, thereby discounting the claim to approximately \$177,278.00. *Id.*

17 Rest Break Claims: Plaintiffs’ rest break claim was based on the allegations that the Defendant
18 maintained facially illegal rest break policies throughout the liability period, which failed to authorize
19 rest breaks for employees who worked in “major fractions” of four hours, and that in practice Class
20 Members were routinely denied compliant rest breaks due to their busy schedules. *Id.* at ¶ 19. If
21 Plaintiffs could prove a 100% violation rate, then damages could reach \$1,514,263.00. *Id.* However,
22 Defendants could argue that a 100% violation rate is unrealistic especially given that in practice, it did
23 provide Class Members with compliant rest breaks, but Class Members had discretion as to the timing
24 and length of such breaks, and could waive their rest breaks if they chose to do so. *Id.* Certification
25 would likely have required depositions and declarations of Class Members, and Defendants surely
26 would have obtained opposing declarations stating either rest breaks were taken or rest breaks were
27 voluntarily waived. *Id.*; *See, e.g., Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, at *11 (C.D. Cal.
28 Jan. 17, 2013) (“Because of the competing testimony before the Court, plaintiff’s evidence that

1 defendant may have an illegal, written rest break policy is insufficient for this Court to find that common
2 issues predominate.”); *Villa v. United Site Servs. of California, Inc.*, 2012 WL 5503550, at *8 (N.D.
3 Cal. Nov. 13, 2012) (“Indeed, Plaintiff’s own evidence confirms that the written policy does not generate
4 uniform practices.”). As a result, Plaintiffs discounted this claim significantly to \$90,855.00, assuming
5 a 30% chance of prevailing at class certification and a 20% chance of success at trial. *Id.*

6 Reimbursement Claims: Plaintiffs’ claim for reimbursements arises, in part, from Defendants’
7 alleged failure to reimburse Plaintiffs and Class Members for the required use of their personal cell
8 phones for business related purposes such as scheduling appointments, answering phone calls, and
9 responding to business-related inquiries and assignments. *Id.* at ¶ 20. Assuming \$25.00 per month for
10 cell phone usage, Plaintiffs’ expert calculated this claim to be worth approximately \$453,199. *Id.*
11 However, Defendants could argue that Class Members were not required to use their personal cell
12 phones and that any such use was voluntary and out of convenience for the employees, rather than
13 required by Defendants. *Id.* Further, even if Class Members did have to resort to their cell phones, there
14 is no source of common proof as to who incurred expenses and whether they sought reimbursement,
15 making the claim difficult to prove at trial. *Id.* Accordingly, Plaintiffs discounted this claim based on an
16 estimated 30% chance of success at class certification and an estimated 20% chance of success at trial,
17 resulting in a new estimated recovery of approximately \$27,192.00. *Id.*

18 Facial and Derivative Wage Statement Claim: Plaintiffs’ facial wage statement claim was based
19 on Defendants’ failure to list the total hours worked during the applicable pay period and failed to
20 include the inclusive dates of the applicable pay period. *Id.* at ¶ 21. Plaintiffs also argued the presence
21 of derivative wage statement violations based on the claims described above. *Id.* Plaintiffs’ expert
22 estimated Plaintiffs’ wage statement claim to be worth as much as \$272,900. *Id.* However, Defendants
23 could argue that the total number of hours are not required if determinable by simple math, or that
24 Plaintiffs could not show that Class Members suffered an “injury” as a result of wage statement
25 violations, as required by Lab. Code § 226. *Id.* As a result, Plaintiffs estimated an approximate 45%
26 chance of success at class certification and an approximate 35% chance of prevailing at trial, thereby
27 discounting this claim to approximately \$42,981.00. *Id.*

1 Derivative Waiting Time Penalties: Plaintiffs’ Counsel also considered the arguable presence of
2 waiting time penalties based on the above violations, and weighed the potential recoveries against
3 probable defenses. *Id.* at ¶ 22. Specifically, Defendants could argue that Plaintiffs could not prove the
4 “willful” prong needed to obtain waiting time penalties under Lab. Code § 203. *Id.* Further, Plaintiff did
5 not discover any evidence of direct waiting time violations, so any waiting time penalties would be
6 derivative of, and rise or fall, with Plaintiffs’ other claims. *Id.* Although the Class arguably could have
7 seen a payout of approximately \$656,351.00 for waiting time penalties, Plaintiffs would not recover any
8 of this derivative penalty if they failed to prove the underlying claims. *Id.* Thus, Plaintiffs estimated a
9 30% chance of prevailing at class certification and a 20% chance of prevailing at trial, thereby
10 discounting these claims to approximately \$39,381.00. *Id.*

11 PAGA Claim: The PAGA claim presented even higher hurdles. *Id.* at ¶ 23. Although Plaintiffs’
12 Counsel found Defendants’ exposure could potentially reach approximately \$281,500.00 under Lab.
13 Code § 2699(f), assuming the initial penalty rate of \$100 for each pay period, Plaintiffs would have to
14 prove a violation in every pay period. *Id.* Most importantly, the Court would have discretion to reduce
15 the PAGA award based on whether the amount of the award would be “unjust, arbitrary and oppressive,
16 or confiscatory.” Lab. Code § 2699(e)(2). In theory, the Court could reduce the award by 99% if it so
17 wished. Davies Decl. at ¶ 23. Plaintiffs were doubtful they could recover any PAGA penalties, especially
18 if a large class judgment was entered for the same violations. *Id.* Accordingly, Plaintiffs could not place
19 a high value on the PAGA penalties, and therefore allocated \$50,000.00 of the Gross Settlement Amount
20 to settle these claims. *Id.*

21 **C. The Requested Class Representative Service Awards for Plaintiffs**

22 Plaintiffs seek Class Representative Service Awards of up to \$10,000.00 each to Plaintiff Sara
23 Simas and Plaintiff Adonte Donastorg for accepting the responsibilities of representing the interests of
24 the Class and assuming risks and potential costs that were not borne by any other Class Members.
25 Settlement Agreement, § III, ¶¶ (B)(1). A named plaintiff is eligible for payment that reasonably
26 compensates him or her for undertaking and fulfilling a fiduciary duty to represent absent class
27 members. *See Cellphone Termination Fee Cases, supra*, 186 Cal. App. 4th at 1393; *Bell v. Farmers Ins.*
28 *Exch.*, 115 Cal. App. 4th 715, 726 (2004).

1 Here, Plaintiffs had the option to pursue their claims individually, but instead chose to pursue this
2 class action, delaying individual recovery until approval of a class action settlement. Davies Decl., ¶ 24.
3 Throughout the case, Plaintiffs met with their attorneys on several occasions to understand the claims
4 and theories of liability at issue, assisted counsel in gathering the evidence necessary to prosecute the
5 class claims, maintained regular contact with counsel, were available on the day of mediation to answer
6 critical questions, and reviewed the Settlement to make sure it was fair to the Class. *Id.* No action would
7 likely have been taken by Class Members individually, and no compensation would have been recovered
8 for them, but for Plaintiffs' services on behalf of the Class. *Id.*

9 By actively pursuing this action, Plaintiffs furthered the California public policy goal of enforcing
10 the State's wage and hour laws. *See Sav-On Drug Stores, Inc., supra*, 34 Cal. 4th at 340. The requested
11 Class Representative Service Awards for Plaintiffs' services as the class representatives and for a
12 general release of all employment claims are reasonable and should be preliminarily approved. At the
13 final approval stage, Plaintiffs will further support the requests for their Class Representative Service
14 Awards by declaration addressing the factors for the award. Davies Decl., ¶ 26.

15 **D. The Requested Attorneys' Fees and Costs**

16 The purpose of an attorneys' fee award in class action litigation is to reward counsel who invested
17 in a case despite the risk of non-payment and achieved a substantial positive result for the class.
18 Attorneys' fees are awarded as a matter of equity. California courts routinely award attorneys' fees
19 equaling one-third or more of the potential value of the common fund. *See Chavez v. Netflix, Inc.*, 162
20 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless of whether the percentage
21 method or the lodestar method is used, fee awards in class actions average around one-third of the
22 recovery").

23 Plaintiffs seek appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed
24 significant work and expended litigation costs in prosecuting the matter with no guarantee of any
25 payment. Davies Decl., ¶ 39. Plaintiffs' Counsel seeks preliminary approval not to exceed one third of
26 the Gross Settlement Amount for attorneys' fees, which is currently \$166,667.67, and up to \$18,000.00
27 in reimbursement of litigation costs. Given the work performed in this matter, the extensive information
28 exchanged, and substantial recovery obtained on behalf of Plaintiffs, the Class, and Aggrieved

1 Employees, Plaintiffs' Counsel achieved a settlement through efficient and diligent work. *See generally*,
2 Davies Decl. At final approval, Plaintiffs Counsel will fully brief the merits of its request for the award
3 of attorneys' fees and litigation costs.' *Id.* at ¶ 40.

4 **V. CONCLUSION**

5 The Parties have negotiated a fair and reasonable Settlement of the class claims in light of the
6 risks present in this case. Plaintiffs have appropriately presented the materials and information necessary
7 for preliminarily approval, and therefore, respectfully request that the Court preliminarily approve the
8 Settlement and schedule a date to conduct the final approval hearing.

9
10 Dated: November 17, 2023

AEGIS LAW FIRM, PC

11
12 By: _____



Jamie M. Loos

13 Attorneys for Plaintiffs Sara Simas and Adonte
14 Donastorg
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