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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DEVYNN E. PHIPPS, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

NEW PUNCH BOWL SACRAMENTO, LLC; and DOES 1 through 20, inclusive,

Defendants.

Case No. 34-2022-00317838-CU-OE-GDS

Assigned for All Purposes to:
Hon. Jill Talley
Dept. 23

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

Date: June 7, 2024
Time: 9:00 a.m.
Dept.: 23

Reservation No.: # A-317838-001

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I. INTRODUCTION

Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Devynn E. Phipps ("Plaintiff") respectfully requests that the Court grant preliminary approval of a class action settlement of wage and hour claims, including claims under the California Private Attorneys General Act of 2004, codified at Lab. Code § 2698, *et seq.* ("PAGA"), against Defendant New Punch Bowl Sacramento, LLC ("Defendant") (collectively, Plaintiff and Defendant are hereafter referred to as, the "Parties"). The putative class consists of approximately 495 persons who were employed as non-exempt employees by Defendant in California (individually, "Class Member"; collectively, the "Class") during the Class Period of May 1, 2021 through March 17, 2023 (the "Class Period"). The basic terms of the Class and Representative PAGA Action Settlement Agreement and Class Notice ("Settlement Agreement" or "Settlement")[1] provide for the following:

(1) A non-reversionary Gross Settlement Amount of $400,000.00 allocated to approximately 495 Class Members on a pro rata basis according to the weeks worked by each Class Member worked during the Class Period;

(2) An award of up to one-third of the Gross Settlement Amount (currently $ 133,333.33) and up to $25,000.00 in reimbursement of costs to Plaintiff's Counsel for services rendered as counsel on this matter;

(3) Enhancement Award of up to $10,000.00 to Plaintiff Devynn E. Phipps;

(4) Settlement Administration fees and costs of up to $8,934.00; and

(5) Allocation of $20,000.00 for civil penalties pursuant to PAGA. Seventy-five percent (75%) of this payment will be paid to the California Labor and Workforce Development Agency ("LWDA PAGA Payment"), and twenty-five percent (25%) will be distributed to Class Members who worked for Defendant during the PAGA Period ("Individual PAGA Payment").

The Settlement satisfies the criteria for preliminary approval and falls well within the range of

[1] A true and correct copy of the fully-executed "Class Action and PAGA Settlement Agreement and Class Notice" is attached as Exhibit 1 to the Declaration of Jamie M. Loos in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Loos Decl."), filed concurrently herewith.

reasonableness given the risks and costs of continued litigation. The Settlement was reached through informed, arms-length bargaining at and after mediation between experienced attorneys. As such, Plaintiff requests that the Court grant preliminary approval of the Settlement, conditionally certify the Class for settlement purposes only, appoint Plaintiff Devynn E. Phipps as the Class Representative, appoint Plaintiff's Counsel as Class Counsel, appoint Rust Consulting, Inc. as the Settlement Administrator, authorize the Settlement Administrator to send notice of the Settlement, and set a final approval hearing date.

II. <u>SUMMARY OF THE LITIGATION</u>

On April 4, 2022, Plaintiff Phipps filed this action on behalf of Defendant's non-exempt employees. Loos Decl., ¶ 3. Due to a prior settlement, the Parties agreed to limit the Class Period to May 1, 2021 through March 17, 2023. *Id*. On March 30, 2022, before adding a PAGA claim, Plaintiff provided written notice to the LWDA and Defendant as required by Lab. Code § 2699.3(a). *Id*. On June 9, 2022, Plaintiff amended her complaint to add a cause of action for PAGA. *Id*. at ¶ 4. On April 7, 2023, Plaintiff amended her complaint a second time to add Plaintiff Kennedy. *Id*. However, due to an inability to contact Plaintiff Alfred Kennedy, only Plaintiff Devynn E. Phipps is a signatory to the Parties' Settlement. *Id*. Plaintiff alleges the following causes of action in the Second Amended Complaint: (1) failure to pay minimum wages (2) failure to pay overtime wages (3) failure to provide meal periods (4) failure to permit rest breaks (5) failure to reimburse necessary business expenses (6) failure to provide accurate itemized wage statements (7) failure to pay all wages due upon separation of employment (8) violation of California Business and Professions Code §§17200, *et seq.*, and (9) enforcement of the Private Attorney General Act, § 2698 et seq. ("PAGA"). *Id*.

After some initial meet and confer efforts between counsel, the parties agreed to private mediation. *Id*. at ¶ 5. In preparation for mediation, Plaintiff informally requested, *inter alia*, data and information pertaining to the Class, all versions of employee handbooks in effect during the Class Period, policy documents such as training materials and documents regarding timekeeping, meal periods and rest breaks, as well as wage statements and pay records. *Id*. In response, Defendant provided a breakdown of data for both the Class and PAGA Period, Plaintiff's personnel file, Class Members' time and pay records, and all versions of employee handbooks and policy documents in effect during the Class Period. *Id*. The documents, data and information provided sufficiently allowed Plaintiff to prepare for mediation. *Id*.

On April 28, 2023, the Parties attended a mediation session with Michael Loeb, a respected mediator. Loos Decl., ¶ 7. The Parties reached a class-wide settlement at mediation and executed a Memorandum of Understanding thereafter. *Id*. The Parties spent the next several months negotiating the terms of the Settlement, which was finalized in December of 2023. Loos Decl., ¶ 8. On May13, 2024, Plaintiff submitted the Settlement and this Motion to the LWDA pursuant to Lab. Code § 2699(l)(2). *Id*. at ¶¶ 8, 47, Exhibit 4 (Confirmation of Submission of Settlement and Motion to LWDA).

III. <u>SUMMARY OF THE SETTLEMENT</u>

A. Terms of Settlement

Plaintiff and Defendant agreed to settle the class and representative PAGA claims in exchange for a Gross Settlement Amount of $400,000.00, subject to a potential pro rata increase. Settlement Agreement, §§ 3.1, 8. The Gross Settlement Amount will be used to make payments for the following: (1) Individual Class Payments to Participating Class Members; (2) attorneys' fees to Class Counsel of up to one-third of the Gross Settlement Amount; (3) reimbursement of Class Counsel's litigation costs of up to $25,000.00; (4) an Enhancement Award to Plaintiff Devynn E. Phipps of up to $10,000.00; (5) Settlement Administration fees and costs of $8,934.00; and (6) an allocation of $20,000.00 in PAGA penalties. *Id.* at § 3.2. Class Members' Individual Class Payments will be distributed after final approval of the Settlement and after Defendant funds the Gross Settlement Amount. *Id.* at § 4.4. Individual Class Payments will be calculated by comparing the total Workweeks for the Class to each individual Class Member's Workweeks. Settlement Agreement, § 3.2.4. The Settlement Administrator will calculate the actual estimated recovery to include in the Class Notice. *See* Settlement Agreement, Exhibit A (Notice of Class Action Settlement).

The Individual Class Payments to Class Members will be allocated for tax purposes as follows: 30% to wages; and 70% to interest, penalties, and reimbursements. Settlement Agreement, § 3.2.4.1. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendant separately from, and in addition to the Gross Settlement Amount. *Id.* at § 3.1. No portion of the Gross Settlement Amount will revert to Defendant. *Id*. Funds from uncashed or undeliverable checks will be tendered by the Settlement Administrator to the California Controller's Unclaimed Property Fund, thereby leaving no unpaid residue consistent with California Code of Civil Procedure § 384, subd. (b). *See* Settlement Agreement at § 4.4.3.

B. Proposed Opt-Out and Objection Process

The Settlement Administrator will send Class Members the Notice of Class Action Settlement ("Class Notice") by first-class mail after checking for updated addresses through the National Change of Address database. Settlement Agreement, § 7.4.2. The Class Notice provides information regarding the nature of the lawsuit, a summary of the substance of the settlement terms, the formula for calculating Individual Class Payments, 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, an Enhancement Award for Plaintiff Devynn E. Phipps, the PAGA allocation, and information on how to access the court's website to view the case records. *See* Settlement Agreement, Exhibit A (Class Notice).

The Class Notice provides instructions for Class Members who choose to exclude themselves from the Settlement. *See* Settlement Agreement, Exhibit A (Class Notice). To opt out, Class Members are instructed to submit a Request for Exclusion to the Settlement Administrator by a specified date (45 days after the date of mailing of the Class Notice). *Id*. Class Members do not need to submit a claim form to participate in the Settlement. *Id.* 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*. 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 mailing or the original deadline, whichever is later. Settlement Agreement, § 7.4.4. The initial 45-day notice period ensures the notice program provides due process by giving Class Members enough time to determine whether they want to participate in the Settlement. This means of notice is reasonably calculated to apprise Class Members of the pendency of the action. *See* Cal. R. Ct. 3.766 (d)-(f).

C. Proposed Release

The release to be given by Class Members is limited to the Defendant and each of its former and present directors, officers, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates. ("Released Parties"). Settlement Agreement, § 1.41. Under the proposed release, Class Members who do not exclude themselves from the Settlement will be deemed to have released or waived the following "Released Claims" against the Released Parties during the period of May 1, 2021, through March 17, 2023 upon the date when Defendant fully funds the entire Gross Settlement Amount and fund all employer payroll taxes owed:

> "…[A]ll claims alleged or that could have been alleged based on the facts alleged in the Operative Complaint, which arose during the Class Period, including, but not limited to, claims under California Labor Code sections 201, 202, 203, 204, 210, 212, 213, 225.5, 226, 226.3, 226.7, 510, 512, 551, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, 2802, failure to pay minimum wages, failure to pay overtime wages, failure to provide meal periods, failure to permit rest breaks, failure to reimburse business expenses, failure to provide accurate itemized wage statements, failure to pay all wages due upon separation of employment, the Industrial Welfare Commission Wage Orders, and claims under Business and Professions Code §§ 17200 *et seq.* based on the aforementioned claims."

Id at §§ 1.39, 5.2.

As for the PAGA Release, upon the date Defendant fully funds the entire Gross Settlement Amount and fund all employer payroll taxes owed, all Class Members who are Aggrieved Employees, regardless of whether they opt out of the Settlement, are deemed to release the Released Parties from, "…all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint, and the PAGA Notices, which arose during the PAGA Period including, but not limited to, claims under California Labor Code sections 201, 202, 203, 204, 210, 212, 213, 225.5, 226, 226.3, 226.7, 510, 512, 551, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, 2802, failure to pay minimum wages, failure to pay overtime wages, failure to provide meal periods, failure to permit rest breaks, failure to reimburse business expenses, failure to provide accurate itemized wage statements, failure to pay all wages due upon separation of employment, the Industrial Welfare Commission

Wage Orders" ("Released PAGA Claims"). *Id*. at §§ 1.40, 5.3. Only Plaintiff Devynn E. Phipps will agree to a general release of any and all claims, whether known or unknown, which exist or may exist on Plaintiff Phipps' behalf as of the date of the Settlement, and a waiver of Civ. Code § 1542. *Id.* at § 5.1.

IV. <u>LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL</u>

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 non-exempt employees employed by Defendant in California at any time from May 1, 2021 through March 17, 2023. *See* Settlement Agreement §§ 1.5, 1.12. Defendant's records show the Class consists of approximately 495 individuals, making joinder of all Class Members impracticable. *See* Loos Decl. ¶ 9. Further, the Class is readily ascertainable from Defendant's business records because all Class Members are current or former employees of Defendant. *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. *<u>Common Questions Predominate</u>*

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.

Plaintiff alleged that Defendant maintained uniform employment policies and/or practices that illegally deprived Class Members of lawful meal periods, rest breaks, accurate wage statements, waiting time pay and reimbursement of necessary business expenses. Loos Decl. ¶ 10. Plaintiff's allegations present common legal and factual questions of, *inter alia*, whether Defendant applied the same scheduling, timekeeping, pay, meal period policies, rest break policies, and reimbursement practices to all Class Members; whether these policies and practices resulted in Labor Code violations; whether Defendant's conduct was intentional; and whether Class Members are entitled to penalties. *Id*.

These common questions could be resolved using Class Members' time punches and pay records, Defendant's corporate representative's testimony, written communications between Defendant and Class Members, and Class Member declarations. *Id*. Thus, the Court can and should exercise its discretion to grant conditional class certification for settlement purposes.

b. *<u>Plaintiff's Claims are Typical of the Class Claims</u>*

The typicality requirement is satisfied when the legal theories and facts supporting Plaintiff's claims are substantially similar to other class members. *See Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). Here, Plaintiff alleges she and other Class Members were employed by Defendant and injured by Defendant's common wage and hour policies and practices, including Defendant's scheduling, timekeeping, compensation, meal period, rest break, and business reimbursement practices. Loos Decl. ¶ 11. Through documents and information exchanged via informal discovery, including production of hundreds of pages of documents by Defendant, Plaintiff confirmed that these common policies and practices similarly affected Plaintiff and the Class. *Id.* Thus, Plaintiff's claims arise from the same employment practices and are based on the same legal theories as those applicable to other Class Members, as further explained in Plaintiff's exposure analysis below.

c. *<u>Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Class</u>*

Certification requires adequacy of both the proposed class representative and proposed class counsel. With respect to the class representative, a plaintiff must adequately represent and protect the interests of other members of the class and demonstrate that his or her claim is not inconsistent with the claims of other members of the class. *See Capitol People First v. State Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 696-697 (2007). Here, Plaintiff Devynn E. Phipps' interests are coextensive with the interests of the Class. Plaintiff demonstrated an ability to advocate for the interests of the Class by initiating this litigation, gathering documents and information, being available on the day of mediation to answer questions, assisting her attorneys in preparing for mediation, reviewing the proposed settlement agreement to understand its legal effect, and obtaining a fair settlement on behalf of Class Members. Loos Decl., ¶ 13.

Likewise, Aegis Law Firm, PC has expended considerable time and effort on this case and will continue to do so through final approval. *See generally*, Loos Decl. Accordingly, Plaintiff should be appointed Class Representative, and Plaintiff's Counsel should be appointed Class Counsel.

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

Class treatment is superior to other methods of adjudication when the probability is small that each class member will come forward to prove his or her claim and when the class approach would deter and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other 495 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. Loos Decl. ¶ 14. Thus, a class action is the superior method for seeking relief.

B. The Settlement Meets the Standards for Preliminary Approval

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

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

1. The Settlement is Entitled to a Presumption of Fairness

a. The Settlement is the Result of Arm's-Length Negotiations

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are conducted in good faith. Here, the Settlement was the product of a full day mediation session with a respected mediator after production of extensive documents and data. Loos Decl. ¶¶ 5-7. The negotiations were adversarial, conducted at arm's length and tempered by the efforts of both sides to serve the interests of their clients. Loos Decl. ¶ 8.

b. Plaintiff's Counsel Conducted Sufficient Investigation and Discovery

Plaintiff's Counsel thoroughly investigated the claims, applicable law, and potential defenses. *See generally*, Loos Decl. In particular, Plaintiff's Counsel assessed the value of the claims using Defendant's data and documents produced prior to mediation. Plaintiff's Counsel also engaged an expert to quantify the potential exposure using the time and payroll records, and then assessed the risks associated with each claims meriting reductions in the likely recovery at trial. Loos Decl. ¶ 15-26. Accordingly, Plaintiff's Counsel fully understood the strengths and weaknesses of the claims before the Parties reached a settlement.

c. Plaintiffs' Counsel is Experienced in Similar Litigation

Plaintiff is represented by Aegis Law Firm, PC ("Class Counsel"). Class Counsel prosecute wage and hour class actions on behalf of employees and others who have had their rights violated. Loos Decl. ¶ 28. The attorneys working on this case have been appointed class counsel in many cases, through both contested motions and settlement approval motions. *Id.* at ¶ 30. Thus, Plaintiff's Counsel has extensive experience in similar litigation and should be appointed as Class Counsel.

2. The Settlement is Reasonable Given the Strengths of Plaintiff's Claims and the Risks and Expense of Litigation

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

While Plaintiff and their counsel believed and continue to believe this is a strong case for certification, the significant risks and expenses associated with class certification and liability proceedings were taken into account. Loos Decl. ¶ 15-25. To determine if the amount offered to settle was reasonable, Plaintiff's Counsel weighed that figure against many risk factors. *Id*. at ¶ 16. If Plaintiff continued to prosecute the claims rather than accept a settlement, Plaintiff would have faced deadlines to file a motion for class certification, had to engage in formal written discovery and taken depositions, expended time and resources to resolve disputes, prepared and filed potential dispositive motions and/or discovery motions, and engaged in extensive trial preparation. *Id*. at ¶ 17. An adverse ruling at any one of these stages could have prevented the Class from obtaining any recovery. *Id.*

a. <u>Exposure Analysis</u>

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

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

Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiff contends that her claims are based on Defendant's common, class-wide policies and procedures, and that liability could be determined on a class-wide basis without dependence on individual assessments of liability. Loos Decl. ¶ 16. Although the amount of Defendant's potential exposure – if proven – is substantial, the legitimate and serious risks of succeeding at class certification and trial compelled a serious consideration of the benefit of a settlement. *Id.*

Extrapolation: As a preliminary matter, the damages were extrapolated from the records produced to cover the entire Class Period. *Id*. at ¶ 18. Although records for all class members were produced, Plaintiff's expert did a slight extrapolation by a factor of about 1.12 to account for the passage of time between the date of production of records and the date of mediation. *Id*. The produced records encompassed 8,147 weekly pay periods for the period of May 31, 2021, to March 12, 2023, and Defendant reported 8,153 workweeks. *Id*. Thus, when the calculations below reference "extrapolation" to the class, it means the expert used the damages amounts calculated for the group in the production and multiplied by a factor of about 1.12 to ensure we accounted for maximum damages for all Class Members. *Id*.

Plaintiff's Meal Period Claim: Plaintiff's theory of liability for meal period violations was based on Defendant's failure to provide timely, uninterrupted meal periods or compensation in lieu thereof, due to Defendant's alleged insufficient written meal period policies that failed to provide meal periods before the end of the fifth hour worked. *Id*. at ¶ 19. Plaintiff's expert found there were approximately 9,747 shifts in the records with meal period violations for which Defendant did not pay a meal period premium. *Id*. These violations included shifts with recorded first meal periods after the end of the fifth hour (i.e., late), first meal periods lasting less than thirty minutes (i.e., short), lack of first meal period for shifts greater than five hours (i.e., missed first meal), and lack of second meal period for shifts greater than five hours (i.e., missed second meal). *Id.* Extrapolating to the class results in 10,902 shifts with meal period violations for which Defendant did not pay a meal period premium. *Id*. Based on an average rate of pay of $16.25, Plaintiff's expert estimated meal period violations to be worth as much as $177,157.50 (10,902 shifts * $16.25 average rate of pay). *Id*. However, Defendant argued that it had compliant meal period waivers and it paid premiums for violations. *Id*. In light of Defendant's arguments and the likelihood that proof of this claim may become reliant upon testimony, Plaintiff estimated a 80% chance of prevailing at class certification and a 40% chance of prevailing at trial, thereby discounting the claim to approximately $56,690.40. *Id.*

Plaintiff's Rest Break Claim: Plaintiff's expert found there were 693 shifts in the records with recorded rest period violations allegedly due to Defendant's insufficient written policies as well as its practice of failing to permit Class Members to take timely, duty-free rest breaks. *Id*. at ¶ 20.

Extrapolating, to the class results in 776 with a recorded violation, with an average rate of pay of $16.25 per hour, the rest break premiums owed would be approximately $12,593.75 (775 violations * $16.25 per hour). *Id.* However, Defendant argued that it complied with its obligations to "authorize" rest breaks because Class Members' schedules provided rest breaks. *Id.* As such, certification would likely have required declarations or depositions of Class Members, and Defendant surely would have obtained opposing declarations stating either rest breaks were taken or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc*., 2013 WL 210223, at *11 (C.D. Cal. Jan. 17, 2013) ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc*., 2012 WL 5503550, at *8 (N.D. Cal. Nov. 13, 2012) ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Accordingly, Plaintiff estimated a 80% chance of success at class certification and a 30% chance of success at trial, thereby discounting the claim to approximately $3,022.50. Loos Decl. ¶ 20.

<u>Plaintiff's Reimbursement Claim:</u> Plaintiff argued that Class Members were required to use their personal cell phones to communicate for work related purposes such as to calculate tips, check their schedules, communicate among the company, and check emails, without reimbursement. *Id*. at ¶ 21. Plaintiff's expert calculated unreimbursed business expenses to be worth approximately $136,680.00 assuming $15.00 of unreimbursed cell phone expenses per pay period per employee (9,112 pay periods * $15.00 per pay period). *Id*. However, Defendant argued that use of their personal cell phones was for convenience of the employees, and was not a necessary expenditure or loss, as required by Labor Code Section 2802. *Id*. Further, even if Class Members did have to resort to their cell phones, there is no source of common proof as to who incurred expenses and whether they sought reimbursement, making the claim difficult to prove at trial. *Id.* Accordingly, Plaintiff estimated a 60% chance of success at class certification and a 30% chance of prevailing at trial, thereby reducing the value of the claim to approximately $24,602.40. *Id.*

<u>Plaintiff's Unpaid Wages Claim:</u> Plaintiff assumed class members worked at least thirty minutes off the clock per pay period because Class Members were allegedly required to use their personal cell phones for work related purposes as described above, while they were not clocked in. *Id*. at ¶ 22. In the

records, the expert multiplied 0.5 hours per pay period by the number of pay periods worked by the group in the record production (9,112 pay periods) to get 4,556 unpaid hours. *Id.* When extrapolated to the class, this equals 5,102.72 total hours of unpaid wages. *Id*. Approximately 20% of these hours constitute overtime hours, which Plaintiff believes should have been paid at 1.5x the rate of pay. *Id*. Since the average rate of pay was $16.25, the calculations were as follows: 1,020 overtime hours * $24.38 for the overtime rate = $24,867.60 unpaid overtime, plus 4,082.18 unpaid straight time hours * $16.25 = $66,335.43, for a total amount of $91,202.43 unpaid wages. *Id.* However, Defendant argued that Class Members were paid for all time worked and that Defendant was unaware if Class Members were completing theses tasks before clocking in, as they were never instructed to do so. *Id*. Similar to Plaintiff's rest break claim, Plaintiff would have needed to obtain Class Member declarations and taken depositions to help prove this claim. *Id*. Surely, Defendant would have also obtained competing declarations and taken Class Members' depositions. *Id*. As such, Plaintiff estimated an approximate 80% chance of success at class certification and an approximate 60% chance of prevailing at trial, thereby discounting this claim to approximately $43,777.17. *Id*.

<u>Plaintiff's Derivative Wage Statement Claim:</u> Plaintiff argued the presence of derivative wage statement violations based on the claims described above. *Id*. at ¶ 23. Plaintiff's expert calculated the wage statement penalties assuming a violation in every pay period in the wage statement liability period. *Id*. Using the start and end dates of employment, assuming a $50 initial penalty and $100 subsequent penalty, Plaintiff's expert calculated a maximum recovery of $886,450.00. *Id*. The calculation included 495 employees who worked 9,112 pay periods in the applicable liability period (with a one-year statute of limitations for this type of claim). *Id.* The math breaks down to 495 initial pay periods x $50 per initial violation = $24,750.00 for the initial penalties, plus 8,617 subsequent pay periods (9,112 total pay periods minus 495 initial pay periods) * $100 per subsequent violation = $861,700.00 for the subsequent penalties, resulting in a total of $886,450.00. *Id.* However, Defendant could argue that Plaintiff could not show that Class Members suffered an "injury" as a result of wage statement violations, as required by Lab. Code § 226. *Id.* As a result, Plaintiff estimated an approximate 60% chance of success at class certification and an approximate 20% chance of prevailing at trial, thereby discounting this claim to approximately $106,374.00. *Id.*

<u>Derivative Waiting Time Penalties:</u> Plaintiff's Counsel also considered the arguable presence of waiting time penalties based on the above violations and weighed the potential recoveries against probable defenses. *Id*. at ¶ 24. Plaintiff's expert calculated the waiting time penalties by multiplying the separated employees' daily wage (at the final rate of pay upon separation of employment) by the number of days that the employee was not paid, up to a maximum of 30 days. *Id*. For purposes of calculating derivative penalties here, Plaintiff's expert assumed that none of the terminated employees were paid all wages due given the violations described above. *Id*. Based on the employment data produced by Defendant, Plaintiff's expert calculated a maximum recovery of $1,185,893.73 in waiting time penalties for the 389 terminated employees who worked an average shift of 6.3 hours per day with an average final pay rate of $16.13 per hour (389 employees * 6.3 hours * $16.13 final rate of pay * 30 days). *Id*. Specifically, Defendant could argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Lab. Code § 203. *Id*. Plaintiff would not recover any of this derivative penalty if she failed to prove the underlying claims. *Id*. Thus, Plaintiff estimated a 60% chance of prevailing at class certification and a 20% chance of prevailing at trial, thereby discounting these claims to approximately $142,307.25. *Id*.

<u>Plaintiff's PAGA Claim:</u> The PAGA claim presented even higher hurdles. *Id*. at ¶ 25. Although Plaintiff's Counsel found Defendant's exposure could potentially reach approximately $911,200.00 under Labor Code section 2699(f), assuming the initial penalty rate of $100 for each pay period and based on 9,112 pay periods, Plaintiff would have to prove a violation in every pay period. *Id*. Most importantly, the Court would have discretion to reduce the PAGA award based on whether the amount of the award would be "unjust, arbitrary and oppressive, or confiscatory." Lab. Code § 2699(e)(2). In theory, the Court could reduce the award by 99% if it so wished. Loos Decl. at ¶ 25. Plaintiff was doubtful she could recover any more than $2 per pay period if a large class judgment was entered for the same violations, considering Defendant paid meal period premiums and had a high compliance rate on the recorded rest breaks. *Id.* Accordingly, Plaintiff could not place a high value on the PAGA penalties, and therefore allocated $20,000.00 of the Gross Settlement Amount to settle these claims. *Id.*

Ultimately, the damages estimates were extremely liberal and assumed the best-case scenario for every Class Member. *Id*. at ¶ 26. However, given the serious risks of continued litigation, reaching a compromise at this stage will allow Class Members to obtain compensation for their claims without having to file and litigate their own cases. *Id.*

C. The Requested Enhancement Award for Plaintiff Phipps

Plaintiff seeks an Enhancement Award of up to $10,000.00 for accepting the responsibilities of representing the interests of the Class and assuming risks and potential costs that were not borne by any other Class Members. Settlement Agreement, § 3.2.1. A named plaintiff is eligible for payment that reasonably compensates him or her for undertaking and fulfilling a fiduciary duty to represent absent class members. *See Cellphone Termination Fee Cases*, *supra*, 186 Cal. App. 4th at 1393; *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004).

Here, Plaintiff had the option to pursue her claims individually, but instead chose to pursue this wage and hour class action, delaying individual recovery until approval of a class action settlement. Loos Decl. ¶ 27. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute the class claims, assisted counsel in preparing for mediation, maintained regular contact with counsel, was available on the day of mediation to answer questions, and reviewed the Settlement to make sure it was fair to the Class. *Id.* No action would likely have been taken by Class Members individually, and no compensation would have been recovered for them, but for Plaintiff's services on behalf of the Class. *Id.*

By actively pursuing this action, Plaintiff furthered the California public policy goal of enforcing the State's wage and hour laws. *See Sav-On Drug Stores, Inc.*, *supra*, 34 Cal. 4th at 340. The requested Enhancement Award for Plaintiff's service as the Class Representative is reasonable and should be preliminarily approved. At the final approval stage, Plaintiff will further support the request for an Enhancement Award by a declaration that addresses the factors for the award. Loos Decl. ¶ 28.

D. The Requested Attorneys' Fees and Costs

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

Plaintiff seeks appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed significant work and expended litigation costs in prosecuting the matter with no guarantee of any payment. Loos Decl. ¶ 42. Plaintiff's Counsel seeks preliminary approval for attorneys' fees of up to one-third of the Gross Settlement Amount, currently estimated to be $133,333.33, and up to $25,000.00 in reimbursement of litigation costs. Settlement Agreement § 3.2.2. Given the work performed in this matter, the extensive information exchanged, and the substantial recovery obtained on behalf of Plaintiff and the Class, Plaintiff's Counsel achieved a settlement through efficient and diligent work. *See generally*, Loos Decl. At final approval, Plaintiff's Counsel will fully brief the merits of its request for the award of attorneys' fees and litigation costs. Loos Decl. ¶ 43.

V. CONCLUSION

The Parties have negotiated a fair and reasonable Settlement of the claims in light of the risks present in this case. Plaintiff has appropriately presented the materials and information necessary for preliminarily approval, and therefore, respectfully requests that the Court preliminarily approve the Settlement and schedule a date to conduct the final approval hearing.

Dated: May 13, 2024 **AEGIS LAW FIRM, PC**

By: ______________________
Jamie M. Loos
Attorneys for Plaintiff