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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JIMMY VILLEDA, individually and on behalf of all others similarly situated, Plaintiff, vs. INSERVIO3, LLC AND OMNI INVICTUS, LLC; and DOES 1 through 20, inclusive, Defendants.	Case No. 22STC09509 *Assigned for all purposes to* *Hon. Stuart M. Rice* *Dept. 1* **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: December 11, 2023 Time: 10:30 a.m. Dept: 1

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I. INTRODUCTION

Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Jimmy Villeda ("Plaintiff") 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 Defendants Inservio3, LLC and Omni Invictus, LLC; and DOES 1 through 20, inclusive ("Defendants") (collectively, Plaintiff and Defendants referred to as, the "Parties"). The putative class consists of approximately 154 non-exempt employees who worked for Defendant in California (individually, "Class Member"; collectively, the "Class") from September 20, 2017 through January 31, 2023 (the "Class Period"). The basic terms of the Joint Stipulation of Settlement ("Settlement Agreement" or "Settlement")[1] provide for the following:

(1) A non-reversionary Gross Settlement Amount of $200,000.00 allocated to approximately 154 Class Members on a pro rata basis according to the number of weeks each Class Member worked during the Class Period;

(2) An award of up to one-third of the Gross Settlement Amount (currently $66,666.66) and up to $25,000 in reimbursement of costs to Plaintiff's Counsel for services rendered as counsel on this matter;

(3) Incentive Award of up to $8,500.00 to Plaintiff Jimmy Villeda;

(4) Settlement Administration fees and costs of up to $15,000.00; and

(5) Payment to the California Labor and Workforce Development Agency ("LWDA") of $16,000.00 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 Payment"), and twenty-five percent (25%) will be paid to the Net Settlement Amount for distribution to Class Members.

With each Class Member allocated an average recovery of approximately $450 from the Net

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[1] A true and correct copy of the fully-executed "Joint Stipulation of Settlement" is attached as **Exhibit 1** to the Declaration of Steven A. McNicholl in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("McNicholl 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.

Settlement Amount, the Settlement satisfies the criteria for preliminary approval and falls well within the range of 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 as the Class Representative, appoint Plaintiff's Counsel as Class Counsel, appoint ILYM Group Inc., as the Settlement Administrator, authorize the Settlement Administrator to send notice of the Settlement, and set a final approval hearing date.

II. SUMMARY OF THE LITIGATION

On March 17, 2022, Plaintiff's counsel provided written notice to the LWDA and Defendant regarding Defendant's alleged Labor Code violations, as required by Lab. Code § 2699.3(a). McNicholl Decl., ¶ 3. The LWDA did not respond to this notice, indicating it did not intend to investigate, thus allowing Plaintiff to bring a PAGA claim against Defendant. *Id.* On June 28, 2022, Plaintiff filed this action on behalf of Defendant's non-exempt employees. Plaintiff alleges the following causes of action in the operative 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 business expenses; (6) failure to provide accurate itemized wage statements (7) failure to pay all wages timely and upon separation of employment; (8) violation of Business and Professions Code § 17200, *et seq.*, based on the preceding claims; and (9) enforcement of Lab. Code § 2698, *et seq.* ("PAGA"), for the preceding claims. *Id.* at ¶ 4.

Through informal discovery, Defendant produced significant amount of documents and information, including Plaintiff's personnel files, employee handbooks for the class period, policy documents for the class period, and an approximately 20% sample of class members' timekeeping and pay records. McNicholl Decl., ¶ 5. After informal discovery and engaging in numerous discussions between the Parties' attorneys, the Parties agreed to attend a private mediation session. *Id.*

On January 31, 2023, the Parties attended a mediation session with Jill R. Sperber, a respected mediator, and reached a settlement. *Id.* at ¶ 6. After a full day of negotiating, the Parties agreed to a settlement amount and executed a Memorandum of Understanding with the material terms the parties had agreed to. *Id.* The Parties spent the next few months negotiating the terms of the Settlement, which was finalized in May of 2023. *Id*. Plaintiff submitted the Settlement to the LWDA pursuant to Lab. Code § 2699(l)(2). *Id.* at ¶ 7, Ex. 2 (Confirmation of Submission of Settlement to LWDA).

III. SUMMARY OF THE SETTLEMENT

A. Terms of Settlement

Plaintiff and Defendant agreed to settle the class claims in exchange for a Gross Settlement Amount of $200,000.00. *See* Settlement Agreement at ¶ 3.1. The Gross Settlement Amount will be used to make payments for the following: (1) Individual Settlement 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; (4) an Incentive Award to Plaintiff of up to $8,500.00; (5) Settlement Administration fees and costs of $10,000; and (6) a payment to the LWDA of $16,000 pursuant to PAGA. *See id.* at ¶ 3.2.

Class Members' Individual Settlement Payments will be distributed after final approval of the Settlement and Defendant funds the Gross Settlement Amount. *See id.* at ¶ 4.4. Individual Settlement Payments will be calculated by comparing the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying Workweeks. *See id.* at ¶ 1.23. With approximately 154 Class Members, the Net Settlement Amount allocates an average of $450 per Class Member. The Settlement Administrator will calculate the actual estimated recovery to include in the Class Notice and provide the estimated low and high range of possible recovery at final approval. *Id. at* ¶ 8.4.2; Settlement Agreement, Ex. A (Notice of Class Action Settlement).

The Individual Settlement Payments to Class Members will be allocated for tax purposes as follows: 60% to wages; 40% to penalties and interest. Settlement Agreement, *See id.* at ¶ 3.2.4.1. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendants separately from, and in addition to the Gross Settlement Amount. *See id.* at ¶ 3.1. No portion of the Gross Settlement Amount will revert to Defendant. *See id.* Funds from uncashed or undeliverable checks will be tendered by the Settlement Administrator to the State Controller Unclaimed Property Fund in the name of the Class Member for whom the funds are designated. *See id*. 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. *See id.* at ¶ 8.4.2. 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 Settlement 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, the Class Representative's Incentive Award, and the PAGA allocation.. *See* Court Approved Notice of Class Action Settlement and Hearing Date for Final Court Approval.

The Class Notice provides instructions for Class Members who choose to exclude themselves from the Settlement. *See id. at* ¶ 8.5. To opt out, Class Members are instructed to submit a Request for Exclusion to the Settlement Administrator by a specified date (60 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.* At ¶ 8.8.1. Accordingly, the content of the Class Notice complies with the requirements of Cal. R. Ct. 3.766(d).

Not later than 3 business days after the Settlement Administrator's receipt of any Class Notice returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding address provided by the USPS. *Id*. at ¶ 8.4.3. If the USPS does not provide a forwarding address, the Administrator shall conduct Class Member Address Search, and re-mail the Class Notice to the most current address obtained. *Id.*; *see also* Cal. R. Ct. 3.766 (d)-(f).

C. Proposed Release

The release to be given by Class Members is limited to the Defendants and each of their former and present directors, officers, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates ("Released Parties"). *See* Settlement Agreement at ¶

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 June 1, 2016 through October 26, 2021:

> All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. ("Released Claims").

See Settlement Agreement at ¶ 6.2.

As for the PAGA claims, all Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, and the PAGA Notice and ascertained in the course of the Action. Settlement Agreement, § 6.3.

Only Plaintiff will agree to a general release of any and all claims, whether known or unknown, which exist or may exist on Plaintiff's behalf as of the date of the Settlement, and a waiver of Civ. Code § 1542. *See id*. at ¶ 6.1.

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 154 non-exempt employees employed by Defendants at any time between September 20, 2017 through January 31, 2023. *See* Settlement Agreement at ¶ 1.5. Defendants' records show the Class consists of approximately 154 individuals, making joinder of all Class Members impracticable. *See id.* at ¶ 4.1. Further, the Class is readily ascertainable from Defendant's business records because all Class Members are current or former employees of Defendants. *See id.* at ¶ 1.5.

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 wages, meal periods, rest breaks, accurate wage statements, and waiting time pay. McNicholl Decl., ¶ 9. Plaintiff's allegations present common legal and factual questions of, *inter alia*, whether Defendant applied the same scheduling, timekeeping, minimum and overtime pay, meal period, and rest break policies 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' schedules, time punches, and payroll 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. Plaintiff's Claims are Typical of the Class Claims

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 that 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, minimum wage pay, overtime pay, meal period, and rest break practices and policies. McNicholl Decl., ¶ 10. Through documents and information exchanged in formal discovery, including production of thousands 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. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Class

Certification requires adequacy of both the proposed class representative(s) 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's interests are coextensive with the interests of the Class. *See* Declaration of Jimmy Villeda in Support of Motion for Preliminary Approval at ¶ 7. 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, meeting with her attorneys on several occasions to understand the claims and theories of liability at issue, assisting 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 who stand to recover a substantial amount under the Settlement. *Id*. at ¶ 8.

Likewise, Aegis Law Firm, PC ("Aegis") has expended considerable time and effort on this case and will continue to do so through final approval. *See generally*, McNicholl 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 397 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. McNicholl Decl. ¶ 21. 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. Plaintiff will analyze the fourth factor at the final approval stage.

1. The Settlement is Entitled to a Presumption of Fairness

a. <u>The Settlement is the Result of Arm's-Length Negotiations</u>

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 extensive investigation and a full day mediation session with a respected mediator after informal discovery. *See* Settlement Agreement at ¶ 2.3. The negotiations were adversarial, conducted at arm's length and tempered by the efforts of both sides to serve the interests of their clients. McNicholl Decl. at ¶ 6. The amount of Plaintiff's requested Incentive Award was not negotiated until after the Parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 19.

b. Plaintiff's Counsel Conducted Sufficient Investigation and Discovery

Plaintiff's Counsel thoroughly investigated the class claims, applicable law, and potential defenses. *See generally,* McNicholl Decl. In particular, Plaintiff's Counsel assessed the value of the class claims using Defendant's data and documents produced through informal discovery. McNicholl Decl., ¶¶ 5, 10, 12-20. Plaintiff's counsel and Plaintiff's expert reviewed both Plaintiff's and Class Members' payroll and timekeeping records and compared them to identify potential violations. *Id*. Accordingly, Plaintiff's Counsel fully understood the strengths and weaknesses of the claims before the Parties reached a settlement. *Id*.

c. Plaintiff's 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. McNicholl Decl. ¶¶ 23-35. The attorneys working on this case have been appointed class counsel in many cases, through both contested motions and settlement approval motions. *Id.* 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 her 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. McNicholl Decl., ¶ 12. To determine if the amount offered at mediation was reasonable, Plaintiff's Counsel weighed that figure against many risk factors. 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 have engaged in more 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. An adverse ruling at any one of these stages could have prevented the Class from obtaining any recovery. *Id.* at ¶¶ 13-14.

a. *Exposure Analysis*

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. McNicholl Decl., ¶ 11. 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.* at ¶¶ 12-19.

Meal Period Claims: Plaintiff's meal period claim was potentially worth about $381,324, in light of the alleged violations shown in the records. Plaintiff's counsel's theory was based on time records showed Defendant maintained a policy of automatically deducting meal periods. However, Defendant argued that its records did not show automatic deductions, it maintained compliant written policies, and employees clocked in and out for meal periods. In light of the above, Plaintiff estimated an 50% chance at class certification and a 30% chance at trial, valuing the meal period claim at roughly $18,000. McNicholl Decl., ¶ 15.

Rest Break Claim: Plaintiff alleged that Defendant's break room was an open space next to the work area inviting interruption of the employee's breaks by management. If Plaintiff could prove a 100% violation rate for each shift over 3.5 hours, then damages could reach up to $1.4 million. However, Defendant argued that it maintained a compliant written policy and rest breaks were not interrupted. As such, this claim would have relied on Class Member testimony, making it a riskier claim at class certification and liability stages. Plaintiff would be very unlikely to establish a violation rate of 100%. Therefore, Plaintiff estimated an 10% chance at class certification and a 5% chance at trial, valuing the rest break claim at roughly $7,000. McNicholl Decl., ¶ 16.

Unreimbursed Business Expenses Claims: Plaintiff argued that Class Members were not reimbursed for expenses for the purchase of required cell-phone and internet services. Plaintiff's expert calculated unreimbursed business expenses to be valued at $526,371 assuming $109 of unreimbursed business expenses per Class Member ($60 per month for cell phone and $49 per month for internet). However, Defendant argued that it provided employees with the equipment necessary to perform their jobs. Further, if Defendant was required to reimburse these expenses, 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*. As such, Plaintiff estimated a 40% chance at class certification and 20% chance at trial, resulting in a settlement value of $42,109.68. McNicholl Decl., ¶ 17.

Minimum Wage and Overtime Claims: Plaintiff's minimum wage and overtime claims were premised on the theories that Defendant required Class Members to work-off-the-clock and failed to properly calculate a blended overtime rate to include nondiscretionary bonuses. Plaintiff calculated that these claims were worth approximately $52,801. However, this claim is dependent on the Court's finding that Defendant knew or should have known that employees were working off the clock, which is difficult to satisfy on a class-wide basis. Defendant also argued the bonuses were discretionary. Plaintiff estimated a 50% chance at class certification and 40% chance at trial, resulting in a settlement value of $10,560.20. McNicholl Decl., ¶ 18.

Wage Statement Penalties: Plaintiff's Counsel investigated and evaluated direct and derivative claims for failure to accurate itemized wage statements. Plaintiff argued Class Members' wage statements listed the incorrect employer's name and address. *Id.* Plaintiff's counsel reviewed Class Members' earning statements and discovered Defendants included non-working hours in the total hours resulting in facially inaccurate wage statements. Defendant argued that the employer listed on the pay stubs was a "DBA" of Defendant that was registered in Texas. *Id*. Defendant argued that Plaintiff could not show that Class Members suffered an "injury" as a result of "knowing and intentional" wage statement violations as required by Cal. Lab. Code § 226. Defendant also argued that Plaintiff's wage statement claim would fail if the wage statements contained all required information; that the wage statements accurately reflected gross and net wages paid by the employer and the rates at which those wage were paid. *Id*. Using the start and end dates of employment and capping the penalties at $4,000 per person, Plaintiff calculated a maximum of $362,500. *Id*. In light of the above, Plaintiff estimated an 60% chance at class certification and a 30% chance at trial, valuing the wage statement claim at roughly $65,250. McNicholl Decl., ¶ 19.

Derivative Waiting Time: Plaintiff's Counsel compared termination dates to the last date of pay in the time and pay records produced by Defendant. Plaintiff discovered an alleged pattern of failing to pay employees either at the time of their discharge or within seventy-two (72) hours of their leaving Defendants' employment. In addition, waiting time penalties would be derivative of, and rise or fall, with Plaintiff's other claims. *Id.* While Plaintiff is confident that it can establish the existence of unpaid wages, Defendant could argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties, and that there is a good faith dispute that any unpaid wages are due. Based on the documents and data produced by Defendant, Plaintiff's expert calculated a maximum $248,014 in waiting time penalties. *Id.* Plaintiff estimated an 60% chance at class certification and a 30% chance at trial, making this claim worth about $44,000. McNicholl Decl., ¶ 20.

PAGA Claim: The PAGA claim presented even higher hurdles. Although Plaintiff's Counsel found Defendant's exposure could potentially reach approximately $368,800 under Lab. Code § 2699(f), assuming the initial penalty rate of $100 for each pay period, Plaintiff would have to prove a violation in every pay period. 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. Plaintiff was doubtful she could recover any PAGA penalties, especially if a large class judgment was entered for the same violations. Accordingly, Plaintiff could not place a high value on the PAGA penalties, and therefore allocated $16,000 of the Gross Settlement Amount to settle these claims. McNicholl Decl. ¶ 21.

C. The Requested Incentive Award for Plaintiff

Plaintiff seeks an Incentive Award of up to $8,500 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, § 3.06(d). 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 class action, delaying individual recovery until approval of a class action settlement. McNicholl Decl., ¶ 22. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute the class claims, maintained regular contact with counsel, were available on the day of mediation and communicated with their attorneys during the day of mediation to answer critical 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 Incentive Award for Plaintiff's service as the class representative and for a general release of all employment claims is reasonable and should be preliminarily approved. At the final approval stage, Plaintiff will further support the request for an Incentive Award by declaration addressing the factors for the award. McNicholl Decl., ¶ 22.

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. McNicholl Decl., ¶ 38. Plaintiff’s Counsel seeks preliminary approval for $66,666.66 in attorneys’ fees, which is up to one-third of the Gross Settlement Amount, and up to $25,000 in reimbursement of litigation costs. Given the work performed in this matter, the extensive information exchange, and substantial recovery obtained on behalf of Plaintiff and the Class, Plaintiff’s Counsel achieved a settlement through efficient and diligent work. *See generally*, McNicholl Decl. At final approval, Plaintiff’s Counsel will fully brief the merits of its request for the award of attorneys’ fees and litigation costs. *Id.* at ¶ 39.

V. <u>CONCLUSION</u>

The Parties have negotiated a fair and reasonable Settlement of the class 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: July 5, 2023 **AEGIS LAW FIRM, PC**

By: *Steven McNicholl*
Steven A. McNicholl
Attorneys for Plaintiff