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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DONALD MCGARITY, individually and on behalf of all others similarly situated, Plaintiff, vs. NV COMMUNICATION; and DOES 1 through 20, inclusive, Defendants.	Case No. 34-2022-00323514 *Assigned for All Purposes to:* *Hon. Judge Lauri A. Damrell; Dept. 28* **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: July 26, 2024 Time: 9:00 a.m. Dept: 28

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I. INTRODUCTION

Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Donald McGarity ("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 Defendant NV Communication ("Defendant") (collectively, Plaintiff and Defendant are hereafter referred to as, the "Parties"). The putative class consists of approximately 426 current and former non-exempt employees who are or were employed by Defendant in California (individually, "Class Member"; collectively, the "Class") from January 17, 2018, through November 16, 2023 (the "Class Period"). The basic terms of the Amended Joint Stipulation of Settlement ("Settlement Agreement" or "Settlement")[1] provide for the following:

(1) A non-reversionary Gross Settlement Amount of $1,050,000.00, the net of which allocated to approximately 426 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 $350,000.00) and up to $20,000 in reimbursement of costs to Plaintiff's Counsel for services rendered as counsel on this matter;

(3) Incentive Award of up to $10,000.00 to Plaintiff;

(4) Settlement Administration fees and costs of up to $9,850.00; and

(5) An allocation of $50,000 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 added to the Net Settlement Amount and distributed to PAGA Group Members.

T 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

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[1] A true and correct copy of the fully-executed "Joint Stipulation of Class Action and PAGA Settlement" 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. Unless otherwise defined herein, all capitalized terms in this Motion will be used as such terms are defined and used in the Settlement.

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. ("ILYM Group"), 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 July 15, 2022, Plaintiff filed this action on behalf of Defendant's current and former non-exempt employees alleging the following causes of action: (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 wages timely during employment; (8) failure to pay all wages due upon separation of employment; and (9) violation of Business and Professions Code § 17200, et seq., based on the preceding claims. *See* Declaration of Jamie M. Loos in Support of Motion for Preliminary Approval ("Loos Decl.") at ¶ 3. On July 14, 2022, before adding a PAGA claim, Plaintiff provided written notice to the LWDA and Defendant as required by Lab. Code § 2699.3(a). *Id.* at ¶ 4. On September 28, 2022, Plaintiff filed a First Amended Complaint to add a claim for PAGA. *Id.*

After engaging in numerous discussions, the parties agreed to mediate. Loos Decl., ¶ 5. In advance of mediation, the Parties engaged in formal discovery in which Defendant produced a significant amount of documents and information, including Plaintiff's personnel file, policy documents, and a 22.5% sample of class members' timekeeping and pay records. *Id.*

On November 16, 2023, the Parties attended a mediation session with Jill R. Sperber, a respected mediator. *Id.* at ¶ 6. The Parties reached an agreement at mediation and thereafter executed a Memorandum of Understanding outlining the basic terms of the settlement. *Id.* The Parties spent the next several months negotiating the terms of the Settlement, which was finalized in April of 2024. *Id.* The negotiations were adversarial, conducted at arm's length and tempered by the efforts of both sides to serve the interests of their clients. *Id.*

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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 $1,050,000.00. Settlement Agreement, § 3.06(a). 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 $20,000.00; (4) an Incentive Award to Plaintiff of up to $10,000.00; (5) Settlement Administration fees and costs of $9,850.00; and (6) $50,000.00 allocated to PAGA, 75% of which, or $37,500.00, will be paid to the LWDA, and 25% of which will be allocated to Individual PAGA Payments. *Id.* at § 3.06(a-h). Class Members' Individual Settlement Payments and Individual PAGA Payments will be distributed after final approval of the Settlement and Defendant funds the Gross Settlement Amount. *Id.* at § 3.06(f). Individual Settlement Payments will be calculated by comparing the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying Workweeks. Settlement Agreement, § 3.06(g). 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.

The Individual Settlement Payments to Class Members will be allocated for tax purposes as follows: 20% to wages; 80% to penalties and interest. Settlement Agreement, § 3.06(i). 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 § 3.06(b). No portion of the Gross Settlement Amount will revert to Defendant. *Id.* at § 1(m). 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. *Id.* at § 3.06(g).

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, § 3.03. 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, 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 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.* at pp. 1, 7. 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. *See generally*, Settlement Agreement. 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, object, or submit a dispute of 15 days from the date of mailing or the original deadline, whichever is later. Settlement Agreement, § 3.03. 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 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 its owners, shareholders, directors, officers, employees, attorneys, agents, and insurers ("Released Parties"). Settlement Agreement, § I(ii). 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 Class Claims" against the Released Parties that arose during the Class Period:

All causes of action and factual or legal theories that were alleged in the First Amended Complaint in the Action, or that reasonably could have been alleged therein against Defendant or any other Released Parties, based on the facts alleged therein, including but not limited to claims for: (i) failure to pay all regular wages, minimum wages and overtime wages due; (ii) failure to provide proper meal and rest periods and to properly provide premium pay in lieu thereof; (iii) failure to provide complete, accurate or properly formatted wage statements; (iv) failure to reimburse business expenditures; (v) failure to timely pay all wages due during employment, including but not limited to, non-productive time worked by piece rate employees; (vi) failure to pay all wages due upon separation of employment; (vii) failure to pay waiting time penalties; (viii) engaging in unfair business practices that could have been premised on the claims, causes of action or legal theories of relief described above or any of the claims, causes of action or legal theories of relief pleaded in the First Amended Complaint in the Action; (ix) any and all other claims or penalties under the Labor Code or other wage-and-hour laws pled in the Action or that reasonably could have been alleged against Defendant or any other Released Parties based on the factual allegations asserted in the Action; (x) any and all claims arising under the related provisions of the Labor Code, including but limited to, Labor Code sections 201-204, 210, 216, 218.6, 226, 226.3, 226.7, 510, 512, 512.5, 558, 1194, 1194.2, 1197, 1198, 2802; (xi) any and all derivative claims under Business & Professions Code sections 17200 et seq., and (xii) any and all damages, penalties, liquidated damages, interest, attorneys' fees and costs, and other amounts recoverable under said claims, causes of action or legal theories of relief.*Id* at § 5.01.

Upon the Date of Finality, Named Plaintiff, the PAGA Employees, and the State of California hereby release Defendant and the other Released Parties from the following claims that arose during the PAGA period (the "Released PAGA Claims"):

> All claims for civil penalties arising during the PAGA Period that could have been sought by the California Labor Commissioner for the violations identified in the PAGA Complaint, to the extent the violations identified in the PAGA Complaint were alleged in the First Amended Complaint in the Action. The Released PAGA claims include all claims by the PAGA Employees for civil penalties that reasonably could have been sought by the Labor Commissioner based upon Defendant's alleged (i) failure to provide 30-minute uninterrupted meal periods within the appropriate time intervals; (ii) failure to pay an additional hour of pay at the regular rate when an employee suffered a meal period violation; (iii) failure to authorize or permit paid 10-minute rest periods for every four

> hours of work or major fraction thereof; (iv) failure to pay an additional hour of pay at the regular rate when an employee suffered a rest break violation; (v) failure to pay at least the legal minimum wage and overtime wage for all hours worked; (vi) failure to compensate employees for necessary business-related expenses incurred as a direct consequence of the discharge of their job duties; (vii) failure to provide accurate, itemized wage statements; (viii) failure to maintain accurate and complete records showing the hours worked daily by employees and wages paid to employees; and (ix) failure to pay all wages owed during employment and following the end of employment, including but not limited to, non-productive time worked by piece rate employees. Named Plaintiff and the State of California do not release any of the PAGA Employees' individual claims for wages or damages. By virtue of this Agreement, the PAGA Employees will be deemed to have, and by operation of the final judgment approved by the Court, will have, fully, finally, and forever settled and released all of the Released PAGA Claims.

Id at § 5.02 (a).

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. *Id.* at § 5.03.

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 current and former non-exempt employees who are or were employed by Defendant in California at any time from January 17, 2018, through November 16, 2023. Settlement Agreement, § I(c),(g). Defendant's records show the Class consists of approximately 426 individuals, making joinder of all Class Members impracticable. Loos Decl. ¶ 8. Further, the Class is readily ascertainable from Defendant's business records because all Class Members are current or former employees of Defendant. *Id.*

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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.

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. Loos 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, rest break policies, and reimbursement of business expenses 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 he 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. Loos Decl. ¶

10. Through documents and information exchanged in formal discovery, 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(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. 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 his 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. *See* Loos Decl. ¶ 24.

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 426 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. Loos Decl., ¶ 24. Thus, a class action is the superior method for seeking relief.

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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 a full day mediation session with a respected mediator after formal discovery. Loos Decl. ¶¶ 5-6. The negotiations were adversarial, conducted at arm's length and tempered by the efforts of both sides to serve the interests of their clients. *Id.* 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 ¶ 25.

b. <u>Plaintiff's Counsel Conducted Sufficient Investigation and Discovery</u>

Plaintiff's Counsel thoroughly investigated the class claims, applicable law, and potential defenses. *See generally,* Loos Decl. In particular, Plaintiff's Counsel assessed the value of the class claims using Defendant's data and documents produced through formal discovery. Loos Decl. ¶¶ 5, 12-

23. Accordingly, Plaintiff's Counsel fully understood the strengths and weaknesses of the claims before the Parties reached a settlement. *Id.*

c. <u>*Plaintiff's Counsel is Experienced in Similar Litigation*</u>

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., ¶ 27. The attorneys working on this case have been appointed class counsel in many cases, through both contested motions and settlement approval motions. *Id.* at ¶ 28. 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 his 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., ¶ 12. To determine if the amount offered at mediation was reasonable, Plaintiff's Counsel weighed that figure against many risk factors. *Id.* at ¶ 13. 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 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.* 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 his 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., ¶ 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 ¶ 13.

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. *Id.* at ¶ 16. Plaintiff alleged that Class Members experienced late, short, interrupted and entirely missed meals as they were required to work through meal periods, complete a task before taking a meal period, discuss work related matters during the meal period, or take a short meal period in order to get back to work. *Id.* Plaintiff's expert found violations in the time records for short, late, and missed meal periods in 90.3% of shifts, or a total of 78,228 shifts with alleged meal period violations for which Defendant did not pay a meal period premium. *Id.* Based on an average rate of pay of $22.76, Plaintiff's expert estimated meal period violations to be worth as much as $1,780,469.28 (78,228 shifts * $22.76 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 60% chance of prevailing at class certification and a 50% chance of prevailing at trial, thereby discounting the claim to approximately $534,141. *Id.*

Plaintiff's Rest Break Claim: Plaintiff alleged a 100% rest break violation rate due to Defendant's alleged practice of requiring employees to keep working during purported rest breaks and therefore failing to permit Class Members to take timely, duty-free rest breaks. *Id.* at ¶ 17. Plaintiff's expert found 83,448 shifts lasted 3.5 hours or more, and thus could have a violation. With an average rate of pay of $22.76 per hour, the maximum rest break premiums owed would be approximately

$1,899,276.48 (83,448 violations * $22.76 per hour). *Id.* However, Defendant argued that it complied with its obligations to "authorize" rest breaks, any missed rest breaks were voluntary, and that a 100% violation rate was unlikely. *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 30% chance of success at class certification and a 20% chance of success at trial, thereby discounting the claim to approximately $113,957. Loos Decl. ¶ 17.

<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 communicate with their supervisors regarding job performance, check their schedules, and communicate among the company via group text chains, without reimbursement. *Id.* at ¶ 18. Plaintiff's expert calculated unreimbursed business expenses to be worth approximately $145,522.50 assuming $7.50 of unreimbursed cell phone expenses per pay period per employee (19,403 weekly pay periods * $7.50 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 50% chance of success at class certification and a 40% chance of prevailing at trial, thereby reducing the value of the claim to approximately $29,104.50. *Id.*

<u>Plaintiff's Unpaid Wages Claim:</u> Plaintiff's unpaid wage claim was based on a decimal conversion error that occurred when Defendant converted Class Members' hours worked into a decimal format in a manner that resulted in regular small underpayments to Class Members. *Id.* at ¶ 19. From

the records produced and extrapolating to the Class, Plaintiff's expert found that there were approximately 1,729.6 underpaid hours in total, with an average underpayment of 4.6 minutes per shift. *Id*. Since the average rate of pay was $22.76, the maximum damages for this claim equals $39,365.70. *Id*. Given that the regular small underpayments can be proved based on Defendant's records alone, Plaintiff felt this claim should be given full value. *Id.*

<u>Plaintiff's Facial and Derivative Wage Statement Claim:</u> Plaintiff argued the presence of facial and derivative wage statement violations based on Defendant's failure to list the total hours worked and failure to list the applicable piece-rate earned when Class Members were paid on a piece-rate basis, as well as the claims described above. *Id*. at ¶ 20. 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 $1,912,050.00. *Id*. The calculation included 271 employees who worked 12,056 weekly 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 271 initial pay periods x $50 per initial violation = $13,550.00 for the initial penalties, plus 11,785 subsequent pay periods (12,056 weekly total pay periods minus 271 initial pay periods) * $100 per subsequent violation = $1,178,500.00 for the subsequent penalties, resulting in a total of $1,912,050.00. *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 50% chance of success at class certification and an approximate 40% chance of prevailing at trial, thereby discounting this claim to approximately $382,410. *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 ¶ 21. 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 $1,546,800.00 in waiting time penalties for the 250 terminated employees who worked an average shift of 8 hours per day with an average final pay rate of $25.78 per hour (250 employees * 8 hours * $25.78 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 he failed to prove the underlying claims. *Id.* Thus, Plaintiff estimated a 30% chance of prevailing at class certification and a 10% chance of prevailing at trial, thereby discounting these claims to approximately $46,404.00. *Id.*

<u>Plaintiff's PAGA Claim:</u> The PAGA claim presented even higher hurdles. *Id.* at ¶ 22. Although Plaintiff's Counsel found Defendant's exposure could potentially reach approximately $997,900.00 under Labor Code section 2699(f), assuming the initial penalty rate of $100 for each pay period and based on 9,979 weekly 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. ¶ 22. Plaintiff was doubtful he could recover the maximum amount per pay period if a large class judgment was entered for the same violations. *Id.* Given Defendant's facially compliant meal and rest break policies, the fact that paid meal period premiums during the PAGA Period, and a potential good faith defense on the unpaid time claim due to a decimal rounding error, Plaintiff could not place a high value on the PAGA penalties, and therefore allocated $50,000.00 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 ¶ 23. However, given the 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 Incentive Award for Plaintiff

Plaintiff seeks an Incentive Award of up to $10,000 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(e). 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 his claims individually, but instead chose to pursue this class action, delaying individual recovery until approval of a class action settlement. Loos Decl., ¶ 24. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute the class claims, maintained regular contact with counsel, was available on the day of mediation to answer critical questions, and reviewed the Settlement to make sure it was fair to the Class. Loos Decl., ¶ 23. 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 Incentive Award by declaration addressing the factors for the award. Loos Decl. ¶ 25.

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. ¶ 40. Plaintiff's Counsel seeks preliminary approval for attorneys' fees of up to one-third of the Gross Settlement Amount, currently estimated to be $350,000.00, and up to $20,000.00

in reimbursement of litigation costs. Settlement Agreement § 3.06(c). 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. ¶ 41.

V. CONCLUSION

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 3, 2024

AEGIS LAW FIRM, PC

By: ____________________

Jamie M. Loos
Attorneys for Plaintiff