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AURIA THAOHO

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

AURIA THAOHO, on behalf of herself and all others similarly situated, aggrieved employees, and the State of California,

Plaintiff,

vs.

CAPITOL CASINO, INC., and DOES 1 through 25, inclusive,

Defendants.

Case No. 34-2018-00228073-CU-OE-GDS

CLASS AND REPRESENTATIVE ACTION

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION FOR: PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS; APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT, APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL APPROVAL HEARING DATE

(SUPPORTING MEMORANDUM AND [PROPOSED] ORDER SUBMITTED CONCURRENTLY HEREWITH)

Date: August 1, 2019
Time: 2:30 p.m.
Dept.: 35
Reservation No.: N/A

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I. INTRODUCTION

By and through the instant motion, Plaintiff AURIA THAOHO ("Plaintiff") hereby requests that this Court enter an Order: (1) Granting Preliminary Approval of the Settlement Agreement, provisionally certifying a class of: "all individuals in California who have worked for Capitol Casino as Cardroom Dealers from February 28, 2014 through Preliminary Approval" ("PCMs") for the purposes of settlement; (2) appointing Plaintiff's counsel as Class Counsel for the purposes of Settlement;[1] (3) Appointing the proposed Settlement Administrator and maximum settlement costs; and (4) Approving the Class Notice and setting a Final Approval hearing date.[2]

On May 20, 2019, the parties reached an agreement in principal to resolve this litigation. After further negotiations regarding the full terms of the settlement agreement, all parties and counsel had executed the agreement by June 20, 2019.

The opt-out Settlement Agreement encompasses all claims Plaintiff asserts in the operative complaint on behalf of herself and a proposed settlement class of approximately one-hundred thirty-seven (137) persons who are or were employed by the Defendant Released Parties as cardroom dealers at the Capitol Casino in Sacramento, CA at any time during the period February 28, 2014 through the date this Court grants preliminary approval of the Settlement (the "Class Period").[3]

Plaintiff's operative complaint alleges that Defendant failed to provide the Class with compliant meal periods, which resulted in other derivative penalties under the Labor Code including unpaid wages and overtime under state and federal law, and unlawfully required them to pay 20% of their tips into a pool that included Defendant and the PCMs' direct supervisors. Plaintiff seeks to recover unpaid missed break premiums, unpaid wages and overtime and resulting derivative penalties and restitution for the improper tip pool on behalf

[1] A copy of the fully executed settlement agreement, entitled "CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE" (Settlement Agreement") is attached as Exhibit 1 to the Declaration of Ryan L. Hicks ("Hicks Dec.") filed concurrently herewith. The terms defined in the Settlement Agreement are used herein with the definitions incorporated therefrom.

[2] The Proposed Notice Package is attached as Exhibits 1-2 to the Settlement Agreement itself.

[3] Settlement Agreement at §§ 2.32 (Settlement Class definition) and 2.35 (Settlement Class Period).

of herself and all other similarly situated putative class members ("PCMs") employed by Defendant during the Class Period, including derivative penalties under the Private Attorneys General Act ("PAGA," Labor Code § 2698, *et seq.*).

Plaintiff has agreed to settle her claims and those of the putative class members in exchange for Defendant's agreement to pay the class $800,000, including the costs of administering the Settlement Agreement, any enhancement award to the Plaintiff, and reasonable attorneys' fees and costs. The Settlement Agreement satisfies all the criteria for preliminary class settlement approval under California Law and falls well within the range of what constitutes a reasonable compromise for claims of this nature and size.

II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS

On February 28, 2018, Plaintiff filed her initial Complaint in the Sacramento County Superior Court on behalf of all poker dealers who worked for Defendant during the four years prior to the date of filing, alleging claims of (1) Failure to Provide Meal periods; (2) Unpaid Wages; (3) Failure to Pay Overtime; (4) Failure to Provide Accurate Wage Statements; (5) Waiting Time Penalties; (6) Gratuity Violations; and (7) Unfair Business Practices.[4] Plaintiff concurrently provided notice by U.S. Certified Mail to the Labor Workforce and Development Agency and also to Defendant of their intent to seek penalties on behalf of the State pursuant to PAGA. On May 10, 2018, Plaintiff filed her Amended Complaint adding a claim for (8) PAGA Penalties. *Id.* Thereafter, Plaintiff discovered that Defendant had sought "Pick Up Stix" releases from the class members just days after receiving notice of this action. *Id.* Plaintiff filed her motion to invalidate those releases on October 15, 2018, and the Court granted that motion on November 7, 2018. *Id.* Shortly thereafter Defendant retained new counsel (current defense counsel), and the parties proceeded with formal discovery that had been previously propounded. Shortly thereafter, the parties then stipulated to suspend discovery and postpone other formal proceedings while attempting to resolve the matter through this early mediation. *Id.* After the curative notice was sent to the PCMs, Plaintiff's counsel was contacted by a PCM who had worked

[4] Hicks Dec. at ¶4.

as a cardroom for Defendant during the Class Period as a dealer for non-poker games, and reported to counsel that the violations asserted on behalf of poker dealers were widespread and applicable to all of Defendant's cardroom dealers. *Id.* At ¶6. Accordingly, on March 22, 2019, Plaintiff filed her Second Amended Complaint which expanded the class definition to include all PCMs. *Id.*

Throughout the litigation the parties engaged in an extensive pre-certification, voluntary exchange of information, including the exchange of documents and voluminous personnel and payroll data, through formal and informal discovery methods. The Parties additionally each conducted independent investigations and fact-finding. Hicks Dec. at ¶7.

Prior to the mediation, Defendant provided summary data and actual timekeeping and payroll data for each of the 137 class members (as of the mediation) regarding the shifts that they worked and their clock in and out records, wage statements, and raw timekeeping data through March 2019. *Id.* at ¶8. During the litigation Defendant also produced documents regarding their asserted meal and rest period, payroll, and timekeeping policies in effect during the Class Period to the extent any existed, various "cage records" and scheduling information and thousands of other records. *Id.*

Plaintiff compiled the data produced by Defendant, and estimated damages on all claims for the entire class during the complete Class Period, including penalties analyzed for each individual PCM. *Id.* at ¶9. Plaintiff's counsel has obtained sufficient discovery to evaluate the likelihood of success on the merits and assess the potential risks facing Plaintiff and the putative class. *Id.*

On May 20, 2019, the parties attended an exhaustive full-day mediation session with Michael J. Loeb, Esq. of JAMS, a highly-respected mediator who specializes in wage and hour class mediations. *Id.* at ¶12. Plaintiff submitted a mediation brief summarizing the evidence that counsel had marshalled and synthesized, the state of the applicable law, and potential class-wide exposure. *Id*. Defendant submitted their own brief arguing that no class could be certified and that they would also prevail on the merits against the individual Plaintiff and any other PCMs. *Id. at* ¶13. With Mediator Loeb's assistance, the Parties

agreed, to the Settlement Agreement of the Actions, which was ultimately memorialized in a memorandum of understanding executed on May 20, 2019. *Id.* Thereafter the parties prepared the Settlement Agreement, which was ultimately executed on June 20, 2019. *Id.* at ¶13.

Plaintiff and her counsel are of the opinion that the Settlement Agreement is well within the range of reasonableness and is in the best interest of the proposed settlement class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential appellate issues.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT MEETS ALL OF THE REQUIRED CRITERIA.

A. Settlement Class Size and Determination

Pursuant to C.R.C. 3.769(d), an order certifying a provisional settlement class is appropriate. The proposed settlement class is sufficiently numerous, because Defendant have identified approximately 137 class members based on their personnel records. Hicks Dec. at ¶14. It is also undisputed that Defendant applied the same nominal meal period policies, payroll practices and meal and break policies to all of the PCMs throughout the class period, satisfying the commonality requirement. *Id.* at ¶15. It is similarly undisputed that Plaintiff's claims are typical of those of the PCMs. *Id.* at ¶16. Plaintiff is aware of no conflicts among Plaintiff and the class (*id.* at ¶17), and Plaintiff's counsel are experienced wage and hour class action attorneys and have litigated this matter in the best interests of the class (*id.*), satisfying the adequacy requirement. Defendant does not dispute the provisional certification of a class for settlement purposes.

B. This is a Non-Reversionary Common Fund Settlement.

The non-reversionary Settlement Agreement provides that Defendant will pay a total of $800,000 to Plaintiff and other Participating Class Members ("CMs") who do not opt-out of the class, including an enhancement award to Plaintiff in an amount up to $10,000, attorneys' fees up to 1/3 of the Settlement Fund $266,666.67 plus their reasonable costs

incurred, claims administrator's fees and expenses up to $15,000, and $10,000 allocated to the PAGA claims to be divided 25% to the class (to be distributed on a *pro rata* basis) and 75% to the California Labor Workforce Development Agency ("LWDA").[5] Within seven (7) days of the Court's Final Approval of the Settlement Agreement and those deductions, Defendant will make its First Payment to the Settlement Fund of $400,000, which will then be distributed to the CMs who have not opted out on a pro rata basis less the approved deductions for payments to Class Counsel, the LWDA, and Plaintiff. *Id.* at §§ 5.1-5.8. 90 days after Defendant submits the First Payment, it will submit the Second Payment of $400,000 to the Settlement Fund, which will then be disbursed to the Settlement Administrator, with the remainder being distributed to CMs who have not opted out of the settlement will be sent a *pro rata* share of the remaining settlement fund based on the number of workweeks that each CM worked during the Class Period while employed by Defendant.[6]

The sum of any settlement checks returned as undeliverable or otherwise un-cashed within 90 days after being mailed will be distributed in accordance with the requirements of CCP § 384 and transmitted to a non-profit organization to projects that will either: benefit the class or similarly situated persons, or promote the law consistent with the objectives and purposes of the underlying Class Action. The parties propose to the Court that any unclaimed funds be transmitted to Legal Aid at Work as a *cy pres* beneficiary.[7]

C. The Value of the Proposed Settlement to the Class Is Within the Bounds of Reasonableness.

The well-recognized factors that a trial court should consider in evaluating the reasonableness of the value of a class action settlement agreement include, but are not limited to:

[5] Settlement Agreement at § 2.36.

[6] *Id.* Assuming the Court approves all maximum deductions from the Total Settlement Amount, the Net Settlement Fund will be $493,833.33, resulting in an average payment of approximately $3,604.62 per Participating Class Member (assuming 137 class members).

[7] *Id* at § 10.3. Legal Aid at Work's qualifications to be designated as the *cy pres* beneficiary of this proposed settlement are attached as Exhibits 3 and 4 to the Hicks Dec. *See also https://legalaidatwork.org/our-mission-and-how-we-work/*).

> [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801.

> [A] presumption of fairness [of a proposed class action settlement] exists where: (1) the settlement is reached through arm's-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.

Kullar v. Foot Locker Retail Inc. (2008) 168 Cal.App.4th 116, 128 (*quoting Dunk, supra*, at 1801); *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 799. However, the *Kullar* and *Clark* courts also noted that a court must be independently satisfied that the consideration being received (here $800,000) is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Clark, supra,* at 452, *quoting Kullar, supra,* at 129.

1. <u>The Settlement Was Reached Through Arm's-Length Negotiations.</u>

That the settlement was reached through arm's-length negotiations is exemplified by the nearly two years of hotly contested litigation and motion practice and that the proposed settlement was achieved only with the assistance of an experienced mediator. Defendant, as evidenced in its mediation brief, other moving and opposition papers, and case management conference statements, believed and maintained that a class could not be certified.[8] Furthermore, the parties legitimately disputed various defenses raised by Defendant, who was faced with the prospect of lengthy and expensive litigation against experienced counsel and a lengthy potential trial, and the spectre of appellate proceedings regarding the use of representative testimony at trial.

On the other hand, while Plaintiff's counsel remain ultimately confident in the merits of their legal arguments, Plaintiff was put in the position of negotiating a settlement at this juncture with unclear case law regarding the propriety of the use of representative

[8] *See, generally,* all Case Management Conference Statements filed to date.

testimony with respect to the PAGA claims possibly facing years of litigation and costs which could exceed any recovery for the class in order to achieve a verdict which still may not have been collectible for many years due to potential appellate issues, and/or uncertainties regarding the precise amount of damages due to each PCM. It was agreed upon by Plaintiff and his counsel that a settlement at this juncture in the sum agreed upon was in the best interests of the class. Hicks Dec. at ¶18.

2. Sufficient Discovery and Investigation Have Been Completed to Warrant Settlement.

A court must "receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." *Kullar, supra,* at 133. Here, the parties have engaged in substantial discovery regarding certification, merits, and damages issues. Plaintiff's counsel analyzed the data provided for all PCMs and assessed the maximum total value of the non-PAGA class claims to be just under $9.8 million (of which approximately 9 million were asserted tip pooling violations, and $995,765.02 were Labor Code violations for meal periods, waiting time penalties and wage statement penalties based on Defendant's own timekeeping records). Hicks Dec. at ¶10.[9]

The "recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released" and Plaintiff took into account "the risks and expenses of attempting to establish and collect on those claims by pursuing them in the future," when discounting the value of the claims being settled here. *Clark, supra,* at 800 (*quoting Kullar, supra,* at 129, emphasis omitted). Plaintiff asserts that Defendant

[9] Including the estimated $8,998,000 in duplicative PAGA penalties, including nearly $6 million in penalties for inaccurate wage statements under Labor Code § 226.3 (which provides for penalties of five times the amount available directly to employees under § 226(a)) increases the total estimated exposure to $18,834,157.42. Defendant asserted that its maximum potential liability was only a fraction of that amount, though it maintained that Plaintiff would recover nothing. Based on the maximum potential exposure, each PCM could have in theory recovered $64,535.71 for the tip pooling violations, and $7,261.06 for the Meal Period, Waiting Time Penalty and Wage Statement Claims, and $65,678.83 in PAGA penalties, though 75% of those would have gone to the state, leaving a maximum of $16,419.71 to the PCM. Hicks Dec. at ¶10.

implemented the following common policies and practices which resulted in violations of the meal and rest period requirements of the Labor Code:

i. Meal Period Claims[10]

Labor Code §§ 226.7 and 512 and the applicable wage orders require employers to authorize and permit meal periods to their employees. California law prohibits employers from employing an employee for more than five hours without a meal period of at least 30 minutes. "[A]n employer's obligation is to provide an off-duty meal period: an uninterrupted 30–minute period during which the employee is relieved of all duty." *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1035 (2012).[11] "An employer must relieve the employee of all duty for the designated period." *Id.* at 1034. An employer cannot "impede or discourage [employees] from [taking off-duty rest periods]." *Id.* at 1040. Unless the employee is relieved of all duty during the 30-minute meal period, the employee is considered "on duty" and the meal period is counted as time worked under the applicable wage orders. *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 264. When an employer fails to provide a meal period in accordance with the applicable wage orders, the employer must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that a compliant meal period is not provided. Labor Code § 226.7.

Defendant failed to provide compliant meal periods, based on the timekeeping records it produced in this matter. Notably, a review of the timekeeping records produced indicate that a compliant meal period was not provided during 39% of the PCMs' shifts.

[10] An in-depth analysis of the relevant case law and evidence related to the meal period and derivative claims can be found in ¶¶19-39 of the Hicks Dec. That analysis is summarized here for the sake of brevity.

[11] There have been numerous wage and hour cases involving California missed break claims certified after *Brinker*. *See Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952 (9th Cir. 2013); *Mendez v. R+L Carriers, Inc.*, 2012 WL 5868973 (N.D. Cal. 2012); *Faulkinbury v. Boyd & Assoc., Inc.*, (2013) 216 Cal.App. 4th 220; *Benton v. Telecom Network Specialists, Inc.*, (2014) 220 Cal.App.4th 701; *Martinez v. Joe's Crab Shack Holdings*, (2013) 221 Cal.App.4th 1148; *Jones v. Farmers Ins. Exch.*, (2014) 221 Cal.App.4th 986; *Bradley v. Net. Inter'l*, (2012) 2012 WL6182473; *Wang v. Chinese Daily News, Inc.*, No. 2:04-CV-01498- CBM, 2014 WL 1712180 (C.D. Cal. Apr. 15, 2014); *Bickley v. Schneider Nat'l,* No. C 08-05806 JSW (N.D. Cal.); *Schulz v. Qualxserv*, No. 09-CV-17-AJB (MDD) (S.D. Cal.); *Paige v. Consumer Programs*, No. CV-07-2498-MWF(RCx) (C.D. Cal.); *Munoz v. Giumarra Vineyards*, No. 1:09-cv-00703-AWI-JLT (E.D. Cal.); *Cubillas v. Dav-El Los*, No. BC 427918 (Cal. Sup. Ct., LA County); *Membreno v. Intern'l House of Pancakes*, No. 488181 (Cal. Super. Ct., San Mateo County); *Drake v. John Stewart Co.*, No.CGC-11-507902 (Cal. Sup. Ct., San Francisco County).

Since the dealers could not leave their tables without being released by a supervisor, it cannot reasonably be argued that any PCM waived an off-duty meal period, or chose to take their meal period late. Moreover, only a handful of meal period premiums were ever paid, and were only paid after this lawsuit was filed. Hicks Dec. at ¶20.

Defendant asserts that there was enough time for PCMs to take a meal period, or that PCMs waived their meal periods willingly and/or chose to take them after the fifth hour of work. *Id.* At ¶23

The area of law regarding the propriety of class treatment of meal period requirements remains unsettled, notwithstanding the California Supreme Court's ruling in *Brinker v. Superior Court* (2012) 54 Cal.4th 1004.

Furthermore, proving up individual damages would likely require costly representative testimony analyzed by experts on both sides, and Defendant would likely dispute the application of *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, and *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 regarding any evidentiary showing and Trial Plan with respect to both liability and damages. Defendants would undoubtedly move for class decertification thereafter, making appellate proceedings almost certain regardless of which side prevailed at trial.[12] Plaintiff estimated that Defendant's potential exposure was $516,275.02 for the meal period claims. Hicks Dec. at ¶10. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶24.

ii. Unpaid Wages and Overtime

As a result of its unlawful meal period practices, Defendant also required the PCMs to perform work without compensation in violation of Labor Code §§ 200, 510, 1194(a) and applicable IWC Wage Orders. The Wage Orders define "hours worked" as the "the time during which an employee is subject to the control of an employer and includes all the time

[12] In light of *Wal-Mart*, and and its prohibition of so-called "trials by formula," and the California Supreme Court's recent opinion in *Duran*, it remains unclear as to what extent Plaintiff would be permitted to use representative testimony at trial. *But see Tyson Foods, Inc. v. Bouaphakeo* (2016) __ U.S. __, 136 S.Ct. 1036.

the employee is suffered or permitted to work, whether or not required to do so." Labor Code § 1194(a) provides that employees are entitled to recover the unpaid balance of their minimum wage or overtime compensation. Specifically, § 510 requires an employer to pay overtime compensation at one and one-half times the regular rate of pay for an employee where the employee works more than eight hours in a day or forty hours in a week.

PCMs are entitled to hourly wages for the time that they were clocked out for a meal period of less than thirty minutes. PCMs are entitled to straight time and overtime compensation for this uncompensated work. However, meal periods were less than 30 minutes on approximately 6% of shifts, and of those a substantial number of those short meal periods were 27 minutes or more, rendering a *de minimis* argument potentially applicable, and Defendant argued that PCMs clocked in from their meal periods of their own volition and were not required to clock in prior to a 30-minute meal period. Hicks Dec. at ¶25. This inquiry is potentially highly individualized as to the timing of each meal period, reasons that the meal period was less than 30 minutes, and whether a *de minimis* argument even applies to a meal period,[13] which made class certification on the issue highly unlikely. Hicks Dec. At ¶26.

Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶27.

iii. Inaccurate Wage Statement Claims

Plaintiff argues and maintains that the testimony and evidence show that Defendant's wage statements did not reflect the premium wages that PCMs were owed for missed or otherwise noncompliant breaks, and that they were also inaccurate on other bases as well. *Id.* at ¶28. Using the data provided by Defendant, the maximum value of the inaccurate wage statement claim was approximately $437,450.00. *Id.* at ¶10. The parties

[13] We note that the California Supreme Court recently held that the federal *de minimis* rule is not incorporated into the California wage and hour law. *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829. However, the Court also found that such a rule may apply under the factual circumstances of an individual case, rendering appellate review of this case almost a certainty.

have vigorously disputed whether Plaintiff and the other CMs were "injured" as a result of any inaccurate wage statements. *Id.* at ¶29.[14] Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶30.

iv. Waiting Time Penalties

Plaintiff asserts that any failure to pay the premium wages for a missed meal or rest period or unpaid wages, including overtime, necessarily exposed Defendant to liability for waiting time penalties. *Id.* at ¶¶31-32. Based on the data provided by Defendant, Plaintiff estimated Defendant's exposure for the Waiting Time Penalties to be approximately $41,040.00. *Id*. at ¶10. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶33.

v. PAGA Claims[15]

Plaintiff also asserts that the underlying alleged meal and period and gratuity violations gave rise to penalties for violations of Labor Code §§ 204, 226.3, 210, 351, 558, and 1174.5 available under the Private Attorneys' General Act. *Id.* at ¶34. Defendant contends that no claim for PAGA penalties of any nature is valid. The PAGA claims were at issue and were resolved as a part of the overall settlement of the case. In such cases, California Courts have held that none of the proceeds of a settlement must necessarily be allocated and distributed to the LWDA as settled PAGA penalties. *Nordstrom Commissions Cases* (2010) 186 Cal.App.4th 576, 589.[16]

Notwithstanding Defendant's asserted defenses based on the underlying meal and rest period and unpaid wages claims, the case law regarding the wholly-derivative and duplicative PAGA claims remains inconsistent at best, and downright murky and conflicted

[14] We also note that there is one recent California case, that asserts in dicta that claims for inaccurate wage statement and waiting time penalties cannot be based on a claim for missed meal or rest breaks (*Ling v. P.F.Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242), contrary to the vast majority of cases reaching the opposite conclusion. *See In re: Autozone, Inc.* (N.D.Cal. Aug. 10, 2016) 2016 WL 4208200 (disagreeing with *P.F. Chang's* "[b]ecause the Court is persuaded by the numerous [courts] recognizing that section 203 penalties are available for wage payments under section 226.7….")

[15] See ¶¶34-39 of the Hicks Dec. for a further in-depth discussion of the PAGA claims, with citations to relevant authority which are summarized here for the sake of brevity.

[16] Plaintiff submitted the proposed settlement agreement along with these moving papers to the LWDA on the same date that they file the instant motion through the LWDA's new online submission system. Hicks Dec. at ¶38.

at worst. The asserted § 226.3 penalties sought under PAGA derive from the same conduct for which Plaintiff seeks penalties under § 226, which itself is derivative of the missed break claims, and all of the asserted PAGA penalties are derivative of other underlying claims. Courts have discretion to reduce any amount of penalties awarded under PAGA, and there is currently no uniform guidance or authority available to predict whether this Court would award all of the PAGA penalties, deem them to be wholly duplicative, or something in between.[17] In counsel's experience, Plaintiffs always calculate potential PAGA penalties, but they are given little weight in settlement negotiations, due to an expectation that a Court would, like the Labor Commissioner, refuse to "stack" duplicative penalties and focus instead on the underlying violations. Hicks Dec. at ¶37. Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶39.

vi. Tip-Pooling Practices

Under Labor Code § 351, gratuities are the property of an employee, and not the employer. That statute prohibits an employer or its agent from imposing a mandated tip pooling policy that requires employees to share their tips with the employer or it's "Agent." Section 350 of the Labor Code defines "Agent" as "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees." Here, that would include management, and the floor supervisors who directly supervise the PCMs. *See, e.g. Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138 (Restaurant Floor Manager who supervised servers on a "daily basis" was an "Agent" under § 350). Plaintiff and PCMs report that they were required to pay 20% of their tips each shift back to the casino, and that they were told that the tips would then be distributed to their own supervisors and management. Hicks Dec. at ¶41. The Poker Dealers we have interviewed indicated that they averaged around $200 tips per shift and

[17] Labor Code § 226 incorporates its own penalty provisions, so an award of the maximum penalty amount provided by PAGA is uncertain. *See* Lab. Code § 2699(f); *see also Guifi Li v. A Perfect Day Franchise Inc.*, (N.D. Cal. 2012) 2012 WL 2236752 at *17. Moreover, even assuming Plaintiff's remaining claims qualify for PAGA penalties, any such award is not automatic. Cal. Lab. Code § 2699(e)(2); *see* also *Thurman v. Bayshore Transit Mgmt., Inc.*, (2012) 203 Cal.App.4th 1112, 1135-36.

were required to pay Defendant $40 per shift, and the Cal Games dealers have indicated that they averaged around $380 in tips per shift and paid Defendant roughly $76 per shift. *Id.* Hence, pursuant to the UCL, Plaintiff and the class are entitled to restitutionary damages that disgorge the Casino from the tips that it unlawfully took from PCMs.[18] *Id.*

However, there were multiple hurdles to certification of this issue. First, the PCMs Plaintiff's counsel interviewed confirmed the uniform application of the tip practice, but also indicated that they did not claim all of their tips on a daily basis, and as a result were afraid that submitting declarations or evidence regarding the tip polling practice could subject them to problems with the IRS. *Id.* at ¶42. Defendant also kept no records of either the tips paid into the pool by the PCMs, or how those funds were distributed to other co-workers. *Id.* Finally, Defendant argues that the Floor Supervisors were not its "agents" as defined by the applicable Labor Code section, and thus, the requirement that PCMs were required to pay tips, some of which (Defendant asserted that 20-25% of the required tip payments went to the floor supervisors) went to Floor Supervisors was not a violation of Labor Code § 351. *See Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1451-52; *Leighton v. Old Heidelberg, Ltd.* (1990) Cal.App.3d 1062, 1067. Defendant further argued that the Floor Supervisors were appropriate recipients of the tip pool because they were in the "chain of service" that led to the dealers' tips, much like a bartender or hostess at a restaurant. *Id.* Plaintiff estimated that the maximum exposure for the tip pooling claims was $8,841,392.39. Hicks Dec. at ¶10. But even if successful, the PCMs may only have been entitled to the estimated 20-25% of that figure that went to the floor supervisors (as opposed to other employees whom Plaintiff did not contend were improper recipients of tip pool monies), just over $2 million. *Id.* at ¶43. And the complete lack of any documentation of the practice, along with the PCMs' refusal to provide willing testimony on the issue resulted in a sharp discount on the tip pooling claim, due to the low potential for certification and success on the merits at trial. *Id.*

[18] Based on the Cage Records provided for this mediation, Defendant failed to record the tips it took from PCMs and distributed to other employees, a violation of Labor Code § 353.

Plaintiff's counsel were aware of these risks and took them into account when discounting the claims for settlement purposes. *Id.* at ¶45.

3. Class Counsel is Experienced and Endorses the Settlement.

Experienced counsel, operating at arm's length, have weighed the foregoing factors and endorse the proposed settlement. Plaintiff's counsel has experience not only in class actions and employment litigation, but specifically in wage and hour class actions. *Id.* at ¶¶1-3. Plaintiff's counsel is experienced and qualified to evaluate the class claims and the viability of the defenses. *Id.* The recovery for each participating class member will be reasonable, given the risks inherent in litigation, the defenses asserted, the unsettled nature of wage and hour and class action law with respect to representative testimony and penalties under the PAGA, and the risk that all of the class claims could be compelled to individual arbitrations.[19] This settlement is fair, adequate and reasonable, and in the best interests of the proposed settlement class.

4. No Objections Can Be Made Until the Final Approval Hearing.

It is impossible to address the fourth factor in the reasonableness assessment unless and until after the class is notified of the proposed settlement. Should any proposed settlement CMs file objections, the Court can evaluate such concerns at the Final Approval Hearing.

D. The Scope of the Release Provisions Corresponds Only to Claims Related to the Class Claims.

Pursuant to the Settlement Agreement, the CMs would release Defendant and their corporate parents, owners, subsidiaries and affiliates from any claims which could have been asserted based on the allegations of the operative complaint, i.e. claims based on meal period and tip pooling violations during the Class Period.[20] The settlement does not ask the Court to enjoin CMs from filing related claims until Final Approval.

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[19] Hicks Dec. at ¶¶46-47 (further testimony regarding the value of the settlement).

[20] Settlement Agreement at § 2.34 ("Settlement Class Members' Released Claims"). Specifically, the released claims are: "[A]ny and all past and present claims, actions, demands, causes of action, suits, debts, obligations, damages, rights or liabilities, of any nature and description whatsoever, known or unknown, existing or potential, recognized now or hereafter, expected or unexpected, pursuant to any theory of recovery

E. The Plaintiff's Proposed Enhancement Award is Fair and Reasonable.

Named Plaintiffs in class action litigation are eligible for reasonable service awards. *See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977.[21] The settlement agreement provides for a Class Representative Service Award of up to $10,000 to Plaintiff subject to the Court's approval, in recognition of their efforts and work in prosecuting the class action.[22] If approved, the $10,000 enhancement award would constitute 1.25% of the Total Settlement Amount. In counsel's experience, the enhancement awards will be reviewed at the Final Approval stage, and Plaintiff will submit a declaration at that time which details the time she put into the case, and the risks that she faced in doing so.

(including but not limited to those based in common law or equity, federal, state, or local law, statute, ordinance, or regulation), and for claims for compensatory, consequential, punitive or exemplary damages, statutory damages, declaratory relief, injunctive relief, equitable relief, penalties, interest, attorneys' fees, costs or disbursements, including but not limited to those incurred by Class Counsel or any other counsel representing the Plaintiff or any Settlement Class Members (other than those expressly awarded by the Court in the Class Counsel Award authorized by this Agreement), that arise from or are reasonably based on or related to Capitol Casino's alleged failure to provide meal periods to and/or its alleged unlawful tip-pooling policy as applied to Settlement Class Members by other entities or individuals, and specifically including the following claims arising from, based on, or reasonably relating to the claims asserted and the facts alleged in the Action: including claims (based on the facts alleged in the Action) for unpaid wages (including claims for minimum wage, regular wages, overtime, final wages, calculation of the correct overtime or regular rate, and/or meal period premiums based on the alleged meal period violations), liquidated damages, expense reimbursements, interest, penalties (including waiting time penalties pursuant to Labor Code Section 203, wage statement penalties pursuant to Labor Code Section 226, restitution, and civil penalties pursuant to the PAGA based on any provision of the Labor Code, Wage Orders or any other statute or regulation to the fullest extent permitted by law), claims pursuant to the California Labor Code, Code of Civil Procedure Section 1021.5, the California Code of Regulations, Title 8, Sections 11010 and 11040, the Industrial Welfare Commission Wage Orders, claims under Business and Professions Code Section 17200, et seq., claims under the federal Fair Labor Standards Act, claims for attorneys' fees and costs, and unfair business practices. "Settlement Class Members' Released Claims" do not include claims that, as a matter of law cannot be released and do not include claims for retaliation, discrimination, wrongful termination, or individual claims filed with the appropriate agency for the recovery of workers' compensation benefits. "Settlement Class Members' Released Claims" are released through the Preliminary Approval Date." Notably, the release is narrowly tailored to the facts asserted in the operative Complaint.

[21] *See, e.g. Castellanos v. The Pepsi Bottling Group,* No. RG07332684 (Alameda Super Ct., Mar. 11, 2010) (award of $12,500); *Novak v. Retail Brand Alliance, Inc.,* No. RG 05-223254 (Alameda Super. Ct., Sept. 22, 2009) (award of $12,500); *Hasty v. Elec. Arts, Inc.,* No. CIV 444821 (San Mateo Super. Ct., Sept. 22, 2006) (award of $30,000); *Meewes v. ICI Dulux Paints, No. BC265880* (Los Angeles Super. Ct. Sept. 19, 2003) (service awards of $50,000, $25,000 and $10,000 to the plaintiffs); *Mousai v. E-Loan, Inc.,* No. C 06-01993 SI (N.D. Cal. May 30, 2007) (service award of $20,000); *Guilbaud v. Sprint/United Management Company*, N.D.Cal. Case No. 3:13-cv-4357-VC (April 15, 2016, $10,000 awards).

[22] Settlement Agreement at § 2.28.

F. The Obligations Placed Upon PCMs Are Reasonable and Clearly Explained in the Notice Package.

The Notice Packet (Exhibits 1-2 to the Settlement Agreement) clearly identifies the options available to PCMs under the Settlement Agreement. (1) request exclusion from the lawsuit and not be bound by the settlement and be free to file their own lawsuit; (2) file an objection to and be bound by the proposed settlement; or (3) do nothing, and be bound by the settlement and receive a *pro rata* share of the settlement proceeds.

G. Method of Notice.

California law vests the Court with broad discretion in fashioning an appropriate notice program so long as it satisfies all due process requirements. Civil Code § 1781; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 970-974; C.R.C. 3.769. The actual form and contents of the notice are within the Court's discretion. *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 251.

The parties have drafted a Class Notice document based upon the general form proposed by the Federal Judicial Center and in "Plain English," and have incorporated information discussed in the Court's guidance documents for class settlements and notices available on the Court's website. Plaintiff's counsel have utilized this same general format in multiple Class Notices approved by Courts in California. The notice explains to the PCMs the meaning and nature of the action and the proposed settlement class, the key terms of provisions of the Settlement Agreement, the manner in which payments to PCMs will be calculated, the minimum estimated amount that a PCM will receive per workweek for the Defendants during the class period if they do not opt out of the class, the number of workweeks that the PCM worked during the Class Period, the proposed amounts of attorneys' fees, the Plaintiff's proposed enhancement award, the time, date and place of the Final Approval Hearing (once set by the Court), and the procedures and deadlines for requesting exclusion from the Class and/or objecting to the settlement.

Within ten (10) calendar days of this Court granting Preliminary Approval of the Settlement Agreement, Defendant will provide the Class List to the proposed settlement

administrator, Rust Consulting (http://www.rustsonsulting.com/).[23] The administrator will then perform a Reasonable Address Verification Measure, or "skip trace" to obtain the most current mailing addresses of the PCMs. *Id.* at § 6.6. No later than twenty-one (21) days after the Court grants Preliminary Approval, the administrator will send the PCMs by First-Class U.S. Mail the Notice Package. *Id.* at § 6.4. The Opt Out Period will last forty-five (45) days from the date Notice is mailed. *Id.* at § 6.3. A copy of the Notice Package will also be available on Class Counsel's website. Plaintiff is unaware of any method available to provide greater notice to the PCMs. Assuming the Court grants final approval of the Settlement, class members will be mailed a Notice of Final Approval providing notice of same. Exhibit 2 to Settlement Agreement

H. Explanation of Settlement Payment Calculations and Procedures

A CM's *pro rata* share of the Settlement Agreement's common fund will be determined based on the number of weeks that he or she worked as a PCM during the Class Period as compared to all CMs. *Id.* at § 5.4. The total of all Individual Settlement Payments will be equivalent to the Net Settlement Fund. *Id.* at § 5.2. If a CM disputes the Weeks Worked identified in their Class Notice, they can provide documentation and/or some explanation of the disputed number of shifts to the administrator. *Id.* at § 6.3; *See also* Proposed Notice at p. 4.

Because Defendant is funding the settlement with two payments, 90 days apart (*see* Settlement Agreement at §5.5, there will be a disbursement after the First Payment, which will include the payments of Class Counsels' fees and costs, the LWDA payment, and the Class Representative Service Award, and the remainder of the First Payment being distributed to the PCMs on a *pro rata* basis. Then following the Second Payment, the Settlement Administration costs will be deducted, with the remainder of the Second Payment being distributed to the PCMs on a *pro rata* basis. *Id.*

[23] Settlement Agreement at § 6 (notice procedures). The Class List includes: full name, phone number, last four digits of Social Security Number, employment start and end dates, and last known address.

I. Cy Pres Beneficiary Process

This Settlement Agreement tracks the requirements of CCP § 384. In the event that there are uncashed checks after the 90 days for cashing them has expired, then the residue will be distributed to a non-profit organization—the parties propose Legal Aid at Work as the *cy pres* beneficiary of this settlement.[24]

J. Tax Consequences

As for the settlement payments, thirty-three percent (33%) of each CM's *pro rata* Individual Settlement Award payment will be treated as wages in the form of back pay for tax purposes, thirty-three percent (33%) will be treated as interest, and thirty-four percent (34%) percent of each payment will be treated as penalties, interest and other non-wage payments. *Id.* at § 4.2. This allocation is appropriate because the potential damages arise out of the underlying meal and rest period claims for premiums, but a substantial portion of the potential damages are made up of prejudgment interest on the premium wages, and all of the potential derivative penalties. Hicks Dec. at ¶49. A CM's *pro rata* share of the twenty-five (25**%**) of the PAGA payment to be distributed to the Settlement Class will also be treated as penalty. *Id.;* Defendant will pay the employer's share of payroll taxes, such as FICA. *Id.* at § 4.1. The Settlement Administrator will issue tax forms to all individuals receiving a payment. *Id.* at §5.8.

K. Estimated Administration Costs

Rust Consulting has provided an estimate of approximately $9,800 for administration costs (Hicks Dec. at ¶50, Ex. 2). In the event that Rust does not incur the full $9,800 of estimated costs permitted by the Settlement Agreement, any costs not incurred will be distributed to the participating Class Members. (Settlement Agreement at § 2.31.)

[24] Settlement Agreement at § 10.3. Attached as Exhibits 3-4 to the Hicks Dec. are documents provided by Legal Aid at Work which describe their qualifications to be designated as the *cy pres* beneficiary of this class settlement.

L. Class Counsel's Request for Attorneys' Fees and Costs.

Class Counsel seeks fees in the amount of $266,666.67 (one-third of the total amount of the settlement) plus reasonable costs incurred,[25] which will result in a modest multiplier of less than 1.5. Plaintiff's counsel will address that request at the final approval stage, as is counsel's experience with the California Complex Litigation departments.[26]

M. The Proposed Settlement Will Have No Effect on Any Other Cases.

Plaintiff is aware of no case pending in any other jurisdiction in which similar claims are asserted on behalf of any PCMs against this Defendant.[27]

IV. THE COURT SHOULD APPOINT RUST CONSULTING AS THE SETTLEMENT ADMINISTRATOR AND APPROVE THE COSTS OF SETTLEMENT ADMINISTRATION.

The settlement contemplates that the parties would jointly select a Settlement Administrator who will be responsible for mailing and re-mailing class notices, processing claim forms and requests for exclusion, calculating settlement awards, preparing reports, and verifying payments. Rust Consulting, Inc. is well qualified to serve as the Administrator and has administered hundreds of settlements in the state of California alone. The parties nominate Rust Consulting to be the Settlement Administrator and request that the Court preliminarily approve the payment of up to $15,000 to Rust to administer the settlement, noting of course that Rust has agreed not to charge for any work not performed, and such leftover funds will be distributed to the participating Class Members. (Settlement Agreement at § 2.31.)

V. THE COURT SHOULD SET A SCHEDULE FOR FINAL APPROVAL.

Where a court grants preliminary approval to a class settlement, the court's order must include the time, date and place of the final approval hearing, and any other matters deemed necessary for the proper conduct of a settlement hearing. C.R.C. 3.769(e). The parties respectfully propose the following schedule for the final approval hearing:

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[25] Settlement Agreement at § 2.2.
[26] *See* Hicks Dec. at ¶¶52-59.
[27] *Id.* at 60.

21 Days After Preliminary Approval (8/22/19)	Mailing of the Notice Package.
45 Days after Mailing of the Notice Package (10/6/19)	Exclusion/Objection Deadline. The last day for PCMs to request exclusion or submit objections.
75 Days after Preliminary Approval	Proposed date for Final Approval hearing. (Tuesday 10/15/19)[28]
7 Days after the Final Approval	First Payment by Defendant to the Settlement Fund
7 Days after the First Payment	First Payments from the Settlement Fund to the CMs, Counsel, and the LWDA
90 Days after the First Payment	Second Payment by Defendant to the Settlement Fund.
7 days after the Second Payment	Second Payments from the Settlement Fund to the CMs, and payment to the Administrator
90 Days after Second Payments	Disbursement of uncashed funds per CCP § 384

VI. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court grant the instant motion in its entirety and preliminarily approve the Settlement Agreement.

Respectfully submitted,

Date: June 20, 2019

HOYER & HICKS,

Richard A. Hoyer
Ryan L. Hicks
Attorneys for Plaintiff

[28] Motion for Final Approval, Attorneys' Fees and Enhancement Awards filed no later than 10/8/19, one week before the Final Approval Hearing.

PROOF OF SERVICE BY EMAIL

I declare that I am employed in the City and County of San Francisco, State of California. I am over eighteen years of age and not a party to the within entitled cause. My business address is 4 Embarcadero Center, Suite 1400, San Francisco, California 94111. On the date below, I served:

NOTICE OF MOTION AND MOTION FOR: PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS; APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT, APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL APPROVAL HEARING DATE

to:

Christina Tillman
christina.tillman@mccormickbarstow.com
Tristan Matthews
tristan.matthews@mccormickbarstow.com
McCormick Barstow LLP
7647 North Fresno Street
Fresno, CA 93720

on:

JUNE 26, 2019

BY EMAIL: I served the document(s) on the person(s) listed above by emailing them pursuant to the parties' written e-service agreement. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on the date above.

Nicole B. Gage