IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANCHESCA ROLON, on behalf of herself and all others similarly situated, Plaintiff, v. WYOMING MALL HIBACHI RESTAURANT, INC., *et al.,* Defendants.	Civil Action No.: 3:24-cv-00232-KM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS AND COLLECTIVE ACTION SETTLEMENT, CERTIFY THE RULE 23 CLASS AND THE FLSA COLLECTIVE, APPOINT CLASS COUNSEL, APPROVE PROPOSED CLASS NOTICE, AND SCHEDULE A FINAL APPROVAL HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff[1], individually and on behalf of all others similarly situated, by and through her counsel, hereby respectfully moves the Court for preliminary approval of the proposed class and collective action settlement ("Settlement") set forth in the Settlement Agreement ("Settlement Agreement" or "SA") (attached as **Exhibit 1** to the contemporaneously filed Declaration of Gerald D. Wells, III ("Wells Decl.")). Plaintiff, with consent of Defendants, requests that the Court enter the proposed Preliminary Approval Order that would:

1. Grant preliminary approval of the proposed Settlement;

2. Certify, for settlement purposes only, the Rule 23 Class which consists of any current or former Tipped Employees, employed by Defendants at their Mirakuya Japanese Restaurant at any time between January 1, 2022 through February 28, 2024;

3. Certify, for settlement purposes only, the FLSA Collective;

4. Approve the form and content of, and direct the distribution of, the proposed Class Notice;

5. Appoint the law firm of Connolly Wells & Gray, LLP ("CWG") as Class Counsel for the Rule 23 Class and FLSA Collective; and

6. Set a date for the Final Approval Hearing at least 60 days after entry of the Preliminary Approval Order.

Class Counsel, on behalf of Plaintiff and a proposed class of individuals, have agreed

[1] All capitalized terms used throughout this brief shall have the meanings ascribed to them in the Settlement Agreement.

to settle all claims against Defendants for alleged violations of: (1) the Fair Labor Standards Act of 1938, as amended 29 U.S.C. §§ 201 *et seq*. ("FLSA"); (2) the Pennsylvania Minimum Wage Act, 43 P.S. § 333.101 *et seq*. ("PMWA"); and (3) the Pennsylvania Wage Payment Collection Law, 43 P.S. § 260.1 *et seq.* ("WPCL"). Plaintiff alleges that Defendants systematically and willfully denied their Tipped Employees all wages due and owing. As set forth in the Settlement Agreement, all Tipped Employees who do not opt out of the Settlement - *i.e.*, all PA Class members - will receive a payment under the Settlement in consideration for the release of their state-law claims. All Tipped Employees who affirmatively opt into the FLSA Collective -- *e.g.*, by submitting a valid and timely Claim Form -- will receive an additional payment in consideration for the release their FLSA claims. These releases and how payments will be calculated are set forth in detail in the proposed Class Notice that will be sent to all Tipped Employees. The Parties anticipate that the Class Notice will be sent to over 100 Tipped Employees.

As set forth below, the proposed Settlement is the product of fully informed, arms-length settlement negotiations. The Settlement satisfies all of the prerequisites for preliminary approval and certification of the PA Class and FLSA Collective. The proposed Settlement is fair, reasonable, and adequate as it recognizes the risks of continued litigation, while providing substantial relief to the Settlement Class Members. For these reasons, and those fully articulated below, Plaintiff respectfully

requests that the Court preliminarily approve the Settlement and enter the proposed Preliminary Approval Order.

II. BACKGROUND AND STATUS OF THE LITIGATION

On February 7, 2024, Franchesca Rolon ("Plaintiff" or "Rolon") sued Defendants in the United States District Court for the Middle District of Pennsylvania, Case No. 3:24-CV-232-KM. *See* ECF 1. On her own behalf, and on behalf of a putative class and putative collective, Plaintiff asserted claims under the FLSA, the PMWA, and the WPCL. On February 7, 2024, Defendants filed their Answer to the Complaint on May 20, 2024. On August 28, 2024, the Court granted Plaintiff's motion to stay all deadlines to allow the Parties to address certain discovery issues with the Court. During this time, the *Parties* engaged in significant, informal settlement discussions based on the production of certain, sensitive financial information from some of the Defendants. Ultimately, the *Parties* agreed to settle on the terms detailed herein.

Based upon their independent analysis, and recognizing the risks of continued litigation, counsel for Plaintiff believes that the proposed Settlement is fair, reasonable, and is in the best interest of Plaintiff and the Tipped Employees.

Although Defendants deny liability, they likewise agree that settlement is in the Parties' best interests. For those reasons, and because the Settlement is contingent on Court approval, the Parties submit their revised Settlement Agreement to the

Court for its review.

III. SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

The key components of the Settlement are set forth below, and a complete description of its terms and conditions are contained in the Settlement Agreement.

A. THE PROPOSED RULE 23 CLASS AND FLSA COLLECTIVE

Through the Settlement Agreement, the Parties stipulate to the certification of the following Rule 23 Class (the "PA Class"), for settlement purposes only:

> All former and current Tipped Employees of Defendants who worked in Defendants' Restaurant at any time from January 1, 2022 through February 28, 2024 who has not filed a Request for Exclusion prior to the Bar Date.

The Parties further stipulate through the Settlement Agreement to the certification of the following FLSA Collective, for settlement purposes only:

> All former Tipped Employees who affirmatively opt into this Action pursuant to 216(b) of the FLSA by submitting a Claim Form to the Claims Administrator prior to the Bar Date.

Should the Court grant final approval of the Settlement, by operation of law and as set forth in Section 5.1(A) of the Settlement Agreement: (a) all members of the PA Class who do not timely submit a Request for Exclusion (attached as **Exhibit C** to the Settlement Agreement) shall be deemed to have released any and all applicable Pennsylvania wage-related claims asserted in the Complaint; and (b) all members of the FLSA Collective shall be deemed to have released any and all federal wage-related claims asserted in the Complaint.

B. THE PROPOSED CLASS NOTICE

The Settlement Agreement provides for dissemination of a Class Notice. The Class Notice provides Tipped Employees with all pertinent information regarding the Settlement as well as the contact information for Class Counsel. After entry of the Preliminary Approval Order, Defendants shall provide the Claims Administrator with a list of all Tipped Employees in electronic form, containing the following information for Plaintiff and for each Tipped Employee: name, last known address, last known telephone number(s), last known email address(es), Social Security Number, hourly rate of pay paid by Defendants (the "cash wage" paid pursuant to Section 203(m) of the FLSA), number of hours recorded in Defendants' timekeeping system, and the dates employed by Defendants at any time during the Class Period. *See* SA § 4.6.

No more than fourteen (14) days after receiving the class list, the Claims Administrator will mail the Notice Packet via First Class Mail to each Tipped Employee. *See* SA § 4.8. The Notice Packet shall include the Class Notice (attached as **Exhibit A** to the Settlement Agreement). The Notice Packet shall, *inter alia*: (i) provide Estimated Settlement Payment amounts, divided into an Estimated Class Payment amount and an Estimated FLSA Collective Payment amount; (ii) inform Tipped Employees that, unless they opt out of the Rule 23 Class, they will automatically receive a Class Payment; and (iii) describe how Tipped Employees

may opt into the FLSA Collective, and thereby receive an additional FLSA Collective Payment. Where an email address is provided, the Claims Administrator will also send an email notifying the individual of the proposed settlement. *Id.* Notably, the Claims Administrator will create a portal that will allow Tipped Employees to submit a Claim Form online.

Upon sending of the Notice Packet, the Claims Administrator shall also establish a settlement website, which will include the Settlement Agreement, relevant pleadings, a copy of the Class Notice, any relevant Court orders regarding the Settlement, and a list of frequently asked questions mutually agreed upon by the Parties. *See* SA § 4.10(F). The form and method of Class Notice agreed to by the Parties satisfies all due process considerations and meets the requirements of Federal Rule of Civil Procedure 23(e)(1)(B). The proposed Class Notice describes plainly: (i) the terms and effect of the Settlement Agreement; (ii) the time and place of the Final Approval Hearing; (iii) how the recipients of the Class Notice may object to the Settlement; (iv) the nature and extent of the release of claims; (v) the procedure and timing for objecting to the Settlement; and (vi) the form and methods by which a Tipped Employee may either participate in or exclude themselves from the Settlement.

C. MONETARY TERMS

The proposed Settlement Amount is an all-in, non-reversionary cash payment

of One Hundred Twenty-Three Thousand Seven Hundred and Fifty Dollars ($123,750.00). *See* SA § 2.42. That amount represents approximately 100% of the back wages Plaintiff alleges are owed to her and the other Tipped Employees in this matter. In accordance with the Settlement Agreement, the Claims Administrator shall make deductions from the Settlement Amount for court-approved attorneys' fees and reasonable litigation costs, fees, and expenses for the Claims Administrator, and any court-approved Service Payment to the Plaintiff, in recognition of the risks and benefits of her participation and services she performed. *See* SA § 4.7(B)(1). Subject to redistribution guidelines to prevent any individual receiving a windfall payment (SA § 4.9(B)(7)), after all applicable fees and expenses are deducted, 50% of the Settlement Amount will be allocated to Rule 23 Class members' state-law claims and 50% of the Settlement Amount will be allocated to FLSA Collective members' FLSA claims.

Should the Court grant final approval of the Settlement, Defendants shall pay the Settlement Amount after the Settlement becomes Final. *See* SA § 4.12(A). Settlement Class Members shall receive their portion of the Settlement by check thereafter. *See* SA § 4.12(B). The payments made to the Settlement Class Members will be accounted for as follows: (i) fifty percent (50%) will be allocated to the claims for unpaid wages and other alleged wage-related claims, and (ii) fifty percent (50%) will be allocated to the claims for alleged liquidated damages, penalties,

interest, and other relief. *See* SA § 4.12(C). Each check will clearly identify the amounts designated for (i) wages or (ii) liquidated damages/other relief. *Id.* The Claims Administrator will make all legally mandated payroll deductions prior to distributing the settlement payments to Settlement Class Members. The Claims Administrator will calculate the Estimated Class Payment, Estimated FLSA Collective Payment, and combined Estimated Settlement Payment, to be included in the Notice Packet, as follows: (1) deduct from the Settlement Amount the anticipated amount of attorneys' fees to be requested, plus estimated expenses of Plaintiff' Counsel, the maximum Service Payment sought for the Plaintiff, and the estimated fees and expenses of the Claims Administrator (the resulting number will be referred to as the "Estimated Net Settlement Amount"); (2) for each Tipped Employee, the Claims Administrator will total the amount of tip credit taken by Defendants for all hours worked as a Tipped Employee during the Class Period (this number will be referred to as the "Estimated Individual Damage Amount"); (3) the Estimated Individual Damage Amounts for all Tipped Employees will then be added together by the Claims Administrator to determine the "Class Members' Estimated Total Damages Amount," and the Estimated Net Settlement Amount will then be divided by the Class Members' Estimated Total Damages Amount; (4) the Claims Administrator will then multiply the resulting fractional amount by a Class Member's Individual Recovery Amount to determine that Tipped Employee's

"Estimated Settlement Payment"; and (5) the Claims Administrator will then multiply the Tipped Employee's Estimated Settlement Payment by 0.5 (*i.e.*, 50%) to obtain the Tipped Employee's "Estimated Class Payment" and by 0.5 (*i.e.*, 50%) to obtain the Tipped Employee's "Estimated FLSA Collective Payment." *See* SA § 4.7(A)(1–5).

Settlement Class Members shall have 180 days to negotiate their Settlement Check. The deadline to negotiate, along with the applicable release, will be included in the cover letter sent with the check. *See* SA § 4.14(D)(1–2). Any checks not negotiated within this time period shall be deemed void and subject to a *Cy Pres* Distribution. SA § 4.12(F)(2). This information is provided to Settlement Class Members via the Class Notice.

D. DISMISSAL AND RELEASE OF CLAIMS

Upon the Settlement becoming Final, PA Class members shall be deemed to have forever released any and all applicable state wage related claims relating to their employment at Defendants' Restaurant that were or could have been asserted in the Complaint during the Class Period. *See* SA § 5.1(A)(1–2). Similarly, upon the Settlement becoming Final, any and all FLSA Collective members shall be deemed to have forever released any and all federal wage related claims relating to their employment at Defendants' Restaurant that were or could have been asserted in the Amended Complaint during the Class Period. *See* SA § 5.1(A)(2). These releases are

described in the proposed Class Notice. Importantly, no PA Class member is releasing any portion of the FLSA claim unless they become members of the FLSA Collective.

E. PROPOSED SCHEDULE FOLLOWING PRELIMINARY APPROVAL

EVENT TIMING	
Mailing of Class Notices	Within fourteen (14) calendar days after the Class Administrator receives the class list and the data required to perform the preliminary calculations (SA § 4.8 (A)) Shortly thereafter, the Claims Administrator will also send an email to any Tipped Employee for which Defendants provided that Tipped Employee's last known email address. The email shall also include a statement that the full Notice Packet has been mailed to the individual's last known address (SA § 4.8 (C))
Deadline for Filing Objections to the Settlement	By the Bar Date (SA § 4.9)
Deadline for Submitting Requests for Exclusion from the Settlement	By the Bar Date (SA § 4.10(B))
Final Approval Hearing	At least sixty (60) days after entry of the Preliminary Approval Order (SA § 2.18)

IV. ARGUMENT

A. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED BY THE COURT

The settlement of class/collective action litigation is favored and encouraged in the Third Circuit. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("Settlement agreements are to be encouraged because they promote the

amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts"); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged").

As set forth below, preliminary approval of this proposed Settlement is appropriate as it satisfies all criteria for preliminary approval. Accordingly, Plaintiff asks that the Court grant the requested relief.

1. Standard for Approval of FLSA Settlements

The standard for approval of an FLSA collective action requires a determination that the settlement reached "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *See Clews v. Cty. of Schuylkill*, No. 3:17-CV-02233, 2024 U.S. Dist. LEXIS 194133, at *3 (M.D. Pa. Oct. 25, 2024) (citing *Lynn's Food Stores. Inc. v. U.S.*, 679 F.2d 1350, 1354 (11th Cir. 1982)). "[W]hen evaluating FLSA settlements, other courts within this Circuit have relied on the considerations set forth in *Lynn's Food Stores*." *Brown v. TrueBlue, Inc*., No. 1:10-cv-00514, 2013 U.S. Dist. LEXIS 137349, at *3 (M.D. Pa. Sep. 24, 2013). Under *Lynn's Food Stores*, a district court may find that a proposed settlement agreement resolves a bona fide dispute when it "reflect[s] a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute." *Lynn's Food Stores,* 679 F.2d at 1354. "If the court is satisfied that the settlement

agreement resolves a bona fide dispute, the court then determines whether the agreement is fair and reasonable to the plaintiff, and whether the settlement furthers or "impermissibly frustrates" the implementation of the FLSA." *Clews*, 2024 U.S. Dist. LEXIS 194133, at *3.

It is not disputed that the Settlement Agreement resolves a bona fide dispute. Moreover, the Settlement Agreement contains no provisions that would be contrary to the purposes of the FLSA or frustrate its implementation. Indeed, the Settlement furthers the purposes of the FLSA by providing Tipped Employees who opt into the FLSA Collective with substantial recovery for their unpaid wages. Because the Settlement facilitates the FLSA and is a fair and reasonable resolution of a bona fide dispute, it should be approved as reasonable.

2. Standard for Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the settlement of class actions. When a proposed class settlement is reached, it must be submitted to the Court for approval. H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2009) ("NEWBERG"). Preliminary approval is the first of three steps comprising the approval process for settlement of a class action. The second step is the dissemination of notice of the settlement to all class members. Finally, there is a settlement approval or final fairness hearing. *See* Manual for Complex Litigation § 21.632-633 (4th ed. 2004).

The Third Circuit has stressed that the most relevant consideration is whether the proposed settlement is within a "range of reasonableness" in light of all costs and risks of continued litigation; that is, the test is whether the proposed settlement is fair and reasonable under the circumstances. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 at 322 (3d Cir. 1998). "[I]n this Circuit, a settlement is entitled to an initial presumption of fairness where it resulted from arm's-length negotiations between experienced counsel...." *Lawson v. Love's Travel Stops & Country Stores, Inc.*, No. 1:17-CV-1266, 2021 U.S. Dist. LEXIS 33983, at *6 (M.D. Pa. Feb. 24, 2021), *quoting Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 493 (E.D. Pa. 2018). To determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), which was reaffirmed in *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 437 (3d Cir. 2016). These factors are:

1) The complexity, expense, and likely duration of the litigation;
2) the reaction of the class to the settlement;
3) the stage of the proceedings and the amount of discovery completed;
4) the risks of establishing liability;
5) the risks of establishing damages;
6) the risks of maintaining the class action through the trial;
7) the ability of the defendants to withstand a greater judgment;
8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 156-57. At the preliminary approval stage, a court need not address every factor, as "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.,* 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008).

The question presented on a motion for preliminary approval of a proposed class action settlement is whether the proposed settlement appears fair and reasonable. If the proposed settlement falls "within the range of possible approval," the Court should grant preliminary approval and authorize the Parties to give notice of the proposed settlement to the class members. *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Stated another way, preliminary approval is a "determination" of whether there "might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980).

In this Circuit, "[w]here the proposed settlement appears to be the product of serious, informed, non—collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Noye v. Yale Assocs*., No. 1:15-cv-02253, 2019 U.S. Dist. LEXIS 138366, at *7 (M.D. Pa. Aug. 15, 2019), *citing In re Nasdaq Market-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995).

Class Counsel believes the terms of the proposed settlement are fundamentally fair, reasonable, and adequate, especially when considering all the risks associated with litigating this matter further. In making its determination of these risks, the Court should give deference to the opinions of Class Counsel. *Austin v. Pennsylvania Dep't of Corrs.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) ("In determining the fairness of a proposed settlement, the Court should attribute significant weight to the belief of experienced counsel that settlement is in the best interests of the class.").

a. Complexity, Expense, And Likely Duration Of The Litigation

This case has been diligently litigated by both sides. Significant work has been done, including but not limited to written discovery, review of documents produced, legal research and comparison of analogous cases, analysis of payroll data, and detailed settlement negotiations between the Parties. Had this case not settled, the Parties would have engaged in full discovery, including multiple depositions, class and collective certification briefing, and summary judgment briefing, with a significant likelihood of a jury trial to determine liability and/or damages. Accordingly, this factor warrants the granting of preliminary approval.

b. Reaction Of The Class To The Settlement

Class Notice has not yet been disseminated. Consequently, Tipped Employees have not yet had the opportunity to consider or opine on the Settlement. As such, Class Counsel will address this factor at the Final Approval Hearing. However,

Plaintiff supports the Settlement.

c. Stage Of The Proceedings And The Amount Of Discovery Completed

As noted above, the Parties have engaged in significant discovery. Indeed, as part of the settlement discussions, Defendants produced certain payroll data and other information which allowed Plaintiff to develop a comprehensive picture of the damages at issue. Further, the Parties' settlement negotiations were at all times conducted at arm's length and without collusion between the Parties. For these reasons, this factor also weighs in favor of approval of the Settlement.

d. Risks Of Establishing Liability And Damages

The inquiries into the risks of establishing liability and damages "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Ikon Off. Sols., Inc. Sec. Litig.*, 209 F.R.D. 94, 105 (E.D. Pa. 2002) (quoting *In re Prudential Ins. Co., Am. Sales Practice Litig. Agent Actions,* 148 F.3d at 319). Here, Defendants continue to strongly deny Plaintiff's allegations, and both liability and damages would be hotly contested issues.

Based on the inherent uncertainties of litigation, it is Class Counsel's considered opinion that settlement on the proposed terms at this juncture in the Litigation, given all the risks involved, is the most prudent course.

e. Risks Of Maintaining The Class Action Through The Trial

"The existence of obstacles, if any, to a plaintiff's success at trial weighs in favor of settlement." *Harshbarger v. Penn Mut. Life Ins. Co*., No. 12-6172, 2017 U.S. Dist. LEXIS 209645, at *19 (E.D. Pa. Dec. 20, 2017). "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Creed v. Benco Dental Supply Co.*, No. 3:12-CV-01571, 2013 U.S. Dist. LEXIS 132911, at *8 (M.D. Pa. Sep. 17, 2013)(*quoting In re Prudential*, 148 F.3d at 321).

Here, the Parties have reached settlement terms prior to motion practice on class certification, which would have been hotly contested. There is no guarantee that Plaintiff would have obtained class certification in this case, or that Defendants would not have attempted to decertify a previously certified class prior to trial. At this stage of the Litigation, the Parties were able to make an informed decision concerning the risks involved. The risks render settlement at this juncture the prudent course.

f. Ability Of Defendants To Withstand A Greater Judgment

The ability of Defendants to withstand a greater judgment was not raised during the settlement discussions. This is because Class Counsel estimates the Settlement Amount represents approximately 100% of back wages owed to Plaintiff and the other Tipped Employees. Therefore, this factor is neutral.

g. Range of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation

These two factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Owens v. Interstate Safety Serv*., No. 3:17-CV-0017, 2017 U.S. Dist. LEXIS 192247, at *6 (M.D. Pa. Nov. 21, 2017) (*citing Altnor v. Preferred Freezer Servs., Inc*., 197 F. Supp. 3d 746, 763 (E.D. Pa. 2016)). Put another way, "[t]his inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 806 (3d Cir. 1995).

Here, the proposed Settlement confers a substantial benefit on the Settlement Class Members – approximately 100% of the back wages that Plaintiff contends are owed -- and does so while avoiding the risks inherent in class action litigation. Consequently, preliminary approval is warranted.

h. The Permissive Factors Also Support Settlement

In *In re NFL,* the Third Circuit again noted that in reviewing a proposed settlement, a court should also – to the extent applicable – look at "several permissive and non-exhaustive factors" when evaluating a proposed settlement. *In re NFL,* 821 F.3d at 437. These factors also support preliminary approval. First, all Tipped

Employees have the right to opt-out of this Settlement. *See* SA § 4.10. Second, all PA Class Members will receive a proportional share of the Settlement Amount based on the amount of alleged damages they specifically incurred (*e.g.*, the total tip credit taken by Defendants based on the number of hours they worked) in consideration for the release of their state-law claims. Third, PA Class members are under no obligation to opt into the FLSA Collective or to release federal-law claims before receiving a payment under the Settlement. Fourth, the FLSA Collective opt-in procedure is straightforward, fair, and reasonable. By submitting a Claim Form, a Tipped Employee will become a FLSA Collective member and thus receive an additional, proportional share of the Settlement Amount based on the amount of alleged damages they specifically incurred (*e.g.*, the total tip credit taken by Defendants based on the number of hours they worked).

Further, the Settlement does not unduly grant preferential treatment to anyone. Instead, the Settlement Agreement permits Plaintiff to seek, subject to the Court's approval, a Service Payment of up to $2,500.00 that recognizes her efforts in prosecuting and resolving this Litigation and the risks associated with bringing this action.

Finally, the provision regarding attorneys' fees is reasonable. Pursuant to the Settlement Agreement, prior to a Final Approval Hearing, Class Counsel will file a motion seeking an amount not to exceed thirty-five (35) percent of the Settlement

Amount as a fee award, plus reimbursement of all reasonable litigation expenses incurred. This maximum amount Plaintiff' Counsel can request is presumptively reasonable. This "percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *Creed v. Benco Dental Supply Co*., No. 3:12-CV-01571, 2013 U.S. Dist. LEXIS 132911, at *12 (M.D. Pa. Sep. 17, 2013)(*citing In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 300 (3d Cir. 2005)). Class Counsel's fee request of no more than thirty-five percent of the Settlement Amount falls well within the range of fees that are generally approved in the Third Circuit. *See Shabazz v. Colonial Park Care Ctr. LLC*, No. 1:17-CV-445, 2021 U.S. Dist. LEXIS 201431, at *14 (M.D. Pa. Oct. 19, 2021)(noting that fees of 20% to 45% approved as reasonable).

Importantly, this fee request is plainly documented in the proposed Class Notice. As such, Class Counsel will be fully prepared to substantiate their final fee request after Settlement Class Members have had an opportunity to opine on its propriety.

Thus, all applicable factors support preliminary approval of this proposed Settlement.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

1. The Rule 23 Class Should Be Certified As Provided For In The Settlement Agreement

Plaintiff requests that the Court certify the proposed PA Class for settlement purposes only. This proposed settlement class plainly satisfies the four elements of Rule 23(a), and one or more of the requirements of Rule 23(b). Importantly, sister courts in this Circuit have routinely granted class certification for directly analogous tip credit notification claims. *See, e.g., Wintjen v. Denny's, Inc., No.* 2:19-CV-00069-CCW, 2021 U.S. Dist. LEXIS 222676 (W.D. Pa. Nov. 18, 2021) (granting class certification for alleged violations of PMWA regarding tip credit notification); *Casco v. Ponzios RD, Inc.,* No. 16-2084 (RBK), 2018 U.S. Dist. LEXIS 73869 (D.N.J. Apr. 29, 2018) (granting class certification for alleged violations of NJWHL regarding tip credit notification). Moreover, Defendants do not oppose certification of the PA Class for settlement purposes only.

2. Rule 23(a) Requirements Are Satisfied

To certify a class under Rule 23, a plaintiff must establish that the class meets each of the four requirements of subsection (a) of the Rule. These four elements are referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Villa v. Cargill Meat Sols. Corp.,* No. 3:22-CV-1321, 2024 U.S. Dist. LEXIS 180090, at *8 (M.D. Pa. Oct. 2, 2024). Here, all four elements are clearly

satisfied.

a. 23(a)(1) - "Numerosity"

The proposed PA Class is sufficiently numerous. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23. Here, there are over 100 Tipped Employees in the PA Class. The numerosity requirement is therefore amply satisfied.

b. Rule 23(a)(2) – "Commonality"

The proposed PA Class also satisfies the commonality requirement. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357-360 (2011). Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50. The commonality inquiry focuses on the defendant's conduct. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"). "[T]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Gair v. Great Star Tools USA, Inc.*, No. 4:21-CV-00976, 2023 U.S. Dist. LEXIS 163753, at *8 (M.D. Pa. Sep. 13, 2023).

Here, commonality exists because the PA Class members' claims are predicated on common core issues: (i) whether Defendants failed to satisfy the notice

requirements of the tip credit; (ii) whether Defendants failed to ensure Tipped Employees earned the mandated minimum wage when taking the tip credit; and (iii) whether Defendants paid Plaintiff and other Tipped Employees the tipped wage even when there was no hope that these employees could earn tips. As such, the PA Class raises common questions of law and fact which arise from a "common nucleus of operative facts" with respect to their claims against Defendants.

c. Rule 23(a)(3) – "Typicality"

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23. Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiff as representatives of the class. *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. Dec. 15, 1994). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *In re NFL*, 821 F.3d at 428. As a sister court aptly noted in granting class certification, "the principal questions presented by the suit go to [defendant's] corporate policies. The controversy here is whether those policies violate the PMWA and whether those policies were applied to plaintiff and other potential class members." *Soles v. Zartman Constr., Inc.,* No. 4:13-cv-29, 2014 U.S. Dist. LEXIS 98181, at *16 (M.D. Pa. July 18, 2014). That is precisely the case at hand - whether

Defendants' corporate policies complied with applicable law regarding use of the tip credit and "whether those policies were applied to plaintiff and other potential class members." *Id.* As such, Plaintiff's claims are typical of the claims of members of the proposed classes.

d. Rule 23(a)(4) – "Adequacy"

The final requirement of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. "The adequacy requirement encompasses two distinct inquires designed to protect the interests of absentee class members: whether the named plaintiff' interests are sufficiently aligned with the absentees', and the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. June 26, 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012).

Here, adequacy is readily met, and Plaintiff satisfies both prongs. First, Plaintiff has no interests adverse or "antagonistic" to absent PA Class Members. Plaintiff seeks to hold Defendants accountable for, among other things, allegedly failing to comply with the tip credit notification requirements of the PMWA. Further, Plaintiff has demonstrated allegiance and commitment to the Litigation by, *inter alia*, conferring with Class Counsel during the course of these negotiations. As such, Plaintiff's interests are perfectly aligned with the interests of the absent PA Class

members, thereby meeting the first adequacy prong. Second, Plaintiff's Counsel is qualified, experienced, and competent in complex litigation, and have an established, successful track record in class litigation – specifically including wage and hour actions. *See* Wells Decl. ¶¶ 17-20. Accordingly, the adequacy requirement is satisfied.

e. Rule 23(b) Requirements Are Satisfied Here

Under Rule 23(b)(3), a class action should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior to other methods of resolving the controversy. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 594, 623 (1997). Superiority requires the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 148 F.3d at 316. Here, Plaintiff readily meets both requirements.

As the court in *Wintjen* noted, "the common (and claim determinative) issue for this case is the content of the tip credit notice [Defendant] provided to its" Tipped Employees. *Wintjen,* 2021 U.S. Dist. LEXIS 222676, at *31. The same is true in the instant matter. As such, PA Class members' claims seek remedy of "common legal grievances" – namely, payment of minimum wages owed due to Defendants'

impermissibly claiming a tip credit. Plaintiff's claims present common operative facts and common questions of law that predominate this inquiry. Notably, the Third Circuit has remarked that it is "more inclined to find the predominance test met in the settlement context." *In re NFL*, 821 F.3d at 434 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 304 n.29 (3d Cir. 2011) (en banc)). Here, plainly, there is predominance based on the claims asserted.

Second, Rule 23 certification of the class must also be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23. Here, superiority is also met. "[A]s courts presiding over other wage and hour cases of this type have observed, 'there is little incentive for Plaintiff to bring their claims individually because the amount of recovery, if any, would be very small. Class actions are particularly appropriate in such cases.'" *Wintjen,* 2021 U.S. Dist. LEXIS 222676, at *44 (quoting *Koenig v. Granite City Food & Brewery, Ltd.,* No. 16-1396, 2017 U.S. Dist. LEXIS 71809, at *13 (W.D. Pa. May 11, 2017). Requiring all of Defendants' Tipped Employees to file individual lawsuits would needlessly waste judicial resources as each lawsuit would likely involve the same evidence concerning Defendants' alleged wrongdoing. Accordingly, the Court should enter an order certifying the Rule 23 Class for settlement purposes only.

C. FLSA COLLECTIVE MEMBERS ARE SIMILARLY SITUATED

Plaintiff requests that the Court conditionally certify the following proposed

FLSA Collective for settlement purposes only, pursuant to the Settlement Agreement: all Tipped Employees who affirmatively opt-into this Action pursuant to Section 216(b) of the FLSA by submitting a Claim Form to the Claims Administrator prior to the Bar Date. This proposed FLSA Collective would be certified pursuant to Section 216(b) of the FLSA.

"Certification of an FLSA collective action proceeds in two steps: (1) conditional certification and (2) final certification. *Tidwell v. YWCA of Greater Harrisburg*, No. 1:22cv908, 2024 U.S. Dist. LEXIS 77116, at *7 (M.D. Pa. Apr. 29, 2024)(*citing Zavala v. Wal Mart Stores Inc*., 691 F.3d 527, 535-36 (3d Cir. 2012)). At this conditional certification stage, Plaintiff need only make a "modest factual showing" that putative opt-in employees may be provisionally categorized as similarly situated to the named plaintiff, meaning "some evidence, beyond pure speculation, of a factual nexus, between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Id*.

To be considered a collective class under 29 U.S.C. § 216(b), plaintiffs must demonstrate that they are "similarly situated" to one another and each individual must affirmatively consent to join the action. *In re Janney Montgomery Scott LLC Fin. Consultant Litig.,* No. 06-cv-3202, 2009 U.S. Dist. LEXIS 60790, *19 (E.D. Pa. July 16, 2009). Here, Plaintiff contends that all Tipped Employees are similarly situated as they were employed by Defendants at their Mirakuya Restaurant during

the Class Period and were paid in substantially the same manner (with Defendants' asserting that they could pay a sub-minimum wage pursuant to Section 203(m) of the FLSA). As such, this Court should order dissemination of notice so as to permit Tipped Employees an opportunity to join the FLSA Collective.

Pursuant to the Settlement Agreement, upon submission of their Claim Form to the Claims Administrator, a Tipped Employee will be considered a member of the FLSA Collective. Upon the Settlement becoming Final, FLSA Collective members shall be deemed to have released their federal wage and hour claims. The Class Notice apprises the Settlement Class Members of this provision and the Claim Form includes the language of the releases contained in the Settlement Agreement.

D. THE PROPOSED SETTLEMENT NOTICE TO THE CLASS SHOULD BE APPROVED

"Rule 23(e)(1)(B) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."

Manual for Complex Litigation, §21.312. "Notice by mail provides such 'individual notice to all members' in accordance with Rule 23(c)(2), and where the names and addresses of the class members are easily ascertainable, individual notice through the mail is 'clearly the 'best notice practical.'" *Fein v. Ditech Fin., LLC*, No. 5:16-cv-00660, 2017 U.S. Dist. LEXIS 158479, at *16 (E.D. Pa. Sep. 26, 2017) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974)).

Here, the Parties proposed notice plan includes direct mail, email (where available), and website publication. This comprehensive notice plan is intended to fully inform Tipped Employees of the Litigation, the proposed Settlement, and the information they require in order to make informed decisions about their rights. The proposed Class Notice is "simple and straightforward language and not legalese" and "the notice program is robust and is likely to ensure that all members receive notice of the claims and their rights with respect to the settlement." *Caddick v. Tasty Baking Co.,* No. 2:19-cv-02106-JDW, 2021 U.S. Dist. LEXIS 206991, at *10 (E.D. Pa. Oct. 27, 2021). Accordingly, this Court should approve the form of notice and the method of publication that Plaintiff propose as they satisfy the due process requirements of Fed. R. Civ. P. 23.

E. CONNOLLY WELLS & GRAY, LLP, SHOULD BE APPOINTED AS CLASS COUNSEL

Fed. R. Civ. P. 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the class. Class Counsel, Connolly Wells & Gray, LLP, easily meet the requirements of Rule 23(g). Importantly, Plaintiff is represented by counsel experienced in class action litigation including directly analogous cases. *See, e.g.* Wells Decl. ¶19. As such, this Court should not hesitate in appointing Connolly Wells & Gray, LLP as Class Counsel.

V. CONCLUSION

The proposed Settlement is fair, reasonable, and adequate. Thus, for all the reasons set forth above, preliminary approval should be, respectfully, granted and the Preliminary Approval Order entered so as to permit the Parties to effectuate notice to the Tipped Employees.

Dated: February 14, 2025

Respectfully submitted,

CONNOLLY WELLS & GRAY, LLP

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Counsel for Plaintiff and the Proposed Classes

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of February 2025, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Gerald D. Wells, III
Gerald D. Wells, III