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

JULI WINTJEN, on behalf of herself and all others similarly situated, Plaintiff, v. DENNY'S, INC., *et al*., Defendant.	Civil Action No. 2:19-cv-00069-CCW

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF PARTIAL CLASS AND COLLECTIVE ACTION SETTLEMENT, AND OTHER RELATED RELIEF

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I. INTRODUCTION

Plaintiff Sarah Gower ("Plaintiff" or "Gower"), on behalf of herself and all others similarly situated, by and through her counsel, hereby respectfully moves the Court for final approval of the proposed partial class and collective action settlement ("Settlement") set forth in the Collective and Class Action Partial Settlement And Release Agreement ("Settlement Agreement").[1] Because the proposed Settlement Agreement is fair and reasonable, does not frustrate the purposes of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"), and amply meets the requirements of Rule 23 regarding class action settlements for settlement purposes only, the Court should approve the Parties' Settlement.

The proposed Settlement is the product of fully-informed, arm's length, and intense negotiations between Class Counsel and Defendant's Counsel conducted through a number of independent mediators over the course of several years. The Settlement satisfies all of the prerequisites for final approval. Continued litigation would impose the significant risk of trial on the Parties and the Partial Settlement Class Members, with no guarantee of achieving a better result.

Absent the Settlement reached here, there is no guarantee that Plaintiff and the Partial Settlement Class would have prevailed had this Action proceeded, or that the Partial Settlement Class Members would receive a larger benefit at a later date or, indeed, any benefit at all. Indeed, had this matter not settled, a trial would have resulted in a factual determination of whether the ETCN Rule 23 Subclass received the ETCN form. A factual finding against the ETCN Rule 23 Subclass would have resulted in no monetary recovery for these individuals. Likewise, at trial, the trier of fact would determine whether Defendant's actions were a willful violation of the FLSA. A

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

factual finding against this group would have resulted in the FLSA Collective recovering nothing for the last year at issue. The instant Settlement removes those risks in return for prompt payment to Partial Settlement Class Members. Indeed, the proposed Settlement is a fair, reasonable, and adequate resolution which recognizes the risks each side faced had the Action continued via the previously scheduled trial.

For these reasons, and those fully articulated below, Plaintiff Gower respectfully requests that the Court grant final approval to the partial Settlement and enter the proposed Final Approval Order. Although Defendant continues to deny liability, it does not oppose final approval of the negotiated Settlement.

II. BACKGROUND

In the interest of brevity, the Parties incorporate herein the "Factual Background and Status of the Litigation" section as set forth in Plaintiff's Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminarily Approval of Partial Class and Collective Action Settlement, and Other Related Relief. (*See* ECF No. 308, pp. 3-5).

On August 6, 2024, this Court granted Preliminary Approval of the Settlement Agreement, approving Class Notice, certifying the proposed ETCN Rule 23 Subclass, appointing Plaintiff as class representative, and Plaintiff's Counsel as Class Counsel. (*See* ECF Nos. 330-331). As set forth in the declaration of the Claims Administrator filed contemporaneously herewith, following the Court's Order, Class Notice was sent to 118 Partial Settlement Class Members. As of the Bar Date of October 10, 2024, no Partial Settlement Class Members have requested to be excluded from the ETCN Rule 23 Class, and, importantly, no objections have been received. *See* Declaration of Jesse Montague ("Claims Admin. Decl."), filed contemporaneously herewith, at ¶¶7, 13-14.

III. SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

The key components of the partial Settlement are set forth below, and a complete description of the terms and conditions of the partial Settlement are contained in the Settlement Agreement and contemporaneous documents. The full terms of the Settlement are set forth in ECF Nos. 309-1 and 328-1.

A. THE PROPOSED PARTIAL SETTLEMENT CLASS

Through the Settlement Agreement, the Parties stipulate, for settlement purposes only, to certification of the ETCN Rule 23 Subclass consisting of all Tipped Employees of Defendant identified on Exhibit A submitted to the Court on March 14, 2024.[2] Excluded from the Partial Settlement Class are all members of the Modified PMWA Class whose names do not appear on the ETCN List. Also included in the Partial Settlement Class are all individuals that affirmatively opted-in to the FLSA Collective. Should the Court grant final approval to the Settlement, by operation of law and as set forth in the Section 6.1 of the Settlement Agreement, all ETCN Rule 23 Subclass members who have not effectively excluded themselves from this Settlement shall be deemed to have released any PMWA claims from January 22, 2016 through August 1, 2019 for claims that were alleged or that could have been alleged in the Complaint. Similarly, all FLSA Collective members shall be deemed to have released any applicable FLSA wage claim relating to their employment with Defendant during their Class Period that was alleged or could have been alleged in the Complaint.

B. MONETARY TERMS

The proposed "Settlement Amount" consists of cash in the amount of Four Hundred Thirty-Seven Thousand, Five Hundred U.S. Dollars and Zero Cents ($437,500.00). *See* Settlement

[2] That list is attached to the Settlement Agreement as "Exhibit C".

Agreement at § 2.63. In accordance with the Settlement Agreement, the Claims Administrator shall make deductions from the Settlement Amount for fees and expenses for the Claims Administrator and any court-approved Service Payment for the Plaintiff. The amount remaining after these deductions (the "Net Settlement Amount) shall be distributed to Partial Settlement Class Members in accordance with the formula for determining the "Settlement Payment" set out in the Settlement Agreement. *See* Settlement Agreement, at §5.8. The Class Notice provided each Partial Settlement Class Member with their estimated payment under the Settlement. The Claims Administrator will also make all legally mandated payroll deductions prior to distributing the settlement payments to Partial Settlement Class Members prior to any distribution. Importantly, all Partial Settlement Class Members who have not excluded themselves will receive money in connection with this Settlement.

In accordance with the Settlement Agreement, Class Counsel also seeks the Court's approval for payment of a "Service Payment" to the Plaintiff in the amount of $2,500. *See* Settlement Agreement at § 5.18(A). This Service Payment shall be in addition to the distribution received from the Net Settlement Amount, as described above, and shall not be opposed by Defendant. The Class Notice apprised Partial Settlement Class Members of this request. In short, the proposed Class Notice apprised Partial Settlement Class Members of all material terms of the Settlement, as well as why Plaintiff Gower believes the proposed settlement is appropriate.

Partial Settlement Class Members shall have 180 days to negotiate their settlement check, and the deadline will be included in the information sent with the check. Any checks not properly negotiated by a Partial Settlement Class Member within 180 days of issuance shall be deemed voided. *See* Settlement Agreement at § 2.29. All unclaimed funds due to voided checks will be

considered part of the *Cy Pres Distribution*. As such, no portion of the Settlement Amount shall revert to Defendant. *See, e.g.,* Settlement Agreement at § 2.63.

C. DISMISSAL AND RELEASE OF CLAIMS

Upon the Effective Date, individuals who are ETCN Rule 23 Subclass Members shall be deemed to have forever released any and all PMWA claims against Defendant. *See* Settlement Agreement at § 6.1. Similarly, individuals who are FLSA Collective Members shall be deemed to have forever released any and all FLSA claims against Defendant. *Id. See* Settlement Agreement at § 6.1. Individuals who are FLSA Collective Members, but not ETCN Rule 23 Subclass Members, shall only release their FLSA claims against Defendant and shall not be prevented by this Settlement from pursuing their PMWA claims as part of, or apart from, the Rule 23 Class. *Id.* at § 6.1 (C). As noted above, the releases are fully described in the Settlement Agreement and individuals are apprised of the ramifications of the proposed Settlement in the Class Notice.

IV. RESULTS OF THE NOTICE AND CLAIMS PROCESS

A. DISSEMINATION OF CLASS NOTICE SATISFIED DUE PROCESS

On August 26, 2024, the Claims Administrator, RG/2 Claims Administration LLC ("RG/2 Claims"), mailed the approved Notice Packet to 118 Tipped Employees who worked for Defendant during all or part of the Class Period. The detailed notice program utilized here is set forth in the declaration of the Claims Administrator. *See* Claims Admin. Decl., at ¶¶7-11. Prior to mailing the Notice Packets, and in order to provide the best notice practicable and locate the most recent addresses for Partial Settlement Class Members, RG/2 Claims processed the list of names and addresses received through the United States Postal Service's ("USPS") National Change of Address database ("NCOA") and updated the data with corrected information. *See* Claims Admin. Decl., at ¶8. As set forth in their declaration, the Claims Administrator mailed the Notice Packet, emailed putative Partial Settlement Class Members (where an email address was available), and

established a settlement website. Importantly, both the Class Notice and the website described in plain English: (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 Partial Settlement Class member may either participate in or exclude themselves from the Settlement. In addition to the Notice Packet mailing, on August 26, 2024, RG/2 Claims caused to be sent by electronic mail, the Class Notice to 77 Class Members for whom email addresses were provided. *See* Claims Admin. Decl., at ¶9. The email notice included individualized passwords with a link to the Settlement Website and portal. Partial Settlement Class Members could use the password on the portal to view their estimated payment under the Settlement. *Id*. In short, the notice process was vigorous.

The deadline for Partial Settlement Class Members to object to the Settlement or exclude themselves from the Settlement has now passed. To date, no individuals have excluded themselves from the Partial Settlement Class and, importantly, no objections have been filed.

B. PLAN OF ALLOCATION & PROJECTED SETTLEMENT PAYMENTS

Following the Court's initial review of Plaintiff's motion for preliminary approval, the Court ordered the Parties to provide additional information sufficient to show that the Settlement was fair and reasonable to members of the FLSA Collective who had won summary judgment. (*See* ECF Nos. 315, 324). In accordance with that directive, the Parties jointly filed an Amendment to Collective and Class Action Partial Settlement and Release Agreement (the "Settlement Amendment"), which revised the calculation of Settlement Payments to Plaintiff and the Partial Settlement Class Members. (*See* ECF No. 328-1).

Pursuant to the terms of the Settlement and the Settlement Amendment, once the Settlement becomes Final, the Claims Administrator will calculate the Settlement Payment for

each Partial Settlement Class Member as follows: After deducting from the Settlement Amount the amount of any awarded service payment and the fees and expenses of the Claims Administrator, the Claims Administrator shall perform the Settlement Payment calculation for each Partial Settlement Class Member detailed in Section 5.8 of the Settlement Amendment. (*See* ECF No. 328-1). The calculation set forth in Section 5.8 of the Settlement Amendment, which was preliminarily approved by the Court along with the Settlement, insures that each Partial Settlement Class Member who previously won summary judgment as a member of the FLSA Collective will receive 100% of all their back wages owed for the time period where willfulness is not at issue. *Id*. The Settlement Amendment further provides that the remaining Partial Settlement Class Members who are either included on the ETCN List or for whom the question of willfulness otherwise remains an open question will recover a percentage of their back wages owed. Importantly, the Court granted preliminary approval only after reviewing and approving the terms of the Settlement Amendment. Notably, Class Counsel's fees are not being deducted from this proposed Settlement as they are part of a separate fee motion. Moreover, the payments to Partial Settlement Class members are also not being diminished due to Class Counsel's expenses, as they are being paid separately by Defendant. In short, every effort was made by Class Counsel to maximize the recovery for Partial Settlement Class members.

Consequently, the payments arising from this Settlement, should it be approved, are substantial. As set forth in their declaration, the Claims Administrator estimated Settlement Payment calculations show the median Settlement Payment would be $2,734.47 with a highest Estimated Settlement Payment being $12,825.88 and the lowest Estimated Settlement Payment being $9.60. *See* Claims Admin. Decl., at ¶17. As set forth below, Class Counsel believes these

payments substantiate the excellent result achieved by this proposed Settlement and, accordingly, respectfully request that this Court grant final approval of the proposed Settlement.

V. ARGUMENT

A. THE SETTLEMENT AGREEMENT SHOULD BE FINALLY APPROVED

1. Standard of Approval of FLSA Settlements

The standard for approval of an FLSA collective action requires only a determination the compromise reached "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *See Brumley v. Camin Cargo Control, Inc.*, No. 2:08-CV-01798, 2012 U.S. Dist. LEXIS 40599, *5 (D.N.J. Mar. 26, 2012) (*citing Lynn's Food Stores. Inc. v. U.S.*, 679 F.2d 1350, 1354 (11th Cir. 1982)).

As a sister court noted, in evaluating whether to approve a settlement, "the Court must determine whether the proposed settlement would resolve a 'bona fide' dispute under the FLSA." *Tumpa v. IOC-PA, LLC,* No. 18-cv-112, 2021 U.S. Dist. LEXIS 2806, *12 (W.D. Pa. Jan. 7, 2021). To that end, the dispute must involve "factual issues" and "evidence of the defendant's intent to reject or actual rejection of that" factual contention. *Id.* (quoting *Kraus v. PA Fit II, LLC*, 155 F. Supp. 3d 516, 530 (E.D. Pa. 2016)). Here, there is no argument that Defendant contests the factual assertions raised by Plaintiff – namely that Defendant willfully failed to comply with the tip credit notice provisions.

Next, the Court must determine if the proposed settlement is fair and reasonable. To determine if a settlement agreement is reasonable and fair, courts generally proceed in two steps, first considering whether the agreement is fair and reasonable to the plaintiff-employees and, if found to be fair and reasonable, then considering whether it furthers or "impermissibly frustrates the implementation of the FLSA" in the workplace. *Brumley*, 2012 U.S. Dist. LEXIS 40599, *13. As a sister court noted, in assessing "whether the proposed settlement is fair and reasonable . . .

this standard is not exacting." *Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 18-cv-1007, 2019 U.S. Dist. LEXIS 182359, *6 (W.D. Pa. Oct. 22, 2019). The *Kapolka* court went on to state that "'"[i]f the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable.'" *Id.* (quoting *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009)).

In the instant matter, it is not disputed that the Settlement Agreement resolves a bona fide dispute. Indeed, had the proposed settlement not been reached, there necessarily would have been a trial on the issue of, *inter alia,* willfulness regarding the FLSA Collective. Moreover, as fully detailed below, an analysis of the factors set forth in Rule 23(e)(2) along with the so-called "*Girsh*" factors, confirms that the Settlement is fair and reasonable to all members of the FLSA Collective and supports final approval of the Settlement. In addition, the Settlement Agreement contains no provisions that would be contrary to the purposes of the FLSA or impermissibly frustrate its implementation. *See Morales v. Unique Beginning Caterers Ltd. Liab. Co.*, No. 1:20-cv-10026, 2021 U.S. Dist. LEXIS 236744,*6 (D.N.J. Dec. 10, 2021) (approving a proposed settlement agreement that "contains none of the terms which Third Circuit courts have found problematic in effectuating the FLSA's purposes, such as a restrictive confidentiality clause"). Rather, the Settlement furthers the purposes of the FLSA by providing the FLSA Collective members with a substantial recovery for their alleged 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

"The Third Circuit 'recognizes a strong public policy favoring settlements of disputes, the finality of judgments and the termination of litigation.'" *Zanghi v. FreightCar Am., Inc.,* No. 13-146, 2016 U.S. Dist. LEXIS 5914, *25 (W.D. Pa. Jan. 19, 2016) (quoting *In re Nazi Era Cases Against German Defendants Litig.*, 236 F.R.D. 231, 241-42 (D.N.J. 2006)). In analyzing whether

a settlement should be approved, the "Third Circuit has adopted a non-exhaustive nine-factor test around which district courts should structure their final decisions to approve class action settlements as fair, reasonable, and adequate as Rule 23(e) requires." *Zanghi*, 2016 U.S. Dist. LEXIS 5914, *26.

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the settlement of class actions. Under Fed. R. Civ. P. 23(e)(2), courts must determine whether a class action settlement is fair, reasonable and adequate by considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account;
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *see also Wood v. AmeriHealth Caritas Services, Inc*., 2020 U.S. Dist. LEXIS 60787, *17 (E.D. Pa. Apr. 7, 2020).

These Rule 23(e) factors "augment, rather than replace, the traditional factors that courts have developed to assess the fairness of a class action settlement." *Caddick v. Tasty Baking Co.,* 2021 U.S. Dist. LEXIS 206991 at *12 (E.D. Pa. Oct. 27, 2021), *citing* Fed. R. Civ. P. 23(e)(2) Advisory Committee Note. In the Third Circuit, courts traditionally apply the nine-factor test enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), to determine whether the

settlement is fair, reasonable and adequate under Rule 23(e). These factors, which have some overlap with those of Rule 23(e), 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.

As detailed below, both the Rule 23 factors and the *Girsh* factors support final approval.

3. Analysis of Rule 23(e) Factors Support Final Approval

With respect to certain Rule 23(e)(2) factors, Courts in this Circuit apply a presumption of fairness when assessing a class settlement for final approval purposes if "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Ricci v. Newrez LLC*, No. 5:22-cv-0650, 2023 U.S. Dist. LEXIS 186727, at *16 (E.D. Pa. Oct. 17, 2023), *citing In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016). Here, each of those considerations is affirmatively established, and the Court should therefore apply a presumption of fairness to the Settlement.

For instance, at all times, the Parties negotiated at arm's length and reached Settlement only after three separate mediations conducted by independent mediators, and months of further negotiation between counsel for the Parties. Additionally, by any standard, discovery conducted in this multi-year litigation – which included written discovery and depositions of not only the named Parties, but also multiple opt-in Plaintiffs -- was more than sufficient to support final approval.

Further, Class Counsel has significant experience in complex class action litigation in general, and FLSA and other wage and hour litigation in particular. Indeed, in addition to having been appointed Class Counsel for the ETCN Rule 23 Subclass in this matter (*see* ECF No. 330), Connolly Wells & Gray, LLP and Lynch Carpenter LLP have successfully served as class counsel in numerous similar class and collective actions. Finally, the Bar Date has now passed and there have been no objections to any of the terms of the Settlement.

In *Tumpa,* the court found that Rule 23(e)'s factors were met where the matter was "mediated for a full day with an experienced neutral, there was sufficient discovery prior to the mediation to identify the class members and their damages, counsel has demonstrated their experience in this litigation, and no class members objected to the settlement . . ." *Tumpa,* 2021 U.S. Dist. LEXIS 2806, *23; *see also Torres v. Brandsafway Indus. LLC,* No. 21-CV-1771-CCW, 2023 U.S. Dist. LEXIS 115870, *3 (W.D. Pa. June 14, 2023) (approving settlement where "the record establishes that all of the criteria described in Civil Rule 23(e)(2) favor approval). A review of the *Girsh* factors below clearly demonstrates that this proposed Settlement also satisfies the Rule 23(e) factors as well.

a) Complexity, Expense, and Likely Duration of the Litigation

This Action has been diligently litigated by both sides. Indeed, this Settlement was reached only on the eve of trial, after the Court ruled on the Parties cross motions for summary judgement. Over the past five years, the Parties engaged in extensive written and deposition discovery, fully briefed class and collective certification, as well as multiple cross motions for summary judgment, and engaged in several mediations. If the Parties had not reached this Settlement, this action would proceed to trial, with no guarantee of any extra benefit to Partial Settlement Class Members. Moreover, the members of the ECTN Rule 23 Subclass ran the risk of receiving no recovery should it be determined at trial that they did in fact receive the ETCN Form. Similarly, the FLSA Collective ran the risk of having their claims barred for the extra year due to a lack of willfulness. Additionally, a trial, and preparing for the same, would entail considerable expense on both sides. The result would not necessarily end the litigation, giving the right of the losing party to appeal.[3]

All of these facts weigh in favor of the Settlement. *See Zanghi*, 2016 U.S. Dist. LEXIS 5914, *49 (approving settlement where, absent settlement, "inevitable post-trial motions and appeals [] would prolong the litigation"); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 642 (E.D. Pa. 2003) (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and "substantial and immediate benefits" to class members favors settlement approval); *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (where litigation is potentially lengthy and will result in great expense,

[3] Indeed, the Defendant intends to appeal the Court's summary judgment ruling with respect to the Rule 23 Class Members – comprised of individuals' claims not part of this Settlement. Therefore, approval of this Settlement guarantees a monetary recovery for the Partial Settlement Class (comprised of the ETCN Rule 23 Subclass and the FLSA Collective) without the delay and uncertainty of the appellate process.

settlement is in the best interest of the class members). Accordingly, this factor warrants the granting of final approval of this proposed Settlement.

b) Reaction of the Class to the Settlement

That the Bar Date has now passed with no objections to or opt outs suggests strongly that the Partial Settlement Class fully supports the terms of the Settlement. *See, e.g., Tumpa,* 2021 U.S. Dist. LEXIS 2806, *24 (approving settlement where no objections were filed and only 3 individuals opted out of the proposed settlement).

c) Stage of the Proceedings and the Amount of Discovery Completed

The Parties have litigated this matter for over five years, up to the eve of trial. Throughout that process, the Parties engaged in extensive discovery and motion practice, including Defendant seeking Third Circuit review, culminating in the Court's grant of partial summary judgment on behalf of the previously certified Modified PMWA Class and FLSA Collective. Moreover, the proposed Settlement is the result of arm's-length negotiations, including no fewer than three mediation sessions before separate mediators over several years, with the final mediation leading to the Settlement for which the Parties now seek final approval. Consequently, there can be no argument that the Parties were not fully aware of the strength and weakness of their respective positions. *See Zanghi*, 2016 U.S. Dist. LEXIS 5914, *55 (finding "little doubt that the parties understood the merits and weaknesses of their respective positions" where they agreed to settle and "cancel[ed] trial just five days before" it was set to begin).

Further, the participation of mediators ensured that the settlement negotiations were conducted at arm's length and without collusion between the parties. *See, e.g., Bernhard v. TD Bank, N.A.*, No. 08-cv-4392, 2009 U.S. Dist. LEXIS 92308, *5 (D.N.J. Oct. 5, 2009); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement

negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). Accordingly, this factor also weighs in favor of final approval of the settlement. *See, e.g.*, *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2005) (finding that the *Girsh* factor satisfied where the parties "gained such an appreciation through their exchange of some discovery" and participation in the mediation process).

d) Risks of Establishing Liability and Damages

"These inquiries 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." *Whetman v. IKON (In re IKON Office Solutions Secs. Litig.)*, 209 F.R.D. 94, 105 (E.D. Pa. Aug. 9, 2002) (quoting *In re Prudential Ins. Co., Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998).

In the instant matter, the Court has already ruled that Defendant violated the FLSA and the PMWA. Nevertheless, proceeding to trial contains numerous inherent risks. As an initial matter, the Court has specifically excluded the members of the proposed ETCN Rule 23 Subclass from her ruling granting partial summary judgment. Thus, the question whether the members of the ETCN Rule 23 Subclass are entitled to recover under the PMWA would be decided by a jury, if not resolved by this Settlement. If a jury were to conclude that Denny's provided the ETCN Form to these subclass members, they would not be entitled to any monetary recovery. There is also a risk that individualized fact inquiries could require the Court to revisit class certification. The Settlement eliminates this risk entirely.

Further, the jury would also determine the issues of willfulness and liquidated damages, creating the potential for a smaller recovery for FLSA Collective members. Additionally, Defendant has stated it intends to appeal the Court's summary judgment ruling with respect to the

Rule 23 Class Members' PMWA claims. An appeal further creates the potential for members of the proposed Partial Settlement Class to ultimately receive nothing should this Settlement not be approved. As such, this factor supports a grant a final approval. *See Nguyen v. Educ. Comput. Sys., Inc.*, No. 22-cv-1743, 2024 U.S. Dist. LEXIS 140013, *29 (W.D. Pa. Aug. 7, 2024) (approving settlement where plaintiffs would "have to prevail at trial and defeat any appeal that might be taken from a favorable outcome"); *see also Zanghi*, 2016 U.S. Dist. LEXIS 5914, *57 (in approving settlement, noting that "[n]o matter the result at the trial level, post-trial motions and appeals would have been likely and would have resulted in further expense to the parties").

It is, therefore, Class Counsel's considered opinion that Settlement on the proposed terms at this juncture in the case, given the significant potential downside risks, upside rewards and concomitant costs of going forward, is the most prudent course for Plaintiff and the Partial Settlement Class to take.

e) Risks of Maintaining the Class Action Through the Trial

As the Court has already granted final certification to the FLSA Collective, this *Girsh* factor is inapplicable here with respect to the FLSA claims at issue. Indeed, the Third Circuit has described analysis of this factor as "perfunctory" given that "the district court always possesses the authority to decertify or modify a class . . ." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d at 321. However, as noted above, whether members of the ETCN Rule 23 Subclass actually received the ETCN Form would likely be contested at trial and could result in the Court determining that this is an individualized inquiry – thereby destroying certification. Settlement at this juncture removes that possibility and thus favors final approval of the proposed settlement.

f) Ability of Defendant to Withstand a Greater Judgment

Defendant's ability to pay was not a factor in the settlement negotiations and, therefore, this *Girsh* factor is neutral. However, the Parties reached agreement on the Settlement Amount during the most recent mediation only after taking into account all facts and circumstances, including the potential for the Partial Settlement Class Members to receive a lower recovery at trial, or even nothing should the Defendant ultimately succeed in any appeal.

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

"This 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). As previously discussed the proposed Settlement confers a substantial benefit on the Partial Settlement Class and, therefore, final approval is warranted.

h) The *Prudential* Factors Also Support This Settlement

The Third Circuit has instructed district courts, where relevant, to consider the *Prudential*[4] factors. *Nguyen*, 2024 U.S. Dist. LEXIS 140013, *36. Here, the applicable *Prudential* factors counsel in favor of approving the proposed Settlement. They include the maturity of the substantive issues, the fact that Partial Settlement Class Members were given the opportunity to opt-out, and the procedure for processing claims is "clear and transparent" and thus "fair and reasonable." *Id.*, at **37-38.

[4] *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d at 323 (noting that "when appropriate" a court may expand the *Girsh* factors).

B. THE PROPOSED SETTLEMENT PROVIDES SUBSTANTIAL BENEFIT TO THE PARTIAL SETTLEMENT CLASS MEMBERS

In the instant Settlement, Defendant has agreed to pay a Settlement Amount of $437,500.00 out of which Partial Settlement Class Members will be paid, based on the number of hours worked during the Class Period. The precise amount will be determined once the Residual FLSA Amount is calculated and all Court awarded costs and expenses are deducted. As described above, each Partial Settlement Class Member will receive a portion of the Settlement Amount based on the amount of alleged damages they specifically incurred (e.g., the number of hours they worked). Thus, the more hours an individual Partial Settlement Class Member worked, relative to his or her colleagues, the greater his or her share of the Settlement's proceeds. Indeed, as detailed above, certain Partial Settlement Class Members who are also members of the FLSA Collective that won summary judgment will receive their back pay on a dollar-for-dollar basis.

Further, the Settlement does not unduly grant preferential treatment to the Plaintiff. She is instead offered, subject to the Court's approval, a reasonable Service Payment that recognizes the added contribution she made to the resolution of the Action, including the burden and risks associated with attaching her name to this litigation publicly as well as in recognition of the time she expended in furtherance of the Partial Settlement Class. Because of her individual efforts, Partial Settlement Class Members will receive significant benefits from the Settlement. Indeed, courts in this Circuit regularly approve incentive payments in class action suits when such awards are authorized by the settlement and disclosed in the class notice. *See In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig*., 269 F.R.D. 468, 486 (E.D. Pa. 2010); *Briggs v. Hartford Fin. Serv. Grp., Inc.*, No. 07-cv-05190, 2009 U.S. Dist. LEXIS 66777, at *56–57 (E.D. Pa. July 31, 2009); *In Re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 422, 490 (E.D. Pa. 2008); *Serrano v. Sterling Testing Sys.*, 711 F. Supp. 2d 402, 424 (E.D. Pa. 2010).

The Parties have agreed that Class Counsel will petition the Court for a Service Payment to Plaintiff Gower of $2,500.

Defendant has agreed not to object to this request. This Service Payment is reasonable in light of the work performed by Plaintiff Gower in assisting in the resolution of this matter. Rather than remain a silent class member, Plaintiff Gower stepped forward and put her name behind this Settlement. Moreover, the Service Payment is consistent with, and indeed at the low end of, other incentive awards granted in similar cases. *See, e.g.*, *Tumpa,* 2021 U.S. Dist. LEXIS 2806, *15 (in approving settlement at early stages of litigation with each named plaintiff receiving a $2,000 incentive award); *Torres*, 2023 U.S. Dist. LEXIS 115870, *2 (approving settlement with a $10,000 service award to the named plaintiff); *Graudins v. Kop Kilt, LLC*, No. 14-cv-2589, 2017 U.S. Dist. LEXIS 25926 (E.D. Pa. Feb. 24, 2017) (granting incentive award of $7,500 where plaintiff in wage and hour class action sat for deposition and attended mediation). Thus, the proposed Service Payment to Plaintiff should be approved.

VI. ATTORNEY'S COSTS

Pursuant to the terms of the Settlement Agreement, Class Counsel is entitled to seek reimbursement of costs "not to exceed twenty-six thousand dollars ($26,000)." *See* Settlement Agreement at § 5.17. Courts in this District have approved settlements with similar costs. *See, e.g., Conley v. Oil,* No. 17-cv-1391, 2019 U.S. Dist. LEXIS 249, **4-5 (W.D. Pa. April 2, 2019) (in approving settlement, "authoriz[ing] the reimbursement of costs and expenses not to exceed $25,000.00 to Class Counsel"). Importantly, Defendant has agreed to take no position with respect to this request. The expenses incurred in this matter arise from deposition transcript costs, mediator's fees, and expenses related to calculation of damages in preparation for both trial and mediation. These costs were necessary to the prosecution and resolution of this Action. Such expenses are routinely approved by courts in approving class action settlements. See, e.g.,

Graudins v. Kop Kilt, LLC, No. CV 14-2589, 2017 WL 736684 *12 (E.D. Pa. Feb. 24, 2017 (approving request for reimbursement of expenses and noting that the "bulk of" such expenses are "associated with mediation and deposition-related fees.").

Notably, the Attorney's Costs, like Class Counsel's Attorney's Fees (which are subject to a separate motion) are separate and apart from the Settlement Amount. *See* Settlement Agreement at § 2.63. Stated another way, the Attorney's Costs (as well as the Attorney's Fees) are not being deducted from any amount being paid to the Partial Settlement Class. This payment structure regarding fees and costs only enhances the value of the Settlement Amount to the Partial Settlement Class.

VII. CONCLUSION

The proposed Settlement provides a fair, reasonable and adequate award to Plaintiff Gower and the proposed Partial Settlement Class and will put an end to the claims of the Partial Settlement Class in Action. Accordingly, Plaintiff respectfully requests that final approval be granted.

Dated: November 7, 2024

Respectfully submitted,

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Counsel for Plaintiff and the Partial Settlement Class

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of November 2024, 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