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

JODDA MOORE, and TERRELL AIKEN, individually and on behalf of all similarly situated persons, Plaintiffs, v. INDEPENDENCE BLUE CROSS, LLC d/b/a INDEPENDENCE BLUE CROSS, Defendant.	No. 2:23-cv-00566 (Judge Scott)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

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Plaintiffs, Jodda Moore and Terrell Aiken ("Plaintiffs"), by and through their counsel, Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, file the instant Brief in Support of Their Unopposed Motion for Final Approval of Class and Collective Action Settlement, averring in support thereof as follows:

I. INTRODUCTION

On May 28, 2024, this Court preliminarily approved the pending class and collective action settlement. (Doc. 33) (the "Preliminary Approval Order"). Pursuant to the Settlement Agreement and Release (the "Settlement Agreement"), defendant Independence Blue Cross, LLC ("Independence" or "Defendant") will pay $667,000 to settle all claims in this action, while denying any and all liability and disputing the amount of alleged damages. The settlement provides for a full and final release and waiver of any and all claims for payment of wages for the

performance of Computer Log-in Procedures,[1] including claims for overtime wage violations of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* ("FLSA") and the Pennsylvania Minimum Wage Act of 1968, 43 P.S. § 260.1, *et seq.* ("PMWA"), the Pennsylvania Wage and Payment Collection Law, 43 P.S. § 260.1 *et seq.* ("WPCL"), and claims for unpaid straight-time wages under Pennsylvania common law, from February 13, 2019 through the Effective Date.

As set forth below, the proposed settlement – which was negotiated with the assistance of the Honorable Thomas J. Rueter (Ret.) – satisfies all of the prerequisites for final approval and certification of the proposed Settlement Collective and Settlement Class. The proposed settlement is a fair, reasonable, and adequate resolution of this action, balancing the risks each side would have faced had this action continued against the benefits conferred by the settlement. For these reasons, and those more fully articulated below, Plaintiffs respectfully request that the Court enter an Order: (1) certifying the Settlement Class pursuant to Fed. R. Civ. P. 23(b)(3), for settlement purposes only; (2) granting final certification of the Settlement Collective pursuant to the FLSA, 29 U.S.C.§ 216(b), for settlement purposes only; (3) granting final approval of the proposed settlement; (4) appointing Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, as Class Counsel; (5) approving Plaintiffs' requested service awards; (6) approving Class Counsel's requested attorneys' fees and costs; and (7) approving the Administrator's requested fees.

[1] For purposes of this brief, Plaintiffs incorporate by reference the definitions contained in the Settlement Agreement. See (Doc. 31-1). Capitalized terms not otherwise defined herein are defined in the Settlement Agreement.

II. WAIVER AND RELEASE OF CLAIMS

In consideration for the promises made in the Settlement Agreement, the Participating Class Members and Settlement Collective Members (collectively, and together with Plaintiffs, the "Settlement Participants") shall be deemed to release and forever discharge Defendant as follows:

All Settlement Participants release Defendant from any and all claims that were or could have been asserted in the Lawsuit with respect to alleged unpaid wages for their performance of pre-shift Computer Log-In Procedures from February 13, 2019 through the Effective Date of the Agreement, including, without limitation, any claims under the FLSA, PMWA, WPCL, and Pennsylvania common law for the payment of back wages, associated damages, fees and costs ("Released Claims"), as more fully defined in paragraph 71 of the Settlement Agreement.[2]

III. RESULTS OF THE NOTICE PROCESS

Rule 23(3) provides that, prior to approving a class action settlement, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Here, the notice plan previously approved by this Court was adhered to, and fully satisfies all aspects of Rule 23(e).

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[2] The backs of the settlement checks issued to Participating Class Members and Settlement Collective Members will include Check Opt-In Form language. See Settlement Agreement, at ¶¶ 2, 91. If the settlement check is signed and cashed or otherwise negotiated, the Check Opt-In Form language will operate as a consent to join the lawsuit for settlement purposes only under 29 U.S.C. § 216(b) and a release of the Released Claims. See id. at ¶¶ 93, 94. However, regardless of whether a Participating Class Member cashes his or her settlement check and thereby opts-in to the FLSA collective, each Participating Class Member will release all Released Claims, including those under the FLSA. See id. at ¶ 92; Cf. Copley v. Evolution Well Servs. Operating, LLC, No. 2:20-CV-01442-CCW, 2023 WL 1878581, at *7 (W.D. Pa. Feb. 10, 2023) ("The proposed settlement would prevent Rule 23 class members who do not affirmatively opt-out from later bringing any FLSA claim—even if they did not opt-in to the FLSA collective. The Third Circuit has not spoken on this issue, but other Courts of Appeals have found that opt-in FLSA claims may properly be released through an opt-out Rule 23 class settlement. Because the Third Circuit has held that final judgments in class action cases have a preclusive effect on other claims, it would likely find that such releases of FLSA opt-in claims are acceptable.") (citations omitted).

Prior to the dissemination of notice to the Settlement Class Members and Settlement Collective Members, the Administrator received an electronic file containing the names, employee identification numbers, last known mailing addresses, dates of employment in each Covered Position during the Relevant Period, Social Security numbers, and data necessary to calculate the Qualifying Workhours for each Settlement Class Member and Settlement Collective Member. See Declaration of Teresa Y. Sutor, on behalf of RG/2 Claims Administration LLC ("Sutor Dec."), at ¶ 5 (attached hereto as **Exhibit "A"**). On July 18, 2024, the Administrator mailed the Notice of Settlement to the 1,356 Settlement Class Members and Settlement Collective Members with greater than 0 Qualifying Workhours[3] by First Class Mail. See id. at ¶ 11. Following the initial Notice of Settlement mailing, 80 of the 1,356 notices mailed were returned by USPS to the Administrator as undeliverable. The Administrator was able to retrieve updated addresses for 47 out of the 80 missing addresses. See id. at ¶ 12.

In addition to mailing the Notice of Settlement, the Administrator also provided a mailing address at Independence Blue Cross Settlement, c/o RG2 Claims Administration, P.O. Box 59479, Philadelphia, PA 19102-9479, to receive Requests for Exclusion, Objections, and undeliverable mail notices. Further, the Administrator also generated a live settlement website at www.mooresettlement.com, email address: IndependenceBlueCrossSettlement@rg2claims.com, and phone number: 1-866-742-4955, to effectively correspond with the Settlement Class Members and Settlement Collective Members to answer any questions. See id. at ¶¶ 7-10.

[3] As noted in Plaintiffs' preliminary approval motion, Independence initially identified 1,382 potential class members. However, 26 of those individuals had 0 Qualifying Workhours. See Sutor Dec. at ¶ 5.

Pursuant to the Preliminary Approval Order, the deadline for Settlement Class Members and Settlement Collective Members to submit Requests for Exclusion or Objections to the settlement was September 5, 2024 (or 30 calendar days after the date of re-mailing of the class notice). (Doc. 33, ¶ 11). As of October 7, 2024, the Administrator has not received any Requests for Exclusion or Objections from the 1,356 Settlement Class Members and Settlement Collective Members. See id. at ¶¶ 13, 14.

IV. PLAN OF ALLOCATION AND PROJECTED SETTLMENT PAYMENTS

Assuming the Court approves the requested attorneys' fees, expenses, and service payments to Plaintiffs, the estimated allocation of the Maximum Settlement Amount is as follows:

Maximum Settlement Amount	$667,000.00
Attorneys' Fees	($222,333.33)
Attorneys' Expenses	($7,065.41)
Administration Expenses	($32,000.00)
Service Payments to Plaintiffs	($10,000.00)
Reserve Amount	($20,000.00)
Net Settlement Amount	**$375,601.26**

The Administrator will calculate the Settlement Payment that each Settlement Participant receives according to the following steps:

1) Each Settlement Participant will receive the flat sum of One Hundred Twenty-Five Dollars ($125.00) (the "Minimum Payment").

2) The Administrator will subtract the sum of the Minimum Payments to all of the Settlement Participants from the Net Settlement Amount set forth above, in order to determine the Residual Net Settlement Amount.

3) Each Settlement Participant will receive an additional *pro rata* share of the Residual Net Settlement Amount, which the Administrator will determine by multiplying the Settlement Participant's number of Qualifying Workhours by the Per Workhour Amount.

4) The Administrator will determine the Per Workhour Amount by dividing the Residual Net Settlement Amount by the sum of the total number of Qualifying Workhours worked by all Settlement Participants.

5) The Administrator will add each Settlement Participant's *pro rata* share of the Residual Net Settlement Amount to the Minimum Payment of $125.00 in order to determine the payment sent to each Settlement Participant. Payments will be made within thirty (30) days of the Effective Date.

V. LEGAL STANDARD

A. Standard for Class Certification Under Rule 23

"Rule 23(a) lays out four threshold requirements for certification of a class action: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. In re Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410, 426 (3d Cir. 2016), as amended (May 2, 2016) (citing Fed. R. Civ. P. 23(a)). "The parties seeking class certification bear the burden of establishing by a preponderance of the evidence that the requirements of Rule 23(a) have been met." Id. (quoting In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig., 795 F.3d 380, 391 (3d Cir.2015)). "If that occurs, [the court] consider[s] whether the class meets the requirements of one of three categories of class actions in Rule 23(b)." Id.

Under Rule 23(b)(3), the court considers "whether (1) common questions predominate over any questions affecting only individual class members (predominance) and (2) class resolution is superior to other available methods to decide the controversy (superiority)." Id. (citing Fed. R. Civ. P. 23(b)(3)). In addition, "[a] plaintiff seeking certification of a Rule 23(b)(3) class must

prove by a preponderance of the evidence that the class is ascertainable." Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015), as amended (Apr. 28, 2015).

B. Standard for Final Approval of a Rule 23 Settlement

There is a "strong presumption in favor of voluntary settlement agreements," which is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" Ehrheart v. Verizon Wireless, 609 F.3d 590, 594-95 (3d Cir. 2010) (quoting In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 784 (3d Cir.1995)); see, e.g., In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); In re Sch. Asbestos Litig., 921 F.2d 1330, 1333 (3d Cir. 1990) (noting that the court encourages settlement of complex litigation "that otherwise could linger for years"); Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation.").

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1988).

With respect to final approval of a class action settlement, courts have explained:

> [A] more demanding test applies [than at the preliminary approval stage], requiring the Court to examine the so-called Girsh factors:
>
> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the

> risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

Torres v. BrandSafway Indus. LLC, No. 2:21-CV-01771-CCW, 2023 WL 346667, at *2 (W.D. Pa. Jan. 20, 2023) (citing In re General Motors Corp., 55 F.3d at 785).

C. Standard for Final Certification of an FLSA Collective

"It is clear from the statutory text of the FLSA that the standard to be applied on final certification is whether the proposed collective plaintiffs are 'similarly situated.'" Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 536 (3d Cir. 2012) (citing 29 U.S.C. § 216(b)). In determining whether this standard has been satisfied, courts within the Third Circuit adhere to an "ad-hoc approach, which considers all the relevant factors and makes a factual determination on a case-by-case basis." Id.

Relevant factors to be considered as part of the ad-hoc approach include, but are not limited to, "whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." Id. at 536-37. "This list is not exhaustive, and many relevant factors have been identified." Id. (citing 45C Am.Jur.2d Job Discrimination § 2184). "[P]laintiffs must satisfy their burden at this second stage by a preponderance of the evidence." Id. at 537.

Generally, in a hybrid Rule 23/FLSA class and collective action, such as the matter at hand, "[b]y meeting the more stringent requirements of Rule 23, [a] class likewise may be certified as a collective action." Hall v. Best Buy Co., 274 F.R.D. 154, 167 n. 68 (E.D. Pa. 2011) (citing Clesceri

v. Beach City Investigations & Protective Servs., Inc., No. 11–3873, 2011 WL 320998, at *4 (C.D.Cal. Jan. 27, 2011)).

D. Standard for Final Approval of an FLSA Settlement

The Third Circuit "has not addressed whether FLSA actions claiming unpaid wages may be settled privately prior to obtaining judicial approval." Haley v. Bell-Mark Techs. Corp., No. 1:17-CV-1775, 2019 WL 1925116, at *2 (M.D. Pa. Apr. 30, 2019). "Absent such guidance, district courts within the Third Circuit have routinely adopted the majority position and have required judicial approval as a precondition to amicable resolution of [FLSA] claims." Id.

Under the standard employed by district courts within the Third Circuit, "a proposed compromise may satisfy judicial review if it is a 'fair and reasonable resolution of a *bona fide* dispute over FLSA provisions.'" Id. (quoting Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982)); see also Kutz v. Cargill Cocoa & Chocolate, Inc., No. 3:19-CV-0176, 2019 WL 5457776, at *5 (M.D. Pa. Oct. 23, 2019). In determining whether an FLSA settlement is fair and reasonable, district courts within the Third Circuit consider the same Girsh factors as those considered when assessing the propriety of a Rule 23 settlement. See, e.g., Haley, 2019 WL 1925116, at *4.

"[C]ourts in the Third Circuit also analyze 'whether the settlement furthers or impermissibly frustrates the implementation of the FLSA in the workplace.'" Id. (quoting Bettger v. Crossmark, Inc., No. 13-cv-2030, 2015 WL 279754, at *4 (M.D. Pa. Jan. 22, 2015)).

Finally, "[o]nce a court has approved the substantive terms of a settlement, it must then address the reasonableness of any attorneys' fees stipulated to by the parties as part of the settlement agreement." Id. (citing In re Chickie's & Pete's Wage and Hour Litig., No. 12-cv-6820, 2014 WL 911718, at *4 (E.D. Pa. Mar. 7, 2014)).

VI. ARGUMENT

A. The Court Should Certify the Rule 23 Settlement Class and Approve the Proposed Settlement

1. The Rule 23 Class Should be Certified

Rule 23(a) requires a class representative to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). A class representative must also satisfy the requirements of Rule 23(b). See Fed. R. Civ. P. 23(b).

Plaintiffs request that the Court certify the following Settlement Class:

> All current and former employees who have worked for Defendant either in-person or remotely at any time from February 13, 2020 through February 13, 2023 in one or more of the following non-exempt positions: (1) customer service representative; (2) senior customer service representative; (3) lead customer service representative; and/or (4) team lead operations, who were employed in Defendant's Customer Service Department, regardless of the members or clients served.

As further described below, the Settlement Class meets the requirements of Rule 23(a) and (b)(3), and, accordingly, the Court should certify it for purposes of settlement.

a. The Proposed Settlement Class Meets the "Numerosity" Requirement of Rule 23(a)(1)

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "While there is no minimum number of plaintiffs required to satisfy the numerosity requirement, it is generally understood that a potential number of plaintiffs greater than 40 is enough to maintain a class action." Checchia v. Bank of Am., N.A.,

No. CV 21-3585, 2023 WL 2051147, at *4 (E.D. Pa. Feb. 16, 2023) (citing Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)).

Here, the Settlement Class consists of 1,356 individuals. Rule 23(a)(1)'s "numerosity" requirement is therefore easily satisfied.

b. The Proposed Settlement Class Meets the "Commonality" Requirement of Rule 23(a)(2)

Rule 23(a)(2)'s commonality element "requires that the proposed class members share at least one question of fact or law in common with each other." In re Warfarin, 391 F.3d at 528 (citing Baby Neal ex. rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). "This question of fact or law must be 'of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Checchia, 2023 WL 2051147, at *4 (quoting In re Nat'l Football League, 301 F.R.D. at 200).

In the present matter, there are several questions of law and fact that are common to the class, including whether Independence required its CSRs to perform uncompensated Computer Log-in Procedures prior to the start of their shifts; whether Independence's alleged policy of requiring CSRs to perform uncompensated Computer Log-in Procedures violated the FLSA, PMWA, and/or Pennsylvania common law; and whether Independence's alleged conduct was willful. Importantly, the fact that Settlement Class Members may receive varying amounts of damages does not defeat the "commonality" requirement. See, e.g., Ripley v. Sunoco, Inc., 287 F.R.D. 300, 308 (E.D. Pa. 2012) ("[W]hile each Plaintiff's recovery might be different due to the number of hours that he or she worked without proper compensation, the wrong was from Defendant's alleged common timekeeping and payroll policies that precluded proper

compensation for overtime work."). Plaintiffs therefore submit that Rule 23(a)(2)'s commonality requirement is met.

c. The Proposed Settlement Class Meets the "Typicality" Requirement of Rule 23(a)(3)

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "The typicality inquiry is intended to assess . . . whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." In re Nat'l Football League, 301 F.R.D. at 200 (quoting Baby Neal, 43 F.3d at 57-58) (alteration in original). "The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." Checchia, 2023 WL 2051147, at *5 (quoting Baby Neal, 43 F.3d at 57). "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirements irrespective of the varying fact patterns underlying the individual claims." Id. (quoting Baby Neal, 43 F.3d at 58).

Here, Plaintiffs' claims are typical of the claims of the Settlement Class, in that Plaintiffs' claims and the Settlement Class Members' claims are all based on the alleged failure of Independence to compensate them for time spent performing Computer Log-in Procedures prior to the start of their shifts. Accordingly, the "typicality" requirement is met.

d. The Proposed Settlement Class Meets the "Adequacy" Requirement of Rule 23(a)(4)

Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem

Prod., Inc. v. Windsor, 521 U.S. 591, 594, 117 S. Ct. 2231, 2236, 138 L. Ed. 2d 689 (1997) (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 2370–2371, n. 13, 72 L.Ed.2d 740 (1982)). "To assess the adequacy of the class representative, courts first inquire into the 'qualifications of counsel to represent the class,' and second, assess whether there are 'conflicts of interest between named parties and the class they seek to represent.'" Checchia, 2023 WL 2051147, at *5 (quoting In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 312 (3d Cir. 1998)).

As set forth below and as detailed in the attached declarations, Plaintiffs' co-counsel are qualified to represent the Settlement Class. In addition, Plaintiffs' claims are purely coextensive with those of the Settlement Class, who have equal interest in the relief offered by the Settlement Agreement. Further, Plaintiffs and their counsel have vigorously prosecuted the interests of the Settlement Class by obtaining a highly favorable settlement. The Court should therefore find that Rule 23(a)(4)'s adequacy requirement is satisfied.

e. The Proposed Settlement Class Meets the Predominance and Superiority Requirements of Rule 23(b)(3), and is Ascertainable

Once the requirements of Rule 23(a) are satisfied, a court may certify a class under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Windsor, 521 U.S. at 623 (citing 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1777, p. 518-19 (2d ed. 1986)). "The superiority requirement 'asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of

adjudication.'" In re Warfarin, 391 F.3d at 533-34 (quoting In re Prudential, 148 F.3d at 316). The analysis of whether a settlement class satisfies the predominance requirement need not be concerned with manageability of a trial, since the proposal is that there be no trial. Sullivan v. DB Invs., Inc., 667 F.3d 273, 303 (3d Cir. 2011).

Plaintiffs here satisfy the predominance inquiry because questions of law and fact common to the Settlement Class substantially outweigh any individual issues. Indeed, Independence's alleged conduct challenged in the instant action is common to all Settlement Class Members and is alleged to have harmed all Settlement Class Members in the same way.

In addition, resolution of the claims at issue in a class action is superior to individual lawsuits because it promotes consistency and efficiency of litigation. It is also the only feasible way for the many Settlement Class Members to litigate their presumably relatively small claims. See Krimes v. JPMorgan Chase Bank, N.A., No. CV 15-5087, 2016 WL 6276440, at *5 (E.D. Pa. Oct. 26, 2016) ("Since the individual claims are relatively small, without the class, individuals might lack incentive to pursue their claims.").

Further, "[t]he Third Circuit also requires that a class certified under Rule 23(b)(3) be ascertainable." Checchia, 2023 WL 2051147, at *6. "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" Byrd, 784 F.3d at 163 (quoting Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013)).

Here, the Parties have utilized Independence's time and payroll records to identify all CSRs who performed work for Independence during the Class Period. This is a suitably objective, reliable, and feasible method of determining the Settlement Class Members. See Wintjen v.

Denny's, Inc., 2:19-CV-00069-CCW, 2021 WL 5370047, at *9 (E.D. Pa. Nov. 18, 2021) ("[B]ecause Denny's maintains records of its restaurant employees, reference to those records provides 'a reliable and administratively feasible mechanism' for determining class membership.")

2. Final Approval of the Proposed Rule 23 Settlement is Appropriate

As noted above, at the final approval stage, the Court must determine whether the Girsh factors have been satisfied. Torres, 2023 WL 346667, at *2 (citing In re General Motors Corp., 55 F.3d at 785)). These factors consist of:

> (1) the complexity and duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining a class action;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement in light of the best recovery; and
> (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

Id. (citing In re General Motors Corp., 55 F.3d at 785).

Here, all of the applicable Girsh factors support approval of the proposed settlement.

i. Complexity, Expense and Likely Duration Of The Litigation

"[F]LSA collective actions are, by their nature, complex." Carts v. Wings Over Happy Valley MDF, LLC, No. 4:17-CV-00915, 2023 WL 4238490, at *6 (M.D. Pa. June 28, 2023) (citing Brumley v. Camin Cargo Control, Inc., No. 08-cv-01798, 2012 WL 1019337, at *11 (D.N.J. Mar. 26, 2012)) (noting that "FLSA claims and wage-and-hour law enforcement through litigation has been found to be complex by the Supreme Court and lower courts"). Plaintiffs herein have asserted not only collective action claims under the FLSA, but class action claims under Rule 23. Accordingly, if the proposed settlement is not approved, additional lengthy and

complex litigation will be required, which will consist of, *inter alia*: Plaintiffs' motion to conditionally certify an FLSA collective action; Plaintiffs' motion for final certification of an FLSA collective action (assuming conditional certification is granted); Defendant's motion to decertify the conditionally certified collective (assuming conditional certification is granted); Plaintiffs' motion for Rule 23 class certification; motions for summary judgment potentially filed by all parties; and significant additional pre-certification and post-certification discovery.

In fact, and as discussed further below, there is a very real possibility that if the litigation continues, Plaintiffs and the Settlement Class will recover far less than provided for by the Settlement Agreement. Additionally, all parties will unquestionably incur substantial additional expenses litigating this matter for the next several years. This factor therefore warrants granting preliminary approval of the proposed settlement. See, e.g., Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class.").

ii. Reaction of the Class to the Settlement

Out of the of 1,356 Settlement Class Members and Settlement Collective Members to whom Notices of Settlement were sent, not a single individual requested to be excluded from the Settlement Class or objected to the proposed settlement. The reaction of the Settlement Class therefore weighs in favor of approval of the proposed settlement. See, e.g., Jackson v. Wells Fargo Bank, N.A., 136 F. Supp. 3d 687, 701-02 (W.D. Pa. 2015) ("Although the practical realities of a class action dictate a cautious approach to recognizing an inference of support based on the lack of a significant number of objectors, the receipt of only a small number of objections provides some support for the approval of a proposed settlement.").

iii. Stage of the Proceedings and the Amount of Discovery Completed

Under the third Girsh factor, "courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." In re Warfarin, 391 F.3d at 537 (citing In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)). In addition, "the pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [,but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000), aff'd sub nom. D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001) (quoting Martens v. Smith Barney, Inc., 181 F.R.D. 243, 263 (S.D.N.Y.1998)) (alterations in original).

Here, although preparing this case through collective and class certification, dispositive motion practice, and trial would require extensive formal discovery for both sides, the Parties have completed enough informal discovery to understand the strengths and weaknesses of the case and, accordingly, counsel were able to appropriately negotiate and recommend a settlement. As noted above, Independence produced the following documents and information to Class Counsel:

- Data reflecting the number of CSRs employed by month during the class period;
- Data reflecting regular and overtime hours worked by CSRs during the relevant period;
- Independence's instructions to CSRs for reporting time;
- Plaintiffs' pay stubs;
- Plaintiffs' time records;
- Training documentation on time reporting;
- Independence's policies on overtime pay and attendance;

- Records reflecting Plaintiffs' interactions with Independence's Business Technology Services employees;
- Independence's Code of Conduct;
- Information regarding the computer hardware and software used by CSRs;
- Information regarding the schedule for computer updates that may impact computer login time; and
- A video which purported to demonstrate that the computer login process for CSRs took less than two (2) minutes.

The data produced by Independence enabled the Parties to develop a class-wide damages model, and the remainder of the informal production allowed the parties to assess the strengths and weaknesses of their respective positions. For example, the computer log-in video produced by Independence provided backup for Defendant's argument that the average amount of time spent by CSRs performing Computer Log-in Procedures was minimal. Thus, although Plaintiffs maintain that they often experienced longer log-in times, the discovery exchanged enabled the Parties to realistically assess the risks of further litigation. In sum, the Parties completed enough informal discovery to understand the strengths and weaknesses of the case and, accordingly, were able to appropriately negotiate and recommend a settlement. This factor therefore weighs in favor of granting approval of the proposed settlement. See, e.g., In re Austrian & German Bank Holocaust Litig., 80 F. Supp. at 176 ("[W]hile discovery in this case was not formal, the information exchanged was extensive. While cooperative, the relationship between counsel for plaintiffs and the [defendants] was by no means collusive.").

iv. 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.'" In re Ikon Off. Sols., Inc. Sec. Litig., 209 F.R.D. 94, 105 (E.D. Pa. 2002) (quoting In re Prudential, 148 F.3d at 319). As a court in this district previously explained:

> [I]f it appears that further litigation would realistically risk dismissal of the case on summary judgment or an unsuccessful trial verdict, it is in the plaintiffs' interests to settle at a relatively early stage. In contrast, if it appears that liability is extraordinarily strong, and it is highly likely that plaintiffs would prevail at trial, settlement might be less prudent. On this issue, the court should avoid conducting a mini-trial and must "to a certain extent, give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action."

Id. at 105-06 (quoting Lachance v. Harrington, 965 F.Supp. 630, 636 (E.D. Pa. 1997)).

With respect to liability in the matter at hand, Independence intends to argue that its policy and practice is in fact to pay CSRs for Computer Log-in Procedures, and that CSRs are instructed to track and submit all hours worked. Independence will therefore argue that liability cannot be established on a class or collective basis.

Independence also intends to argue that to the extent any work was compensable, the time spent performing same was legally *de minimis* and, accordingly, not compensable under the FLSA. "The FLSA does not require employers to compensate non-exempt employees for de minimis quantities of time spent working before and after shifts." Williams v. Securitas Sec. Servs. USA, Inc., No. CIV.A. 10-7181, 2011 WL 3629023, at *3 (E.D. Pa. Aug. 17, 2011). In determining whether a particular task is *de minimis*, courts analyze "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." Id. (quoting De Asencio v. Tyson Foods, Inc., 342 F.3d 301,

306 (3d Cir.2003)). Thus, if litigation continued, Independence would attempt to defeat Plaintiffs' FLSA claims at the summary judgment stage, and it is far from certain how the Court would rule.

In addition, Independence intends to argue that even if the time worked was compensable and violations of law did occur, Independence did not violate the law willfully, and had a good faith basis for believing that its policies were in compliance with the FLSA. If Independence successfully demonstrates its good faith and absence of willfulness, the statute of limitations for the putative collective members' FLSA claims would be limited to two (2) years rather than three (3) years, and they would be precluded from recovering liquidated damages. See, e.g., Sec'y United States Dep't of Lab. v. Mosluoglu, Inc., No. 22-2749, 2023 WL 5972044, at *4 (3d Cir. Sept. 14, 2023) (noting that the 2-year FLSA statute of limitations is "extended to three years if the violation was willful") (citing 29 U.S.C. § 255(a)); Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033, at *4 (E.D. Pa. Oct. 17, 2023) ("[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount less than the equivalent of the unpaid overtime compensation.") (internal quotation marks omitted).

As a result of the foregoing risks, it is Class Counsel's opinion that the proposed settlement is the most sensible course for Plaintiffs and the Settlement Class to take.

v. Risks of Maintaining the Class Action Through Trial

The Third Circuit has explained:

> The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.

In re Gen. Motors Corp., 55 F.3d at 817.

In the present matter, in agreeing to settle the claims at issue, Class Counsel was heavily influenced by the district court's recent denial of class certification in Garcia v. Vertical Screen, Inc., No. CV 18-4718, 2022 WL 282541 (E.D. Pa. Jan. 31, 2022). Class Counsel found Garcia to be instructive not only due to the factual similarities between the cases, but also because Garcia was pending before the Eastern District of Pennsylvania.

In Garcia, the plaintiff asserted class and collective action claims against his employer for failing to pay overtime in violation of the FLSA and PMWA. 2022 WL 282541, at *1. Specifically, the plaintiff alleged the defendant failed to pay him and similar hourly-paid non-exempt researchers and/or team leaders for time spent logging into their computers and the company's timekeeping system at the start of their shifts. Id.

The defendant's business involved running pre-employment background checks in various databases for people applying for work with the defendant's clients. Id. It was the job of the named plaintiff and the opt-in plaintiffs to run these databases. Id.

To track employees' work hours, the defendant used an online timekeeping software called Workforce Now, also known as ADP. Id. The plaintiffs recorded their time through ADP by logging into the software at the beginning of their shifts. Id. The plaintiffs reported experiencing significant difficulty logging into the defendant's timekeeping software in two (2) respects: first, the plaintiffs dealt with delays logging into their computers; and, second, even after successfully logging into their computer, numerous plaintiffs reported additional delays logging into the ADP system itself, ranging from delays of three minutes to thirty minutes. Id.

The ADP timekeeping system rounded all employee time to the nearest quarter of the hour. Id. at *2. Therefore, employees who clocked in within seven minutes after the hour (*e.g.*, at

7:07a.m.) were paid as if they clocked in at the hour (at 7:00 a.m.). Id. Employees who clocked in eight minutes after the hour, on the other hand, were paid as if they clocked in fifteen minutes after the hour. Id.

In July 2019, the district court granted conditional certification of the plaintiff's claims, and approved dissemination of notice to the conditional FLSA collective. Id. at *1. Of the putative collective members, 66 opted in to the FLSA collective action. Id. The plaintiff thereafter moved for final FLSA certification and Rule 23 class certification, and the defendant simultaneously moved to decertify the conditionally certified collective. Id.

While the court granted final certification of the plaintiff's FLSA claims, the court denied the plaintiff's motion for Rule 23 class certification. Id. at *5-7. In particular, the court found that the plaintiff was unable to demonstrate the predominance requirement of Rule 23(b)(3). Id. at *6.

According to the court, establishing liability required the employees to prove that they worked over forty hours in a given week when they claimed to have been owed overtime, which would require individualized inquiries into their timesheets and hours scheduled. Id. In addition, establishing liability would require the plaintiffs to prove that they spent more than seven (7) minutes logging into the computer on a particular occasion, in light of the defendant's quarter-hour time rounding policy. Id. Further, the court anticipated that the defendant would likely argue that the time the plaintiffs spent was *de minimis*, which would depend on the varying amount of time the plaintiffs could prove they spent. Id. Finally, the court explained that damages questions would require individualized inquiries. Id.

Here, the discovery produced to date revealed that – just like the defendant in Garcia – Independence also utilizes a quarter-hour time rounding policy. Further, Independence's CSRs' usual schedule is 37.5 hours per week. Thus, for the same reasons articulated by the court in

Garcia, Class Counsel believe that there is a significant possibility that after several years of hard-fought litigation, their motion for class certification may ultimately be denied. In light of these risks, Class Counsel believe that settlement is the most appropriate course. See, e.g., In re Glob. Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 460 (S.D.N.Y. 2004) ("No class has been certified in the Actions except in the settlement context. Were these cases not to settle, defendants might contest class certification on various grounds, thereby creating appreciable risk to the class members' potential for recovery. And even if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage.") (citation omitted).

vi. Ability of Defendant to Withstand a Greater Judgment

Although a defendant's ability to withstand a greater judgment can be a relevant consideration under certain circumstances (*e.g.*, when a defendant receives a significant discount in settling claims due to its precarious financial condition), the Third Circuit has upheld a district court's determination that this factor neither favored nor disfavored a settlement due to "lack of evidence in the record about [the defendant]'s ability to pay or whether such a consideration factored into the settlement negotiations." In re Warfarin, 391 F.3d at 538.

In the present matter, Independence's ability to pay a greater judgment was not a factor in the Parties' settlement negotiations. Class Counsel therefore respectfully submits that this factor neither weighs for nor against the proposed settlement.

vii. 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 Gen. Motors Corp., 55 F.3d at 806. In In re Gen. Motors Corp., the Third Circuit further explained:

> [I]n cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. . . . The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Id. (internal quotation marks omitted).

Pursuant to the Parties' class-wide damages model created after exchanging informal discovery, the $667,000 proposed settlement represents payment to the Settlement Class Members and Settlement Collective Members of more than five (5) minutes of uncompensated time per shift (excluding liquidated damages) for the 3-year period predating Plaintiffs' Complaint. See Declaration of Peter C. Wood, Jr., Esq. ("Wood Dec."), at ¶ 10 (attached hereto as **Exhibit "B"**).

Although Plaintiffs allege that they often spent more than fifteen (15) minutes (and sometimes up to thirty (30) minutes) per shift performing uncompensated Computer Log-in Procedures, as noted above, Independence produced contrary evidence that the time spent performing Computer Log-in Procedures was less than two (2) minutes per shift. Further, in light of the risks of establishing liability against Independence, and the risks of maintaining a class action through trial – both described immediately above – Class Counsel believes that the resolution reached is an excellent one. This factor therefore again weighs in favor of approving the proposed settlement.

Moreover, as noted in the preliminary approval motion, the $667,000 proposed settlement payment here is substantially larger than a recent settlement approved by this Court in Garcia, consisting of payment of $80,000 in damages to 68 FLSA opt-in plaintiffs following the court's

denial of the named plaintiff's motion for class certification. (Doc. No. 31-4). The settlement also compares favorably to settlements approved in other similar wage and hour class and collective actions. See, e.g., Turner v. Concentrix Servs. US, Inc., No. 1:18-cv-1072, 2023 WL 2002091 (W.D. Ark. Jan. 11, 2023) (approving FLSA collective action settlement involving allegations by customer service representatives of logging into computer software off-the-clock, in which $603,500 was to be distributed to a maximum of 2,710 opt-ins); Kress v. Fulton Bank, N.A., No. 19-18985 (CDJ) (MJS), 2021 WL 9031639 (D.N.J. Sept. 17, 2021) (report and recommendation recommending preliminary approval of class and collective action settlement involving similar allegations encompassing 2,044 employees and a payment to the class and collective of $1,000,000, prior to deducting counsel fees and costs of administration), *report and recommendation adopted*, No. 119CV18985CDJMJS, 2022 WL 2357296 (D.N.J. June 30, 2022).

For all of the foregoing reasons, the Court should find that the Girsh factors have been satisfied, and approve the settlement under Rule 23.

B. The Court Should Certify the Settlement Collective, and Approve the Proposed Settlement Under the FLSA

1. Final Certification of the Settlement Collective is Appropriate

Plaintiffs request that the Court certify the following Settlement Collective:

> All current and former employees who have worked for Defendant either in-person or remotely at any time from February 13, 2020 through February 13, 2023 in one or more of the following non-exempt positions: (1) customer service representative; (2) senior customer service representative; (3) lead customer service representative; and/or (4) team lead operations, who were employed in Defendant's Customer Service Department, regardless of the members or clients served.

Generally, by meeting the more stringent requirements of Rule 23, a class may likewise be certified as a collective action. See Hall, 274 F.R.D. at 167.

In any event, the Settlement Collective Members are "similarly situated" under the FLSA, warranting certification of the Settlement Collective. Among other things, the Settlement Collective Members: (1) were all employed in Defendant's Customer Service Department; (2) all either worked in-person at Independence's Philadelphia, Pennsylvania headquarters, or remotely from their homes; (3) were hourly-paid non-exempt employees under the FLSA; (4) performed similar job duties, and utilized a computer provided by Independence to perform certain of those duties; (5) were subjected to common timekeeping and compensation policies and practices, including the requirement that they perform Computer Log-in Procedures before their scheduled punch-in time, and without compensation; (6) often worked more than forty (40) hours per week; and (7) seek monetary damages resulting from uncompensated Computer Log-in Procedures. Plaintiffs therefore submit that the Settlement Collective Members are "similarly situated" under the FLSA. See Zavala, 691 F.3d at 536.37.

2. The Court Should Approve the Proposed Settlement Under The FLSA

As noted above, in analyzing a proposed settlement under the FLSA, courts within the Third Circuit first examine whether the settlement reflects a fair and reasonable resolution of a *bona fide* dispute, and next ask whether the settlement furthers the implementation of the FLSA in the workplace. In the present case, all of these inquiries can be answered in the affirmative, rendering the proposed settlement appropriate.

a. The Parties Have a *Bona Fide* Dispute

"A *bona fide* dispute exists when parties genuinely disagree about the merits of an FLSA claim—when there is factual rather than legal doubt about whether the plaintiff would succeed at trial." Haley, 2019 WL 1925116, at *4. "Courts have found that a *bona fide* dispute exists where the parties disagree as to the plaintiff's key allegations, including . . . the number of overtime hours

worked." Bellan v Capital Blue Cross, 2022 WL 736441, at *3 (M.D. Pa. 2022). "Thus, a 'proposed settlement resolves a *bona fide* dispute where the settlement's terms reflect a reasonable compromise over issues, such as . . . back wages, that are actually in dispute and are not a mere waiver of statutory rights brought about by an employer's overreaching.'" Kutz, 2019 WL 5457776, at *5 (quoting Howard v. Phila. Hous. Auth., 197 F. Supp. 3d 773, 777 (E.D. Pa. 2016)) (alteration in original). "In essence, for a *bona fide* dispute to exist, the dispute must fall within the contours of the FLSA and there must be evidence of the defendant's intent to reject or actual rejection of that claim when it is presented." Kapolka v. Anchor Drilling Fluids USA, LLC, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *3 (W.D. Pa. Oct. 22, 2019) (quoting Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 530 (E.D. Pa. 2016)).

Here, the proposed settlement resolves a *bona fide* dispute between the Parties. Plaintiffs allege that Independence maintained a policy and practice of failing to compensate CSRs for time spent performing Computer Log-in Procedures. Independence denies that it unlawfully failed to pay any wages to CSRs, and further asserts that it acted in good faith at all times, and did not willfully violate the FLSA. Under the terms of the Settlement Agreement, the Settlement Collective Members will release their wage and hour claims against Independence in exchange for monetary compensation. Thus, the parties respectfully submit that the proposed settlement resolves a *bona fide* dispute. See, e.g., Kapolka, 2019 WL 5394751, at *3 ("[T]he record establishes that resolution of many of the relevant legal issues would turn on the underlying, disputed facts surrounding, at a minimum, (i) Plaintiffs' employment; (ii) Defendants' pay practices; (iii) Defendants' state of mind, *i.e.*, Defendants' good or bad faith in establishing the challenged pay practices, and; (iv) industry custom. The Court therefore finds that the proposed

settlement resolves a '*bona fide*' dispute of 'factual issues rather than legal issues.'") (citing Kraus, 155 F. Supp. 3d at 530).

b. The Proposed Settlement is Fair and Reasonable

After determining whether the proposed Agreement resolves a *bona fide* dispute between the parties, this Honorable Court must next decide whether the proposed settlement "represents a fair and reasonable compromise" of Plaintiffs' claims against Independence. See Haley, 2019 WL 1925116, at *4. "In undertaking this analysis, district courts within the Third Circuit have considered the factors set forth in Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975), which established evaluative criteria for measuring the fairness of proposed class action settlements." Id.

As described in detail above, supra § VI.A.2., all of the relevant Girsh factors demonstrate the fairness of the proposed settlement. Thus, for the same reasons as described above, Plaintiffs respectfully submit that the proposed settlement is a fair and reasonable compromise of Plaintiffs' claims.

c. The Proposed Settlement Does Not Frustrate the Purpose of the FLSA

The Court must also determine whether the proposed Agreement "furthers or frustrates the implementation of the FLSA in the workplace." See Haley, 2019 WL 1925116, at *5. "This inquiry requires consideration of three interrelated FLSA objectives: (1) combatting inequalities in bargaining power between employers and employees; (2) ensuring widespread employer compliance with the FLSA; and (3) honoring the private-public character of employee rights, whereby the public has a general interest in employee well-being and access to fair wages." Id. (citations omitted). "Courts assess a settlement's consonance with these FLSA objectives by considering, *inter alia*, the scope of any confidentiality provisions, and the breadth of any release of claims provisions." Id. (citations omitted).

While "[t]here is a strong presumption against confidentiality clauses in FLSA wage-settlement agreements," "[d]istrict courts within the Third Circuit have occasionally approved narrowly crafted confidentiality clauses." Id. at *5-6 (citing cases). In addition, "[d]istrict courts reviewing proposed FLSA settlements frequently require litigants to limit the scope of waiver and release provisions to 'claims related to the specific litigation.'" Id. at *6 (quoting Singleton v. First Student Mgmt. LLC, No. 13-1744, 2014 WL 3865853, at *8-9 (D.N.J. Aug. 6, 2014)).

In the matter at hand, the release contained in the Settlement Agreement is reasonable because the Settlement Collective Members have only released claims arising out of Computer Log-in Procedures that were or could have been asserted in this litigation, and further because there is no confidentiality provision. See Settlement Agreement, at ¶ 71.

C. The Proposed Service Payments are Reasonable and Appropriate

"Service payments are a common feature of collective action settlements." Brown v. Kadence Int'l, Inc., No. CV 22-1097-KSM, 2023 WL 2614587, at *10 (E.D. Pa. Mar. 23, 2023) (citing Sullivan v. DB Invs., Inc., 667 F.3d 273, 333 n.65 (3d Cir. 2011)). "These payments serve to compensate named plaintiffs for the services they provided and the risks they incurred during the course of [the] litigation and to reward the public service of contributing to the enforcement of mandatory laws." Id. (internal quotation omitted). Indeed, "[i]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

In the present matter, Plaintiffs: (i) provided information and documents to Class Counsel and spoke with Class Counsel on multiple occasions to describe details about their work experience with Independence, such as their job duties and Independence's compensation policies;

(ii) personally attended the Parties' November 16, 2023 mediation; and (iii) in undertaking this case, assumed the risk of being associated with a class and collective action against a former employer.

Plaintiffs seek Court approval for the payment of service awards in the amount of $5,000 to Plaintiff Moore and $5,000 to Plaintiff Aiken. Independence does not object to the request. These service payments are well within the accepted range in this circuit, and numerous courts have approved service awards equal to or higher than those proposed here. See, e.g., Kress v. Fulton Bank, N.A., No. 1:19-cv-18985-CDJ-MJS, at ¶ 11 (D.N.J. Nov. 2, 2022) (order granting final approval of $5,000 service payment to named plaintiff in class and collective action that settled prior to formal discovery) (attached hereto to as **Exhibit "C"**); Acevedo v. BrightView Landscapes, LLC, No. 3:13-2529, 2017 WL 4354809, at *2-3 (M.D. Pa. Oct. 2, 2017) (approving $5,000 to named plaintiff and $1,000 each to five opt-in plaintiffs); Tompkins v. Farmers Ins. Exch., No. 5:14-cv- 3737, 2017 WL 4284114, at *8 (E.D. Pa. Sep. 27, 2017) (approving payment of $48,500 to 11 plaintiffs); Devlin v. Ferrandino & Son, Inc., No. 15-4976, 2016 WL 7178338, at *11 (E.D. Pa. Dec. 9, 2016) (approving payment of $7,500 to each named plaintiff and $1,000 to each opt-in plaintiff); Schaub v. Chesapeake & Del. Brewing Holdings, No. 16-756, 2016 WL 9776070, at *5 (E.D. Pa. Nov. 14, 2016) (approving service payment of $9,000 to named plaintiff). The Court should therefore approve the requested service payments.

D. The Court Should Approve Class Counsel's Fees and Costs Request

"The court is required to thoroughly review the reasonableness of attorneys' fees in all class action settlements." Bonett v. Educ. Debt Servs., No. 01-cv-6528, 2003 WL 2168267, at *8 (E.D. Pa. May 9, 2003). "In cases such as this, where class members recover from a single common fund, the Third Circuit favors the percentage-of-recovery method in evaluating the fairness of attorneys' fees." Checchia, 2023 WL 6164406, at *8 (quoting Graudins v. Kop Kilt, LLC, 2017

WL 736684 (E.D. Pa. Feb. 24, 2017)); see also In re Prudential, 148 F.3d at 333 ("The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.") (citation and internal quotation marks omitted).

"In Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir.2000), the Third Circuit set forth with specificity the factors that a court should consider in evaluating attorneys' fees under the percentage of fund method." Chemi v. Champion Mortg., No. 2:05-CV-1238(WHW), 2009 WL 1470429, at *10 (D.N.J. May 26, 2009). The Gunter factors include:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Id. (citing Gunter, 223 F.3d at 195 n. 1). "These fee award factors need not be applied in a formulaic way and in certain cases, one factor may outweigh the rest." Checchia, 2023 WL 6164406, at *9 (quoting In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 301 (3d Cir. 2005)).

Pursuant to the proposed Settlement Agreement, Class Counsel seek a fee award in an amount equal to one-third (1/3) of the Maximum Settlement Amount, plus reimbursement of all reasonable litigation expenses incurred. As set forth immediately below, all of the Gunter factors support Class Counsel's requested fee award.

1. The Size of the Fund Created and the Number of Persons Benefitted

The settlement in the instant matter provides for payment to all Settlement Participants. This is not a "claims made" settlement, meaning that the Settlement Class Members are not required to take any action to receive compensation from the settlement. The Settlement Agreement provides for a settlement fund of $667,000. This is a substantial recovery for the

Settlement Participants, which supports Class Counsel's requested fee award. See, e.g., Wood v. Saroj & Manju Invs. Philadelphia LLC, No. CV 19-2820-KSM, 2021 WL 1945809, at *11 (E.D. Pa. May 14, 2021) ("[T]he Court finds that factor one, the size of the settlement fund and the number of people benefitted by it, weighs in favor of approval. . . . [W]here counsel's efforts have led to the recovery of $250,000 on behalf of a class/collective comprising 532 people, attorneys' fees of 33 percent are reasonable."); Kress, No. 1:19-cv-18985-CDJ-MJS, at ¶ 12 (noting that "the tangible benefits [consisting of a $1,000,000 common fund payable to 2,044 individuals] conferred on the class as a result of the legal services provided by Class Counsel" supported class counsel's request for a fee award in the amount of one-third of the settlement fund); see also Kapolka, 2019 WL 5394751, at *8 ("[F]ee awards ranging from thirty to forty-three percent have been awarded in cases with funds ranging from $400,000 to $6.5 million . . . .") (quoting Erie Cty. Retirees Ass'n v. Cty. of Erie, Pennsylvania, 192 F. Supp. 2d 369, 381 (W.D. Pa. 2002)).

2. The Absence of Objections by Members of the Class

The Notices of Settlement sent to Settlement Participants informed them that Class Counsel would seek a fee award of $222,333.33, plus out-of-pocket costs of $7,065.41. Not a single objection was raised with respect to Class Counsel's fee request. This factor therefore weighs in favor of approving the fee application. See, e.g., Bredbenner v. Liberty Travel, Inc., No. CIV.A. 09-1248 MF, 2011 WL 1344745, at *20 (D.N.J. Apr. 8, 2011) ("To date, the claims administrator has received no objections—either to the settlement terms generally or to the fee request specifically. The absence of any objection weighs in favor of the fee request.") (citing cases).

3. The Skill and Efficiency of the Attorneys Involved

The skill and efficiency of Class Counsel is "measured by 'the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case

and the performance and quality of opposing counsel.'" In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000) (quoting In re Computron Software, Inc., 6 F. Supp. 2d 313, 323 (D.N.J. 1998)).

Here, as discussed above, Plaintiffs faced several difficulties in this litigation. Notwithstanding these difficulties, Class Counsel negotiated a favorable settlement early in the litigation that will benefit 1,356 hourly workers.

Additionally, Class Counsel are experienced in employment litigation, including wage and hour litigation, and have handled other class and collective action lawsuits. See Wood Dec., at ¶¶ 4, 8; Declaration of Alex A. Pisarevsky, Esq. ("Pisarevsky Dec."), at ¶¶ 4, 8, 9 (attached hereto as **Exhibit "D"**). Defendant does not dispute Class Counsel's qualifications. Class Counsel's efforts in prosecuting this case, together with their background and experience, favor the proposed fee award.

4. The Complexity and Duration of the Litigation

Although this litigation was not particularly lengthy, this factor should not weigh against the requested fee award. In fact, as the court noted in approving a 35% fee award in Kapolka – a case that also settled in its early stages, following the exchange of informal discovery – counsel "should not be penalized for settling the case early in the litigation." Kapolka, 2019 WL 5394751, at *6 (quoting Arrington v. Optimum Healthcare IT, LLC, No. CV 17-3950, 2018 WL 5631625, at *10 (E.D. Pa. Oct. 31, 2018)). "To the contrary, the early settlement of potentially costly litigation is commendable." Id.

5. The Risk of Nonpayment

Class Counsel represented Plaintiffs on a contingency fee basis, and thus had no guarantee that they would be compensated for their services. Further, as described above, in light of the risks of establishing liability against Independence, and the risks of maintaining a class and/or collective

action through trial, Class Counsel was aware that the claims advanced by Plaintiffs faced realistic hurdles. Class Counsel's pursuit of this case on a contingency fee basis thus supports the proposed fee award. See, e.g., Kapolka, 2019 WL 5394751, at *9 ("Counsel represented Plaintiffs on a contingent basis and invested considerable time and resources litigating this case and negotiating with Defendants, all with no guarantee of recovery. The Court therefore finds that counsel incurred significant risk of nonpayment, which favors approving the fee award."); Brumley v. Camin Cargo Control, Inc., No. CIV.A. 08-1798 JLL, 2012 WL 1019337, at *11 (D.N.J. Mar. 26, 2012) ("The Court also finds that Plaintiffs' counsel risked non-payment during the period of their representation since they represented Plaintiffs entirely on a contingent basis, with no retainer fees or expenses paid at the beginning of the litigation. Counsel took on the costs of litigation despite their lack of certainty that the Court would find that Defendants violated the FLSA . . . . Given these considerations, the Court finds that the risk of non-payment weighs in favor of the requested fee.") (citations omitted).

6. The Amount of Time Devoted to the Case by Class Counsel

Although a district court may cross-check the amount of the fee award requested against the amount of time devoted to the case by counsel, "the Third Circuit has recognized that such a 'lodestar' analysis is not necessary in cases such as this, where attorneys' fees are reasonably requested based on a percentage of a common fund." Checchia, 2023 WL 6164406, at *9 (citing In re Cendant Corp., 264 F.3d at 284-85). "Indeed, a lodestar check could discourage the very type of efficient resolution of complex class actions that occurred here." Id. (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 198 (3d Cir. 2000)) ("[O]ne purpose of the percentage method of awarding fees—rather than the lodestar method, which arguably encourages lawyers to run up their billable hours—is to encourage early settlements by not penalizing efficient counsel . . . .") (citations and quotation marks omitted).

In any event, Class Counsel's lodestar through September 30, 2024 is approximately $138,972.50, which excludes anticipated time spent preparing for, traveling to, and attending the final approval hearing. See Wood Dec., at ¶¶ 11, 12; Pisarevsky Dec., at ¶¶ 11, 12. Thus, the requested fee award of $222,333.33 reflects a multiplier of 1.60.

"The Court of Appeals for the Third Circuit has recognized that multipliers 'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" Katz v. DNC Servs. Corp., No. CV 16-5800, 2024 WL 454942, at *14 (E.D. Pa. Feb. 6, 2024) (quoting In re Prudential, 148 F.3d at 341). Accordingly, the multiplier of 1.60 is in line with fee awards in similar cases, and does not account for the additional time Class Counsel will have to expend going forward. See id.; Kress, No. 1:19-cv-18985-CDJ-MJS (granting final approval of settlement and awarding $333,333, plus expenses, to class counsel, representing one-third of the settlement fund, based upon a lodestar of $123,395); Kapolka, 2019 WL 5394751, at *11 ("This [2.54 multiplier] is 'well within the [1.0 to 4.0] range frequently awarded in common fund cases in this Circuit.'") (quoting Rouse v. Comcast Corp., No. CIV.A. 14-1115, 2015 WL 1725721, at *14 (E.D. Pa. Apr. 15, 2015)) (some alterations in original).

7. Awards in Similar Cases

"[C]ourts have approved attorneys' fees in FLSA settlement agreements 'from roughly 20-45%' of the settlement fund." Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 534 (E.D. Pa. 2016) (quoting Mabry v. Hildebrant, No. 14-5525, 2015 WL 5025810 (E.D. Pa. Aug. 24, 2014)). However, "[a]lthough courts have approved attorneys' fees in FLSA settlement agreements from roughly 20–45% of the settlement fund, a benchmark of one-third of the settlement fund is often appropriate to prevent a windfall to counsel[.]" Copley v. Evolution Well Services Operating, LLC, No. 2:20-CV-01442-CCW, 2023 WL 1878581, at *5 (W.D. Pa. Feb. 10, 2023) (citation and internal quotation marks omitted). Class Counsel's requested fee award is therefore consistent

with the one-third benchmark often awarded in FLSA settlements. See id.; see also Kapolka, 2019 WL 5394751, at *8-12 (awarding attorneys' fees equal to 35% of the common fund).

Finally, the Settlement Agreement seeks reimbursement of $7,065.41 in costs incurred by Class Counsel. "[C]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." Kapolka, 2019 WL 5394751, at *12 (quoting In re CertainTeed Fiber Cement Siding Litig., 303 F.R.D. 199, 226 (E.D. Pa. 2014)); see, e.g. Yong Soon Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004) (approving reimbursement of costs including (1) "travel and lodging," (2) "local meetings and transportation," (3) "depositions," (4) "photocopies," (5) "messengers and express services," (6) "telephone and fax," (7) "Lexis/Westlaw legal research," (8) "filing, court and witness fees," (9) "overtime and temp work," (10) "postage," and (11) "the cost of hiring a mediator").

Here, the $7,065.41 in costs incurred by Class Counsel consist of court filing fees, mediation costs, legal research, travel and lodging, and meals while traveling, and were necessary to Plaintiffs' successful prosecution of this case. See Wood Dec. at ¶ 13; Pisarevsky Dec. at ¶¶ 13, 14. Plaintiffs therefore request that the Court approve an award of $7,065.41 in costs to Class Counsel.

E. Plaintiffs Should be Appointed as Class Representatives, and Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, Should be Appointed as Class Counsel

As set forth above, supra § VI.A.1.d., Plaintiffs satisfy the adequacy requirements of Rule 23(a)(4). For this reason, Plaintiffs should be appointed as class representatives. See, e.g., Katz v. DNC Servs. Corp., No. CV 16-5800, 2023 WL 2955887, at *4 (E.D. Pa. Apr. 14, 2023) (appointing the plaintiff as class representative after determining that she would "fairly and adequately protect the interests of the class" in accordance with Rule 23(a)(4)).

In addition, Rule 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the class. Fed R. Civ. P. 23(g). Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, satisfy the requirements of Rule 23(g). Class Counsel have devoted substantial time and resources to the case, including: (i) developing the factual basis of the claims; (ii) preparing a detailed and thorough Complaint; (iii) conducting substantial informal discovery; and (iv) participating in a mediation session and negotiating a successful resolution of Plaintiffs' claims. Further, Class Counsel are experienced in employment litigation, including wage and hour litigation, and have handled other class and collective action lawsuits. See Wood Dec., at ¶¶ 4, 8; Pisarevsky Dec., at ¶¶ 4, 8, 9. Class Counsel's efforts in prosecuting this case, together with their background and experience, satisfy the requirements of Rule 23(g). Additionally, Defendant does not dispute Class Counsel's qualifications. This Honorable Court should therefore appoint Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, as Class Counsel.

F. The Court Should Approve Payment of the Claims Administrator's Fees and Expenses

The Court appointed RG/2 to administer the proposed settlement. RG/2 has dutifully complied with its role as the notice administrator and will fulfill its duties in distributing the settlement payments to the Settlement Participants.

Pursuant to the terms of the Settlement Agreement, the RG/2's fees and expenses should be paid from the Maximum Settlement Amount. The amount of fees and expenses ($32,000) requested is reasonable, and directly tied to the costs of providing the Notices of Settlement and payment to the Settlement Class Members and Settlement Collective Members. Sutor Dec., ¶ 15. Thus, Plaintiffs respectfully request that the Court order that RG/2 be paid for its services from the Maximum Settlement Amount.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Unopposed Motion for Final Approval of Class and Collective Action Settlement, and enter an Order: (1) certifying the Settlement Class pursuant to Fed. R. Civ. P. 23(b)(3), for settlement purposes only; (2) granting final certification of the Settlement Collective pursuant to the FLSA, 29 U.S.C.§ 216(b), for settlement purposes only; (3) granting final approval of the proposed settlement; (4) appointing Mobilio Wood, and Cohn Lifland Pearlman Herrmann & Knopf LLP, as Class Counsel; (5) approving Plaintiffs' requested service awards; (6) approving Class Counsel's requested attorneys' fees and costs; and (7) approving the Administrator's requested fees.

Respectfully submitted,

Date: 10/8/2024 BY: */s/ Peter C. Wood, Jr.*

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

JODDA MOORE, and TERRELL AIKEN, individually and on behalf of all similarly situated persons, Plaintiffs, v. INDEPENDENCE BLUE CROSS, LLC d/b/a INDEPENDENCE BLUE CROSS, Defendant.	No. 2:23-cv-00566 (Judge Scott)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of October, 2024, the foregoing Brief in Support of Plaintiffs' Unopposed Motion for Final Approval of Class and Collective Action Settlement was electronically filed and served on the following counsel of record via the Court's ECF system:

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