IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ROCK HILL DIVISION

Kevin Faile, Louis C. Roman, Alan R. DePalma, and Brian Scott Craton, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Lancaster County, South Carolina, Defendant.	Civil Action No. 0:10-cv-2809-CMC **MEMORANDUM OF LAW IN SUPPORT OF CONSENT MOTION TO APPROVE SETTLEMENT AGREEMENT, TO AUTHORIZE NOTICE TO CLASS, AND TO SCHEDULE FAIRNESS HEARING**

I. Introduction

Plaintiffs, Kevin Faile, Louis C. Roman, Alan R. DePalma, and Brian Scott Craton, all individually and on behalf of all other similarly situated individuals, by and through their undersigned attorneys and with the consent of Defendant, Lancaster County, South Carolina, hereby submit this Memorandum of Law in Support of Consent Motion to Approve Settlement Agreement, to Authorize Notice to Class, and to Schedule Fairness Hearing. (The Settlement Agreement executed by the parties is attached hereto as Exhibit A). As set forth in detail below, Plaintiffs respectfully request that the Court review and approve the terms of the proposed settlement of this action as both a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and also as a class action under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq., as well as the proposed apportionment of the settlement proceeds, after conducting a hearing about the fairness, reasonableness, and adequacy of the proposed settlement. Attached hereto as Exhibit B, Plaintiffs submit a proposed notice of the settlement to be mailed or delivered to each opt-

in Plaintiff under the FLSA collective action and to each potential class member under the Rule 23 class, informing them of the terms of the Settlement Agreement and giving them an opportunity to be heard about the final approval of the settlement.

II. Statement of the Case

This is a lawsuit under the Fair Labor Standards Act and the South Carolina Payment of Wages Act to recover unpaid overtime compensation and to recover compensation for "off the clock" work required by Defendant. Plaintiffs filed the Complaint on October 29, 2010, as a collective action under Section 16(b) of the FLSA and also as a traditional class action under Rule 23, Fed. R. Civ. P., for the alleged violations of the South Carolina wage payment statute. The Court granted Plaintiffs' Motion for Class Certification on August 25, 2011, and established a deadline of October 31, 2011, for potential class members to file consent forms to opt in to the collective action under the FLSA claims or to file opt out forms to exclude themselves from the state-law claims. (Docket No. 56). A total of 58 individuals, including the 4 named Plaintiffs, filed opt-in forms prior to the deadline. No opt-out forms have been filed.

Plaintiffs and members of the Plaintiff class are paramedics and EMTs currently or formerly employed by the Lancaster County EMS Department. Plaintiffs generally work a 24/48 schedule, meaning that they work a 24-hour shift followed by 48-hours off duty. EMS employees are paid by the County on a two-week pay cycle.

Plaintiffs challenge several aspects of the payroll policies and practices of Defendant's EMS Department that existed prior to late October 2010. First, Defendant utilized the so-called "fire-fighter exemption" under Section 7(k) of the FLSA, paying overtime to its employees only after they worked more than 106 hours during a two-week pay period, rather than after 40 hours every work-

week. Second, Defendant's EMS Department generally deducted an 8-hour sleeping period from 11:00 p.m. to 7:00 a.m. from hours worked in each 24-hour shift pursuant to the sleep-time exemption of 29 C.F.R. § 785.22. EMS employees were paid for any emergency calls that occurred during the regularly scheduled sleeping period and were paid for the full 24-hour shift if they received three calls, performed an out-of-town transport, or did not have a cumulative total of 5 hours of time available for sleep during the sleep period. Part-time employees or employees who filled in for a colleague or worked a pick-up shift beyond their normal schedule were paid for the full 24-hour period without regard to sleep time. Third, Defendant's EMS Department required its 24/48 employees to work 15 minutes beyond the scheduled end-time of every shift, without compensation, to transition the ambulance and controlled medications to the on-coming crew. Plaintiffs were generally required to clock in before 8:01 a.m. every shift and to clock out after 8:15 a.m. the next morning; yet, they were only paid for a maximum of 24 hours every shift, with the default time being 16 hours of pay because of the scheduled, 8-hour sleep period.

On July 25, 2011, Plaintiffs filed a motion for partial summary judgment on all three aspects of Plaintiffs' claims. Defendant conceded that its use of the fire-fighter exemption in Section 7(k) was unlawful because the County's EMS employees are clearly not considered fire-fighters under the applicable regulations. The County also conceded that its requirement that each employee work 15 minutes off the clock each shift was unlawful. Accordingly, on September 21, 2011, the Court granted Plaintiffs' motion for partial summary judgment with respect to those two issues, and denied the motion as to the other issues without prejudice. (Docket No. 63).

III. Issues in Dispute

There remain a number of unsettled legal and factual issues in this case. The largest dispute

in this case centers on the sleep-time exemption. In their motion for partial summary judgment, Plaintiffs first argued that the County cannot deduct sleep-time at all because the County is a public employer that attempted to pay its EMS employees under the "fire-fighter exemption" of Section 7(k). There is a materially different sleep-time exemption for public employers who elect to pay their employees under Section 7(k), which is found at 29 C.F.R. § 553.222. Where section 553.222 applies, sleep-time can only be deducted if the employee is scheduled for a tour of duty of greater than 24 hours; if the tour of duty is exactly 24 hours, no deduction can be made for sleep time. Here, Plaintiffs argued that section 553.222 applies because the County elected to pay its EMS employees under Section 7(k) as if they were firefighters (although such election was unlawful), and the tours of duty of the EMS employees were exactly 24 hours since the additional 15-minutes of each 24-hour shift was unpaid. Defendant countered that section 553.222, by its own terms, applies only to fire fighters and police officers. Defendant also asserted that Plaintiffs are essentially arguing out of both sides of their mouths–in one part of the case, Plaintiffs challenge the County's ability to use Section 7(k) to pay its EMS employees; yet, in another part of the case, Plaintiffs seek to use a regulation that only applies where Section 7(k) applies. Plaintiffs' surreply argument on this issues was that employers bear the burden of proof on exemptions and Defendant should not be allowed to benefit by its mistaken application of Section 7(k), because if the Section 7(k) election were proper, the County likely could not have taken advantage of the sleep-time exemption. The Court denied Plaintiffs' motion for partial summary judgment on this issue, deferring a ruling on the sleep-time issues until after the close of discovery. (Docket No. 63).

Plaintiffs also contend that Defendant is not entitled to utilize the sleep-time exemption of section 785.22 because the EMS Employees could not "usually enjoy an uninterrupted night's sleep,"

as required by the plain language of the regulations. 29 C.F.R. § 785.22(a). Defendant counters by arguing that the holding of the Fourth Circuit Court of Appeals in Roy v. Lexington County, 141 F.3d 533 (4th Cir. 1998), fully supports the County's use of the sleep-time exemption. The Roy court read the phrase "uninterrupted night's sleep" as used in subsection (a) to mean the same thing as the phrase "reasonable night's sleep" from subsection (b)–meaning at least 5 hours of sleep. In other words, the Roy case requires the court to focus on whether the EMS employees could usually enjoy at least 5 hours of sleep per night, not whether the employees could usually enjoy a full 8-hour sleep period completely uninterrupted by an emergency call.

Plaintiffs hired a sleep physiologist as an expert witness, who expressed an opinion about how much non-working time EMS employees must have available during the sleep period of each shift in order to actually achieve the five-hour sleep threshold mentioned in section 785.22(b). According to Plaintiffs' expert, for an employee actually to get 5 hours of sleep during the sleeping period, he or she must have between 6:02 and 6:18 of time available for sleep, depending on the actual numbers of interruptions that occur during a particular sleep period. Plaintiffs also obtained an expert opinion from a labor economist that in approximately 52% of the total shifts during the period covered by the lawsuit, employees of the Lancaster County EMS Department did not have sufficient time available during the scheduled sleep period to allow them to obtain at least 5 hours of consecutive, uninterrupted sleep. Defendant challenged the foundation for Plaintiffs' expert's opinions by filing a motion in limine to exclude the sleep physiologist's testimony in that regard. The Court denied Defendant's motion without prejudice, deferring a definitive ruling until the trial of this matter; however, the Court stated that it likely would not allow any expert opinions to be offered regarding the quality of sleep. (Docket No. 79).

The next sharply disputed issue is whether Defendant is entitled to a set-off against its overtime liability under the FLSA for alleged overpayments to EMS employees during double short-week pay periods. Defendant's EMS Department had a long-standing practice of paying its full-time employees an extra 16 hours of pay every six weeks to even out the 24/48 hour pay cycle. Under the 24/48 schedule, employees worked either 2 or 3 full shifts every week, with a regular pattern of 3-2-2 shifts per week, which pattern repeats itself every three weeks. Because employees were paid once every two weeks, their pay checks included a long-week followed by a short-week, a short-week followed by a long-week, or two short-weeks. Whenever the pay cycle produced a double sort-week pay check, which occurred every 6 weeks (or every 3 pay periods), the Operations Manager of the EMS Department would add 16 hours to each employee's pay to average out every pay check to 40 hours of base pay per week, regardless of how much time the employee actually worked during those two weeks. Defendant asserts that such "short-week" payments were unauthorized and caused employees to be paid for hours not actually worked. Defendant contends that such "overpayments" should be set-off against any liability for unpaid overtime in this case.

Plaintiffs counter that the "short-week" payments were not, in fact, overpayments, but were necessary to provide employees the annual, base compensation they were promised for their regularly scheduled shifts. When Plaintiffs were hired by the Lancaster County EMS Department, the Director generally discussed their rate of pay on an annual, base level of compensation. This annual amount was converted to an hourly figure by the County's human resources department by dividing the annual pay amount by 2,080 hours, which corresponds to 40 hours per week for 52 weeks a year. This calculation understated the actual hourly rate the employees earned, because full-time EMS employees were actually scheduled to work a base amount of 1952 hours or 1936 hours per year

under the 24/48 cycle, considering the anticipated sleep deduction of 8 hours per shift. Plaintiffs therefore assert that the short-week payments were an integral part of full-time employees' compensation and that such payments should be included as part of each employee's "regular rate" for purposes of calculating overtime. The effect of including the short-week payments in each employee's compensation would be to increase the Plaintiffs' hourly rate by approximately 107% of their stated hourly rate. Plaintiffs also contend that the asserted set-offs for such alleged overpayments are also not expressly authorized by the FLSA and, therefore, would be improper under the statute. These issues regarding the short-week payments and the regular rate of pay were included in Plaintiffs' motion for partial summary judgment, which was denied without prejudice by the Court.

Other contested issues in this case include what source data to use for the underlying calculation of overtime compensation due (e.g., the hand-written attendance records from the Operations Manager, computerized clock-in and clock-out data, or computerized scheduler data); whether to apply the general 2-year statute of limitations under the FLSA or the 3-year statute of limitations for willfulness; whether Plaintiffs would be entitled to liquidated damages on some or all of their claims under the FLSA or treble damages under the South Carolina Payment of Wages Act; and the statutory award for attorney's fees and costs under both statutes.

IV. Settlement Negotiations

The proposed Settlement Agreement in this case is the product of extensive, arms-length settlement negotiations, which culminated after a second mediation of this case on December 21, 2011, before attorney Franklin G. Shuler, Jr. Mr. Shuler is a Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court and has extensive experience representing both

plaintiffs and defendants in employment cases, as well as serving as mediator in scores of employment cases. He presently serves as the Chair of the Specialization Advisory Board for Employment and Labor Law through the South Carolina Commission on CLE and Specialization. The parties previously attempted an early mediation in the case on June 20, 2011, before attorney Regina H. Lewis, also a respected and experienced mediator and employment law practitioner. After the first mediation ended in an impasse, the parties commenced discovery in earnest and Plaintiffs retained expert witnesses to review and evaluate the wage and hour records of Defendant's EMS Department.

The parties exchanged several sets of written interrogatories and requests for production, along with an initial set of requests for admissions. Defendants produced over 8,300 pages of documents, along with approximately 700 pages of payroll data for each employee of the EMS Department for 3 years, computerized scheduling data for each shift during the 3-year period, and summaries of all EMS dispatches during the sleep times for the 3-year period. Plaintiffs have taken depositions of seven facts witnesses, plus the deposition of Defendant's economic expert. Defendant has taken the deposition of each of the four named Plaintiffs, plus the deposition of Plaintiffs' economic expert. The parties filed two dispositive motions in an attempt to narrow the legal issues in dispute: Plaintiffs filed a motion for partial summary judgment, which was granted in part and denied in part as set forth above; and Defendant filed a motion to exclude Plaintiffs' sleep expert, which was denied without prejudice.

At the time of the second mediation, discovery had largely been concluded, both sides' experts had submitted reports of their expert opinions, and the disputed legal and factual issues had been sharply defined. Plaintiffs were represented at the mediation by the undersigned attorney for

Plaintiffs, David E. Rothstein, and six of the seven members of the Plaintiffs' Steering Committee attended the second mediation. The County was represented by Defendant's counsel, Christopher W. Johnson and Derwood L. Aydlette, III; and Lancaster County Administrator, Steve Willis, and the County attorney, James Michael Ey, attended the mediation in person on behalf of Defendant.

At the end of a full day of mediation on December 21, 2011, the parties were fairly close to a resolution in principle, but were still somewhat apart on the gross amount of the payment. The Lancaster County Council met in executive session on Thursday, December 22, 2011, to consider Plaintiffs' last position from the mediation session. After the County Council rejected Plaintiffs' last counter-demand, the parties' attorneys and Mr. Shuler engaged in some additional settlement discussion on the afternoon and evening of December 22. On the morning of December 23, the parties were ultimately able to reach agreement on all of the settlement terms, subject to approval by the Court.

V. Proposed Settlement Terms

The proposed Settlement Agreement provides that the County will make a gross payment of $1.5 million in complete settlement of this action. Plaintiffs have proposed, and Defendant has agreed not to contest, the following apportionment of the settlement proceeds: (1) $500,000 for attorney's fees; (2) $35,000 for reimbursement of costs; (3) $67,500 as service or incentive payments to the named Plaintiffs and the members of the Plaintiffs' Steering Committee, with individual amounts of $18,000 each for the two lead Plaintiffs, $9,000 each for the other two named Plaintiffs, and $4,500 each for the remaining three members of the Plaintiffs' Steering Committee; (4) payment of 100% of the state-law claims to all members of the Plaintiff class (opt-in and non-opt-out) who worked "off the clock" at the end of each 24-hour shift during the 3-year period covered by the suit,

but who have not already received back-pay payments by Defendant since the commencement of this action; (5) payment of 100% of the opt-in Plaintiffs' back-pay claims under section 7(k) of the FLSA for three years; and (6) the remaining settlement proceeds paid to opt-in Plaintiffs based on their pro-rata share of the potential value of the collective group's FLSA back-pay claims under the best-case scenario, including sleep-time, as calculated by Plaintiff's expert economist. All payments to class members (FLSA or state-law) will be apportioned as 50% to back pay, subject to payroll withholdings and retirement contributions, and 50% to liquidated damages. This allocation is appropriate to maximize the amount of each class member's cash payout and lessen the burden of withholdings for Social Security and Medicare for both the employees and the County. The service or incentive payments to the named Plaintiffs and members of the Plaintiffs' Steering Committee will not be subject to withholding as back-pay, but would be treated as non-wage compensation.

A. Payments to Individual Class Members

The $1.5 million dollar proposed settlement amount is a fair, adequate, and reasonable resolution of this claim. Plaintiffs' economic expert, Dr. Jeffrey Yankow, calculated a range of potential back-pay awards in this action for the named Plaintiffs and potential members of the Plaintiff class by reviewing the available work records and payroll records for each employee, calculating the correct amount of their compensation for overtime under the FLSA on a work-week by work-week basis, and comparing what each employee should have been paid versus what they were actually paid. Dr. Yankow performed two sets of calculations: one using each employee's stated hourly rate from the County's payroll records, and one using and adjusted hourly rate, which Dr. Yankow referred to as the "true" hourly rate, which relied on an average of 1,941.33 hours of based work per year instead of 2,080 hours as used by the County's human resources department to

calculate each employee's stated hourly rate.

Dr. Yankow's calculations showed a low-end back pay award of $353,910.91 for the Plaintiff class, which is based on a two-year statute of limitations for the FLSA claims of the opt-in Plaintiffs, plus three years of the state-law claims of all potential Plaintiffs, at the stated hourly rates. On the high end of the range, or the best-case scenario for the Plaintiff class, Dr. Yankow calculated a back-pay amount of $2,168,591.70, which is based on a three-year statute of limitations for the FLSA claims of the opt-in Plaintiffs, full compensation for every 24-hours shift without deducting any time for sleep time, plus three years of the state-law claims of all potential Plaintiffs, at the adjusted "true" hourly rates for each person. The sleep-time claim accounts for approximately $1.6 million (or almost 74%) of Dr. Yankow's best-case-scenario number for the opt-in class members. As was previously discussed, this claim is the most hotly contested issue in the case.

Defendant also hired its own economic expert, Dr. Perry Woodside, to perform similar calculations of potential back-pay awards. Dr. Woodside determined that the employees of the Lancaster County EMS Department were underpaid by a total of $353,437.25 during the three-year period in question. Dr. Woodside also determined that some employees (including some opt-in Plaintiffs) were actually overpaid during that period in the total amount of $19,128.67. Dr. Woodside's opinions did not assign any value to Plaintiffs' sleep-time claims.

The proposed settlement figure of $1.5 million is a fair settlement value of this case because it is well within the mid-range of likely outcomes for the Plaintiff class, given the unresolved legal and factual issues in the case. The proposed settlement apportionment will actually pay every underpaid member of the Plaintiff class 100% of the value of their back pay award on the state-law claims at each employee's time-and-a-half overtime rate, plus all opt-in Plaintiffs will receive at least

100% of their 3-year back-pay amounts under section 7(k) of the FLSA at one-and-a-half times the higher "true" hourly rate, even after the payment of attorney's fees, costs, and service or incentive payments to the named Plaintiffs and the members of the Plaintiffs' steering committee. In other words, the proposed settlement will make every member of the Plaintiff class whole under state and federal law in terms of actual hours worked, without consideration of the sleep-time deductions. On average, the opt-in Plaintiffs will receive a payment equal to 160.94% of their 3-year section 7(k) back-pay amount, as their pre-tax share of the FLSA portion of the settlement, even after payment of all attorney's fees, costs, service or incentive payments to the Plaintiffs and Plaintiffs' Steering Committee Members, and the entire class's back-pay claim under state law. Under the proposed settlement agreement, 58 current or former employees of the Lancaster County EMS Department will receive at least some payment, and 55 opt-in class members will receive payments under the FLSA. The average payment for the state-law claims alone is $1,584.17 per person, and the average payment to each opt-in class member is an additional $14,647.60 per person. In the interest of preserving the privacy rights of each class member, Plaintiffs' counsel would be willing to submit a detailed summary of the calculations for each class member to the Court under seal for consideration at or before the fairness hearing. Individualized letters will be sent to each class member receiving money under the settlement describing their range of damages and how their proportionate share of the payments was calculated.

B. Attorney's Fees and Costs

The proposed apportionment of the settlement provides for a attorney's fees of one-third of the gross amount of the common settlement fund, or a total of $500,000 for attorney's fees, plus $35,000 for reimbursement of actual costs in connection with the case. Plaintiffs' counsel will

address the issues relating to attorney's fees and costs in a separate motion, with supporting memorandum of law and attachments.

C. Service Payments to Named Plaintiffs and Steering Committee Members

The proposed apportionment of the settlement also provides for the payment of additional amounts to the named Plaintiffs and to the members of the Plaintiffs' Steering Committee in the total amount of $67,500. This amount will be divided as $18,000 each to the two lead Plaintiffs, Kevin Faile and Louis Roman; $9,000 each to the other two named Plaintiffs, Al DePalma and Scott Craton; and $4,500 each to the three other members of the Plaintiffs' Steering Committee, Larry Adams, Katherine Holloway, and Helen Ortega.

It is very common in class action cases for service or incentive payments to be paid to named Plaintiffs or class representatives in addition to their proportionate share of the recovery. Such payments compensate Plaintiffs for their additional efforts, risks, and hardships they have undertaken as class representatives on behalf of the group in filing and prosecuting the action. Service or incentive payments are especially appropriate in employment litigation, where "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 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). Courts around the country have approved substantial incentive payments in FLSA collective actions and other employment-related class actions. See, e.g., In re Janney Montgomery Scott LLC Fin. Consultant Litigation, 2009 WL 2137224, *12 (E.D. Pa. Jul. 16, 2009) (approving incentive payments of $20,000 each to three named Plaintiffs) (copy of unpublished decision attached); Stevens v. Safeway, Inc., C/A No. 2:05-cv-01988-MMM-SH, pp. 18-20 (C.D. Cal. Feb. 25, 2008) (awarding incentive

payments of $20,000 and $10,000 each to named Plaintiffs) (copy of unpublished decision attached); Frank, 228 F.R.D. at 187 (approving incentive award to class representative of $10,523.37, which represented 8.4% of the total settlement fund); Bredbenner v. Liberty Travel, Inc., 2011 WL 1344745, *22-23 (D.N.J. Apr. 8, 2011) (approving incentive payments of $10,000 to eight named plaintiffs; citing 2006 study referenced in 4 Newberg on Class Actions § 11.38, at 11-80, that showed average incentive award to class representatives to be $16,000) (copy of unpublished decision attached); Wineland v. Casey's General Stores, Inc., 267 F.R.D. 669 (S.D. Iowa 2009) (approving incentive payments of $10,000 per named plaintiff and $1,000 for each deponent in FLSA case on behalf of over 11,000 cooks and cashiers employed by convenience store chain); Clark v. Ecolab, Inc., 2010 WL 1948198 (S.D.N.Y. May 11, 2010) (approving $10,000 service awards to 7 named plaintiffs in hybrid class/collective action involving unpaid overtime) (copy of unpublished decision attached); and Hoffman v. First Student, Inc., 2010 WL 1176641, *3 (D. Md. Mar. 23, 2010) (affirming $3,000 service payments to seven lead plaintiffs in FLSA case of over 750 school bus driver and aides, with total gross recovery of $1.55 million) (copy of unpublished decision attached).

Here, the total of the service payments requested by Plaintiffs of $67,500.00 represents 4.5% of the gross amount of the settlement in this case. The largest proposed amounts for each of the lead Plaintiffs ($18,000.00) represents 1.2% of the gross settlement amount each. The average proposed service payment among the 7 members of the Plaintiffs' Steering Committee is approximately $9,600.00, and is approximately 45% of the average $21,063.24 payment that the seven Committee members will receive on their underlying claims, apart from the incentive payments.

The lead Plaintiffs and the members of the Steering Committee have devoted substantial

amounts of time to this case, and all have taken great personal, career risks in serving as the driving force behind this lawsuit against the County. Both lead Plaintiffs have devoted hundreds of hours to the case, including interviewing and selecting counsel, reviewing pleadings, assisting with discovery responses, sitting for depositions and attending the depositions of most witnesses in the case, participating in strategy meetings with the committee, communicating with counsel about all aspects of the case, and participating in the mediations of this case. (See Affidavits of Kevin Faile and Louis Roman, attached hereto as Exhibits D and E respectively). The amounts of the proposed service payments were thoroughly discussed and debated among the Plaintiffs Steering Committee and were voted on with the two lead Plaintiffs abstaining. (See Affidavit of Helen Ortega, attached hereto as Exhibit F). The proposed amounts of service payments to the two other named Plaintiffs and the three remaining committee members were based on their corresponding risks and level of involvement in the case.

VI. Discussion

Settlements of class actions under Rule 23, Fed. R. Civ. P., and collective actions under the FLSA require court approval. Rule 23(e) provides that "a class action shall not be dismissed without approval of the court." Fed. R. Civ. P. 23(e). A court's primary concern is evaluating a proposed class action settlement is protecting absent class members whose rights are affected by the proposed settlement, but who were not direct participants in the settlement negotiations. Kovacs v. Ernst & Young (In re Jiffy Lube Securities Litigation), 927 F.2d 155, 158 (4th Cir. 1991). To approve a class action settlement, a court must ensure that the interests of all class members have been protected, and the court must be convinced that the settlement is "fair, reasonable, and adequate." Wineland v. Casey's General Stores, Inc., 267 F.R.D. 669, 676 (S.D. Iowa 2009). Although the Fourth Circuit

Court of Appeals has not directly articulated that standard for approving a settlement under the FLSA, district courts within the Fourth Circuit have incorporated the same standard that is generally applied in evaluating settlements of Rule 23 classes. See Lomascolo v. Parsons Brinckerhoff, Inc., 2009 WL 3094955, *11 (E.D. Va. Sept. 28, 2009) (copy of unpublished decision attached); Hoffman v. First Student, Inc., 2010 WL 1176641, *2 (D. Md. Mar. 23, 2010) (copy of unpublished decision attached).

The Fourth Circuit has articulated a well-established test to determine whether a proposed class-action settlement should be approved, which includes consideration of the following factors: (1) the extent of discovery conducted, (2) the stage of the proceedings, (3) the absence of bad faith or collusion in the settlement, and (4) the experience of counsel who has represented plaintiffs in the settlement negotiations. Flinn v. FMC Corp., 528 F. 2d 1169, 1173 (4th Cir. 1975); In re Jiffy Lube, 927 F.2d at 158-59. Other courts within the Fourth Circuit have applied the factors from the seminal case of City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), in assessing the substantive fairness of a class-action settlement. See South Carolina Nat'l Bank v. Stone, 749 F. Supp. 1419, 1423 (D.S.C. 1990) (citing Grinnell, 495 F.2d 448). The Grinnell case was actually cited with approval by the Fourth Circuit in Flinn. 528 F.2d at 1172-73. The so-called Grinnell factor 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. Grinnell, 495 F.2d at 463. Approval of settlements in collective actions under the FLSA generally involves less stringent standards than Rule 23 class settlements. Clark v. Ecolab, Inc. 2010 WL 1948198, * 7. "Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes." Id. (citing Lynn's Food Stores, Inc. V. United States, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982)).

Courts greatly favor the settlements of cases and allowing litigants to achieve their own resolution of disputes. Lomascolo, 2009 WL 3094955, at *10. Although the district court has broad discretion in approving a settlement of a class action case, there is a "strong presumption in favor of finding a settlement fair." Id. A settlement fairness hearing is not a trial, and the court should defer to the evaluation and judgment of experienced trial counsel in weighing the relative strengths and weaknesses of the parties' respective positions and their underlying interests in reaching a compromise. Id.

A. Procedural Fairness

Approval of a class settlement requires the court to ensure that both procedural and substantive fairness are achieved. Procedural fairness is accomplished by providing court-approved notice of the proposed settlement to those whose rights may be affected by the settlement, and affording them an opportunity to be heard about the settlement. Here, the proposed notice attached hereto as Exhibit B plainly describes the terms of the proposed settlement and informs the members of the Plaintiff class of their rights to be heard at the fairness hearing. Notice of the class action was previously sent to potential class members who had not yet opted in to the case. The County's human resources department mailed the initial class notice to each potential class member who had not yet opted in to the case, at his or her last known address. Only five notices were returned

undeliverable. Of the five undelivered notices, only one person appears to have a potential claim for unpaid overtime or other compensation. The County has been able to track down this individual's parents, who indicated that they will forward the notice to their son. The County has been able to find updated addresses for the remaining four individuals.

The proposed notice of the settlement will be sent to all opt-in class members and to any current or former employees of Defendant's EMS Department who are potentially members of the Plaintiff class under Rule 23. The relatively small and well-defined nature of the class makes actual notice of the action relatively easy, as does the fairly tight-knit community of EMS employees in Lancaster County. The proposed notice provides adequate, advanced notice of the fairness hearing and it thoroughly discusses the terms of the settlement and how the settlement was reached. Attached to each notice will be an individualized letter explaining the range of potential damages for the class as a whole and how each class member's proportionate share of the damages was calculated. Copies of the proposed letters are attached hereto as Exhibit C.

B. Substantive Fairness

The substantive fairness prong of the court's evaluation of the settlement focuses on whether the settlement is "reasonable, adequate and fair." Applying the Flynn factors to this case confirms that the settlement is appropriate and in the best interests of the class as a whole.

First, as discussed in detail above, both sides have conducted extensive discovery in this case. Plaintiffs served two sets of interrogatories, three sets of requests for production, and one set of requests for admission on Defendant. Defendant produced over 8,300 pages of documents, plus three years of worth of payroll and attendance records for each employee of the EMS Department during the relevant period. Plaintiffs took the depositions of seven fact witnesses, plus the

deposition of Defendant's expert witness. See Affidavit of David E. Rothstein, ¶ 13 (attached hereto as Exhibit G). Defendant's took the depositions of the four named Plaintiffs, plus the deposition on Plaintiffs' expert economist. The mediation occurred two days before the discovery deadline expired under the amended scheduling order. Clearly, sufficient discovery was conducted in this case to make both sides fully aware of the factual issues in the case.

Second, with regard to the stage of the proceedings, the settlement of this case occurred after extensive efforts to narrow the scope of the disputed legal issues. As mentioned above, Plaintiffs filed a motion for partial summary judgment on a number of legal issues in this case, and the Court granted the motion, in part, after Defendant conceded liability on the section 7(k) issue and the 15-minute, "off the clock" claim. The Court denied the motion without prejudice on the other remaining issues. Defendant also filed what was, in effect, a dispositive motion in an effort to have the opinions of Plaintiffs' expert sleep physiologist excluded as a matter of law. The Court denied Defendant's motion, as well, without prejudice. The settlement was reached after 14 months of litigation that had narrowed and defined the remaining issues as clearly as possible. The parties also conducted a preliminary mediation in June 2011, which ended in an impasse, but was still beneficial in laying out the issues that needed to be developed further in discovery and with expert reports.

Third, there is no evidence that the settlement was reached through fraud or collusion between counsel or the parties. The mediation was conducted before an attorney who has extensive experience in labor and employment law, both as a practitioner and as a mediator, and the proposed Settlement Agreement was reached after extensive, bona fide, arms-length negotiations. The decisions made on behalf of Plaintiffs were made by a Steering Committee after thorough debate and deliberation. There is no evidence or even suggestion that the settlement was affected by any

improper considerations, such as undue influence, duress, intimidation, or coercion. See Rothstein Affidavit, ¶¶ 15-17.

Next, the settlement agreement was adopted by Plaintiffs at the recommendation of the undersigned Plaintiffs' counsel, who has significant experience in employment and labor law in South Carolina. Plaintiffs' counsel graduated from law school in 1993 from the University of South Carolina School of Law, where he was at the top of his class and was the Editor in Chief of the South Carolina Law Review. He served as a judicial law clerk to two prominent and well-respected federal judges for the first three years of his legal career and has been in private practice for over 15 years, where his primary practice area has been in employment and labor law. Plaintiffs' counsel has been a Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court since February 2006, and was recertified in 2011. He has been involved in several class action or collective action cases, both under Rule 23, Fed. R. Civ. P. and the FLSA. (Rothstein Affidavit, ¶¶ 3-12). Plaintiffs' counsel's experience and understanding of the FLSA strongly support the Court's approval of the proposed settlement.

Fourth, the proposed settlement has been approved by all members of the Plaintiffs' Steering Committee. To the extent that any objections to the settlement are raised before or at the fairness hearing, Plaintiffs' counsel is confident that he can fully defend and justify the proposed settlement of this case.

Finally, the settlement amount is adequate when viewed against the risks, expenses, and delays inherent in continued litigation. As noted previously, the most hotly contested issue in the case (and by far the largest portion of the best-case scenario amount as calculated by Plaintiffs' economic expert) is the sleep-time issue. Present Fourth Circuit precedent on this issue seems to

favor Defendant with regard to whether the County is entitled to deduct sleep-time under 29 C.F.R. § 785.22. See Roy v. Lexington County, South Carolina, 141 F.3d 533, 546-47 (4th Cir. 1998). Although it would certainly be possible for Plaintiffs to receive a higher recovery after trial, it would also be possible for Plaintiffs to receive a lower net recovery after trial, especially considering the expense and delay inherent in continued litigation and possible appeals. In light of all of these risks, Plaintiffs made a reasonable decision to settle this case for the terms set forth in the proposed Settlement Agreement.

VII. Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement Agreement, authorize the sending of the proposed notice of settlement to all class members, schedule a settlement fairness hearing, and grant final approval of the settlement of this matter, including the proposed apportionment of the settlement proceeds, after providing a reasonable opportunity for any class members to comment on or object to the proposed settlement.

Respectfully submitted,

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