IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Darlington County, South Carolina, Defendant.	Civil Action No. 4:11-cv-00740-RBH **PLAINTIFFS' MOTION TO APPROVE ATTORNEY'S FEES AND COSTS**

Plaintiffs, Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, by and through their undersigned attorney, hereby file this Motion to Approve Attorney's Fees and Costs. Plaintiffs respectfully request that the Court apportion $75,000.00, or one-third of the gross settlement amount of $225,000.00 in this case, as attorneys' fees, and $1,763.03 as reimbursement of costs advanced by Plaintiffs' counsel.

The grounds for this motion are that Plaintiffs' attorney fee agreements with Plaintiffs' counsel provide for a one-third contingency fee agreement; the preferred method for awarding attorney's fees in a class action is based on a percentage of common fund; and under the lodestar cross-check, the attorney's fees are fair and reasonable in light of the hours expended by counsel, the results obtained, and the risks involved in taking this case on a contingency basis. In addition, the costs expended by Plaintiffs' counsel were reasonable and necessary in the prosecution of this action

against Defendant. This motion is supported by the accompanying Memorandum of Law and the affidavits and documents attached thereto.

Respectfully submitted,

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October 4, 2013

Greenville, South Carolina.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Darlington County, South Carolina, Defendant.	Civil Action No. 4:11-cv-00740-RBH **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO APPROVE ATTORNEY'S FEES AND COSTS**

I. Introduction

Plaintiffs, Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, by and through their undersigned attorney, hereby file this Memorandum of Law in Support of Plaintiffs' Motion to Approve Attorney's Fees and Costs. For the reasons set forth below, Plaintiffs respectfully request that the Court apportion $75,000.00, or one-third of the gross settlement amount of $225,000.00 in this case as attorney's fees and $1,763.03 as reimbursement of costs advanced by Plaintiffs' counsel.

II. Statement of Case

This is an action under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq. to recover unpaid overtime compensation and compensation for "off the clock" work Plaintiffs earned during their employment

with the Darlington County EMS Department. The parties have reached a proposed settlement of this action after a mediation on February 1, 2013, which is presently before the court for approval. The gross amount of the proposed settlement is $225,000.00, which was intended to cover all of Defendant's liability to the opt-in Plaintiffs under the FLSA in the case, including for attorney's fees and costs. Plaintiffs propose to apportion the settlement amount as follows: $75,000.00 for attorneys' fees; $1,763.03 for reimbursement of costs; $7,500.00 total for service or incentive payments to the named Plaintiffs and the members of the Plaintiffs' Steering Committee; and the remaining settlement proceeds of $140,736.97 to be paid to opt-in Plaintiffs based on their pro-rata share of the potential value of the collective group's FLSA back-pay claims.

III. Statement of Facts

Plaintiffs' counsel handled this matter on a contingency basis, pursuant to written fee agreements with the named Plaintiffs as class representatives, as required by Rule 1.5(c) of the South Carolina Rules of Professional Conduct, SCACR 407, Rule 1.5(c). The Contingent Fee Agreements signed by the five named Plaintiffs and Plaintiffs' counsel provide for an attorney's fee amount equal to one-third of any (including settlement or arbitration). See Contingent Fee Agreements of DeWitt, Hodge, Quick, Hudson, and Amerson, (attached hereto as Exhibit A). Although Plaintiffs' counsel does not have written fee agreements with all of the opt-in Plaintiffs, the Consent to Join Lawsuit forms whereby each person opted in to the case contain the following language: "As a current or former employee of Darlington County EMS, I hereby consent, agree, and opt-in to become a party plaintiff herein and to be bound by any settlement of this action or adjudication of the Court. . . . I hereby further authorize the named Plaintiffs herein to retain their counsel of record or to select new counsel, as they shall determine in their discretion, and I hereby further authorize such counsel to

make all decisions with respect to the conduct and handling of this action, including the settlement thereof, as they deem appropriate or necessary, subject to the approval of the Court." See Consent to Join Lawsuit form, ¶ 6,8 (sample copy attached hereto as Exhibit B).

The Contingent Fee Agreement also requires the named Plaintiffs to reimburse Plaintiffs' counsel for any costs advanced in connection with the case:

> **Client shall pay all costs**, including but not limited to: copying costs; filing fees; service of process fees; postage, copy costs, fax charges, investigation; court reporter/deposition costs, travel and lodging charges; etc. out of client's share of recovery. These costs will be deducted from the amount remaining after attorneys' fees are computed. The remainder will be remitted to Client.

(Exhibit A).

The undersigned counsel for Plaintiffs handled this case along with attorney Herb Louthian as joint counsel of record. The undesigned has been involved in this case since on or about March 16, 2011, when he was contacted by Mr. Louthian about serving as lead counsel in this matter. During the two and a half years that this case has been pending, he has devoted over 187 hours of attorney time to the case and has expended over $1,700 in costs. See Affidavit of David E. Rothstein, ¶¶ 15, 16 (attached hereto as Exhibit C). Detailed summaries of Plaintiffs' counsel's time entries and costs are attached to the Affidavit. Mr. Louthian has spent an additional 13.8 hours of attorney time in connection with the case. (Exhibit C, ¶ 17 & Attachment 2).

IV. Discussion

Attorney's fees in class action cases under Rule 23, Fed. R. Civ. P., as well as collective actions under FLSA, are subject to court approval. Rule 23(h) provides, in relevant part, "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Both the FLSA and the

South Carolina Payment of Wages Act contain fee-shifting provisions. 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); S.C. Code Ann. § 41-10-80(C) ("In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow."). The gross settlement amount in this case of $225,000.00 was intended by the parties to include Defendant's liability for attorney's fees and costs with regard to the claims of the opt-in Plaintiffs.

There are two general methods for assessing awards of attorney's fees in class action cases: (1) the percentage-of-the-fund method and (2) the lodestar method. The percentage-of-the-fund method, also known as the common-fund doctrine, allows attorney's fees to be based on a percentage of the total recovery to the plaintiff class. See Boeing Co. V. Van Gemert, 444 U.S. 472, 478 (1980). The common fund doctrine recognizes that where a group of individuals receives a benefit from litigation without directly contributing to its costs, the group would be unjustly enriched unless each member is required to contribute a portion of the benefits to compensate the attorneys responsible for creating or enhancing the common fund. The trend among most courts seems to be towards favoring the percentage-of-the-fund approach to awarding attorney's fees in class action cases, because it "better aligns the interests of class counsel and class members . . . [by] t[ying] the attorneys' award to the overall result achieved rather than the hours expended by the attorneys." Kay Co. v. Equitable Production Co., 749 F. Supp. 2d 455, 461 (S.D. W. Va. 2010). The percentage-of-the-fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours

worked on the case. Id. at 462.

The lodestar method determines the appropriate amount of attorney's fees by applying the well-established factors from the seminal case of Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978), to determine a "lodestar" figure by multiplying the number of hours expended by class counsel times a reasonable hourly rate. See Local Civil Rule 54.02(A), D.S.C. The loadstar method is used to award attorney's fees to successful plaintiffs after obtaining a judgment at trial in a fee-shifting case. See Hensley v. Eckerhart, 461 U.S. 424 (1983).

Many courts that have used the percentage-of-the-fund method have also used a modified form of the lodestar method to perform a "cross-check" to ensure that the percentage award is fair and reasonable. The Fourth Circuit has not issued any definitive guidance about which methodology is preferred for awarding or approving attorney's fees in class action cases. Kay Co., 749 F. Supp. 2d at 463. District Courts have considerable discretion in evaluating the reasonableness of an attorney's fee award. Id. Numerous district courts within the Fourth Circuit have used the percentage of the fund method, and many have also employed the lodestar cross-check, in setting attorney's fees in class action settlements. See id. at 463-64, nn. 3-4 (citing cases); Domonoske v. Bank of America, N.A., 790 F. Supp. 2d 466 (W.D. Va. 2011) (approving attorney's fees of 18% of common-fund in FCRA class action, amounting to $1.791 million of $9.95 million common fund); Smith v. Krispy Kreme Doughnut Corp., 2007 WL 119157 (M.D.N.C. Jan. 10, 2007) (approving attorney's fees of 26% of common fund in ERISA class action, amounting to $1.235 million of $4.75 million cash common fund) (unpublished decision attached). This court has used the percentage-of-the-fund framework with a modified lodestar cross-check in approving attorney's fees in a large class action under the FCRA. Clark v. Experian Info. Solutions, Inc., C/A No. 8:00-cv-1217-CMC

(D.S.C. Apr. 21, 2004) (Dkt. No. 365).

A. Percentage of Fund

The undersigned Plaintiffs' counsel requests that the Court use the percentage-of-the-fund method for approving attorney's fees in this case and award one-third (33.33%) of the gross settlement fund, or $75,000.00 of the $225.000.00 total settlement, to Plaintiffs' counsel.

In evaluating the reasonableness of attorney's fees under the common-fund doctrine in class action cases, courts generally examine the following factors: "(1) the results obtained for the class, (2) the quality, skill, and efficiency of the attorneys involved, (3) the complexity and duration of the case, (4) the risk of nonpayment, (5) awards in similar cases, (6) objections, and (7) public policy." Kay Co., 749 F. Supp. 2d at 464; see also In re Cendant Corp. Prides Litig., 243 F.3d 722, 733 (3d Cir. 2001). Application of these factors demonstrates that Plaintiffs' counsel's request for one-third of the gross settlement proceeds for attorney's fees is fair and reasonable.

1. Result Obtained for the Class

Plaintiffs have achieved substantial victory on behalf of the class with the proposed settlement of $225,000.00. As discussed in connection with the motion to approve the settlement, the proposed settlement enables all opt-in Plaintiffs to receive a substantial percentage of their back-pay amount under their FLSA claim, after payment of attorney's fees, costs, and service payments to the members of the Plaintiffs' Steering Committee. In Plaintiffs' counsel's experience, the proposed settlement of $225,000.00 is substantial for a South Carolina employer, especially with a relatively small class size of 23 opt-in Plaintiffs.

The case of Roy v. Lexington County, South Carolina, 141 F.3d 533 (4th Cir. 1998), which involved many issues similar to those presented in this case, included approximately 65 plaintiffs

according to the caption of the case. After trial and referral of the case to a special master for calculation of damages, the district court entered judgment for back pay and prejudgment interest in the total amount of $136,044.10. Id. at 538.

The proposed settlement of this case is an outstanding result for the Plaintiff class.

2. Quality, Skill and Efficiency of Attorney Involved

This case was handled primarily by the undersigned counsel, who is a solo practitioner in Greenville, South Carolina. Plaintiffs' counsel's qualifications are recited in the Affidavit of David E. Rothstein attached hereto. In summary, the undersigned graduated from law school with honors and clerked for two prominent federal judges prior to entering private practice. Since entering private practice, the undersigned has practiced extensively in the area of employment litigation and has written and taught CLEs on numerous employment-law topics. Plaintiffs' counsel has been a Certified Specialist in Employment and Labor Law since 2006. (Exhibit C, ¶ 9).

With respect to the undersigned's reputation, noted South Carolina employment law attorney M. Malissa Burnette, Esq. has offered a favorable opinion about the undersigned's abilities and reputation with respect to employment litigation. Affidavit of M. Malissa Burnette, Esq. (Attached hereto as Exhibit D). Greenville attorney Brian P. Murphy, who is also a well-respected employment lawyer in South Carolina, has also offered an affidavit supporting the Plaintiffs' Motion to Approve Attorney's Fees. Affidavit of Brian P. Murphy, Esq. (attached hereto as Exhibit E).

Lead Plaintiff, Anna DeWitt, previously submitted an affidavit in support of the motion to approve the settlement agreement in which she attests that she has been satisfied with the legal services performed by the undersigned, and that she supports the requested allocation for attorney's fees and costs. DeWitt Aff., ¶¶ 8-9 (Exhibit C to Consent Motion to Approve Settlement) (Dkt. No.

33-4).

Plaintiffs' counsel's quality, skill, and efficiency support the requested attorney's fees.

3. Complexity and Duration of Case

This case was fairly complex, involving several technical aspects of the FLSA and the accompanying regulations. The case has been pending since March 28, 2011. During the 30 months that this case has been pending, Plaintiffs' counsel has expended considerable effort in prosecuting this action. (Exhibit C, ¶¶ 13-15). This factor amply supports the requested attorney's fees.

4. Risk of Non-payment

Plaintiffs' counsel agreed to handle the case on a contingency fee basis. As in any case, there is always a risk that the plaintiff will not recover a verdict or might recover a verdict less than the full amount of damages sought. The contingency nature of the fee agreement puts a substantial risk of loss on Plaintiffs' counsel, because he does not get paid unless he is successful in obtaining some recovery in the case on behalf of Plaintiffs.

Here, Defendant denied in its Answer that it had violated the FLSA or the South Carolina Payment of Wages Act. Only after substantial discovery did Defendant acknowledge that some aspects of its previous pay plan for the EMS Department might give rise to liability under the FLSA.

With regard to the ability of Defendant to respond to a potential judgment in this case, because Defendant is a public body, there is less risk of non-payment than with most private employers. However, Plaintiffs' counsel is aware of recent news reports, especially in light of the poor economy of the past few years, where city and county governments across the country have been unable to meet their financial obligations. Plaintiffs counsel is not aware of any significant

fiscal problems within Darlington County that would affect Defendant's ability to pay a settlement or judgment in this case.

Accordingly, the risk of non-payment should not be a significant factor either way in the court's assessment of the attorney's fees requested in this case.

5. Awards in Similar Cases

One-third of the recovery is a fairly common percentage in contingency cases, especially where the total settlement amount is not so large as to produce a windfall of the plaintiffs' attorneys based solely on the number of class members. In Clark v. Ecolab, Inc., 2010 WL 1948198 (S.D.N.Y. May 11, 2010) (copy of unpublished decision attached), the court noted that an attorney's fee percentage of one-third is "reasonable and 'consistent with the norms of class litigation in [the Second] circuit." Id. at *8. The Clark court approved attorney's fees of $2 million or one-third of the common fund, in a collective action under the FLSA. Id.; see also Wineland v. Casey's Gen. Stores, Inc., 267 F.R.D. 669, 677 (S.D. Iowa 2009) (approving attorney's fees of 33 1/3% of total settlement fund of $6.7 million, plus $150,000 in costs, in FLSA collective action on behalf of class approximately 11,400 convenience store employees).

Similarly, in Smith v. Krispy Kreme Doughnut Corp., 2007 WL 119157 (M.D.N.C. Jan. 10, 2007) (copy of unpublished decision attached), the Court noted, "In this jurisdiction, contingent fees of one-third (33.3%) are common." Id. at *2. The Smith court approved a 26% fee in that case under the lodestar cross-check method, which produced a risk multiplier of 1.6 over the lodestar amount. Plaintiffs' counsel in the Smith case reported 1089 hours of attorney time and 772 hours of paralegal time, and the court approved a fee of $1,235,000 out of the common fund of $4.75 million cash value of the settlement. Id. at * 2-3.

In Bredbenner v. Liberty Travel, Inc., 2011 WL 1344745 (D.N.J. Apr. 8, 2011) (unpublished decision attached), the court cited to cases from district courts throughout the country in common fund cases where attorney's fee awards "generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund." Id. at *21. Most of the cases cited by the Bredbenner court awarded attorney's fees at the level of 33.3% of the common fund. Id. The court in Bredbenner approved the requested fees and costs in the amount of $990,000 out of a $3,000,000 total settlement amount, which produced a lodestar multiplier of 1.88. Id. at *18, 22.

The case of Hoffman v. First Student, Inc., 2010 WL 1176641 (D. Md. Mar. 23, 2010) (copy of unpublished decision attached), also approved an attorney fee award of one-third of the total class recovery. Id. at *3 ("Under the FLSA and the terms of the lead class members' Agreement with counsel, Plaintiffs' counsel may recover one-third of the damages award. Because this amount appropriately reflects the time spent and expenses incurred by Plaintiffs' counsel in this litigation, the fees and costs requested are reasonable and appropriate.").

Ms. Burnette testifies in her affidavit that a one-third contingency fee percentage is reasonable and customary in employment cases. (Exhibit D, ¶ 6).

6. Objections

The named Plaintiffs' contingency fee agreements with the undersigned counsel provide for a one-third recovery. (Exhibit A). Although the Court is not bound by the parties' agreements in this regard, the amount is reasonable and fair in light of the relatively small size of the Plaintiff class and the amount of work required by the case. Furthermore, as discussed above, Plaintiff DeWitt submitted an affidavit supporting the proposed attorney's fee payment. Plaintiffs' counsel is confident that he would be able to rebut any objections to the attorney fee payment if such objections

are made prior to the fairness hearing in this case.

7. Public Policy

In the undersigned counsel's experience, employment cases are not eagerly sought out by the majority of the plaintiffs' bar in South Carolina, because of the difficulty of the cases and the complexity of the issues usually involved. In situations like this case, where each individual's economic damages may be relatively modest and where the employee victims usually do not have the resources to pay substantial attorney's fees and costs in advance, obtaining counsel would be extremely difficult were it not for the statutory provisions for attorney's fees and costs for prevailing parties. Therefore, public policy favors adequate awards of attorney's fees in cases under the FLSA to encourage aggrieved plaintiffs to bring these actions and to provide incentives for plaintiffs' counsel to take such cases. Plaintiffs' counsel is not aware of any public policy concerns raised by this motion.

B. Lodestar Cross-check

Many courts that employ the common-fund doctrine in evaluating attorney's fee requests under class settlements compare the percentage of the fund to the lodestar calculation to ensure that the percentage amount is fair and reasonable. The lodestar is defined as "the number of hours reasonably expended, multiplied by a reasonable hourly rate." Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 174 (4th Cir. 1994). In fee-shifting cases, this amount is generally considered the presumptively reasonable fee in a case that is successfully litigated to judgment. See Alexander S. v. Boyd, 929 F. Supp. 925, 932 (D.S.C. 1995), aff'd mem. 89 F.3d 827 (4th Cir. 1996). The lodestar figure may be adjusted upward or downward to account for exceptional circumstances, such as the results obtained or the quality of the representation. Id.

The standard for determining a reasonable figure for attorney's fees is set forth in the familiar Fourth Circuit case of Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978); see Local Civil Rule 54.02, D.S.C. (expressly incorporating the Barber v. Kimbrell's, Inc. factors):

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) this skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber, 577 F.2d at 226, n.28. The Barber factors are discussed in order below, although many of them overlap with the previous discussion about the fairness of the percentage-of-the-fund method.

1. Time and labor expended

As set forth in the Affidavit of David E. Rothstein, which is attached hereto as Exhibit C, Plaintiffs' firm has expended over 187 hours of attorney time in connection with this matter. Plaintiffs' counsel anticipates spending an additional 20-30 hours of time after October 4, 2013, in connection with the settlement approval hearing and ensuring that the settlement proceeds are distributed properly. Plaintiffs' legal assistant has also spent over 13 hours of time in connection with this case.

The undersigned attorney began representing Plaintiffs in mid March 2011. This case involved significant discovery, including the review and analysis of over 5,800 Bates labeled documents, plus thousands of individual entries on time and payroll records. Plaintiffs' counsel also worked very closely with the Plaintiffs' Steering Committee. Although no depositions were taken

in the case and no dispositive motions were filed, the work involved in reviewing the County's payroll records and performing calculations of overtime due was substantial and tedious.

As set forth in the Ms. Burnette's Affidavit, the amount of time and labor expended in this case is reasonable. (Exhibit D, ¶ 5). Mr. Murphy's Affidavit corroborates that the time involved in this case is appropriate and reasonable. (Exhibit E, ¶¶ 5-6).

2. Novelty and Difficulty of the Questions Raised

As the Court is aware, overtime cases under the Fair Labor Standards Act can be very complex and difficult, involving the interaction among various statutes, regulations, and evolving case-law. The difficulty of this case is appropriately reflected in the hours and time entries submitted by Plaintiffs' counsel.

3. Skill Required to Perform the Legal Services Rendered

Because of the difficulty of this case as discussed above, a high degree of skill was required to perform the legal services rendered in this matter. Employment law is currently perhaps one of the most dynamic areas of the law, requiring counsel to stay abreast of developments in both state and federal law. Moreover, as with any litigation in federal court, attorneys in overtime cases must be thoroughly familiar with developments and changes in the Federal Rules of Civil Procedure and the Local Civil Rules of this District.

4. Attorney's Opportunity Costs in Pressing the Instant Litigation

As summarized in the time sheets attached to the undersigned's Affidavit, this case involved more than 180 attorney hours. (Exhibit C, ¶ 15). This time commitment represents a significant opportunity cost in terms of other cases, either hourly or contingency, on which the undersigned could have worked over the past 30 months. In addition, Plaintiffs' counsel has advanced all of the

costs of this litigation, since Plaintiffs did not have the ability to pay the costs associated with this case.

5. Customary Fee for Like Work

A one-third contingency fee is actually below the contingency arrangement that Plaintiffs' counsel usually reaches with his clients in individual employment matters in which a lawsuit is filed. Plaintiffs' counsel is very selective about what cases he takes on a contingency agreement, but he usually charges 40% of any recovery once a lawsuit is actually filed.

The Affidavit of Ms. Burnette demonstrates that a one-third contingency fee is reasonable and customary in employment cases in South Carolina. (Exhibit D, ¶ 6).

With regard to an hourly rate for purposes of the lodestar cross-check framework, the undersigned's standard hourly rate in non-contingency employment matters is $300.00. Plaintiffs' counsel usually seeks an increase over his normal hourly rate to account for the risk of accepting employment cases like this one on a contingency basis and to compensate him for the beneficial results obtained. (Exhibit C, ¶ 19).

Generally, the hourly rate included in an attorney fee calculation should be the "prevailing market rates in the relevant community." Rum Creek Coal Sales, 31 F.3d at 175. As set forth in the Affidavits of Ms. Burnette and Mr. Murphy, the requested amount of attorney's fees rate is well within the market rate for experienced employment lawyers in South Carolina. (Exhibit D, ¶ 6); (Exhibit E, ¶¶ 7-8).

6. Attorney's Expectations at the Outset of the Litigation

Plaintiffs' counsel accepted this case on a contingency basis, with the understanding that if Plaintiffs prevailed at trial, the Court would make an award of fees pursuant to the FLSA. Plaintiffs

and their counsel agreed that the attorney's fees would be the greater of one-third of the total recovery or the court-awarded fees.

7. Time Limitations Imposed by the Client or Circumstances

The time required by the circumstances of this case are discussed in connection with items 1 and 4 above. No time other limitations were imposed by the clients.

8. Amount in Controversy and Results Obtained

The Fourth Circuit has acknowledged that "'the most critical factor' in calculating a reasonable fee award 'is the degree of success obtained.'" Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)). Plaintiffs enjoyed significant success in this matter and were able to hold Defendant accountable for the County's unlawful pay practices within the EMS Department. In summary, the results obtained on Plaintiffs' behalf in this case amply support the request for attorney's fees and costs.

9. Experience, Reputation, and Ability of Attorney

This factor is discussed above in connection with section entitled Quality, Skill and Efficiency of Attorney Involved.

10. Undesirability of the Case Within the Legal Community in Which the Suit Arose

This factor is also discussed above in connection with the Public Policy section.

11. Nature and Length of the Professional Relationship Between Attorney and Client

The undersigned has represented Plaintiffs for approximately thirty months during the course of this litigation. This is the first matter for which the undersigned has provided any legal services to any of the named Plaintiffs, so this factor does not have much application in this Motion.

12. Attorneys' Fee Awards in Similar Cases

The attorney's fees and costs requested by Plaintiffs are in line with awards in other employment cases in the District of South Carolina. Plaintiffs' counsel's most recent attorney fee award in the District of South Carolina on a FLSA case was in the case of Kevin Faile et al. v. Lancaster County, South Carolina, C/A No. 0:10-cv-2809-CMC. In March 2012, the Hon. Cameron M. Currie approved a one-third contingency fee of $500,000 on a gross settlement amount of $1.5 million, which equated to an effective hourly rate of approximately $410.00 per hour for the undersigned counsel. (Dkt. No. 102, March 8, 2012). In 2011 in another case under the FLSA, the Hon. Richard M. Gergel awarded the undersigned counsel attorney's fees at the rate of $350.00 per hour. George et al. v. Pro Med Ambulance Service, LLC, C/A No. 2:10-cv-00087-RMG (D.S.C. Oct. 20, 2011) (Dkt. No. 50). On June 13, 2011, the Hon. J. Michelle Childs awarded attorneys' fees to Brian P. Murphy and John S. Nichols at the rate of $300.00 per hour in a successful race discrimination case. Banks v. Allied Crawford Greenville, Inc. et al., C/A No. 6:09-cv-01337-JMC. Although both Mr. Murphy and Mr. Nichols are experienced trial counsel, neither is a Certified Specialist in Employment and Labor Law. Other similar awards in employment cases in South Carolina include the following: Rosetti v. World Group Mortgage, LLC, 2005-CP-23-00550 (Greenville County Ct. of Common Pleas) ($300.00 per hour); Miller v. HSBC Fin. Corp., 3:08-cv-01942-MJP, 2010 WL 2722689 (D.S.C. July 9, 2010) ($290.00 per hour); Harrison-Belk v. Rockhaven Community Care Home, 3:07-54-CMC, 2008 WL 2952442 (D.S.C. July 29, 2008) ($290.00 per hour), aff'd sub. nom Harrison-Belk v. Barnes, 319 Fed. Appx. 277 (4th Cir. 2009).

Using a rate of $350.00 per hour for the 187 hours the undesigned Plaintiffs' counsel has expended on the case to date, plus the estimated 20 hours of additional work yet to be performed,

along with the 13.8 hours spent by Mr. Louthian, would yield a lodestar amount of $77,280.00 which is actually greater than the $75,000.00 contingency amount. Even at Plaintiffs' counsel's regular hourly rate of $300.00 per hour, the loadstar amount would be $66,240.00, for a risk multiplier of 1.13 times the lodestar amount, which is well within the range of reasonable attorney's fee amounts in common fund cases. See Kay Co., 749 F. Supp. 2d at 470 ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."). The Kay court approved a requested fee amount that produced a lodestar multiplier between 3.4 to 4.3 times the lodestar amount. Id.; see also Smith v. Krispy Kreme Doughnut Corp., 2007 WL 119157, at *3 (using lodestar cross-check and approving multiplier of 1.6 times above the lodestar amount).

V. Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that the Court approve attorney's fees of $75,000.00 to Plaintiffs' counsel based on one-third (33/33%) of the total gross settlement amount of the common fund of the Plaintiff class. In addition, Plaintiffs respectfully request that the Court approve reimbursement of $1,763.03 in costs to be paid from the settlement fund.

* * *

Respectfully submitted,

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Index of Exhibits to Plaintiffs' Motion to Approve Attorney's Fees and Costs

Exhibit No.	Description
A	Contingent Fee Agreements with Named Plaintiffs
B	Sample Opt-in Form of Kim Weaver
C	Affidavit of Plaintiffs' Counsel, David E. Rothstein, with Attachments 1-3
D	Affidavit of M. Malissa Burnette, Esq.
E	Affidavit of Brian P. Murphy, Esq.
	Unpublished Decisions

Exhibit A

STATE OF SOUTH CAROLINA

CONTINGENT FEE AGREEMENT

COUNTY OF DARLINGTON

RE: Anna DeWitt v. Darlington County EMS

Employment of Attorney:

The undersigned, referred to as "Client", employs the law offices of Louthian Law Firm, P .A. referred to as "Attorney", to represent Client in the above referenced matter.

Attorney accepts this employment and agrees to take steps that are in his judgment reasonably advisable to enforce Client's rights.

Fees and Expenses:

Client agrees to pay Attorney a fee of 33 1/3% of any recovery (including settlement or arbitration).

Appeal:

In the event Client wishes to appeal any order of judgment of the Court, another written agreement regarding such appeal will have to be negotiated. This contract does not pertain to any appeal.

Client shall pay all costs, including but not limited to: copying costs; filing fees; service of process fees; postage, copy costs, fax charges, investigation; court reporter/deposition costs, travel and lodging charges; etc. out of client's share of recovery. These costs will be deducted from the amount remaining after attorneys' fees are computed. The remainder will be remitted to Client.

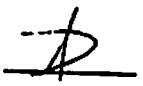
Review by Attorney:

Attorney accepts this employment on the condition that he will investigate said claim to determine if there exists a reasonable probability of making an economical recovery. If, after due investigation and careful consideration, Attorney concludes that to proceed with the claim would not be meritorious, or that it would not result in an economical recovery, then Attorney shall have the right to withdraw as counsel in the case upon proper notice to client.

Settlement:

No settlement of the above referenced matter can be made without the consent of Client.

In the event reasonable professional efforts have been made in the pursuit of said claim and the Client is unwilling to settle the above referenced matter for an amount Attorney, in his professional judgment, determines is reasonable in light of the issues of liability, extent of damages and ability to recover, Attorney reserves the right to withdraw as counsel upon proper notice to Client. In such event, Client shall pay Attorney a fee for his services in pursuing the above referenced matter, a sum equivalent to 33 1/3 % of the highest offer to settle the claim by the opposing party in addition to the costs mentioned above.

Client Initials: 

Payment of Debts:

Client hereby authorizes, but does not require, Attorney to pay from Client's net share of the proceeds from any recovery any and all expert witness fees and similar fees and related expenses which are unpaid at the time of the disbursement of the proceeds of any recovery.

Miscellaneous:

Client understands and agrees that Attorney may consult and utilize experts, paralegals, independent researchers, etc., and associate other attorneys in the necessary and proper handling of the case.

Attorney agrees to exercise his best efforts on Client's behalf but cannot guarantee a recovery.

Any other case or issues other than those which flow naturally and directly and are reasonably foreseeable from the above referenced matter will not be subject to this agreement. Further, the parties must agree to representation on such issues or cases in an agreement separate and apart from this one.

Client acknowledges that this is a binding agreement between the attorney and the client. Client also acknowledges that this agreement has been explained to him and that he understands all of its terms. Client also agrees that any modification of this agreement must be in writing.

Client agrees that, upon the conclusion of the case and the termination of Attorney's services, all copies of papers, photographs, and other documents from Attorney's file will, upon request by the Client, be returned to the Client. Client specifically agrees that, after retrieving any documents and other material from attorney's file which client may desire to retain, attorney may, after a period of seven (7) years following the conclusion of attorney's services, destroy all papers and other file material, without further notice to Client.

Anna DeWitt

February 12, 2011

Herbert W. Louthian, Sr.

STATE OF SOUTH CAROLINA

CONTINGENT FEE AGREEMENT

COUNTY OF Darlington

RE: Anna DeWitt, *et al* v. Darlington County EMS

Employment of Attorney:

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Review by Attorney:

Attorney accepts this employment on the condition that he will investigate said claim to determine if there exists a reasonable probability of making an economical recovery. If, after due investigation and careful consideration, Attorney concludes that to proceed with the claim would not be meritorious, or that it would not result in an economical recovery, then Attorney shall have the right to withdraw as counsel in the case upon proper notice to client.

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Client Initials: 

Payment of Debts:

Client hereby authorizes, but does not require, Attorney to pay from Client's net share of the proceeds from any recovery any and all hospital, medical, expert witness fees, and similar fees and related expenses which are unpaid at the time of the disbursement of the proceeds of any recovery.

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David Hodge

Herbert W. Louthian, Sr.

March 18, 2011
Columbia, SC

STATE OF SOUTH CAROLINA **CONTINGENT FEE AGREEMENT**

COUNTY OF Darlington

RE: Anna DeWitt, *et al* v. Darlington County EMS

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Lena Quick

Herbert W. Louthian, Sr.

March 16, 2011
Columbia, SC

STATE OF SOUTH CAROLINA

CONTINGENT FEE AGREEMENT

COUNTY OF Darlington

RE: Anna DeWitt, *et al* v. Darlington County EMS

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ENTD MAR 21 2011

Client Initials:

Payment of Debts:

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Lynette Hudson

Herbert W. Louthian, Sr.

March 15, 2011
Columbia, SC

STATE OF SOUTH CAROLINA

CONTINGENT FEE AGREEMENT

COUNTY OF Darlington

RE: Anna DeWitt, *et al* v. Darlington County EMS

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ENT'D MAR 21 2011

Client Initials: JEA

Payment of Debts:

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Jennifer Amerson

Herbert W. Louthian, Sr.

March 18, 2011
Columbia, SC

Exhibit B

CONSENT TO JOIN LAWSUIT
(Pursuant to 29 U.S.C. § 216(b))

Anna C. DeWitt et al. v. Darlington County, South Carolina
(Darlington County EMS Overtime Case)

Civil Action No. 4:11-cv-00740-RBH

Please type or print in ink the following:

1. Name: Kim Weaver

2. Address: _____

_____
City State Zip Code

3. Phone: _____ (work) _____ (home/mobile)

4. Dates of Employment with Darlington County EMS: 1-25-05

5. Position(s) with County: Paramedic

6. I understand that this suit is brought under the Fair Labor Standards Act to recover unpaid overtime compensation. As a current or former employee of Darlington County EMS, I hereby consent, agree, and opt-in to become a party plaintiff herein and to be bound by any settlement of this action or adjudication of the Court.

7. I hereby authorize Plaintiffs' counsel of record to file this Consent with the Clerk of Court.

8. I hereby further authorize the named Plaintiffs herein to retain their counsel of record or to select new counsel, as they shall determine in their discretion, and I hereby further authorize such counsel to make all decisions with respect to the conduct and handling of this action, including the settlement thereof, as they deem appropriate or necessary, subject to the approval of the Court.

Date: 3-22-11

Kim Weaver
Signature

Kim Weaver
Print or Type Name

Exhibit C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Darlington County, South Carolina, Defendant.	Civil Action No. 4:11-cv-00740-RBH **AFFIDAVIT OF PLAINTIFFS' COUNSEL, DAVID E. ROTHSTEIN**

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

PERSONALLY appeared before me David E. Rothstein, who, after being duly sworn, deposes and states the following:

1. My name is David E. Rothstein. I am older than eighteen years of age. The statements in this Affidavit are based upon my own personal knowledge.

2. I am lead counsel for Plaintiffs in the above-captioned case.

3. I am an attorney in good standing and have been licensed to practice law by the State of South Carolina since November 15, 1993, and by the State of North Carolina since April 11, 2008. I am also admitted to practice before the United States District Court for the District of South Carolina, the United States District Court for the Western District of North Carolina, the United

States District Court for the Middle District of North Carolina, United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

4. I graduated cum laude from the University of South Carolina School of Law on May 14, 1993, where I was Editor in Chief of the South Carolina Law Review, a member of the Order of the Coif, and a member of the Order of the Wig and Robe.

5. Upon graduation from law school, I served as a judicial law clerk to the Hon. Joseph F. Anderson, Jr., United States District Court Judge for the District of South Carolina, from August 1993 to August 1995. Thereafter, I served as a judicial law clerk to the Hon. Robert F. Chapman, then Senior United States Circuit Court Judge for the Fourth Circuit Court of Appeals, from August 1995 to October 1996.

6. I worked as an associate attorney at the law firm of Nexsen Pruet Jacobs & Pollard, LLP, in Columbia, South Carolina, from October 1996 to January 1999, where the majority of my practice involved employment law. While employed at the Nexsen Pruet firm, I represented both employers and employees in employment litigation and appeals.

7. I worked as an associate attorney at the law firm of Gergel Nickles & Solomon, P.A., in Columbia, South Carolina, from January 1999 to June 30, 2005, where the majority of my practice involved employment law.

8. I was a shareholder in the law firm of Burnette & Rothstein, P.A. from July 1, 2005 until July 31, 2010, when I moved to Greenville and formed Rothstein Law Firm, PA, which is currently a solo practice. Almost all of my current practice involves employment law and litigation.

9. I have been a Certified Specialist in Employment and Labor Law since February 2006. Although I primarily represent individual employees in employment-related matters, my firm

also represents several small employers in employment-related matters.

10. I currently serve as an associate member of the South Carolina Board of Law Examiners, which position I have held since January 2007.

11. I have had extensive experience in employment litigation, both as an attorney and as a judicial law clerk to two federal judges. In addition, I have written several articles and made numerous CLE presentations on employment law and related topics. I am a member of the Employment Law Sections of the South Carolina Bar, the South Carolina Trial Lawyers Association, and the National Employment Lawyers Association. I am a past Chair of the Employment and Labor Law Section Council of the South Carolina Bar (2011), and I am currently a member of the Specialization Advisory Board for Employment and Labor Law through the South Carolina Supreme Court Commission on CLE and Specialization.

12. Throughout my career, I have been involved in several class actions under Rule 23 of the Federal Rules of Civil Procedure, as well collective actions under the Fair Labor Standards Act. I was involved as trial counsel in the case of Johnson v. Collins, one of the largest class actions in the history of South Carolina, which led to the demise of the video poker industry in South Carolina. I have also handled numerous individual cases and collective actions under the Fair Labor Standards Act for improperly paid overtime.

13. The above-captioned case involved substantial investigation and discovery, including review of over 5,800 pages of documents produced by Defendant, along with voluminous computer data regarding payroll, work schedules, time-keeper records, and summaries of EMS dispatches for the 3-year period covered by the lawsuit.

14. This case has also involved some technical legal issues, which has required

substantial legal research and analysis. I have also performed very tedious calculations based on the time and payroll records from the County's EMS Department.

15. Attached is a detailed summary of the time I have spent on this case from mid March, 2011 through the date of this Affidavit. (Attachment 1). I have spent 187 hours of time in connection with this case during the 30-month period covered by the lawsuit. I believe that the time recorded on the attached summary is reasonable and was necessary in the prosecution of this case. I anticipate having to spend another 20-30 hours in connection with the final settlement approval process and the distribution of the settlement proceeds.

16. Included in Attachment 1 is a detailed summary of the costs I have expended in connection with this case, which total $1,763.03 to date. This figure does not include the costs of copying and mailing the notices and letters to the opt-in Plaintiffs, nor does it include any costs associated with publishing the required information on my law firm's web-site. I have been very careful to keep the expenses in this case as low as possible, and I have not sought advances or reimbursement from the named Plaintiffs, any opt-in members of the Plaintiff class, or any of the members of the Plaintiffs' Steering Committee. I believe that the expenses are reasonable and were necessary in the prosecution of this case.

17. Also attached is a copy of the time sheets of my co-counsel, Herb Louthian. Mr. Louthian and I had joint responsibility for representing Plaintiffs in this case, and he associated my law firm because of my recent experience with the sleep-time regulations under the FLSA. Mr. Louthian is an incredibly well-respected member of the employment bar in South Carolina and has been involved in establishing numerous ground-breaking precedents for over forty years. Mr. Louthian has recorded 13.8 hours of time in connection with this file. (Attachment 2).

18. In addition, I am also attaching a detailed summary of the time my legal assistant, Lorry Miller, has spent in connection with this case. (Attachment 3). Ms. Miller has recorded 13.83 hours of time in connection with this case. I believe that a fair hourly rate for a competent legal assistant with Ms. Miller's experience and credentials is $75.00 per hour.

19. My regular hourly rate in employment cases is $300.00 per hour. I generally anticipate receiving a premium above my normal hourly rate when I take cases on a contingency basis, because of the additional risks involved in taking such cases. I am very selective about what cases I take on a contingency basis, especially because employment cases are generally difficult and can involve investment of hundreds of hours of time. For individual employment cases, my standard contingency percentage is 33.33% of any recovery prior to filing suit, which increases to 40% after suit is filed. I agreed to handle this case on a one-third contingency fee case, rather than 40%, after commencement of litigation because of the economies of scale involved in representing multiple, similarly-situated Plaintiffs who share common legal and factual issues.

FURTHER AFFIANT SAYETH NOT.

David E. Rothstein

SWORN to and subscribed before me,

this 4th day of October, 2013

(L.S.)
Notary Public for South Carolina

My commission expires: 3/29/17.

Attachment 1

ROTHSTEIN LAW FIRM, PA
514 Pettigru Street ◆ Greenville, SC 29601

Anna DeWitt

11-024

DeWitt v. Darlington County

Services

Type	Date	Description	Quantity	Rate	Total
Service	01/14/2011	Work on discovery responses and damages calculations	6.20	$300.00	$1,860.00
Service	03/16/2011	TC from Herb Louthian to discuss case against Darlington County; TC to Ms. DeWitt to discuss case	0.70	$300.00	$210.00
Service	03/17/2011	E-mail to Ms. DeWitt; e-mail from Ms. DeWitt; e-mail to Ms. DeWitt about case; prepare consent forms for lawsuit; TC to Ms. DeWitt to discuss case further	1.20	$300.00	$360.00
Service	03/20/2011	E-mails from Ms. DeWitt about case; review documents; research re: FLSA issues	5.30	$300.00	$1,590.00
Service	03/22/2011	Receive additional consent forms; e-mail from Ms. Miller about new consents	0.20	$300.00	$60.00
Service	03/25/2011	E-mail from Ms. Miller about new consent forms; receive and review new opt-in forms; work on complaint	5.50	$300.00	$1,650.00
Service	03/27/2011	E-mails from Ms. DeWitt; work on complaint; e-mail draft of complaint to Ms. DeWitt	6.60	$300.00	$1,980.00
Service	03/28/2011	Finalize complaint; prepare summons and Rule 26.01 responses; prepare civil cover sheet; e-mail from Mr. Louthian about draft of complaint; TC to Ms. DeWitt; file complaint via ECF; receive notice of suit and summons	4.80	$300.00	$1,440.00
Service	03/29/2011	Receive NEF for consents; receive new consent forms; prepare and file notice of joinder for new opt-ins; prepare service letters	1.80	$300.00	$540.00
Service	04/04/2011	Receive proof of service on Darlington County; e-mail from Ms. Miller about proof of service; E-mail from Ms. DeWitt about case; e-mail to Ms. DeWitt	0.50	$300.00	$150.00
Service	04/05/2011	Receive and review proof of service from Ms. Miller; receive fee agreement from Philips; e-mail to Ms. DeWitt	0.70	$300.00	$210.00
Service	04/08/2011	E-mails from Ms. DeWitt about case; TC to Ms. DeWitt; receive new consent form for Fedorchuk	0.60	$300.00	$180.00
Service	04/11/2011	Receive new consent for Kissiah	0.10	$300.00	$30.00

Service	04/12/2011	Prepare and file notice of joinders for Fedorchuk and Kissiah	0.40	$300.00	$120.00
Service	04/19/2011	Receive and review answer and Rule 26.01 responses from Darlington County; receive and review scheduling order; docket deadlines	1.20	$300.00	$360.00
Service	04/23/2011	E-mail from Ms. DeWitt about status of case	0.10	$300.00	$30.00
Service	05/02/2011	E-mail from Ms. DeWitt	0.10	$300.00	$30.00
Service	05/09/2011	E-mail from Mr. Louthian's office about fee agreement from Kissiah	0.10	$300.00	$30.00
Service	05/10/2011	E-mail from Ms. DeWitt; e-mail to Ms. DeWitt about case	0.40	$300.00	$120.00
Service	05/16/2011	E-mail from Ms. Miller about fee agreement for Bowen	0.10	$300.00	$30.00
Service	05/23/2011	E-mail from Mr. Johnson's office about Rule 26(f) report; prepare Rule 26.03 responses; receive and review Rule 26(f) report from Defendant; receive and review motion for confidentiality order; e-mail from Mr. Johnson's office to Judge Harwell about proposed order	4.80	$300.00	$1,440.00
Service	05/24/2011	Receive and review confidentiality order	0.20	$300.00	$60.00
Service	06/01/2011	Receive and review new consents; prepare notice of joinder for new consents	0.80	$300.00	$240.00
Service	06/04/2011	E-mail from Ms. DeWitt about press report about case	0.10	$300.00	$30.00
Service	06/14/2011	Receive and review new consents from Epps and Tanner; prepare and file notices of joinder for new opt ins	0.80	$300.00	$240.00
Service	06/30/2011	E-mail from Ms. DeWitt about consents; e-mail from Ms. Miller to Ms. DeWitt with updated spreadsheet of parties	0.30	$300.00	$90.00
Service	07/01/2011	Receive consent form for Gleason	0.10	$300.00	$30.00
Service	07/06/2011	Prepare and file consent form for Gleason	0.50	$300.00	$150.00
Service	07/07/2011	Receive filing correction notice; re-file Gleason consent form	0.30	$300.00	$90.00
Service	08/12/2011	Receive consent for Locklair; prepare and file notice of joinder	0.50	$300.00	$150.00
Service	08/29/2011	Receive notice of request for protection from Mr. Johnson	0.20	$300.00	$60.00
Service	10/11/2011	TC from Mr. Johnson about amending scheduling order; e-mail from Mr. Johnson about motion to amend scheduling order; receive NEF for motion to amend scheduling order; e-mail from Mr. Johnson to Judge Harwell; e-mail from Judge's law clerk about proposed order	0.60	$300.00	$180.00
Service	10/13/2011	Receive and review amended scheduling order; docket new dates	0.50	$300.00	$150.00
Service	10/14/2011	Receive and review Defendant's first set of discovery	0.70	$300.00	$210.00
Service	10/19/2011	Prepare discovery to Defendant; prepare service letter for discovery	3.20	$300.00	$960.00
Service	10/20/2011	E-mail from Mr. Louthian about discovery	0.10	$300.00	$30.00
Service	11/09/2011	E-mail from Ms. DeWitt about discovery responses	0.20	$300.00	$60.00
Service	12/02/2011	Receive and review Defendants' discovery responses	2.50	$300.00	$750.00
Service	01/05/2012	E-mail from Ms. DeWitt about status of case; TC to Ms. DeWitt	0.40	$300.00	$120.00
Service	02/07/2012	TC to Ms. DeWitt to discuss case	0.40	$300.00	$120.00
Service	04/18/2012	E-mail from Mr. Johnson with settlement proposal and spreadsheet of calculations; review information from Mr. Johnson	3.50	$300.00	$1,050.00

Service	04/25/2012	TC from Mr. Johnson about amending scheduling order; receive and review motion and proposed order; e-mail from Mr. Johnson's office to Judge Harwell about proposed order	0.40	$300.00	$120.00
Service	04/27/2012	Receive and review revised scheduling order; docket new deadlines	0.50	$300.00	$150.00
Service	05/01/2012	E-mail to Mr. Louthian about case	0.20	$300.00	$60.00
Service	05/02/2012	Message from Mr. Louthian's office about client meeting	0.10	$300.00	$30.00
Service	05/16/2012	Travel to and from Columbia to meet with Mr. Louthian and Plaintiffs; meeting with Mr. Louthian, Ms. DeWitt; Mr. Epps; and Mr. White	4.80	$300.00	$1,440.00
Service	06/02/2012	E-mail to Mr. Johnson about discovery responses	0.10	$300.00	$30.00
Service	06/02/2012	E-mail from Mr. Johnson about case	0.10	$300.00	$30.00
Service	11/28/2012	E-mail from Mr. Johnson about case; TC to Mr. Johnson	0.40	$300.00	$120.00
Service	12/21/2012	Prepare proposed amended scheduling order; e-mail to Mr. Johnson; e-mails to and from Mr. Johnson about amended scheduling order; TC to Mr. Johnson; file motion; e-mail proposed order to Judge Harwell	2.20	$300.00	$660.00
Service	12/27/2012	E-mail form Judge Harwell's docket clerk; e-mail proposed order with signatures of counsel	0.40	$300.00	$120.00
Service	12/28/2012	TC to Herb Louthian about mediation; e-mail from Mr. Louthian; e-mail to Mr. Louthian; e-mail proposed order to Judge Harwell's docket clerk	0.50	$300.00	$150.00
Service	01/04/2013	Receive and review third amended scheduling order; docket new deadlines	0.50	$300.00	$150.00
Service	01/04/2013	Receive and review letter from Frank Shuler re: mediation	0.30	$300.00	$90.00
Service	01/13/2013	Work on discovery responses; review County policies; work on damages calculations	7.50	$300.00	$2,250.00
Service	01/15/2013	Finalize plaintiff's discovery responses; TC to Mr. Johnson about case; e-mail documents to Mr. Johnson; work on damages calculations; e-mail from Mr. Johnson about county's calculations; print Defendants documents; review documents	7.70	$300.00	$2,310.00
Service	01/16/2013	E-mail from Mr. Johnson about sleep-time issue	0.30	$300.00	$90.00
Service	01/28/2013	Receive and review ADR Certification from Mr. Johnson	0.10	$300.00	$30.00
Service	01/30/2013	TC to Ms. DeWitt about mediation; review documents; prepare for mediation	7.40	$300.00	$2,220.00
Service	01/31/2013	Prepare for mediation; prepare PowerPoint presentation for mediation	10.40	$300.00	$3,120.00
Service	02/01/2013	Travel to and from Columbia for mediation; attend mediation; e-mail to Mr. Louthian about mediation outcome	10.20	$300.00	$3,060.00
Service	02/04/2013	E-mail from Mr. Louthian about settlement; TC to Mr. Louthian to discuss case	0.40	$300.00	$120.00
Service	02/05/2013	E-mail from Judge Harwell's civil case manager about settlement; e-mail to Ms. Ciccolella	0.30	$300.00	$90.00
Service	03/06/2013	E-mail from Ms. Wells about settlement; e-mail to Ms. Wells; TC from Mr. Cox about status of approval by county council	0.50	$300.00	$150.00
Service	03/07/2013	E-mail from Mr. Louthian; e-mail from Mr. Johnson; re-sent e-mail to Ms. Wells because of error message	0.30	$300.00	$90.00

Service	03/08/2013	E-mail from Ms. Wells	0.10	$300.00	$30.00
Service	04/05/2013	E-mail from Ms. Wells about status of case; e-mail from Mr. Johnson	0.20	$300.00	$60.00
Service	04/08/2013	TC from Mr. Johnson about settlement approval by Darlington County	0.20	$300.00	$60.00
Service	04/12/2013	E-mail to Ms. Wells about status of settlement	0.20	$300.00	$60.00
Service	04/15/2013	E-mail from Ms. Wells	0.10	$300.00	$30.00
Service	04/16/2013	E-mail from Ms. DeWitt; TC to Ms. DeWitt about settlement approval process	0.50	$300.00	$150.00
Service	05/20/2013	E-mail from Ms. DeWitt about address change of Ms. Herndon (Quick)	0.10	$300.00	$30.00
Service	06/02/2013	Work on settlement documents and apportionment calculations	5.50	$300.00	$1,650.00
Service	06/03/2013	Work on settlement documents and appointment calculations	4.00	$300.00	$1,200.00
Service	06/04/2013	Work on settlement approval documents and apportionment calculations; e-mail to mediator; TC to Ms. DeWitt	6.70	$300.00	$2,010.00
Service	06/05/2013	Prepare draft of declaration for settlement; work on settlement documents	2.80	$350.00	$980.00
Service	06/06/2013	Work on settlement apportionment and cost calculations; e-mails to and from bookkeeper about costs	6.20	$300.00	$1,860.00
Service	06/07/2013	E-mail to Mr. Louthian about settlement documents and apportionment; e-mail from Mr. Louthian; work on settlement documents; e-mail to Ms. DeWitt about spreadsheet	8.60	$300.00	$2,580.00
Service	06/08/2013	Work on settlement calculation spreadsheet; e-mail to Ms. DeWitt about spreadsheet	6.20	$300.00	$1,860.00
Service	06/09/2013	Work on affidavit of Ms. DeWitt; TC to Ms. DeWitt about settlement apportionment; finalize draft of settlement documents; e-mail documents to Mr. Johnson; Review payroll data; work on spreadsheet	7.80	$300.00	$2,340.00
Service	06/10/2013	E-mail from Ms. DeWitt about affidavit; TC to Chris Johnson to discuss settlement documents; e-mail from Mr. Johnson to Ms. Wells; e-mail from Ms. Wells; e-mail from Mr. Johnson about draft settlement documents; e-mails to and from Ms. Wells and Mr. Johnson about settling up conference call	1.40	$300.00	$420.00
Service	06/13/2013	TC with Mr. Johnson and Ms. Wells	0.50	$300.00	$150.00
Service	06/18/2013	Receive and review signed affidavit from Ms. DeWitt	0.10	$300.00	$30.00
Service	06/25/2013	E-mail from Ms. Wells about status of settlement motion; work on settlement documents; e-mail draft of settlement documents to Ms. Wells; e-mail from Mr. Johnson	8.50	$300.00	$2,550.00
Service	06/26/2013	E-mail from Ms. Wells	0.10	$300.00	$30.00
Service	06/28/2013	E-mail from Mr. Louthian about status of case; e-mail to Mr. Louthian	0.20	$300.00	$60.00
Service	07/09/2013	E-mail from clerk's office about status of case; e-mail from Mr. Johnson; e-mail to Judge Harwell's docket clerk; e-mail from Ms. Wells	0.40	$300.00	$120.00
Service	07/11/2013	E-mail from Ms. Wells; e-mail to Ms. Wells about setting conference call; e-mail to Mr. Johnson; e-mail from Mr. Johnson; e-mail from Ms. Wells	0.40	$300.00	$120.00
Service	07/12/2013	TC with Ms. Wells and Chris Johnson about settlement documents; review damages calculations; e-mail to Ms. Wells about revisions to	1.90	$300.00	$570.00

		notice; e-mail from Mr. Johnson; e-mail from Ms. Wells; revise proposed settlement documents			
Service	07/13/2013	Work on proposed order; revise settlement documents; e-mail to Mr. Johnson and Ms. Wells with revised settlement documents	1.70	$300.00	$510.00
Service	07/15/2013	E-mail from Ms. Wells about proposed filings; e-mail from Mr. Johnson with red-lines to proposed documents; review red-lines from Mr. Johnson; make corrections to proposed settlement documents; e-mail to Ms. Wells; e-mail to Mr. Johnson; e-mail from Mr. Johnson about mailing	1.60	$300.00	$480.00
Service	07/18/2013	Finalize consent motion to approve settlement and attachments; file motion via ECF; e-mail to Judge Harwell with proposed order	1.80	$300.00	$540.00
Service	07/19/2013	E-mail to Ms. Miller to prepare courtesy copy of filings to Judge Harwell; e-mail from Ms. Miller about Judge Harwell's filing preferences	0.20	$300.00	$60.00
Service	07/23/2013	E-mail from Mr. Johnson with mailing labels and lists of Darlington County EMS employees	0.20	$300.00	$60.00
Service	08/12/2013	E-mail from Ms. DeWitt about status of case; TC to Ms. DeWitt to discuss status of case	0.30	$300.00	$90.00
Service	09/05/2013	E-mail from Mr. Louthian about status of case; e-mail to Mr. Johnson	0.20	$300.00	$60.00
Service	09/12/2013	E-mail from Ms. Wells about approval of proposed order and to schedule dates for fairness hearing; e-mail from Mr. Johnson	0.30	$300.00	$90.00
Service	09/17/2013	E-mail from Mr. Johnson about status of scheduling	0.10	$300.00	$30.00
Service	09/20/2013	Review dates for hearing; e-mail to Mr. Johnson about possible hearing dates; e-mail from Mr. Johnson	0.50	$300.00	$150.00
Service	09/23/2013	E-mail from Ms. Wells about date of fairness hearing; e-mail from Chris Johnson about hearing date; e-mail from Ms. Wells; e-mail to Ms. Wells about time and location of hearing; e-mail from Ms. Wells	0.50	$300.00	$150.00
Service	09/24/2013	Receive and review order from court re: preliminary approval of settlement and notice of hearing; e-mail to Ms. DeWitt; e-mail to Mr. Louthian; receive and review notice of appearance from Fred Williams; confer with Ms. Miller about mailings; e-mail to West about adding information to web-site	2.50	$300.00	$750.00
Service	09/25/2013	E-mail from Ms. Miller about mailing of notices and letters to opt-in plaintiffs; e-mail from Mr. Louthian about case; e-mail files to Ms. Miller for letters	0.40	$300.00	$120.00
Service	09/26/2013	Confer with Ms. Miller about letters to opt-in plaintiffs	0.20	$300.00	$60.00
Service	09/29/2013	Review proposed letters to opt-in plaintiffs to cross-reference apportionment spreadsheet; e-mail to Herb Louthian about case	0.90	$300.00	$270.00
		Quantity Subtotal	**187.0**		
				Services Subtotal	**$56,240.00**

Expenses

Type	Date	Description	Quantity	Rate	Total
Expense	03/16/2011	Mileage to and from Columbia for meeting with Plaintiffs and Mr. Louthian (220 miles @ $0.51 per mi.)	1.00	$112.20	$112.20
Expense	03/28/2011	Filing fee, federal court	1.00	$350.00	$350.00

Expense	10/19/2011	Postage	1.00	$3.84	$3.84
Expense	10/19/2011	Copies (36 x .20)	1.00	$7.20	$7.20
Expense	05/16/2012	Mileage to and from Columbia for meeting with Plaintiffs and Mr. Louthian (220 miles @ $0.555 per mi.)	1.00	$122.10	$122.10
Expense	01/15/2013	Copies - 45 x .20	1.00	$9.00	$9.00
Expense	01/15/2013	Postatge - Sent discovery responses to counsel	1.00	$3.80	$3.80
Expense	01/15/2013	Contract copies and 10 binders (pages 1-5830)--PLCG, Inc.	1.00	$1,030.59	$1,030.59
Expense	02/01/2013	Mileage to and from Columbia for mediation (220 miles @ $0.565 per mi.)	1.00	$124.30	$124.30
Expense	10/01/2013	Copies: 670 x .20	1.00	$134.00	$134.00
				Expenses Subtotal	**$1,897.03**
		Quantity Total	**187.0**		
				Subtotal	**$58,137.03**
				Total	**$58,137.03**

Attachment 2

Anna Dewitt, et al. v. Darlington County

Time Sheet

Herbert W. Louthian, Sr.

	Time (Hours)
Initial meeting with client	1
Letter to client requesting additional information	.4
Conference with client, review fee contract, correspondence	2
Telephone call and emails to D. Rothstein	.6
Preparation of separate fee agreements	.6
Correspondence with potential co- plaintiffs	1
Office conference with D. Rothstein, telephone call to client, review file	1.6
Emails to and From D. Rothstein	.6
Letter to Anna Dewitt	.2
Letters to Gleason, White	.4
Letters Bowen, Kissiah, D. Rothstein	.8
Letter to Dukes	.2
Letter to D. Rothstein	.2
Memo to file	.4
Review complaint, Confidentiality order, Defendant's response to court's interrogatories, Defendant's supplemental 26f report, discovery plan, notice of joinder, Plaintiffs 26.01 filing, scheduling order	2.4
Review Answer	.2
Rothstein letter	.2
Emails to and from Rothstein	.4
Emails from Rothstein, file review	.2
Emails from Rothstein, file review	.2
Emails from Rothstein, file review	.2
Total	**13.8**

Attachment 3

Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
3/16/11	Initial Consultation with DER. Set-up file and created client profile.	25
3/16/11	Created Parties Spreadsheet and entered information.	20
3/27/11	Updated address for Tracy Phillips.	5
3/28/11	Complaint filed in District Court. Receipt of ECF for Summons, Complaint, and Plaintiff's 26.01's. Saved to file, printed copies for filing, created Pleading Index, and filed same.	30
3/29/11	Receipt of ECF filing for Notice of Filing and Notice of Joinder - 1) Exhibit Consent to Join Lawsuit forms for Johnny L. Fedorchuk and Cynthia Kissiah. Saved to system, printed copies for filing, updated Pleading Index, and filed same.	10
4/12/11	Receipt of ECF filing for Notice of Joinder filed on behalf of Jennifer E Amerson, Anna C DeWitt, David Hodge, Lynette Hudson, Lena M Quick. Saved to system, printed copies for filing, updated Parties Spreadsheet, updated Pleading Index and filed same.	15
4/19/11	Receipt of ECF filing - Defendant's Answer and Local Rule 26.01 Answers to Interrogatories by Darlington County South Carolina. Saved to system, printed copies for filing, updated Pleading Index and filed same.	15
4/19/11	Receipt of ECF filing - Scheduling Order. Saved to system, printed copy for filing, created Orders Index, and filed same. Entered docket dates on calendar.	30
5/23/11	Receipt of ECF filing - both Plaintiffs' Local Rule 26.03 Answers to Interrogatories, and Defendant's Local Rule 26.03 Answers to Interrogatories. Saved to system, printed copy for filing, updated Pleading Index, and filed same.	15

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Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
5/23/11	Receipt of ECF filing - Joint 26(f) Report. Saved to system, printed out copy, updated Pleading Index, and filed same.	10
5/23/11	Receipt of ECF filing - Joint Motion for Confidentiality Order. Saved to system, printed copy, created Motion Index, and filed same.	15
5/24/11	Receipt of ECF corrected filing for Joint 26(f) Report, and corrected filing for Joint Motion for Confidentiality Order. Updated Pleading Index to reflect correction.	10
5/24/11	Receipt of ECF filing - Order granting Joint Motion for Confidentiality Order. Saved to system, printed copy, updated Order Index, and filed same.	10
6/1/11	Receipt of ECF filing - Notice of Joinder for Justin Mays and Michelle Smith. Saved to system, printed copy, updated Pleading Index, and filed same. Updated Parties Spreadsheet.	15
6/14/11	Receipt of ECF filing - Notice of Joinder for Betty W. Tanner and Linwood R. Epps. Saved to system, printed copy, updated Pleading Index, and filed same. Updated Parties Spreadsheet.	15
6/30/11	Sent updated Parties Spreadsheet to Anna DeWitt.	5
7/6/11	Receipt of ECF filing - Notice of Joinder for Candace B. Gleason. Saved to system, printed copy, updated Pleading Index, and filed same. Updated Parties Spreadsheet.	10
7/7/11	Receipt of ECF Deficiency. Copy filed with Court not clear. Corrected and sent to Court for replacement. Receipt of correct ECF filing. Corrected and replaced documents.	20
8/12/11	Receipt of ECF Filing - Notice of Joinder for Robin Locklair. Saved copy to system, printed copy for filing, updated Pleading Index, and filed same. Updated Parties Spreadsheet.	10

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Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
8/29/11	Receipt of ECF filing - NOTICE of Request for Protection from Court Appearance by Christopher W Johnson for 9/22/2011 through 9/26/2011. Saved to system, printed copy out, updated Pleading index, and filed same. Docketed dates on calendar.	15
10/11/11	Receipt of ECF filing - Joint Motion to Amend/Correct Scheduling Order. Saved to system, printed copy for filing, updated Motions Index, and filed same.	10
10/13/11	Receipt of ECF Filing - FIRST CONSENT AMENDED SCHEDULING ORDER. Saved to system, printed copy for filing, updated Orders Index, and filed same. Updated Docket Calendar.	20
11/9/11	Receipt of email from Anna DeWitt questioning a package the parties received in the mail. Forwarded email on to DER for response	5
1/18/12	Request from Anna DeWitt regarding status of case. Sent email to DER for response.	5
1/30/12	Request from Anna DeWitt regarding status of case. Sent email to DER for response.	5
2/7/12	Telephone call from Anna DeWitt regarding process of case. Sent email to DER to give her clarification of court procedures.	5
4/25/12	Receipt of ECF filing - Joint Motion to Amend Scheduling Order. Saved to system, printed copy for filing, updated Motions Index, and filed same.	10
4/27/12	Receipt of ECF filing - Second Consent Amended Scheduling Order. Saved to system, printed copy for filing, updated Motions Index, and filed same. Updated Docket Calendar.	20

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Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
5/2/12	Telephone call from Breanne at Louthian Law Firm regarding meeting scheduled for 5/16/12. Email message to DER.	10
10/8/12	Receipt of email from Anna DeWitt asking status of case and requesting an updated copy of the spreadsheet. Email DER to call Anna DeWitt. Sent Anna DeWitt an updated copy of the Parties Spreadsheet. Receipt of responding email from Anna DeWitt.	10
10/29/12	Receipt of email from Anna DeWitt requesting status of case and asking about court dates. Responded to email stating we were not eligible for trial until May 2013. Sent DER email message to call Anna DeWitt.	5
10/31/12	Voicemail message from Chris Johnson regarding emails he had sent to DER. Sent DER email to call Chris Johnson.	5
12/21/12	Receipt of ECF for Consent Motion to Amend/Correct Scheduling Order. Saved to system. Printed copy out for filing. Updated Motion Index and filed same.	10
12/27/12	Receipt of notification from Court that Order did not comply with Judge's preferences.	5
12/27/12	Receipt of ECF modifying Motion to Amend/Correct Scheduling Order. Saved to system. Printed copy out for filing. Updated Motion Index and filed same.	10
1/4/13	Receipt of ECF on THIRD CONSENT AMENDED SCHEDULING ORDER. Saved to system and printed out for filing. Updated Order Index and filed same. Updated calendar docket.	15
1/14/13	Set up case in Clio case management system	45

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Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
1/15/13	Scanned documents to be produced in Plaintiff's discovery responses in to system.	30
1/28/13	Receipt of ECF on ADR Statement/Certification. Saved to system and printed out for filing. Updated Pleading Index and filed same.	5
1/30/13	Receipt of email from Anna DeWitt regarding mediation. Responded to email with the information and cc'd DER.	5
2/15/13	Reminder (from Clio) that deadline of Plaintiff's Motion for Conditional Class Certification is coming due. Email to DER.	5
4/17/13	Receipt of email from Anna DeWitt regarding the approval of the settlement by County Council and various other questions regarding the status of the settlement. Emailed DER to respond to her questions. Let Anna DeWitt know that I sent her message on the DER.	5
4/17/13	DER had problems responding to Anna DeWitt's email. Forwarded his response to Anna DeWitt.	5
5/23/13	Updated information received on change of address for Michelle Herndon (Quick).	5
6/4/13	Receipt of Anna DeWitt email requesting status report. Forwarded email to DER for response.	5
6/18/13	Receipt of Anna DeWitt affidavit. Scanned and saved to system. Emailed to DER.	5
7/19/13	Prepared to send Judge Harwell courtesy copies of Motion to Certify Class. Looked-up Judge Harwell's preferences and discovered Judge Harwell does not require copies.	5
8/12/13	Request from Anna DeWitt for status on case. Emailed DER to respond to her request.	5

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Anna C. DeWitt, et al. v. Darlington County, South Carolina
Time - Lorry Miller

DATE	DESCRIPTION	TIME (minutes)
9/26/13	Worked on and completed mailmerge of letters to be sent to parties in lawsuit.	120
10/1/13	Prepared mailing.	120
10/4/13	Receipt of Malissa Burnette's affidavit. Saved to system. Emailed copy to DER.	5
10/4/13	Metered mailing	10
	TOTAL TIME (MINUTES)	830

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Exhibit D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Darlington County, South Carolina, Defendant.	Civil Action No. 4:11-cv-00740-RBH **AFFIDAVIT OF M. MALISSA BURNETTE, ESQ. IN SUPPORT OF DAVID E. ROTHSTEIN, ESQ.**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

PERSONALLY appeared before me M. Malissa Burnette who, after being duly sworn, deposes and states the following:

1. I am a partner in the firm of Callison, Tighe & Robinson, LLC in Columbia, South Carolina.

2. I graduated from the University of South Carolina School of Law in 1977. I was an attorney for the Governor of South Carolina from 1977-1979. I served as Chief of Staff for the Lieutenant Governor of South Carolina from 1979-1982. After managing the campaign for Attorney General Travis Medlock in 1982, I co-founded the law firm of Gergel & Burnette in Columbia. In 1996, I co-founded the law firm of Burnette & Leclair, P.A., which in 2005

became Burnette & Rothstein, P.A. I merged my practice with Callison, Tighe & Robinson, LLC in August 2010 when I was invited to join the firm as a member.

3. I have been a Certified Specialist in Employment and Labor Law since 1993, a Certified United States District Court Mediator since 2010, have taught over fifty employment law CLE's, and have extensive experience in the field of employment law. I am admitted to practice in the United States District Court, the Fourth Circuit Court of Appeals and the United States Supreme Court. I am the co-author and editor of all four editions of Labor and Employment Law for South Carolina Lawyers, (S.C. Bar) In May 2011 I received the first Distinguished Lawyer Award from the South Carolina Bar's Employment and Labor Law Section.

4. I have known and worked with David E. Rothstein for over ten years. We were law partners from 2005 through most of 2010. During that time I had the opportunity to closely observe his work habits and to interact with him on a daily basis. I can verify that he works diligently, efficiently and effectively for his clients. He is well-qualified to handle a complex employment case such as representing the plaintiffs named in this matter, as he has successfully prosecuted a similar case involving a larger class of plaintiffs.

5. I have carefully reviewed Mr. Rothstein's fee petition, and am aware that he devoted approximately 190 hours to representing his clients over a 30-month period, and incurred costs of $1763.03. The amount of time expended and the costs incurred appear to be very reasonable, given the amount and type of tasks involved. Having practiced in a two-lawyer firm for much of my own career, I believe that the time expended and the costs incurred in this case would be challenging for a solo practitioner, and would impact his ability to work on

income-generating hourly-fee cases.

6. My regular fee rate is $300.00 per hour, but is higher in certain cases. In contingent fee cases, I normally agree with my client to a one-third fee if the matter is settled prior to litigation, and 40% if a case goes to court. I believe these hourly rates and contingency percentages are reasonable given my years of experience and the fees customarily charged in this area for this type of legal representation. Mr. Rothstein's $300 per hour rate and a one-third contingency fee are within the range of fees that are consistent with his legal experience, and that are customary in the community for this type of legal work.

M. Malissa Burnette

M. Malissa Burnette

SWORN and subscribed to before me
this 3rd day of October, 2013.

Denise Minor

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 2-11-2018

Exhibit E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Anna C. DeWitt, David Hodge, Lena M. Quick, Lynette Hudson, and Jennifer E. Amerson, all individually and on behalf of all other similarly situated individuals, Plaintiffs, vs. Darlington County, South Carolina, Defendant.	Civil Action No. 4:11-cv-00740-RBH **AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION TO APPROVE ATTORNEY'S FEES AND COSTS**

Brian Murphy states that he is an adult over the age of eighteen (18) years of age, that the factual matters herein are true and correct to the best of his knowledge, and that the opinions expressed herein are provided in good faith and are honestly held by the affiant:

1. I am a 1992 graduate of the University of South Carolina School of Law with honors and have practiced primarily in the area in the area of employment law during the past ten years. I was employed by two large defense firms (Morgan, Lewis & Bockius and Ogletree Deakins) for approximately four (4) years. Since 1996, I have represented primarily plaintiffs in employment litigation. I am licensed to practice law before the following courts: The United States Supreme Court; The United States Court of Appeals for the Third Circuit; The United States Court of Appeals for the Fourth Circuit; the United States District Court for the District of South Carolina; The United States District Court for the Middle District

of Pennsylvania; all courts in the Commonwealth of Pennsylvania and all courts in the State of South Carolina. My Martindale-Hubbell rating is AV. I am listed in both Best Lawyers and Super Lawyers.

2. Since April, 1994 I have practiced in Greenville, South Carolina. I am familiar with or know well most of the employment law practitioners throughout the state.

3. I have known David Rothstein since law school when we both served on the University of South Carolina Law Review.

4. Mr. Rothstein enjoys a reputation as a top practitioner in this area. I first learned of his reputation as a practitioner when he was still practicing in Columbia. I have become more familiar with Mr. Rothstein since he has moved to the Upstate. We now share office space. Mr. Rothstein is someone you can always approach with a complex employment-law issue and he always has good insight and displays an impressive depth of knowledge in many areas. Mr. Rothstein is one of just a few plaintiff's lawyers who have sought and obtained certified specialist status in South Carolina for labor and employment law.

5. I have reviewed the motion and docket entries on PACER for this matter. I also am aware of the time and attention give to this matter by Mr. Rothstein. I have represented clients in wage and hour cases and also have been involved in default dispute motions practice.

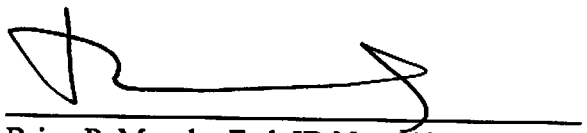
6. I respectfully submit that the amount requested extremely reasonable and that the overall petition is fair and reasonable given the complexities of this matter and the skill and effort necessarily to represent Plaintiffs in this matter.

7. I am also aware that Mr. Rothstein has been awarded $350 per hour for his time in other cases where his clients have prevailed. That rate is reasonable given the charged by certified specialists in employment law with similar skills and experience.

8. I also am well aware of Mr. Louthian, who is a luminary in the employment Bar and a trailblazer in terms of plaintiff's rights in South Carolina. The fact he has participated in this case should lay to rest any question as to whether the amount of the fee sought here is reasonable.

I swear that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated this 1st day of October, 2013.



Brian P. Murphy Fed. ID No. 6405

DeWitt et al. v. Darlington County, South Carolina,
C/A No. 4:11-cv-00740-RBH

Unpublished Decisions

(1) Bredbenner v. Liberty Travel, Inc., 2011 WL 1344745 (D.N.J. Apr. 8, 2011)

(2) Clark v. Ecolab, Inc., 2010 WL 1948198 (S.D.N.Y. May 11, 2010)

(3) Hoffman v. First Student, Inc., 2010 WL 1176641 (D. Md. Mar. 23, 2010)

(4) Smith v. Krispy Kreme Doughnut Corp., 2007 WL 119157 (M.D.N.C. Jan. 10, 2007)

2011 WL 1344745
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Deanna BREDBENNER, Paul Gilbert, and Belinda Serrano, both individually and on behalf of all other similarly situated persons, Plaintiffs,
v.
LIBERTY TRAVEL, INC., Defendant.
Carol Connell, William Krumpholz, Corrine Orchin, Nicole Reid, and Leigh Anne Hubbs, both individually and on behalf of all other similarly situated persons, Plaintiffs,
v.
Liberty Travel, Inc., Flight Centre USA, Inc., Gilbert Haroche, and Michelle Kassner, Defendants.

Civil Action Nos. 09–905 (MF), 09–1248(MF), 09–4587(MF). | April 8, 2011.

Attorneys and Law Firms

Patrick Joseph Monaghan, Jr., Monaghan, Monaghan, Lamb & Marchisio, Montvale, NJ, for Plaintiff.

Michael T. Grosso, Littler Mendelson, P.C., Newark, NJ, for Defendants.

Opinion

OPINION

FALK, United States Magistrate Judge.

***1** This case and the companion actions described below arise from a series of complaints initiated against Liberty Travel, Inc. by former employees for unpaid overtime. On July 9, 2010, the parties reached a global settlement in principle. The Court provisionally certified a settlement class and granted preliminarily approval of the class action settlement on November 19, 2010. CM/ECF No. 97. Presently before the Court are three related motions seeking (a) final certification of the settlement class; (b) final approval of the class action settlement; (c) approval of the collective action settlement; (d) attorneys' fees and costs; and (e) service payments for named Plaintiffs. CM/ ECF Nos. 98, 102, 105. A fairness hearing was held on March 14, 2011. CM/ECF No. 113. For the reasons set forth below, Plaintiffs' motions are **granted** in their entirety.

I. BACKGROUND

Defendant Liberty Travel, Inc. ("Liberty") operates a network of retail stores throughout the country that offer travel services (Answer ¶¶ 2, 29). The company employs travel agents to service its customers (*Id.* ¶ 2). Travel agents as part of their job description are required to work in excess of forty (40) hours as the position may demand (Pls.' Brief in Supp. of Mot. to Certify a FLSA Action Attach. 3, Ex. 3 ("Employment Agmt.") ¶ 2.2 [CM/ECF No. 15]; *see also* Decl. of Michael J.D. Sweeney in Supp. of Pls.' Renewed Mot. for Expansion of the FLSA Collective Action Class ("Aug. 28, 2009, Sweeney Decl.") Ex. D, at 25 ("There will be times when you will need to work overtime....") [CM/ECF No. 53]). Plaintiffs are generally a group of former Liberty employees that worked as travel agents in the Northeastern United States.

A. Compensation Scheme for Liberty Travel Agents

Travel agents working for Liberty are compensated through a mix of weekly base pay, commissions, bonuses, and overtime for hours worked in excess of forty (40) per week (Employment Agmt. ¶¶ 3.1–3.4; Aug. 28, 2009, Sweeney Decl. Ex. A ("Joint Stip."), at 1). Overtime pay specifically is calculated using a formula that is appended to Liberty's form employment agreement as Exhibit A (Employment Agmt. ¶¶ 3.2; Joint Stip. 1). Employees eligible for overtime receive one-half (1/2) their effective hourly rate, derived from a composite of their weekly base pay and the total number of hours worked that week, for each overtime hour (Employment Agmt. Ex. A; Joint Stip. 1). The employment contract also specifies that their compensation scheme would "convert" to a fixed hourly rate once the employee exhausts all previously allocated personal time for each hour that they work under forty (40) in any given week (Employment Agmt. ¶ 3.3; Joint Stip. 1). Liberty apparently changed to a different payment model at some point in September 2008 (Pls.' Brief in Supp. of Mot. to Certify a FLSA Action Attach. 3 ("Fiorenzo Decl.") ¶ 12 [CM/ECF No. 15]).

B. Summary of Claims

***2** Plaintiffs in these matters maintain that the formula used by Liberty to calculate overtime establishes a "diminishing" pay structure (Compl.¶ 2). Because the overtime rate of pay is not fixed and instead dependent on the sum total of

hours accumulated each week, they argue that overtime pay progressively decreases as the number of hours spent working overtime increases (*Id.*). Liberty contends that it properly paid overtime under applicable law by using the widely-accepted "fluctuating work week" ("FWW") method to determine the amount of overtime due to each employee (Def .'s Brief in Opp. to Pls.' Mot. to Certify FLSA Representative Action and to Issue Notice 11–13). *See* 29 C.F.R. § 778.114 (Department of Labor interpretive rule codifying Supreme Court jurisprudence on the FWW approach to overtime); *see also Urnikis–Negro v. Am. Family Prop. Serv.*, 616 F.3d 665, 673 (7th Cir.2010) (discussing background and construction of § 778.114); *Hunter v. Sprint Corp.*, 453 F.Supp.2d 44, 55 (D.D.C.2006) (same).

C. Procedural History

Plaintiffs initially brought suit against Liberty and its parent company, Flight Centre USA, Inc., in the U.S. District Court for the Southern District of New York under the caption *Reid v. Liberty Travel, Inc.* on November 17, 2008. That action was dismissed without prejudice to re-filing in the District of New Jersey for improper venue on February 20, 2009 (Decl. of Michael J.D. Sweeney in Sup. of Pls.' Mot. for Final Certification of the Settlement Class ("March 4, 2011, Sweeney Decl.") ¶ 1 [CM/ECF No. 100]).

On February 27, 2009, Deanna Bredbenner, Paul Gilbert and Belinda Serrano filed this putative collective action against Liberty Travel, Inc. under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (2006), for unpaid overtime. CM/ECF No. 1. On March 19, 2009, Carol Connell, William Krumpholz, Corrine Orchin, and Nicole Reid, filed a class action on behalf of a putative class comprised of Maryland, Massachusetts, and New York residents, against Liberty, Flight Centre, and two high-ranking Liberty executives, Gilbert Haroche and Michelle Kassner, under state labor law for similar reasons. Docket No. 09–1248, CM/ECF No. 1. [1] The *Connell* complaint was amended to include a cause of action under 29 U.S.C. § 216(b) for violation of the overtime provisions of the FLSA. Docket No. 09–1248, CM/ECF No. 4. On September 4, 2009, Leigh Anne Hubbs filed suit against Liberty Travel, Inc., Flight Centre, Gilbert Haroche, and Michelle Kassner, under the FLSA and New Jersey wage and hour law, individually and on behalf of all others similarly situated. Docket No. 09–4587, CM/ECF No. 1.

1 All references to docket entries standing alone relate to submissions made in the lead *Bredbenner* case, and all references to docket entries preceded by a case number relate to submissions made in the case assigned to that case number. For example, the above-noted reference indicates entry number one (1) on the *Connell* docket, which is assigned case number 09–1248.

Because many of the issues involved in the *Connell* case were similar to those raised in *Bredbenner*, the *Connell* action was stayed pending resolution of the legal issues in *Bredbenner* (Sept. 2 Order, at 3 [Docket No. 09–1248, CM/ECF No. 31]). The Court ordered that "the final determination of those issues in *Bredbenner* will apply with equal force and effect to the FLSA claims in [*Connell*]" (Sept. 2 Order, at 3). For similar reasons, the *Hubbs* case was consolidated and stayed with *Connell.* Docket No. 09–1248, CM/ECF No. 43. [2]

2 The *Hubbs* case, which at that point was consolidated with *Connell* (*"Hubbs/Connell"*), was subsequently consolidated with *Bredbenner*, CM/ECF No. 82, but the Court later unconsolidated the *Hubbs/Connell* matter from *Bredbenner* and re-stayed the *Hubbs/Connell* action. CM/ECF No. 84. Thus, the cases were on the same procedural posture as they were before *Hubbs* was consolidated with *Bredbenner*.

***3** Only July 31, 2009, the Honorable William J. Martini conditionally certified the FLSA claim in *Bredbenner* as a collective action for all persons employed by Liberty as a travel agent in Delaware, Maryland, and New York, between August 13, 2006, and September 1, 2008. *See Bredbenner v. Liberty Travel Inc.*, No. 09–905, 2009 WL 2391279 (D.N.J. July 31, 2009); *see also White v. Rick Bus Co.*, 743 F.Supp.2d 380 (D.N.J.2010) (describing two-tiered approach to class certification of FLSA claims). In all, one hundred and forty-three (143) individuals eventually opted-in to the *Bredbenner* action, nine (9) opted-in to the *Connell* action, and two (2) opted-in to the *Hubbs* action (March 4, 2011, Sweeney Decl. ¶¶ 6, 14, 16).

D. Joint Statement of Facts and Discovery

Prior to entering settlement negotiations, the parties had conducted an extensive investigation into the underlying claims. The parties represent that they recognized that liability could likely be resolved on summary judgment and both sides were amenable to stipulating to certain core facts (March 4, 2011 Sweeney Decl. ¶ 9). Beginning in July 2009, they worked together on crafting a joint statement of facts pursuant to Local Civil Rule 56.1 (*Id.*). Discovery proceeded on disputed matters.

As part of discovery, Plaintiffs' counsel received and analyzed a large amount of electronic discovery (*Id.* ¶ 19). In January 2010, Defendant deposed each of the named parties, and Plaintiffs held a 30(b)(6) deposition of Defendant (*Id.* ¶ 10). Plaintiffs also noticed other depositions as well, (*Id.* ¶ 11), and filed a motion to compel further discovery, CM/ECF No. 90. Plaintiffs also informally interviewed several putative class members and opt-in plaintiffs to gather additional information (March 4, 2011 Sweeney Decl. ¶ 19). The parties also had the benefit of previously-obtained discovery from a distinct lawsuit against Liberty that involved twenty-nine (29) depositions, dispositive motion practice, and trial decisions (*Id.* ¶ 19).

E. Settlement Negotiations

The Court held in-person settlement conferences on five separate occasions since February of 2010. *See* CM/ECF Nos. 80, 83, 86–88. After nearly six months of negotiations, and numerous settlement conferences, the parties reached a global settlement in principle on July 9, 2010, that resolves all claims in each of the pending overtime suits (March 4, 2011 Sweeney Decl. ¶ 21). The Court oversaw the negotiation process (*Id.* ¶ 62). The salient terms of the settlement were memorialized on the record on July 9, 2010. *See* CM/ ECF No. 94.

F. Terms of Settlement

The settlement agreement creates a common fund of $ 3,000,000 for: (1) settlement payments as consideration for the release of all class claims; (2) attorneys' fees for class counsel; (3) enhancements or "service payments" for class representatives; (4) payroll taxes associated with the settlement; and (5) claims administration expenses (Pls.' Mot. for Prelim. Approval of Class Settlement and Other Relief Ex. A ("Settlement Agmt.") § III.B.1 [CM/ECF No. 96]). It contemplates the prospective certification of a state law settlement class (*Id.* § II.OO). Workers eligible to receive a payout under the settlement include all named plaintiffs, all state law class members who do not affirmatively opt-out, and all class members who affirmatively opted-in to one of the FLSA actions (*Id.* § 11.00 (cross-referencing § II.N)).

***4** The common fund will be distributed in the first instance to qualifying class members, less their pro-rata share of attorneys' fees, and to satisfy any "service payments" approved by the Court (*Id.* § III.B.1.f-e). All class members who timely file a valid claim will receive one and a half (1.5) times their hourly rate, based on a forty (40) hour work week, for each overtime hour they worked during the class period less overtime already paid to them by Liberty (*Id.* § II.S). All original opt-in plaintiffs will also receive a premium equal to twenty-five percent (25%) of their total overtime claim (*Id.* § II.S). The minimum payout is $50 (*Id.* § II.S). Fifty percent (50%) of the total payment will constitute wages, subject to income taxation, and the other fifty percent (50%) will constitute liquidated damages (*Id.* § III.B.1.c). The remaining money will be used to satisfy claims administration expenses and payroll taxes associated with the settlement payout (*Id.* § III.B.1.g). Finally, Liberty will retain any unused funds (*Id.* § III.B.1.g).

G. Preliminary Approval and Notice

On November 19, 2010, the Court provisionally certified for purposes of settling the state law claims only, *see In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 792 (3d Cir.), *cert. denied*, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (discussing and approving use of settlement-only classes), a class consisting of all individuals who worked as full-time Liberty travel agents:

(1) in Maryland between March 19, 2006, and August 31, 2008;

(2) in Massachusetts between March 19, 2007, and August 31, 2008;

(3) in New Jersey between September 4, 2007, and August 31, 2008; and

(4) in New York between March 19, 2003, and August 31, 2008

(Nov. 19 Order ¶ 31 [CM/ECF No. 97]). The Court also appointed Getman & Sweeney, PLLC as class counsel, preliminarily approved the class action settlement of state claims as fair, and approved the notice and claim forms used to apprise potential class members about the lawsuit and fairness hearing (*Id.* ¶¶ 21, 38, 41).

Following preliminary approval of the settlement class and the proposed settlement agreement, Liberty provided a list of possible class members to the claims administrator (Declaration of Bernella Lenhart in Supp. of Mot. for Final Approval of Class Action Settlement ("Lenhart Decl.") ¶ 2 [CM/ECF No. 101]). A notice package was mailed out on December 3, 2010 (*Id.* ¶ 3). The notice contained information on the underlying claims in each case, the terms of the settlement, the period of time within which to file objections,

the ability to opt-out, and the date of the fairness hearing (*Id.* Ex. A "Settlement Notice")). Out of the one thousand two hundred and eighty-three (1,283) members that were mailed a package, five hundred and thirty two (536) returned a claim form to the claim administrator (Lenhart Decl. ¶¶ 2, 9). [3] Only six class members chose to opt-out of the settlement (*Id.* ¶ 10). The claims administrator received no objections whatsoever (*Id.* ¶ 11). The Court held a fairness hearing on Monday, March 14, 2011. *See* CM/ECF No. 113.

3 Of the returned forms, four (4) were postmarked after the deadline to file a valid claim and seven (7) contained various deficiencies (Lenhart Decl. ¶¶ 2, 9). The parties advised the Court that they would still treat the four (4) late filings as eligible under the settlement (Transcript of Mar. 14, 2011 Fairness Hearing ("Tr"), at 28:10–19 [CM/ECF No. 113]). In addition, the Court ordered that all members who filed an inadequate claim form should be provided (10) additional days to cure any deficiencies in their previously filed form (Tr., at 28:5).

II. DISCUSSION

A. Certification of Settlement Class

***5** In order to obtain class certification, a party must show that all four prerequisites of Rule 23(a) are met and that the case qualifies as at least one of the matters identified in Rule 23(b). *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir.1994) (citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.3d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975)). Class certification calls for a "rigorous analysis" of the factual and legal allegations. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir.2006) (quoting *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.61[1] (3d ed.2008). The Court therefore may conduct a "preliminary inquiry" into the merits before it determines that the requirements for class certification are satisfied. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316–17 (3d Cir.2008) (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir.2001)).

A party that seeks to certify a settlement class must satisfy the same requirements necessary to maintain a litigation class. *In re Gen. Motors Corp.*, 55 F.3d at 778. The substantive terms of the settlement agreement may factor into certain aspects of the certification calculus. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Plaintiffs move under Rule 23(b)(3). The Court preliminarily found that the requirements of Rules 23(a) and 23(b)(3) were met. The Court now finds that all the requirements for class certifications are in fact satisfied.

i. Rule 23(a) of the Federal Rules of Civil Procedure

A case may be certified as a class action under Rule 23 only when:

(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.

Fed.R.Civ.P. 23(a); *Weiss v. York Hosp.*, 745 F.2d 786, 807 (3d Cir.1984), *cert. denied*, 470 U.S. 1060 (1985). These four threshold requirements are commonly referred to as "numerosity," "commonality," "typicality," and "adequacy of representation," respectively. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir.2004).

a. Numerosity

Rule 23(a)(1) requires that the size of the class is so large that joinder of all potential parties is impracticable. Impracticability does not mean impossibility. *Dewey v. Volkswagen of Am.*, 728 F.Supp.2d 546, 656 (D.N.J.2010). Rather, it means that joinder would be "extremely difficult or inconvenient." *Szczubelek v. Cendant Mortgage Corp.*, 215 F.R.D. 107, 116 (D.N.J.2003) (citing *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J.1993)). While no minimum number is required, the Third Circuit has stated that numerosity is generally met where the moving party "demonstrates that the potential number of plaintiffs exceeds 40...." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir.2001) (citing 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[3][a] (3d ed.1999)), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2661, 153 L.Ed.2d 836 (2002). The Court should also take into account other factors, such as the geographic dispersion of the anticipated class. *See Osgood v. Harrah's Entm't, Inc.*, 202 F.R.D. 115, 122 (D.N.J.2001) (citing Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* (hereinafter *Newberg on Class Actions*) § 3.06, at 3–27 (3d ed.1992)).

***6** The numerosity requirement is satisfied in this case. The class approved by this Court contains over 1,200 putative class members, at least 526 of which have expressed interest in participating in this litigation. The members of the class are dispersed throughout four different states and the sheer number of potential plaintiffs would make joinder impracticable. *See* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.05, at 3–25 (4th ed.2002) (observing that classes "numbering in the hundreds" will alone satisfy numerosity); *see also NAACP v. N. Hudson Regional Fire & Rescue*, 255 F.R.D. 374, 382 (D.N.J.2009), *remanded on other grounds*, 367 Fed. Appx. 297 (3d Cir.2010) ("Even if all of the approximately 850 members of the proposed class here still live in Essex, Union or Southern Hudson County, joinder of over 800 additional plaintiffs would simply be impracticable.").

b. Commonality

Next, Plaintiffs must demonstrate that there are questions of fact or law that are common to the members of the class. Fed.R.Civ.P. 23(a)(2). Commonality exists where the named plaintiffs share at least one question of fact or law with the grievances of the proposed class. *See In re Warfarin*, 391 F.3d at 527–28. Indeed, "Rule 23(a)(2) does not require that class members share every factual and legal predicate...." *In re Gen. Motors Corp.* ., 55 F.3d at 817. Thus, the commonality requirement is easily met in most cases because all that is required is one common issue. *Baby Neal*, 43 F.3d at 56.

Plaintiffs clearly meet the low commonality threshold. All class members worked over forty hours and allege that they did not receive a proper amount of overtime pay for that time. Factually, Liberty's overtime formula is central to the claims of all class members. Legally, the class would implicate the substantive law of four different states. However, the claims all class members will turn on whether the FWW method of calculating overtime is compatible with applicable state wage and hour laws. In particular a common question across all four sub-classes would be whether Liberty's compensation regime qualifies as a FWW payment model. Courts regularly find commonality in similar wage and hour suits in which class certification is sought. *See, e.g.*, *Bernhard v. TD Bank, N.A.*, No. 08–4392, 2009 WL 3233541, at *3 (D.N.J. Oct.5, 2009); *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06–3202, 2009 WL 2137224, at *4 (E.D.Pa. July 16, 2009); *Lenahan v. Sears Roebuck and Co.*, No. 02–0045, 2006 WL 2085282, at *7 (D.N.J. July 24, 2006).

c. Typicality

The claims of the representatives must also be typical of the claims of the class. Fed.R.Civ.P. 23(a)(3). The Third Circuit recently identified three interrelated considerations relevant to this inquiry: "(1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir.2009). This component of Rule 23 is designed to ensure that "the [class representatives] will work to benefit the entire class through the pursuit of their own goals." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions* (*Prudential II*). 148 F.3d 283, 311 (3d Cir.1998) (citing *Baby Neal*, 43 F.3d at 57), *cert. denied*, 525 U .S. 1114 (1999).

***7** The typicality prong does not require that all putative class members share identical claims or underlying facts. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir.1998), *cert. denied* 526 U.S. 1114, 119 S.Ct. 1760, 143 L.Ed.2d 791 (1999). All that is required is a strong similarity in legal theories or a showing that the claims arise from the same course of conduct. *See Prudential II*, 148 F.3d at 311–12; *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123 (3d Cir.1987) (citing 1 *Newberg on Class Actions* § 3.15, at 168 (2d ed.1985)), *abrogated in part on other grounds by Reed v. United Transp. Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989).

All class members allege that they were improperly compensated as a result of Liberty's overtime compensation formula. The injury sustained by the class representatives is the same as the injury sustained by the class as a whole. They seek same relief as all putative class members. Because the class representatives challenge the same underlying conduct as do all members in the putative class, the interests of the class representatives are completely aligned with the interests of the entire class. *See Newton*, 259 F.3d at 183–84 ("If the claims of the named plaintiffs and putative class members involve the same conduct by defendant, typicality is established regardless of factual differences."). Moreover, the named Plaintiffs are subject to the same overarching FWW

defense as are all class members. The claims of the class representatives are therefore typical of the absentees.

d. Adequacy of Representation

Adequate representation focuses on two criteria: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel*, 508 F.2d at 247. These distinct inquiries assess the adequacy of class counsel and the adequacy named plaintiffs, respectively, to represent the rest of the class. *See Prudential II*, 148 F.3d at 312; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Plaintiffs clearly meet both of these prongs.

First, class counsel is comprised of competent and experienced class action attorneys that are readily capable of prosecuting Plaintiffs' claims. Class counsel is highly experienced in wage-and-hour litigation (March 4, 2011, Sweeney Decl. ¶¶ 58, 63). In fact, they are involved in nineteen (19) pending federal and state wage-and-hour cases (*Id.* ¶ 58). The Court observes that class counsel have competently and vigorously pursued the interests of the class throughout the litigation. For example, class counsel undertook a private investigation to identify potential class members, proposed a draft statement of stipulated facts to reduce costs, and efficiently reviewed a tremendous amount of electronic discovery to help evaluate the case.

***8** Second, there are no conflicts between class representatives and other class members. The second prong serves to uncover conflicts of interest between the named parties and the class they seek to represent. *See Amchem*, 521 U.S. at 626 n. 20 (citing *Falcon*, 457 U.S. at 157–58 n. 13). Indeed, the absence of collusion or undue pressure assumes a "crucial" role in the context of settlement class certification. *See In re Gen. Motors Corp.*, 55 F.3d at 799 n. 21. Plaintiffs must prove the same wrongdoing as the absent class members in order to establish liability in this matter. The named Plaintiffs held identical positions while employed by Liberty and allege the same harm as other Plaintiffs (March 4, 2011, Sweeney Decl. ¶ 57). Further, the settlement allocation formula poses no conflict because damages are calculated in the same way for the named Plaintiffs as for all other class members (Settlement Agmt. § II.S). *See Lenahan*, 2006 WL 2085282, at *8. Given the absence of any conflict, and the stellar qualifications of class counsel, the Court finds that the adequacy requirement is easily met.

In light of the foregoing, the class plainly satisfies each of the four prerequisites to class certification contained in Rule 23(a). The Court therefore now turns to Rule 23(b)(3).

ii. Rule 23(b)(3) of the Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 23(b)(3) permits the court to certify a class in cases where "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). These dual requirements are commonly referred to as "predominance" and "superiority," respectively. *See, e.g., In re Constar Int'l, Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir.2009).

a. Predominance

Predominance probes whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *See Amchem*, 521 U.S. at 623 (citing 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1777, at 518–19 (2d ed.1986)). Although it tends to merge with the concept of commonality, it imposes a more exacting standard. *See Newton*, 259 F.3d at 186. To establish predominance, issues common to the class must predominate over individual issues. *Prudential II*, 148 F.3d at 313–14. Common issues do not "predominate," and the case in inappropriate for certification, if "proof of the essential elements of a cause of action require individual treatment." *Newton*, 259 F.3d at 172 (citing *Binder v. Gillespie*, 184 F.3d 1059, 1063–66 (9th Cir.1999), *cert. denied*, 528 U.S. 1154, 120 S.Ct. 1158, 145 L.Ed.2d 1070 (2000)). Whether an element requires individual or common treatment depends nature of the evidence that will suffice to resolve it. *See In re Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir.2005)). When an issue requires both individual and common proofs, the Court must determine which proof is key to its outcome. *See In re Lineboard*, 305 F.3d at 162–163. Indeed, the presence of some individual issues "does not *per se* rule out a finding of predominance." *Prudential II*, 148 F.3d at 315.

***9** Liberty's overtime formula was applied uniformly to all class members in these cases. Plaintiffs contend that it violated applicable state law and Liberty claims that it did not. Whether Liberty's formula was compatible with state

wage and hour law is "about the most perfect question[ ] for class treatment." *Iglesias–Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y.2007). This issue is clearly susceptible to class-wide proof. Whether the formula itself violated the law is the central issue in these cases and would determine Liberty's liability. Factual differences between class members, such as their base salary and their amount of unpaid overtime, are incidental matters that only impact damages. The Third Circuit has cautioned that "obstacles in calculating damages may not preclude class certification." *Newton*, 259 F.3d at 189. Where, as here, "common issues which determine liability predominate," calculating damages on an individual basis does not prevent an otherwise valid certification. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir.1977) (citations omitted); *see also In re Community Bank of N. Va.*, 418 F.3d 277, 306–07 (3d Cir.2005); *In re Lineboard*, 305 F.3d at 163.

Differences in the substantive state laws at issue will similarly pose no obstacle. Normally, a court must determine whether variances in applicable state law may be so substantial as to defeat predominance. *See In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir.2001); *Prudential II*, 148 F.3d at 315; *Georgine*, 83 F.3d at 627; *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir.1986). However, variations in state laws are "irrelevant" when a case will come to fruition with the certification of a settlement class. *See In re Warfarin*, 391 F.3d at 529 (citing *Amchem*, 521 U.S. at 620). Thus, issues common to the class predominate over individual issues.

b. Superiority

The non-exhaustive list of factors that a court may consider in evaluating the superiority of a class action include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3). This prong of Rule 23(b)(3) 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." *Georgine*, 83 F.3d at 632 (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 757 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974)).

A class action in New Jersey is the "superior" method of adjudicating this controversy. First, the relatively modest size of each individual claim counsels that independent actions would likely be impracticable. *See Georgine*, 83 F.3d at 633 (citing Fed.R.Civ.P. 23(b)(3) advisory note to 1966 amendment). The class action procedure would serve to spread the costs of litigation across a greater pool of injured parties, *In re Gen. Motors*, 55 F.3d at 783–84, and the total amount of potential liability is not so significant as to impose "hydraulic pressure" on Liberty to settle in the face of marginal claims. *See Newton*, 259 F.3d at 167 n. 8 (citing *In re Rhone–Paulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867, 116 S.Ct. 184, 133 L.Ed.2d 122 (1995)). Any potential interest in maintaining individual actions is further diminished by the fact that there are no other pending lawsuits arising from the same allegations beyond those involved in the settlement. *See In re Warfarin*, 391 F.3d at 534 (citing *Prudential II*, 138 F.3d at 316). Second, New Jersey is also the most appropriate forum for the class. A forum selection clause found in the employment contract of each class member limits the disposition of their claim to the jurisdiction of New Jersey (Employment Agmt. ¶¶ 3.1). Concentrating litigation in New Jersey is also desirable because it is home to Liberty's corporate headquarters. *See In re Warfarin*, 391 F.3d at 534 (citing *Prudential II*, 138 F.3d at 316). Finally, the class consists of a fully-matured set of claims; the class itself closed at the point in time when Liberty stopped using the overtime formula at issue in this case. *See Newton*, 259 F.3d at 192. The class action mechanism is both fair and efficient in these cases.

***10** Having determined that the class satisfies each of the requirements of Rule 23(a) and Rule 23(b)(3), final certification of the settlement class is warranted.

B. Final Approval of the Class Action Settlement

Under Rule 23(e), the claims of a certified class may be settled only with the Court's approval. The Court acts in a protective capacity as fiduciary for absent class members by assuring that the settlement terms are "fair, reasonable, and adequate" in exchange for the release of the class claims. Fed.R.Civ.P. 23(e)(2); *see In re Gen. Motors Corp.*, 55 F.3d at 805. The Court must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Gen. Motors Corp.*, 55

F.3d at 785 (quoting 2 *Newberg on Class Actions* § 11.41, at 11–88 (3d ed.1992)). Where settlement negotiations precede class certification, and settlement and class certification are sought simultaneously, the Court must be "even more scrupulous" than usual to safeguard against abuses. *Id.* at 805. This "heightened standard" is intended to ensure that the class counsel has engaged in sustained advocacy throughout the proceedings and protected the interests of all putative class members. *See Prudential II,* 148 F.3d at 317. The fairness determination is ultimately committed to the sound discretion of the Court. *Bryan v. Pittsburg Plate Glass Co.,* 494 F.2d 799, 801 (3d Cir.).

For the reasons that follow, the settlement is entitled to a presumption of fairness and is fair, reasonable, and adequate for purposes of Rule 23(e).

i. Presumption of Fairness

A class settlement is entitled to an "initial presumption of fairness" when "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Gen. Motors,* 55 F.3d at 785 (citing 2 *Newberg on Class Actions* § 11.41 at 11–88 (3d ed.1992)); *Manual for Complex Litigation (Third)* § 30.42, at 238 (1997). This presumption may attach even where, as here, settlement negotiations precede class certification. *See In re Warfarin,* 391 F.3d at 535.

The settlement here clearly satisfies these criteria. The class settlement was the product of nearly six months of negotiations between highly experienced counsel, and after years of discovery, investigation, legal analysis, and motion practice. In addition, not one class member objected to the terms of the settlement agreement and only six affirmatively opted-out. This alone should be enough for the presumption of fairness to attach. *See McCoy v. Health Net, Inc.,* 569 F.Supp.2d 448, 458–59 (D.N.J.2008); *Varacallo v. Ma. Mut. Life Ins. Co.,* 226 F.R.D. 207, 235 (D.N.J.2005). In addition, the Court directly oversaw the negotiations during which the settlement was reached. Participation of an independent mediator in settlement negotiations "virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bert v. AK Steel Corp.,* No. 02–467, 2008 WL 4693747 (S.D.Ohio Oct.23, 2008) (internal citations omitted); *see also Milliron v. T–Mobile USA, Inc.,* No. 08–4149, 2009 WL 3345762, at *5 (D.N.J. Sept.14, 2009) (finding presumption applies when negotiations occurred before federal judge); *In re LG / Zenith Rear Projection Tel. Class Action Litig.,* No. 06–5609, 2009 WL 455513, at *6 (D.N.J. Feb.18, 2009) (same).

ii. Fairness of the Class Settlement

***11** In *Girsh v. Jepson,* 521 F.2d 153 (3d Cir.1975), the Third Circuit identified nine factors that a court should consider in evaluating whether a proposed class action settlement is "fair, reasonable, and adequate." The nine *Girsh* factors include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) 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.

Id. at 516–17 (citing *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974)). However, due to the "sea-change" in the way class actions have evolved since *Girsh* was decided, the Third Circuit has instructed courts to address other concerns as they may arise in each case:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved-or likely to be achieved-for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential II, 148 F.3d at 324. These set of considerations embody a substantive inquiry into the terms of the settlement itself and a procedural inquiry into the negotiation process. *In re Prudential Ins. Co. of Am. Sales Practice Litig. (Prudential I),* 962 F.Supp. 450 (D.N.J.1997) (citing *In re Gen. Motors,* 55 F.3d 796).

a. Complexity, Expense, and Duration of Litigation

This factor is intended to "capture 'the probable cost, in both time and money, of continued litigation.' " *In re Gen. Motors,* 55 F.3d at 812 (quoting *Bryan,* 494 F.2d at 801). Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement. *Prudential I,* 962 F.Supp. at 536.

If this action were to continue, the parties would expend considerable time and money pursuing their claims. For start, these cases involve claims that arise under several state and federal statutes. While the differences in substantive law are not unmanageable, *supra,* it would undoubtedly make the process of litigation complex. *See In re Gen. Motors,* 55 F.3d at 812 (finding complexity arising from a "web of state and federal warranty, tort, and consumer protection claims"). The previously-litigated action against Liberty Travel in Pennsylvania spanned over thirteen (13) years and was extremely adversarial. Here, the parties would be forced to confront fairly technical legal issues regarding the FWW overtime model to prevail on the merits. Continued prosecution of this case both before and at trial would therefore require extensive involvement by experts. Heavy dispositive motion practice would be a certainty. The expected factual and legal issues at trial are complex. Based on the history of the Pennsylvania action, an appeal would likely follow. By reaching a settlement prior to the time for dispositive motions, the parties "avoid[ ] the costs and risks of a lengthy and complex trial." *Ehrheart v. Verizon Wireless,* 609 F.3d 590, 595 (3d Cir.2010). Since continued litigation would be time-consuming and expensive, settlement makes consummate sense.

b. Reaction of the Class to Settlement

***12** The second factor seeks to gauge whether members of the class actually support the settlement. *Prudential II,* 148 F.3d at 318. Courts generally assume that silence constitutes "tacit consent" to the settlement terms. *Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1314 n. 15 (3d Cir.1993) (citing *Shlensky v. Dorsey,* 574 F.2d 131, 148 (3d Cir.1978)). Thus, courts looks to the "number and vociferousness of the objectors." *In re Gen. Motors,* 55 F.3d at 812.

Here, not one single member from the class objected to the terms of the settlement, and less than one percent of the class opted out. While this type of response weighs in clear favor of the settlement, *Weber v. Gov't Emp. Ins. Co.,* 262 F.R.D. 431, 445 (D.N.J.2009); *In re Cendant Corp., Derivative Action Litig.,* 232 F.Supp.2d 327, 333–34 (D.N.J.2002), the Third Circuit has cautioned that the inference of silent approval may be unwarranted in cases where the settlement and class action notice are sent in tandem. This is because class members are not in a position to weigh the relative strengths and weaknesses of the settlement terms. *See In re Gen. Motors,* 55 F.3d at 812–13. While mindful of this admonition, the inference of approval is still warranted in this case. Unlike *General Motors,* the notice that was mailed out to potential class members included a clear and informative summary about the claims in each of the underlying cases, placing potential class members in a better position to judge the terms of the settlement agreement. The class reaction strongly supports the settlement.

c. Stage of the Proceedings and Amount of Discovery Completed

This factor considers the degree of case development accomplished by counsel prior to settlement. *See In re Gen. Motors,* 55 F.3d at 813. For the proceedings to be sufficiently developed to foster a fair settlement, the parties must have "an adequate appreciation of the merits of the case before negotiating." *Id.* Courts therefore endeavor into "the type and amount of discovery the parties have undertaken." *Prudential II,* 148 F.3d at 319. In general, post-discovery settlements are more likely to be fair and reflective of the true value of the claims in the case. *See Bolger,* 2 F.3d at 1314.

The parties entered the settlement armed with much discovery. Over the course of one year, initial disclosures were exchanged, a tremendous volume of documents were produced, and the depositions of all named parties were taken. Plaintiffs' counsel also informally interviewed potential class members, and coordinated with defense counsel to draft a joint stipulation of facts. Numerous conferences addressing discovery and case management were conducted by the Court. The parties were also aided in substantial part by discovery already gained from prior litigation, which involved over twenty-nine (29) depositions, dispositive motions, and an appeal. The Third Circuit has explicitly recognized that discovery in a parallel proceeding can be beneficial to settlement negotiations. *See In re Gen. Motors,* 55 F.3d at 813 (citations omitted).

***13** This case settled just sixty (60) days before the close of fact discovery. CM/ECF No. 89. Thus, both parties were in an excellent position to enter negotiations based on their unique knowledge of the underlying facts. *See In re Cendant Corp. Litig.,* 264 F.3d at 236 (finding appreciation for merits despite

settlement at an early stage of discovery). With extensive discovery and due diligence, class counsel clearly possessed sufficient information to assess the relative strengths and weaknesses of their case and reach a fair bargain. The stage of proceedings factor thus weighs in favor of approving the settlement.

d. Risks of Establishing Liability and Damages

The fourth and fifth *Girsh* factors survey the "possible risks of litigation" by balancing the likelihood of success, and the potential damages award, against the immediate benefits offered by settlement. *Prudential II*, 148 F.3d at 319. Where the risks of litigation are high, these factors weigh in favor of the settlement. *See id.* Because damages are contingent on establishing liability, "the same concerns animate both of these elements." *McCoy*, 569 F.Supp.2d at 461. To properly weigh these considerations, the Court should not press into the merits of the case and instead rely to a certain extent on the estimation provided by class counsel, who is experienced with the intricacies of the underlying case. *See Dewey v. Volkswagen of Am.*, 728 F.Supp.2d 546, 584 (D.N.J.2010) (citing *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 105–06 (E.D.Pa.2002)); *Weber*, 262 F.R.D. at 445 (quoting *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D.Pa.2005)). The immediate cash payout provided by the class settlement offers a substantial benefit over the many risks and costs Plaintiffs would face in litigating their claims to a conclusion.

First, it is not clear that Plaintiffs could maintain their state claims for unpaid overtime alongside the federal causes of action under the FLSA. In *De Asencio v. Tyson Foods*, 342 F.3d 301, 309 (3d Cir.2003), the Third Circuit directed courts to analyze, on a case-by-case basis, whether the joinder of state law overtime claims with a claim under the FLSA is a proper exercise of supplemental jurisdiction. Where state law issues "substantially predominate," the state claims may be dismissed without prejudice for resolution by state tribunals. *Id.* (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

Second, even assuming the state law claims could remain, Plaintiffs' ability to succeed on those claims depends on whether the FWW method of overtime pay provides a sufficient defense under state law. This determination would have to be made with respect to each state law involved. For those states that embrace the FWW approach to overtime pay, Plaintiffs would need to establish that Liberty's overtime formula was not a proper application of the FWW method.

***14** Third, any issues that survived summary judgment would go to trial before a jury. A trial on the merits always entails considerable risk. *Weiss v. Mercedes–Benz of N. Am., Inc.*, 899 F.Supp. 1297, 1301 (D.N.J.1995). This is particularly true here, given the technical nature of the FWW method and the need to rely on expert testimony. *See In re Cendant Corp.*, 264 F.3d at 239 (recognizing the increased risk of establishing liability when a jury is presented with competing expert testimony).

Finally, even if Plaintiffs were to succeed on the merits, the quantum of damages that they could collect is also uncertain. For example, under the FLSA a party may collect on three years of back pay, instead of the two year default, only if they can prove that the opposing party acted willfully. *See, e.g., Pignataro v. Port Auth. of N.Y. and N.J.*, 593 F.3d 265, 273 (3d Cir.2010); *Brock v. Claridge Hotel and Casino*, 846 F.3d 180, 188 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988). Throughout, Defendants could be expected to continue their zealous defense and would likely appeal if plaintiffs prevailed. In the fact of such considerable risks, an immediate cash settlement provides certainty and offers a significant benefit to all class members.

e. Risks of Maintaining the Class Action Through Trial

The sixth *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *In re Warfarin*, 391 F.3d at 538. This factor is important because the prospects for obtaining certification impact the range of recovery that a party can reap from the action. *In re Gen. Motors*, 55 F.3d at 817.

The Court has found that class certification is appropriate for purposes of settlement, and suspects the result would be the same for a litigation class. However, Liberty would strenuously contest certification if the case were to proceed (March 4, 2011, Sweeney Decl. ¶¶ 70, 72). Confronted with a motion to certify a litigation class, instead of a settlement class, the Court would additionally need to consider whether the case would pose intractable management problems. *See Amchem*, 521 U.S. at 620. It is also possible that Liberty would seek an interlocutory appeal of any order granting class certification. *See* Fed.R.Civ.P. 23(f). In addition, class certification can always be modified at any time before final judgment. Fed.R.Civ.P. 23(c)(1)(C). All in all, the risk of decertification is small. However, this is not an obstacle to approval. The Third Circuit cast some doubt on how "significant" this factor is in cases where a settlement class is sought, *Prudential II*, 148 F.3d at 321, and some courts

in this district have discredited the importance of this factor in settlement-only classes, *e.g.*, *In re Schering–Plough/Merck Merger Litig.*, No. 09–1099, 2010 WL 1257722, at *11 (D.N.J. March 26, 2010).

f. Ability of Defendant to Withstand a Greater Judgment

***15** This factor "is concerned with the whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *In re Cendant Corp.*, 264 F.3d at 240. The Court is not in a position to determine whether Liberty could withstand a greater judgment than the substantive settlement. However, a settlement amount greater than the payouts provided under the settlement would likely be difficult to attain given that they are largely based on figures from payroll records. This factor therefore does not favor or disfavor settlement. *See In re Warfarin*, 391 F.3d at 538 ("[T]he fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the ... class members are entitled to under the theories of liability that existed at the time the settlement was reached."). Indeed, courts in this district regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts. *See, e.g.*, *McCoy*, 569 F.Supp.2d at 462–63; *Weber*, 262 F.R.D. at 446; *Varacallo*, 226 F.R.D. at 239.

g. Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

The final two *Girsh* factors collectively "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Warfarin*, 391 F.3d at 538. To make this determination, the Court analyzes the reasonableness of the settlement against the best possible recovery and the risks the parties would face if the case went to trial. *Prudential II*, 148 F.3d at 322. In cases where monetary relief is sought, "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." *In re Gen. Motors*, 55 F.3d at 806 (quoting *Manual for Complex Litigation (Second)* § 30.44, at 252 (1985)). Precise value determinations, however, are not necessary. *In re Pet Food Prods. Liability Litig.*, 629 F.3d 333, 355 (3d Cir.2010) (citing *In re Warfarin*, 391 F.3d at 538).

These factors likewise weigh in favor of approving the settlement. The settlement establishes a fund of $3 million to compensate class members for unpaid overtime. Each state law class member will receive a payout dependent on the number of overtime hours that they worked. The total amount each class member receives should put them in roughly the same position as if they received one and a half times their hourly rate for each overtime hour worked. In other words, the settlement payout basically restores each class member to where they would have been had Liberty paid overtime at one and one half times each employee's regular rate. Compensating the class members at close to one hundred percent (100%) of their alleged actual damage "obviously represents a good value for the class members' claims, and is well within the range of reasonableness." *Weber*, 262 F.R.D. at 447.

***16** Plaintiffs acknowledge that recovery "could be greater" if they prevailed on all claims at trial. Plaintiffs do seek liquidated damages under some of the state law claims involved. But winning on any claim is far from certain and hitting a grand slam would be unlikely. Plaintiffs would face considerable risk were the case to proceed. Defendants have certain credible defenses and strongly presented them. The settlement, on the other hand, offers an immediate and substantial benefit given the significant risks of litigation. *See Varacallo*, 226 F.R.D. at 240. In short, the recovery of each class member under the settlement "exceeds the value of the best possible recovery discounted by the risks of litigation." *Prudential I*, 962 F.Supp. at 540.

h. Additional Factors

Several additional factors identified by the Third Circuit in *Prudential*, 148 F.3d at 323, also counsel in favor of approving the settlement. The underlying substantive issues are fully matured for adjudication given that Liberty ceased using the disputed method of overtime pay in August of 2008, which is when the state classes close. In addition, the parties were guided by extensive discovery that was obtained in the prior Liberty litigation. *See McCoy*, 569 F.Supp.2d at 469. Class counsel are highly qualified and experienced in wage and hour class action litigation and consider the terms of the settlement to be fair, reasonable, and adequate. *See Varacallo*, 226 F.R.D. at 240 (citing *Prudential I*, 962 F.Supp. at 543). Finally, the settlement was premised on Liberty payroll records. *See McCoy*, 569 F.Supp.2d at 469.

After careful consideration of the *Girsh* factors, and the presumption of fairness, the Court concludes that the substantive terms of the settlement are eminently fair and that the negotiation process was unassailable. The majority of the *Girsh* factors, and several additional considerations, strongly favor approval. The settlement provides a significant

benefit to all class members, which is substantiated by the overwhelmingly positive response from the class. Accordingly, the Court approves the terms of the settlement that resolve the state law class claims.

C. Approval of the Collective Action Settlement

Plaintiffs also ask the Court to approve the balance of the settlement agreement that resolves the collective action claims under the FLSA. Previously, the Court conditionally certified an FLSA class. *See* CM/ECF No. 41. Courts in this district, however, use a two-stage procedure to certify classes under the FLSA. *See, e.g., White,* 743 F.Supp.2d at 383; *Morisky v. Pub. Serv. Elec. & Gas Co.,* 111 F.Supp.2d 493, 497 (D.N.J.2000). [4] The Court must therefore reach a final determination as to the FLSA class before addressing the terms of the settlement. *See Burkholder v. City of Ft. Wayne,* —— F.Supp.2d ——, 2010 WL 4457310, at *2 (N.D.Ind.2010) (collecting cases); *Vasquez v. Coast Valley Roofing, Inc.,* 670 F.Supp.2d 1114, 1124 (E.D.Cal.2009) ("Subject to final approval at a later date, conditional certification of a settlement class under the FLSA is appropriate.").

4 The two stages consist of a preliminary or "conditional" certification and then, after notice issues and pertinent discovery is obtained, a "reconsideration" phase during which the Court will either grant final certification or decertify the class. *See Ruehl v. Viaccom, Inc.,* 500 F.3d 375, 388 n. 17 (3d Cir.2007) (recognizing use of two-tier certification process in ADEA collective action that incorporates section 16(b) of the FLSA). *See generally* 7B Charles Alan Wright et al., *Federal Practice & Procedure* § 1805, at 487 (3d ed.2005) (hereinafter *Federal Practice & Procedure*).

i. Final Class Certification Under the FLSA

***17** To certify a case as a collective action under the FLSA, the Court must determine that employees in the class are "similarly situated," within the meaning of § 16(b) of the Act. *See Sperling v. Hoffman–La Roche, Inc.,* 862 F.2d 439, 444 (3d Cir.1888), *aff'd,* 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989); *Morisky,* 111 F.Supp.2d at 496. Courts impose a stricter standard for final class certification than they do for conditional certification because the factual record is more fully developed. *See Morisky,* 111 F.Supp.2d at 497 (citing *Thiessen v. Gen. Elec. Capital Corp.,* 996 F.Supp. 1071, 1080 (D.Kan.1998)); 7B *Federal Practice & Procedure* § 1805, at 497. In *Lockhart v. Westinghouse Credit Corp.,* 879 F.2d 43 (3d Cir.1989), the Third Circuit tacitly endorsed the factors identified in *Plummer v. General Electric Co.,* 93 F.R.D. 311 (E.D.Pa.1981), and *Lusardi v. Xerox Corp.* (*Lusardi I*), 118 F.R.D. 351 (D.N.J.1987) to make this determination. It explicitly approved a "balancing" of these factors in a later decision. *See Ruehl,* 500 F.3d at 388 n. 17 ("[W]e have approved of the balancing of factors in *Plummer* and *Lusardi.*" (citing *Lockhart,* 879 F.2d at 51)). Courts in this district regularly use the *Lusardi* factors to reach a final determination on class certification under the FLSA. *See, e.g., Aquilino v. Home Depot, U.S.A., Inc.,* No. 04–4100, 2011 WL 564039, at *5 (D.N.J. Feb.15, 2011); *Zavala v. Wal–Mart Stores, Inc.,* No. 03–5309, 2010 WL 2652510, at *2 (D.N.J. June 25, 2010). They include "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [defendants] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Lusardi I,* 118 F.R.D. at 359, *vacated in part sub nom. Lusardi v. Lechner* (*Lusardi II*), 855 F.2d 1062 (3d Cir.1988). This list is neither exhaustive nor mandatory to grant certification. *Ruehl,* 500 F.3d at 388 n. 17.

There is no doubt that the FLSA class should be certified. Because the analysis required for final certification, "largely overlap[s] with class certification analysis under Federal Rule of Civil Procedure 23(a)," the Court need only address the *Lusardi* factors in passing. *Murillo v. Pac. Gas & Elec. Co.,* No. 08–1974, 2010 WL 2889728, at * 3 (E.D.Cal. July 21, 2010); *see also Thiessen v. Gen. Elec. Capital Corp.,* 267 F.3d 1095, 1105 (10th Cir.2001) (noting "there is little difference [between the two] approaches"). The factual circumstances underlying the claims of each putative class members are very similar, not disparate. Each held the same job, signed the same employment contract, worked overtime during the relevant class period, received overtime pay pursuant to a common formula, and each claims the same relief under the FLS A. The class as a whole is therefore "similarly situated" to the class representatives. Second, the Court cannot envision any individualized defenses that would interfere with final certification. In any case, the concern with individualized defenses is that they may pose case management problems. *See Ruehl,* 500 F.3d at 388. However, the Court need not account for case management issues because, much like the Rule 23 analysis, the class is being certified for purposes of settlement. *See Amchem,* 521 U.S. at 620.

ii. Fairness of the Collective Action Settlement

***18** Unlike a traditional class action under Rule 23, potential class members in an FLSA collective action must affirmatively opt-in to be bound by the judgment. *See Lusardi*

II, 855 F.2d at 1070. Their failure to do so does not prevent them from bringing their own suit at a later date. *Id.* (citing *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (1945)). This differs markedly from a class action instituted under Rule 23(b)(3). *See* 5 *Newberg on Class Actions* § 16.20 (noting tension between *res judicata* effect of FLSA collective action and Rule 23(b)(3) class action). Thus, the Court does not assume the same "fiduciary" role to protect absent class members as it would under Rule 23 when assessing a proposed settlement resolving FLSA claims.

To approve a settlement resolving claims under the FLSA, the Court must scrutinize its terms for fairness and determine that it resolves a bona fide dispute. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir.1982); *see also* H.R.Rep. No. 101–664, at 18–19 (1990). In so doing, the Court ensures that the parties are not "negotiating around the clear FLSA requirements" via settlement. *Collins v. Sanderson Farms, Inc.*, 568 F.Supp.2d 714, 720 (E.D.La.2008). Its obligation "is not to act as caretaker but as gatekeeper." *Goudie v. Cable Commc'n, Inc.*, No. 08–507, 2009 WL 88336, at *1 (D.Or. Jan.12, 2009). As set forth above, the Court has detailed the reasons the settlement is fair.

The "bona fide dispute" requirement is not an issue here. The dispute between the parties centers on whether the overtime formula used by Liberty was compatible with the FLSA. Liberty argues that its formula provided proper overtime wages under the FWW approach to compensation. Plaintiffs on the other hand contend that they were entitled to more. A disagreements over "hours worked or compensation due" clearly establishes a bona fide dispute. *Hohnke v. United States*, 69 Fed. Cl. 170, 175 (Fed.Cl.2005). The institution of a federal court litigation followed aggressive prosecution and strenuous defense demonstrates the palpable bona fides of this dispute. *See Lynn's Food*, 679 F.2d at 1354; *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n. 8, 66 S.Ct. 925, 90 L.Ed. 1114 (1946). The settlement, which provides time and one half each employee's hourly rate, represents "a reasonable compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer's overreaching." *Lynn's Food*, 679 F.2d at 1354. Accordingly, the Court approves the portion of the settlement resolving the FLSA claims.

D. Attorneys' Fees and Expenses

Class counsel also seeks an award of attorneys' fees and reimbursement of expenses in the amount of $990,000. This is a common fund case in which fees and costs come directly out of the recovery to the class. *See generally In re Cendant Corp. Litig.*, 264 F.3d at 256. More specifically, class counsel seeks $978,353.16 in fees and $11,646.84 in out-of-pocket expenses. These amounts represent 32.61% and .39%, respectively, of the common fund. The Court notes preliminarily that it has received not a single objection pertaining to the proposed amount of fees. *See Lenahan*, 2006 WL 2085282, at *19 ("The lack of significant objections from the Class supports the reasonableness of the fee request.").

***19** Courts in the Third Circuit employ the percentage-of-recovery method to award attorneys' fees in common fund cases. *See In re Gen. Motors*, 55 F.3d at 821 (citing *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985) (hereinafter *Task Force Report*)); *see also Manual for Complex Litigation (Fourth)* § 14 .121, at 186 (2004). Indeed, it is the prevailing methodology used by courts in this Circuit for wage-and-hour cases. *See, e.g., In re Janney*, 2009 WL 2137224, at *14; *Chemi v. Champion Mortg.*, No. 05–1238, 2009 WL 1470429, at *10 (D.N.J. May 26, 2009); *Lenahan*, 2006 WL 2085282, at *19. Under the percentage-of-recovery approach, the Court must determine whether the percentage of total recovery that the proposed award would allocate to attorneys fees is appropriate "based on the circumstances of the case." *In re Cendant Corp. Litig.*, 264 F.2d at 256. The Court is primarily guided by seven factors identified by the Third Circuit:

> (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.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir.2000) (citations omitted); *see also In re AT & T Corp.*, 455 F.3d 160, 166 (3d Cir.2006) (noting that courts should also consider any other factors that are "useful and relevant" under the facts of each case) (citations omitted). Each case is different, however, and in some circumstances one single factor may outweigh the rest. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir.2005) (citing *Gunter*, 223 F.3d at 195 n. 1). In addition to the *Gunter* factors, the Third Circuit has suggested that courts "cross-check" its fee calculation against the lodestar award method. *Gunter*, 223 F.3d at 195 n. 1. Based on the reasons that follow,

the Court finds that the fees requested by Class Counsel are appropriate given the facts of this case.

i. Size of Fund and Number of Persons Benefitted

As a general rule, the appropriate percentage awarded to class counsel decreases as the size of the fund increases. *See In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 736 (3d Cir.2002) (citing *Task Force Report*, 108 F.R.D. at 256). The inverse relationship is predicated on the belief that increases in recovery are usually a result of the size of the class and not a result of the efforts of counsel. *See Prudential II*, 148 F.3d at 339 (quoting *In re First Fidelity Bancorp. Sec. Litig.*, 750 F.Supp. 160, 164 n. 1 (D.N.J.1990)). The settlement achieved in this case, while substantial, does not create a "mega-fund." *See In re Cendant Corp. Prides Litig.*, 243 F.3d at 736–37. Moreover, the results obtained represent a significant benefit in the face of the many legal and factual risks posed by litigation. The common fund is substantial in that it creates a common fund of $3 million for over one thousand class members. Smaller common funds have been found significant for classes of roughly the same size in other wage-and-hour cases. *See, e.g., In re Janney*, 2009 WL 2137224, at *14 ($2.9 million for 1,310 class members); *Chemi*, 2009 WL 1470429, at *10 ($1.2 million for 917 class members). The benefit to each class member is all the more significant in that it approximates 100% of the actual damages that they would collect if they prevailed at trial. *See Gunter*, 223 F.3d at 199 n. 5 (noting it may be prudent for courts to "to determine what percentage of the plaintiffs' and class members' approximated actual damages the settlement figure represents" in light of the risk of non-recovery). The settlement therefore creates a substantial benefit for a large group of class members.

ii. Presence or Absence of Substantial Objections

***20** The Notice sent out to each class member expressly advised them that class counsel would apply for an attorney fee award in the amount of 33% of the settlement fund. It also set out the procedure for objecting to the fee request. 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. *See In re Rite Aid*, 396 F.3d at 305; *In re Janney*, 2009 WL 2137224, at *14; *Chemi*, 2009 WL 1470429, at *11.

iii. Skill and Efficiency of Class Counsel

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)). As noted earlier, class counsel is highly experienced in complex wage-and-hour class action litigation. Based on the Court's experience in supervising this litigation, class counsel has demonstrated the utmost skill and professionalism in effectively managing these consolidated actions and bringing them to a successful conclusion. Defendants counsel are also savvy, experienced defense attorneys in wage-and-hour cases (March 4, 2011 Sweeney Decl. ¶ 9), and the ability to achieve a favorable result in a case involving such formidable defense counsel is a clear indication of the skill with which class counsel handled these cases. *See In re Elec. Carbon Prods. Antitrust Litig.*, 447 F.Supp.2d 389, 407 (D.N.J.2006). Class counsel's success in bringing this litigation to a conclusion prior to trial is another indication of the skill and efficiency of the attorneys involved. *See Gunter*, 223 F.3d at 198 (noting that the percentage method encourages early settlements by efficient counsel (citing *Manual on Complex Litigation (Third)* § 24.121, at 207 (1997))). This factor therefore weighs in favor of the fee request.

iv. Hours Worked and Risk of Non–Payment

Courts consider the risk of non-payment in light of the Defendant's ability to satisfy an adverse judgment, *Yong Soon Oh v. AT & T Corp.*, 225 F.R.D. 142, 152 (D.N.J.2004), or the risk of establishing liability at trial, *In re Cendant Corp.*, 232 F.Supp.2d at 339. Although the Court has no reason to believe Defendant could not satisfy an adverse judgment, *supra*, class counsel faces a risk of non-payment due to the difficulty of establishing liability at trial. Class counsel has prosecuted this case on a contingent basis, with no retainer. As described above, the case poses a number of genuine factual and legal risks. Liberty presents a strong defense that, if successful, could relieve the company from any liability. In short, class counsel undertook substantial risk that the litigation would yield little or no recovery and leave them completely uncompensated for their time.

***21** Class counsel has expended over 1,800 hours in bringing this case to a favorable resolution. As reflected in the Sweeney declaration, the hours recorded were incurred investigating claims, interviewing putative class members, reviewing documents produced by Liberty, taking and

defending depositions, drafting and defending several formal motions, responding to two motions to dismiss, and engaging in extensive settlement negotiations. Given the complexity of the issues involved in this case and the activities performed to date, the hours incurred are entirely reasonable. The considerable amount of time devoted to this case, coupled with the risk of non-payment, also weighs in favor of the fee request.

v. Awards in Similar Cases

The requested fee is also consistent with awards in similar cases. To address this factor, the Court should (1) compare the actual award requested to awards in comparable settlements, and (2) ensure that the award is consistent with what an attorney would have likely received if the fee was negotiated on the open market. *Dewey*, 728 F.Supp.2d at 604. In common fund cases, fee awards generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund. *See In re Gen. Motors*, 55 F.3d at 822 (citing *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F.Supp. 525, 533 (E.D.Pa.1990)). The fee requested in this case, which represents 32.6% of the settlement fund, clearly falls within this range and is entirely consistent with fee awards for similar wage-and-hour cases in this Circuit and throughout the country. *See, e.g.*, *Lenahan*, 2006 WL 2085282, at *19 (thirty percent (30%)); *In re Janney*, 2009 WL 2137224, at *16 (thirty percent (30%)); *Adeva v. Intertek USA Inc.*, No. 09–1096, ECF Entry No. 228 (D.N.J. Dec. 22, 2010) (thirty-four percent (34%)); *Bernhard*, No. 08–4392, ECF Entry No. 40 (D.N.J. Feb. 3, 2010) (thirty-three percent (33%)); *see also, e.g.*, *Rotuna v. West Customer Mgmt. Group, LLC*, No. 09–1608, 2010 WL 2490989, at *7–*8 (N.D.Ohio June 15, 2010) (thirty-three percent (33%)); *Khait v. Whirlpool Corp.*, No. 06–6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan.20 2010) (thirty-three percent (33%)); *Stefaniak v. HSBC Bank USA, N.A.*, No. 05–720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) (thirty-three percent (33%)); *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05–3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar.24, 2008) (thirty-three percent (33%)). The percentage award in this case is also consistent with prevailing contingent fee rates in non-class action cases. *See In re Lucent Tech., Sec. Litig.*, 327 F.Supp.2d 426, 442 (D.N.J.2006) (observing "the customary contingent fee would likely range between 30% and 40% of the recovery."); *In re Ikon Office Solutions*, 194 F.R.D. at 194 (same).

vi. Lodestar Cross-check

Finally, the requested fee is also supported by the Lodestar cross-check. The crosscheck is performed by calculating the "lodestar multiplier." *In re AT & T Corp.*, 455 F.3d at 164. The multiplier is determined by dividing the requested fee award, determined from the percentage-of-recovery method, by the lodestar. *Id.* This figure represents "the contingent nature or risk involved in a particular case and the quality of the attorneys' work ." *In re Rite Aid*, 396 F.3d at 306 (citing *Task Force Report*, 108 F.R.D. at 243). The Third Circuit has recognized that multiples "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Prudential II*, 148 F.3d at 341 (citing 3 *Newberg on Class Actions* § 14.03, at 14–5 (3d ed.1992)). However, the Court may consider reducing the percentage-of-recovery award when the multiplier is too high. *See In re Rite Aid*, 396 F.3d at 306.

***22** In determining the lodestar for cross-check purposes, the Court need not engage in a "full-blown lodestar inquiry," *In re AT & T*, 455 F.3d at 169 n. 6 (citing *In re Rite Aid Corp.*, 396 F.3d at 307 n. 16), or "mathematical precision," *In re Rite Aid Corp.*, 396 F.3d at 306–07 (citing *Prudential II*, 148 F.3d at 342). Indeed, where, there have been no objections to the lodestar calculations, "a full-blown lodestar analysis is an unnecessary and inefficient use of judicial resources." *Dewey*, 728 F.Supp.2d at 592–93 (citing *Weber*, 262 F.R.D. at 451 n. 10). Counsel submits that their fees as calculated under the lodestar method are $520,142.75. The fee request under the percentage of recovery method represents 1.88 times the lodestar. The Third Circuit has approved a cross-check multiplier of 3 in a "relatively simple" case that did not involve the application of several state laws or carry risks as to liability. *See In re Cendant Corp. Prides Litig. .*, 243 F.3d at 742. The 1.88 multiplier in this case is therefore quite reasonable. It is a reflection of the risks assumed by class counsel in taking the case on a contingency basis and the level of skill they bring to this complex litigation. It was through their diligence that the parties were able to reach a favorable settlement prior to dispositive motion practice. The Court therefore finds that the requested fee is also supported by the Lodestar method.

vii. Expenses

The Court likewise finds that class counsels' request for reimbursement of $11,646.84 in actual out-of-pocket litigation expenses is appropriate given that such expenses have been adequately documented and are reasonable based on the circumstances of this case. *See generally In re*

Safety Components, Inc. Sec. Litig., 166 F.Supp.2d 72, 108 (D.N.J.2001) ("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir.1995))).

E. Service Payments to Named Plaintiffs

Class counsel also seeks incentive awards from the common fund in the amount of $10,000 for each named Plaintiff, totaling $80,000. Service payments are fairly common in class action lawsuits involving a common fund for distribution to the class. *See Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D.Pa.1990) (quoting *In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D.Ohio 1997)). The purpose of these payments is to compensate named plaintiffs for "the services they provided and the risks they incurred during the course of class action litigation," *id.*, and to "reward the public service" of contributing to the enforcement of mandatory laws, *see In re Cendant*, 232 F.Supp.2d at 344 (citing *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F.Supp. 525, 535 (E.D.Pa.1990)); *see also Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir.2009) (describing utility of incentive awards). An incentive award that comes out of the payment allocated for attorneys fees need not be subject to intense scrutiny because the interests of the public and the defendants are not directly affected. *See In re Cendant*, 232 F.Supp.2d at 344 (citing *In re Presidential Life Sec.*, 857 F.Supp. 331, 337 (S.D.N.Y.1994)). Where the payments come out of the common fund independent of attorneys' fees, the Court must "carefully review" the request for fairness to other class members. *See Varacallo*, 226 F.R.D. at 257.

***23** Courts have ample authority to award incentive or "service" payments to particular class members where the individual provided a benefit to the class or incurred risks during the course of litigation. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig .*, 447 F.Supp.2d at 412 ((citations omitted)); *Varacallo*, 226 F.R.D. at 258; *In re Cendant Corp.*, 232 F.Supp.2d at 327 (citing *Brotherton v. Cleveland*, 114 F.Supp.2d 907, 913 (S.D.Ohio 1991)); *see also Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998) (identifying factors relevant to awarding incentive payments (citing *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F.Supp. 1226, 1267 (N.D.Ill.1993)).

Each of the named Plaintiffs devoted considerable time and effort into the prosecution of these cases. They provided detailed information on the job duties, contacted witnesses, set up meetings between class counsel and putative class members, executed declaration that were publicly filed with the Court, produced personal documents, and relayed information to class members during the pendency of the litigation (Decl. of Michael J. Sweeney in Supp. of Pls.' Mot. for Service Payments ("Sweeney Decl. for Service Payments") ¶ 2 [CM/ECF No. 104]). Several prepared and sat for depositions (*Id.* ¶ 3). All prepared with class counsel for settlement negotiations, and several attended the mediation sessions in person (*Id.* ¶¶ 5, 8). None of the other class members engaged in similar activity. In fact, class counsel indicates that these cases would not have been possible without the initial groundwork performed by the lead Plaintiffs (*Id.* ¶ 10). The benefits that accrue to all class members under the settlement agreement are therefore a direct result of the services rendered by named Plaintiffs. *See Cullen*, 197 F.R.D. at 146 ("[T]he assistance of the plaintiffs provided the foundation upon which this case was built."). In bringing these actions, named Plaintiffs also took on certain risks. By bringing suit against a major company in the travel business, they risk their good will and job security in the industry for the benefit of the class as a whole. *See Frank v. Eastman Kodak, Co.*, 228 F.R.D. 174, 187 (W.D.N.Y.2005) ("In 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 ." (citing *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 201 (S.D.N.Y.1997))).

In addition, the service payments sought are consistent, if not lower, than awards regularly provided in similar cases. *See, e.g., Dewey*, 728 F.Supp.2d at 610 ($10,000); *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Practice Litig.*, 263 F.R.D. 226, 245 (E.D.Pa.2009) (between $5,000 and $10,000); *Mehling v. NY. Life Ins. Co.*, 248 F.R.D. 445, 467 (E.D.Pa.2008); *In re Elec. Carbon*, 447 F.Supp.2d at 412 ($12,000); *Varacallo*, 226 F.R.D. at 259 ($3,000 to $10,000 for active plaintiffs); *In re Remeron End–Payor Antitrust Litig.*, No. 02–2007, 2005 WL 2230314, at *32–*33 (D.N.J. Sept.13, 2005) ($30,000); *see also* 4 *Newberg on Class Actions* § 11.38, at 11–80 (citing empirical study from 2006 that found average award per class representative to be $16,000).

***24** While the Court might normally compare the size of the service payment total to the size of the common fund in order to assess the impact of the award on other class members, it is unnecessary to do so in this case. Unlike other cases, the

settlement is distributed on a claim-by-claim basis. Under the terms of the settlement, any unused funds revert to Liberty (Settlement Agmt. § III.B.1.g). With only 41.5% of the class participating, any decrease in the service payments would revert back to Liberty rather than be distributed to the class. Moreover, not one class member has filed an objection to the service enhancements despite a clear message in the claims notice that counsel would apply for "service payments" in the amount of $10,000 for each named Plaintiff (Settlement Notice 3). Accordingly, the Court awards service payments to each of the eight (8) named Plaintiffs in the amount of $10,000 each.

III. Conclusion

Based on the reasons set forth above, the Court: (a) certifies the state class for purposes of this settlement; (b) certifies the FLSA class for purposes of this settlement; (c) approves the proposed settlement agreement in its entirety; (d) awards class counsel the attorneys' fees and costs requested; and (e) awards the service payments requested. A separate Order accompanies this Opinion.

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2010 WL 1948198
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. New York.

Michael CLARK, David Starkman, Franco Desimone, and John Dinisi, individually and on behalf all others similarly situated, Plaintiffs,
v.
ECOLAB INC., Defendant.
Troy Masson, individually and on behalf all others similarly situated, Plaintiffs,
v.
Ecolab Inc., Defendant.
Jimmy English and William Zimmerlee, individually and on behalf all others similarly situated, Plaintiffs,
v.
Ecolab Inc., Defendant.

Nos. 07 Civ. 8623(PAC), 04 Civ. 4488(PAC), 06 Civ. 5672(PAC). | May 11, 2010.

Opinion

PAC ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION OF THE SETTLEMENT CLASS, FINAL APPROVAL OF THE CLASS SETTLEMENT, AND APPROVAL OF THE FLSA SETTLEMENT

PAUL A. CROTTY, District Judge.

*1 The parties' proposed settlement resolves all claims in three separately filed federal overtime lawsuits, *Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (the *"Clark Case"*); *English v. Ecolab, Inc.*, No. 06 Civ. 5672, *appeal docketed,* No. 08-1812-cv (2d Cir. Apr. 16, 2008) (the *"English Case"*); and *Masson v. Ecolab, Inc.*, No. 04 Civ. 4488 (the *"Masson Case"*) (collectively the "Litigation").

Litigation Background

On June 15, 2004, Plaintiff Troy Masson filed a collective action Complaint pursuant to 29 U.S.C. § 216(b) in the U.S. District Court for the Southern District of New York, asserting violations of the FLSA. Masson was a former "Route Manager" or "Route Sales Manager" (hereinafter "RSM") in Ecolab's Institutional Division. He alleged that he and similarly situated RSMs were misclassified as exempt employees under the FLSA, and he sought recovery of overtime wages, attorneys' fees and costs, and liquidated damages. (Decl. of Justin M. Swartz in Supp. of Pls.' Mot. for Final Approval ("Swartz Decl.") ¶ 5.)

Ecolab filed its Answer to the *Masson Case*, disputing the material allegations and denying any liability in the proposed collective action. Ecolab asserted, among other defenses, that RSMs were "exempt" from receiving overtime pay. (Swartz Decl. ¶ 6.)

On March 2, 2005, Masson filed a Motion to Approve Collective Action Notice. On April 18, 2005, Ecolab filed a Motion for Summary Judgment. In an Opinion and Order dated August 17, 2005 and modified on August 29, 2005, the Court granted Masson's Motion to Approve Collective Action Notice and denied Ecolab's Motion for Summary Judgment. *See Masson v. Ecolab, Inc.*, 04 Civ. 4488, 2005 U.S. Dist. LEXIS 18022, 2005 WL 2000133 (S.D.N.Y. Aug. 17, 2005). Nationwide notice in the *Masson Case* was mailed on September 28, 2005 to approximately 1,200 RSMs. (Swartz Decl. ¶¶ 7-8.)

On July 27, 2006, Plaintiff-Appellant Jimmy English filed a collective action Complaint pursuant to 29 U.S.C. § 216(b) in the U.S. District Court for the Southern District of New York, asserting violations of the FLSA. An Amended Complaint was later filed adding William Zimmerlee as a named plaintiff. Plaintiffs English and Zimmerlee were employed in Ecolab's Pest Elimination Division as Pest Elimination Service Specialists or Senior Pest Elimination Service Specialists (hereinafter "Pest Service Specialists"). Plaintiffs English and Zimmerlee alleged that they and similarly situated Pest Service Specialists were misclassified as exempt employees under the FLSA, and they sought recovery of overtime wages, attorneys' fees and costs, and liquidated damages, among other things. (Swartz Decl. ¶ 9.)

Ecolab filed its Answer and Amended Answer to the *English Case*, disputing the material allegations and denying any liability in the proposed collective action. In its Answer, Ecolab asserted, among other defenses, that Pest Service Specialists were "exempt" from receiving overtime pay. (Swartz Decl. ¶ 10.)

*2 On November 15, 2006, Plaintiffs filed a Motion to Conditionally Certify a FLSA Collective Action. On July 20,

2007, the parties filed cross-motions for summary judgment. On March 28, 2008, the Court issued an Opinion and Order granting Ecolab's motion for summary judgment and denying Plaintiffs' cross-motion. *See English v. Ecolab, Inc.*, No. 06 Civ. 5672, 2008 U.S. Dist. LEXIS 25862, 2008 WL 878456 (S.D.N.Y. Mar. 28, 2008, as amended March 31, 2008). The Plaintiffs' Motion to Conditionally Certify a FLSA Collective Action was denied as moot. *See English*, 2008 U.S. Dist. LEXIS 25862, at *55, 2008 WL 878456. A Final Judgment closing the case was entered on April 3, 2008. (Swartz Decl. ¶ 11.)

On April 16, 2008, Plaintiffs appealed the Final Judgment to the Court of Appeals for the Second Circuit (the *"English Appeal"*).

On October 4, 2007, Michael Clark filed a lawsuit alleging a nationwide FLSA collective action and a Rule 23 class action on behalf of putative class members in California. On December 4, 2007, Plaintiff Clark, Franco DeSimone, David Starkman, and John Dinisi filed an Amended Complaint and also alleged a Rule 23 class action on behalf of putative class members in New York, Washington, and Oregon. Plaintiffs Clark and DeSimone were both employed as Territory Representatives ("TRs") for a wholly owned subsidiary of Ecolab, Kay Chemical Company. Plaintiffs Dinisi and Starkman were both employed as RSMs in Ecolab's Institutional Division, the same position at issue in the *Masson Case.* (Swartz Decl. ¶ 13.)

Ecolab's Answer in the *Clark Case* disputes the material allegations and denies liability. It also asserts, among other defenses, that the positions in question are "exempt" from FLSA and state law coverage. (Swartz Decl. ¶ 15.)

In December 2007, Ecolab brought a motion to transfer venue, and to sever the RSM plaintiffs and consolidate their claims in the *Masson Case.* (Swartz Decl. ¶ 14.) The Honorable Derrise Cote denied the motion without prejudice to renewal and the case was reassigned to this Court. (Swartz Decl. ¶ 14.)

Settlement Negotiations and Preliminary Approval

Over the course of approximately six years of litigation, the parties unsuccessfully engaged in informal settlement negotiations several times. (Swartz Decl. ¶ 28.) In early 2009, the parties agreed to attempt to resolve the Litigation through non-binding private mediation with an experienced class action mediator, Hunter Hughes of Rogers & Hardin LLP, Atlanta, Georgia. The parties agreed on the terms of a settlement, which were memorialized in a formal Joint Stipulation of Settlement and Release (the "Settlement Agreement"). Without conceding the validity of Plaintiffs' claims and without admitting liability, Ecolab agreed, among other things, to create a Settlement Fund (the "Fund") of $6,000,000 to resolve the Litigation. (Swartz Decl. ¶¶ 30, 32.)

On November 17, 2009, this Court entered an Order preliminary approving the settlement; provisionally certifying the settlement class; appointing Outten & Golden LLP and Getman & Sweeney, PLLC as Class Counsel; approving Plaintiffs' proposed notice of settlement, and granting other relief. *Clark v. Ecolab Inc.*, No. 07 Civ. 8623, et al., 2009 U.S. Dist. LEXIS 108736 (S.D.N.Y. Nov. 17, 2009).

*3 On January 5, 2010 and February 4, 2010, Settlement Services, Inc ., the Claims Administrator, sent the Notices to all 519 Class Members informing them of their right to opt out or object to the settlement and of Class Counsel's intention to seek service awards of $10,000 for each of the named plaintiffs, up to 35% of the Fund for attorneys' fees, and their out-of-pocket expenses. (Swartz Decl. ¶¶ 55-56; Ex. D ("Notices"); Ex. E ("Patton Decl.") ¶¶ 5-7.)

On April 27, 2010, Plaintiffs filed their Motion for Certification of the Settlement Class, Final Approval of the Class Settlement, and Approval of the FLSA Settlement. In that Motion, Plaintiffs also requested modification of the Endorsement-release language to be used with the settlement checks, and approval of an individual settlement that will not impact the Fund. ("Motion for Final Approval"). The same day, Plaintiffs also filed Unopposed Motions for Approval of Attorneys' Fees and Reimbursement of Expenses ("Motion for Attorneys' Fees") and for Class Representative Service Awards ("Motion for Service Awards"). Eeolab took no position with respect to any of these motions.

The Court held a fairness hearing on May 11, 2010. No Class Member objected to the settlement, the service awards, or Class Counsel's request for fees and costs, and only one Class Member requested exclusion.

Having considered the Motion for Final Approval, the Motion for Attorneys' Fees, the Motion for Service Awards, the supporting declarations, the oral argument presented at the May 11, 2010 fairness hearing, and the complete record in this matter, for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Certification Of The Settlement Class

1. The Court certifies the following classes under Federal Rule of Civil Procedure 23(e), for settlement purposes:

(A) California Class: all individuals who were employed by Ecolab as RSMs in the State of California from October 4, 2003 to July 6, 2009;

(B) New York Class: all individuals who were employed by Ecolab as RSMs in the State of New York from December 4, 2001 to July 6, 2009;

(C) Oregon Class: all individuals who were employed by Ecolab as RSMs in the State of Oregon from December 4, 2004 to July 6, 2009; and

(D) Washington Class: all individuals who were employed by Ecolab as RSMs in the State of Washington from December 4, 2004 to July 6, 2009.

2. Plaintiffs meet all of the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b) (3).

3. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(1), numerosity, because there are approximately 345 state Class Members. (Swartz Decl. ¶ 55.) Thus, joinder is impracticable. *See Consol Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995) ("[N]umerosity is presumed at a level of 40 members.")

4. The proposed class also satisfies Federal Rule of Civil Procedure 23(a)(2), the commonality requirement. All Class Members bring the identical claim that Ecolab allegedly failed to pay them earned overtime wages in violation of state wage and hour laws. Other common issues include, but are not limited to, (a) whether Plaintiffs and the state settlement Class Members were exempt from overtime eligibility during the class period; (b) whether Ecolab failed to pay Plaintiffs and the state settlement Class Members overtime premium pay for all hours they worked over 40 in a workweek; and (c) whether Ecolab maintained accurate time records of the hours Plaintiffs and the state settlement Class Members worked. *See Westerfield v. Washington Mut. Bank*, No. 06 Civ. 2817, et al., 2009 U.S. Dist. LEXIS 54553, at *6-7 (E.D.N.Y. Jun. 26, 2009).

*4 5. Named Plaintiffs satisfy Federal Rule of Civil Procedure 23(a) (3), typicality, because Plaintiffs' claims arise from the same factual and legal circumstances that form the bases of the Class Members' claims. *See Damassia*, 250 F.R.D. at 158 (finding typicality satisfied where plaintiffs' claims were based on the same course of events and legal theory as class members' claims).

6. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(4), adequacy, because Plaintiffs' interests are not antagonistic or at odds with those of Class Members, *see McMahon v. Olivier Cheng Catering and Events, LLC*, No. 08 Civ. 8713, 2010 U.S. Dist. LEXIS 18913, at *5-6 (S.D.N.Y. Mar. 3, 2010); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2009 U.S. Dist. LEXIS 27899, at *11, 2009 WL 5851465 (S.D.N.Y. Mar. 31, 2009); and because Class Counsel "has an established record of competent and successful prosecution of large wage and hour class actions, and the attorneys working on the case are likewise competent and experienced in the area," *Reyes v. Buddha-Bar NYC*, No. 08 Civ. 2494, 2009 U.S. Dist. LEXIS 45277, at *11-12, 2009 WL 5841177 (S.D.N.Y. May 28, 2009) (internal quotation marks and citation omitted)).

7. Plaintiffs also satisfy Federal Rule of Civil Procedure 23(b) (3). Here, all Class Members are unified by common factual allegations and a common legal theory. These common questions predominate over any factual or legal variations among Class Members. *See Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 U.S. Dist. LEXIS 4067, at *9-10, 2010 WL 2025106 (E.D.N.Y. Jan. 20, 2010).

8. Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for Class Members, particularly those who lack the resources to bring their claims individually. *See Mohney*, 2009 U.S. Dist. LEXIS 27899, at *12; 2009 WL 5851465 *Damassia*, 250 F.R.D. at 161, 164.

Approval Of The Settlement Agreement

9. The Court hereby grants the Motion for Final Approval and finally approves the settlement as set forth in the Settlement Agreement and this Order under Federal Rule of Civil Procedure 23.

10. Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Fed.R.Civ.P. 23(e). To determine procedural fairness, courts examine the negotiating process leading to the settlement. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir.2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001). To determine substantive fairness, Courts determine whether the settlement's terms are fair, adequate, and reasonable

according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974).

11. Courts examine procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116; *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238, 2005 U.S. Dist. LEXIS 10848, at *18, 2005 WL 1330937 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions."). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *12, 2007 WL 2230177 (S.D.N.Y. July 27, 2007). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *McMahon*, 2010 U.S. Dist. LEXIS 18913, at *9-10 (citation omitted). The Court gives weight to the parties' judgment that the settlement is fair and reasonable. *See Reyes*, 2009 U.S. Dist. LEXIS 45277, at *9; 2009 WL 5841177 *Mohney*, 2009 U.S. Dist. LEXIS 27899, at *13, 2009 WL 5851465.

Procedural Fairness

*5 12. The settlement is procedurally fair, reasonable, adequate, and not aproduct of collusion. *See* Fed.R.Civ.P. 23(e); *Frank*, 228 F.R.D. at 184 (citing *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir.2000)). The settlement was reached after Plaintiffs had conducted a thorough investigation and evaluated the claims, and after extensive negotiations between the parties. Plaintiffs interviewed hundreds of workers (including RSMs, Pest Service Specialists, Institutional Division Territory Managers, and TRs) to determine the hours that they worked, the wages they were paid, their job duties, and other information relevant to their claims; obtained supportive declarations from putative class members; took 5 depositions pursuant to Federal Rule of Civil Procedure 30(b)(6); and defended 25 depositions of opt-in plaintiffs. (Swartz Decl. ¶¶ 17-23.)

13. Plaintiffs also obtained, reviewed, and analyzed thousands of pages of hard-copy documents and electronically-stored data including, but not limited to, time and payroll records, human resources data, financial records, sales data, marketing materials, and employee lists. Ecolab served discovery requests on Plaintiffs, and in response Plaintiffs produced documents including, but not limited to, W-2s, earning statements, pay stubs, and payroll forms. During the discovery phase of the Litigation, the parties engaged in numerous discovery disputes which required court intervention. (Swartz Decl. ¶¶ 24-26.)

14. To help resolve the case, the parties enlisted the services of experienced class action mediator Hunter Hughes of Rogers & Hardin LLP in Atlanta, Georgia. (Swartz Decl. ¶ 28.) Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process. *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811, 2010 U.S. Dist. LEXIS 1445, at *10, 2010 WL 476009 (S.D.N.Y. Jan. 6, 2010); *Mohney*, 2009 U.S. Dist. LEXIS 27899, at *13, 2009 WL 5851465.

Substantive Fairness

15. The settlement is substantively fair. All of the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974), which provides the analytical framework for evaluating the substantive fairness of a class action settlement, weigh in favor of final approval.

16. The "*Grinnell* factors" are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

*6 17. Litigation through trial would be complex, expensive, and long. Therefore, the first *Grinnell* factor weighs in favor of final approval.

18. The class's reaction to the settlement was positive. The Notices included an explanation of the allocation formula and estimates each Class Member's award. (Swartz Decl. Ex. D (Notices).) The Notices also informed Class Members that they could object to or exclude themselves from the settlement, and explained how to do so. (Swartz Decl. ¶ 56, Ex. D (Notices).) No Class Member objected to the Settlement, and only one requested exclusion. (Swartz Decl. ¶ 56.) This favorable response demonstrates that the Class approves of the results, which supports final approval. *Wright*

v. Stern, 553 F.Supp.2d 337, 344-45 (S.D.N.Y.2008) (where 13 out of 3,500 class members objected and 3 opted-out, noting that "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness).

19. The parties have completed enough discovery to recommend settlement. The pertinent question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *McMahon*, 2010 U.S. Dist. LEXIS 18913, at *12 (citation omitted). Here, the parties engaged in aggressive discovery efforts, obtaining voluminous amounts of documents and taking numerous depositions. The resulting discovery allowed them to evaluate adequately the strengths and weaknesses of the case. (Swartz Decl. ¶ 16.) The third *Grinnell* factor thus weighs in favor of final approval.

20. The risk of establishing liability and damages further weighs in favor of final approval. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.1997). One purpose of a settlement is to avoid the uncertainty of a trial on the merits. *In re Ira Haupt & Co.*, 304 F.Supp. 917, 934 (S.D.N.Y.1969). Here, the fact-intensive nature of Plaintiffs' claims and Ecolab's affirmative defenses presents risk. The settlement eliminates this uncertainty. The fourth *Grinnell* factor weighs in favor of final approval.

21. The risk of maintaining class status throughout trial also weighs in favor of final approval. A contested class certification motion would likely require extensive discovery and briefing. If the Court granted a contested class certification motion, Ecolab could seek to file a Federal Rule of Civil Procedure 23(f) appeal and/or move to decertify, which would require additional rounds of briefing. Settlement eliminates the risk, expense, and delay inherent in this process. The fifth *Grinnell* factor weighs in favor of final approval.

22. Although Ecolab's ability to withstand a greater judgment is not currently at issue, this factor is not determinative. *See Frank*, 228 F.R.D. at 186 ("[D]efendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair.") (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 178 n. 9 (S.D.N.Y.2000)).

*7 23. The substantial amount of the settlement weighs strongly in favor of final approval. The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.' " *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F.Supp.2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement-a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.' " *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972)). The seventh *Grinnell* factor favors final approval.

Approval Of The FLSA Settlement

24. The Court hereby approves the FLSA settlement.

25. The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement. *McMahon*, 2010 U.S. Dist. LEXIS 18913, at *15. Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 n. 8 (11th Cir.1982); *McMahon*, 2010 U.S. Dist. LEXIS 18913, at *15. Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Lynn's Food Stores*, 679 F.2d at 1353-54. If the proposed settlement reflects a reasonable compromise over contested issues, the settlement should be approved. *Id.* at 1354; *McMahon*, 2010 U .S. Dist. LEXIS 18913, at *16; *Mohney*, 2009 U.S. Dist. LEXIS 27899, 2009 WL 5851465 at*13.

26. The FLSA settlement meets the standard for approval. The settlement was the result of contested litigation and arm's length negotiation. Recognizing the uncertain legal and factual issues involved, the parties engaged in mediation with an experienced mediator and, after numerous rounds of negotiation, ultimately reached the settlement pending before the Court. During the litigation and at the mediation, Plaintiffs and Ecolab were both represented by counsel.

Dissemination of Notice

27. Pursuant to the Preliminary Approval Order, the Notices were sent by first-class mail to each identified Class Member at his or her last known address (with re-mailing of returned Notices). (Swartz Decl. Ex. E ("Patton Decl.") ¶¶ 5-7.) This Court finds that the Notices fairly and adequately advised Class Members of the terms of the settlement, as well as the right of Class Members to opt out of the class, to object to the settlement, and to appear at the fairness hearing conducted on May 4, 2010. Class Members were provided the best notice practicable under the circumstances.

28. The Court further finds that the Notices and distribution of such Notices comported with all constitutional requirements, including those of due process.

*8 29. The Court confirms Settlement Services, Inc. ("SSI") as the Claims Administrator.

30. The Court approves the modification of the Endorsement-release language to the following:

> By endorsing this settlement check, I agree to the full and final release of federal and state wage and hour claims, and derivative claims, as set forth more fully in the Settlement Agreement and Notice.

Award of Fees and Costs to Class Counsel and Award of Service Payments to Named Plaintiffs

31. On November 17, 2009, the Court appointed Outten & Golden LLP and Getman & Sweeney, PLLC as Class Counsel because they met all of the requirements of Federal Rule of Civil Procedure 23(g).

32. Class Counsel did substantial work identifying, investigating, prosecuting, and settling Plaintiffs' and the Class Members' claims.

33. Class Counsel are experienced class action employment lawyers and have extensive experience prosecuting and settling wage and hour class actions. *See, e.g.*, *Mohney*, 2009 U.S. Dist. LEXIS 27899, at *15, 2009 WL 5851465 ("O & G's lawyers have substantial experience prosecuting and settling employment class actions, including wage and hour class actions and are well-versed in wage and hour law and in class action law."); *Westerfield v. Washington Mut. Bank*, No. 06 Civ. 2817, No. 08 Civ. 287, 2009 U.S. Dist. LEXIS 94544, at *12-13 (E.D.N.Y. Oct. 2, 2009) (O & G lawyers "have substantial experience prosecuting and settling ... wage and hour class actions....").

34. The work that Class Counsel have performed in litigating and settling this case demonstrates their commitment to the Class and to representing the Class's interests. Class Counsel have committed substantial resources to prosecuting this case.

35. The Court hereby grants Plaintiffs' Motion for Attorneys' Fees and awards Class Counsel attorneys' fees of $2,000,000, or one-third of the Fund.

36. In this Circuit, the "percentage-of-recovery" method is the "trend." *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir.2010); *Wal-Mart Stores, Inc.*, 396 F.3d at 122; *see also Mohney*, 2009 U.S. Dist. LEXIS 27899, at *16, 2009 WL 5851465.

37. The Court has discretion to award attorneys fees based on the lodestar method or the percentage-of-recovery method, *McDaniel*, 595 F.3d at 417.

38. Class Counsel's request for one-third of the Fund is reasonable and "consistent with the norms of class litigation in this circuit." *See Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 U.S. Dist. LEXIS 23016, at *15, 2008 WL 782596 (S.D.N.Y. Mar. 24, 2008) (granting one-third of the settlement fund); *Khait*, 2010 U .S. Dist. LEXIS 4067, at *4, 2010 WL 2025106 23-25 (awarding 33% of $9.25 million fund in FLSA and NYLL case); *Reyes*, 2009 U.S. Dist. LEXIS 45277, at *2-3, 11, 2009 WL 5841177 (awarding 33% of $710,000 fund in FLSA and NYLL tip misappropriation case); *Mohney*, 2009 U.S. Dist. LEXIS 27899, at * 13, 16-17, 2009 WL 5851465 (awarding 33% of $3,265,000 fund in FLSA and NYLL case); *Stefaniak v. HSBC Bank USA, N.A.*, No. 05 Civ. 720, 2008 U.S. Dist. LEXIS 53872, at *9, 2008 WL 7630102 (W.D.N.Y. June 28, 2008) (awarding 33% of $2.9 million fund in FLSA and NYLL case); *see also Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 370 (S.D.N.Y.2002) (awarding 33 1/3% fee on fund valued at $11.5 million in securities class action); *Cohen v. Apache Corp.*, No. 89 Civ. 0076, 1993 U.S. Dist. LEXIS 5211, at *1, 1993 WL 126560 (S.D.N.Y. Apr. 21, 1993) (awarding 33 1/3% of the $6.75 million fund in securities class action).

*9 39. Class Counsel risked time and effort and advanced costs and expenses, with no ultimate guarantee of compensation. (Decl. of Justin M. Swartz in Supp. of Pls.' Unopposed Mot. for Approval of Attys' Fees and Reimbursement of Expenses and Unopposed Mot. for Class Representative Service Awards ("Swartz Fees/Awards Decl.") ¶¶ 11-12.) A percentage-of-recovery fee award of one-third is consistent with the Second Circuit's decision in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, where the Court held that a "presumptively reasonable fee" takes into account what a "reasonable, paying client" would pay, 493 F.3d 110, 111-12 (2d Cir.2007). An award of one-third of the fund is consistent with what reasonable, paying clients pay in contingency employment cases. (Swartz Fees/Awards Decl. ¶ 8.) While *Arbor Hill* is not controlling here because it does not address a common fund fee petition, it supports a one-third recovery in a case like this one where Class Counsel's fee entitlement is entirely

contingent upon success. *McMahon,* 2010 U.S. Dist. LEXIS 18913, at *21.

40. All of the factors in *Goldberger* weigh in favor of a fee award of one-third of the Fund.

41. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, (*see* Swartz Fees/Awards Decl. ¶ 10), also supports their fee request, *see McMahon,* 2010 U.S. Dist. LEXIS 18913, at *22-23.

42. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of $62,591.89, which the Court deems to be reasonable. Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *See In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) (citing *Miltland Raleigh-Durham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993)).

43. The attorneys' fees awarded and the amount in reimbursement of litigation costs and expenses shall be paid from the Settlement Fund.

44. The Court finds reasonable service awards of $10,000 each to Class Representatives Troy Masson, Jimmy English, William Zimmerlee, Michael Clark, David Starkman, Franco DeSimone, and Jolm Dinisi. These amounts shall be paid from the Settlement Fund.

45. Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff. *Khait,* 2010 U.S. Dist. LEXIS 4067, at *26-27, 2010 WL 2025106 (awarding $15,000 service awards each to 5 named plaintiffs and $10,000 service awards each to 10 named plaintiffs); *Mohney,* 2009 U.S. Dist. LEXTS 27899, at *18-19 (awarding $6,000 service awards each to 14 named plaintiffs); *see* Nantiya Ruan, Bringing Sense to Incentive Payments: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions, 10 Emp. Rts. & Emp. Pol'y J. 395 (2006) (discussing the importance of aggregating claims to protecting civil rights and wage and hour rights).

CONCLUSION

*10 46. Within three (3) business days of this Order, Ecolab shall submit the Settlement Amount to the Claims Administrator to establish the Fund.

47. The Claims Administrator shall distribute Settlement Checks from the QSF to the Class Members as described in the Settlement Agreement, except that the Endorsement-release language shall be modified as proposed by The parties.

48. The Claims Administrator shall also pay to Class Counsel attorneys' fees of $2,000,000 and costs of $62,591.89 from the Fund.

49. The Claims Administrator's fee of $31,000 shall be paid from the Fund.

50. The Claims Administrator shall also pay $10,000 each to Class Representatives Troy Masson, Jimmy English, William Zimmerlee, Michael Clark, David Starkman, Franco DeSimone, and John Dinisi as a service award described in the Settlement Agreement.

51. The Claims Administrator shall satisfy the employer obligations to pay all employer taxes and withholdings on the Settlement Checks from the Fund.

52. The Claims Administrator shall further (1) provide verification to Class Counsel and Ecolab's Counsel that it has distributed the Settlement Checks, (2) retain copies of all the endorsed Settlement Checks with releases, and (3) provide Ecolab's Counsel with the original of the endorsed Settlement Checks in accordance with the Settlement Agreement.

53. All claims asserted in the Litigation and the claims of all Class Member who have not opted out are hereby dismissed with prejudice, subject only to an application for relief under Federal Rule of Civil Procedure 60(b)(1) or 60(d).

54. The Court approves the Individual Settlement reached by the parties, which shall have no impact on the Fund.

55. The Clerk of Court is directed to enter Final Judgment in these actions.

56. The Court retains jurisdiction over this action thirty (30) days after the Acceptance Period, as necessary for the administrative purposes.

57. The parties shall abide by all terms of the Settlement Agreement and this Order.

It is so ORDERED.

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2010 WL 1176641
Only the Westlaw citation is currently available.
United States District Court,
D. Maryland,
Northern Division.

Earl Edward HOFFMAN, Sr., et al., Plaintiffs,
v.
FIRST STUDENT, INC., Defendant.

Civil No. WDQ-06-1882. | March 23, 2010.

Opinion

MEMORANDUM OPINION

WILLIAM D. QUARLES, JR, District Judge.

*1 A class of more than 750 school bus drivers, aides, and others sued First Student for violating the Fair Labor Standards Act ("FLSA")[1] and comparable Maryland labor laws[2] by failing to pay straight and overtime wages from June 2003. Pending is the parties' joint motion to approve the class-wide settlement. For the following reasons, the proposed settlement will be approved.

1 29 U.S.C. §§ 201 *et seq.*

2 Maryland Wage & Hour Law, Md.Code Ann., Lab. & Empl. §§ 3-401, *et seq.*; Maryland Wage Payment & Collection Act, Md.Code Ann., Lab. & Empl. §§ 3-501 *et seq.*

I. Backg o nd

The Plaintiffs alleged that, when calculating overtime, First Student did not aggregate time appropriately; e.g., an employee who drove a bus for 30 hours and trained other drivers for 20 hours in a week only received pay for 50-hours with no overtime. Paper No. 80 at 2. The Plaintiffs also alleged that First Student failed to pay overtime to charter drivers and the safety and attendance bonuses, and provided inadequate pay for non-driving tasks. *Id.*

The Court certified the Plaintiffs' FLSA claims as a collective action, Paper No. 33, and certified the Maryland labor claims as a class action under Fed.R.Civ.P. 23, Paper No. 81. On January 6, 2010, the parties notified this Court that they had reached a proposed settlement. *Id.* Under the terms of that settlement, the Plaintiffs would receive $1.55 million (inclusive of attorneys' fees and expenses) in exchange for releasing their claims against First Student. Paper No. 107, Ex. A ¶ 9.[3] From that award, Plaintiffs' counsel seeks $497,666 in attorneys' fees and $57,000 in litigation expenses. *Id.* ¶ 11(g). The proposed settlement also awards the seven lead plaintiffs a supplemental "service payment" of $3,000 to compensate for time spent meeting with counsel to explain their work and First Student's pay practices. *Id.* at 5.

3 Unclaimed funds will be donated to the Children's Miracle Network. Paper No. 107 at 2.

On January 27, 2010, the parties filed a joint motion to approve the class-wide settlement. Paper No. 107. On January 28, 2010, the Court (1) preliminarily approved the proposed settlement, (2) approved the Notice of Proposed Settlement and ordered that it be sent to all class members by first-class mail, and (3) scheduled a fairness hearing to allow any class member to object to the settlement or opt out of the class. Paper No. 108. On March 19, 2010 at 2:00pm, the Court held the fairness hearing.

II. Anal i

A. S anda d of Re ie

1. R le 23(e)

Before approving a settlement in a certified class action, the court must evaluate its procedural and substantive fairness. Fed.R.Civ.P. 23(e). To ensure procedural fairness, Rule 23(e) requires: (1) court-approved notice to all class members bound by the proposed settlement, (2) a hearing to determine whether the proposal is "fair, reasonable, and adequate," (3) the parties' statement specifying their agreement, and (4) an opportunity for class members to object. *Id.*[4] "The primary concern addressed by Rule 23(e) is the protection of class members whose rights might not have been given adequate consideration during the settlement negotiations ." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir.1991).

4 The court may refuse approval if a proposed settlement does not allow individual class members to request exclusion, even if class members had and declined an earlier opportunity for exclusion. Fed.R.Civ.P. 23(e)(5). An objection may be withdrawn only with leave of court. *Id.* This proposed settlement does contain an "opt-out" provision for prospective beneficiaries. Paper No. 107, Ex. 3 ¶ 16.

*2 There is a "strong presumption in favor of finding a settlement fair." *Lomascolo v. Parsons Brinkerhoff, Inc.*,

2009 WL 3094955, at *10 (E.D.Va. Sept.28, 2009) (internal quotation omitted).[5] Because a settlement hearing is not a trial, the court's role is more "balancing of likelihoods rather than an actual determination of the facts and law in passing upon ... the proposed settlement ." *Id.* at 1173.

5 To determine whether the proposed terms are reasonable, adequate, and fair, the court should consider (1) the extent of discovery that has occurred; (2) the stage of proceedings, including the complexity, expense and likely duration of litigation; (3) evidence of bad faith or collusion in the settlement; (4) the experience of plaintiffs' counsel; (5) the opinions of class counsel and class members after receiving notice of the settlement-expressed directly or through failure to object; and (6) the plaintiffs' probability of success on the merits and the amount of settlement compared with the potential recovery. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir.1975); *see also Jiffy Lube*, 927 F.2d at 158-59; *Lomascolo*, 2009 WL 3094955 at *11.

2. FLSA Collec i e Ac ion

FLSA settlements also must be approved by the court. *See Lynn's Food Stores v. United States*, 679 F.2d 1350, 1355 (11th Cir.1982). Although "the Fourth Circuit has not directly addressed the factors to consider in determining whether an [FLSA class settlement] ... is fair and reasonable, various federal courts have analogized to the fairness factors generally considered for court approval of class action settlements" under Rule 23(e). *See Lomascolo*, 2009 WL 3094955 at *11. At the least, the Court must confirm that the collective action device has not been abused and that the absent putative class members will not suffer prejudice under the proposed settlement. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306 (4th Cir.1978).

B. Fai ne of he Se lemen Ag eemen

1. P oced al Fai ne

As required by Rule 23(e), Plaintiffs' counsel sent court-approved Notice of Proposed Settlement and the Class Member Information Form to all class members, Paper No. 110,[6] and filed the settlement agreement and memorandum describing it, Paper No. 107. On March 19, 2010, the Court held a fairness hearing; one class member, Ms. Leslie Langley, who had considered objecting, appeared to state her support for the proposed settlement. No other class member objected to the proposal, and no class member opted out of the class. Paper No. 110 ¶¶ 2-3. As the parties have complied with Rule 23(e), the proposed settlement meets the procedural requirements for fairness.

6 The Plaintiffs' counsel were unable to reach 57 of the more than 750 class members because of the lack of addresses. Paper No. 110 ¶ 5. At the hearing, Plaintiffs' counsel represented that the number of unreached class members was between 20 and 30.

2. S b an i e Fai ne

a. Damage A a d i Rea onable, Ade a e, and Fai

The record shows that (1) there has been extensive discovery, assuring sufficient development of the facts to permit an accurate assessment of the merits of the case; (2) shortly before this case was referred for settlement negotiations, the Court's decision on the cross-motions for summary judgment clarified the issues for trial; (3) there is no evidence of bad faith or collusion in the settlement; (4) the Court previously found that the Plaintiffs' counsel would adequately represent the class;[7] (5) no class member has objected to the proposed settlement[8] and the parties' counsel attest to the fairness of this proposal in their joint motion to approve the class-wide settlement;[9] and (6) the Plaintiffs estimated their claims to be worth about $2.3 million but were "uncertain" what would result from a jury trial and thus have "traded off the risk of nonsuccess" for certain, immediate recovery.[10] Accordingly, the proposed settlement terms appear to be reasonable, adequate, and fair.

7 Paper No. 80 at 10 (evaluating competence of counsel to represent the plaintiffs for purposes of class certification).

8 Paper No. 110 ¶ 3.

9 Paper No. 107 at 2.

10 Paper No. 107 at 2-3.

b. Li iga ion E pen e & A o ne ' Fee

*3 If requested by the prevailing plaintiff in an FLSA case, the court "shall ... allow a reasonable attorney's fee to be paid by the defendant [ ] and the cost of the action." 29 U.S.C. § 216(b). The Agreement for Legal Services entered by the lead class members also provided that counsel for the prevailing parties would receive the greater of (a) "reasonable compensation" plus expenses and costs for their services or (b) one-third of the total recovery. Paper No. 107, Ex. 10 ¶ 4.

The Plaintiffs have estimated their litigation expenses at $59,250[11] and their legal fees at $685,000 for over 2,900 hours of work since this case began in April 2006. Paper No. 107 at 4. The Plaintiffs' counsel is seeking to recover, under the second option of the Agreement, approximately $500,000 in costs and attorneys' fees. *Id.* Under the FLSA and the terms of the lead class members' Agreement with counsel, Plaintiffs' counsel may recover one-third of the damages award. Because this amount appropriately reflects the time spent and expenses incurred by Plaintiffs' counsel in this litigation, the fees and costs requested are reasonable and appropriate.

11 Though the Settlement Agreement estimates Plaintiffs' costs at $57,000, Plaintiffs' counsel represented at the March 19, 2010 hearing that final litigation expenses were actually $59,250.

c. S pplemen al A a d o he Se en Lead Plain iff

As part of a class action settlement, "named plaintiffs ... are eligible for reasonable incentive payments." *Stanton v. Boeign Co.*, 327 F.3d 938, 977 (9th Cir.2003).[12] To determine whether an incentive payment is warranted, the court should consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook*, 142 F.3d at 1016.

12 "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004 (7th Cir.1998).

The proposed settlement awards a $3,000 "service payment," which is independent of the back-pay and damages awarded, to Earl Hoffman, Wayne Gerry, Melanie Willner, Carl King, Tina Himes, Rose Marie Sandlin, and Yolanda Davis-the seven "lead" plaintiffs in this class/collective action. Paper 107 at 4-5. This payment is intended to compensate them for their (1) time spent providing counsel with information needed to pursue this litigation, (2) participation in the December 2007 mediation, and (3) time spent in-and preparing for-depositions by First Student. *Id.* at 5. Because a $3,000 award is commensurate with the effort expended by the named plaintiffs and a substantial award benefitting all class members was obtained, the incentive payment is appropriate.

III. Concl ion

For the reasons stated above, the joint motion to approve the class-wide settlement will be granted.

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2007 WL 119157
Only the Westlaw citation is currently available.
United States District Court,
M.D. North Carolina.

Paul SMITH and Alfie Carter, each on behalf of himself and all others similarly situated including all participants and beneficiaries in the Krispy Kreme Doughnut Corporation Retirement Savings Plan or the Krispy Kreme Profit Sharing Stock Ownership Plan, Plaintiffs,
v.
KRISPY KREME DOUGHNUT CORPORATION, Randy J. Casstevens, Ken Hudson, Sherry Luper, Frank Murphy, Pam Petro-Ott, Michael C. Phalen, Sherry Polonsky, Jeff Thielen, Scott A. Livengood, and John N. (Jack) McAleer, Defendants.

No. 1:05CV00187. | Jan. 10, 2007.

Attorneys and Law Firms

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Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES, AND FOR NAMED PLAINTIFFS' COMPENSATION

WILLIAM L. OSTEEN, J.

***1** This matter comes before the Court on the Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Costs and Expenses, and for Named Plaintiffs' Compensation. Pursuant to the Court's Preliminary Approval Order and the Notice provided to the Class, the Court conducted a hearing on these issues, under Fed.R.Civ.P. 23(e), on January 10, 2007.

The Court has reviewed the materials submitted by the parties, and has heard arguments presented at such hearing. For the reasons cited on the record as well as those stated hereafter, the Court finds and orders as follows:

For the reasons set forth in Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Costs and Expenses, and for Named Plaintiffs' Compensation, and the memorandum, affidavits and declarations presented in support of same, Plaintiffs' motion is granted.

Attorneys' Fees

On the question of attorneys fees, the Court finds that in a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery. *DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C.2003) (citing with approval *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D.Me.2003); *In re Microstrategy, Inc. Sec. Litig.*, 172 F.Supp.2d 778, 787 (E.D.Va.2001); *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 WL 34312839, at *3 (D.D.C. July 16, 2001)). *See also* *Manual for Complex Litigation* § 14.121 (4th ed.2004) (“the vast majority of courts of appeals ... permit or direct district courts to use the percentage-fee method in common-fund case”).

Plaintiffs and Class Counsel request attorneys' fees of $1,235,000 (equal to 26% of the cash recovered for the class). To determine the reasonableness of the fee award sought by Class Counsel in this action, this Court has considered each of the factors derived from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), which were adopted by Fourth Circuit adopted in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir.1978), which include:

(1) time and labor expended;

(2) novelty and difficulty of the questions raised;

(3) skill required to properly perform the legal services;

(4) attorney's opportunity costs in pressing the litigation;

(5) customary fee for like work;

(6) attorney's expectation at the outset of litigation;

(7) time limitations imposed by the client or circumstances;

(8) amount in controversy and results obtained;

(9) experience, reputation and ability of the attorney;

(10) undesirability of the case within the legal community in which the suit arose;

(11) nature and length of the professional relationship between the attorney and client; and

(12) fee awards in similar cases.

In re Microstrategy, Inc. Sec. Litig., 172 F.Supp.2d 778, 786 (E.D.Va.2001) (citing *Barber*, 577 F.2d at 226, with only minor variations).

1. Time and Labor Expended

***2** As demonstrated by the record in this case, Class Counsel dedicated significant time and effort to pursuing litigation on behalf of the class. The time and labor expended to date (at least 1089 hours of attorney time and 772 hours of paralegal time) tends to support the reasonableness of the requested fee award.

2. Novelty and Difficulty of the Questions Raised

ERISA law is a highly complex and quickly-evolving area of the law. The novelty and difficulty of the questions raised tends to support the reasonableness of the requested fee award.

3. Skill Required to Properly Perform the Legal Services

The Court recognizes that it takes skilled counsel to manage a nationwide class action, carefully analyze the facts and legal claims and defenses under ERISA, and bring a complex case to the point at which settlement is a realistic possibility. Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel. This factor tends to support the reasonableness of the requested fee award.

4. Attorney's Opportunity Costs in Pressing the Litigation

Class Counsel note that there were many times when the demands of this litigation precluded other paying work, but Class Counsel has not quantified its opportunity cost of pursuing this case. As it is unquantified, this factor does not tend to support the reasonableness of the requested fee award.

5. Customary Fee for like Work

In this jurisdiction, contingent fees of one-third (33.3%) are common. This factor provides support for the reasonableness of the requested fee award.

6. Attorney's Expectation at Outset of Litigation

Class Counsel have informed the Court that their expectation at the outset of this case was that Defendants would present a vigorous defense. Indeed, Defendants filed comprehensive motions to dismiss, which is consistent with the expectation of Class Counsel. This factor tends to support the reasonableness of the requested fee award.

7. Time Limitations Imposed by the Client or Circumstances

Class Counsel notes that there were many times when the demands of this litigation precluded other paying work. This factor tends to support the reasonableness of the requested fee award. *Johnson*, 488 F.2d at 718 ("priority work that delays the lawyer's other work is entitled to some premium").

8. Amount in Controversy and Results Obtained

Class Counsel has informed the Court that it is accurate to characterize the amount in controversy as between $11.7 to $12.2 million (exclusive of attorneys fees Defendants might become liable to pay under ERISA's fee-shifting provision).

The proposed settlement results in a $4.75 million cash common fund for the Class and also creates additional economic value for the Class, valued at approximately $3.82 million.

The proposed settlement, considered as a percentage of the conservatively-estimated potential recovery, represents a highly favorable recovery for the Plans and the Class. This factor tends to support the reasonableness of the requested fee award.

9. Experience, Reputation and Ability of the Attorney

***3** Class Counsel have provided information showing that they are very experienced in successfully handling class actions, and specifically class actions in relation to ERISA 401(k) plans. Keller Rohrback L.L.P. has a national reputation in this field. Likewise, Lewis & Roberts P.L.L.C. has an outstanding reputation in this District. The experience, reputation and ability of Class Counsel strongly supports the reasonableness of the requested fee award.

10. Undesirability of the Case within the Legal Community in which the Suit Arose

Class Counsel have advised the Court that no other law firms or claimants stepped forward to seek recovery on behalf of the Krispy Kreme ERISA plans, and they have explained why the case may have been viewed as economically and logistically unattractive to any but the most experienced and specialized counsel. This lack of interest by others in the legal community tends to support the reasonableness of the requested fee award.

11. Nature and Length of the Professional Relationship between the Attorney and Client

Class Counsel did not have professional relationships with either Named Plaintiff prior to this litigation. This factor tends to support the reasonableness of the requested fee award.

12. Fee Awards in Similar Cases

Class Counsel have cited numerous similar cases in which courts have awarded percentage fees of 25% or more. Class Counsel's request for 26% of the cash recovered for the Class is reasonable under this factor.

In conclusion, consideration of each factor related to the reasonableness of a 26% fee in this case tends to support the fairness and adequacy of Class Counsel's request. It is also noteworthy that no-one has objected to the requested fee.

It is not necessary for the Court to conduct a lodestar analysis, but if one were to "cross-check" the requested 26% fee against the range of reasonable fee awards under a lodestar analysis, it is apparent that a "lodestar cross-check" confirms the reasonableness of the requested percentage fee. Class Counsel has devoted at least 1089 hours of attorney time and 772 hours of paralegal time, with a straight-time value of approximately $700,000. Considering the additional services that Class Counsel may be required to provide if the Settlement is approved, the total straight-time value of Class Counsel's services is in the likely range of $780,000. Thus, the 26% fee award requested here ($1,235,000), constitutes a multiplier of approximately 1.6 over the lodestar. This is a modest risk multiplier. The close association between the percentage fee requested and the fee one would expect from a lodestar analysis tends to confirm the reasonableness of the percentage fee requested by Class Counsel.

Class Counsel's request for a fee $1,235,000 (equal to 26% of the cash recovered for the class), is hereby approved as fair and reasonable.

Reimbursement of Expenses

An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. 1 Alba Conte, *Attorney Fee Awards* § 2:08, at 50-51 (3d ed. 2004) ("The prevailing view is that expenses are awarded in addition to the fee percentage").

***4** Here, Class Counsel have advanced or incurred $87,433.32 in expenses to date.[1] The Court has reviewed Class Counsel's detailed listing of expenses and the expenses incurred appear to be fair and reasonable. The Class Notice informed the class that counsel's expenses might be as high as $110,000, but the actual expenses are much less. No objections were lodged concerning the higher amount, so it is clear that no class member would object to the smaller amount now requested.

1 This figure excludes the expense of issuing class notice and supplemental class notice, which the Court has already Ordered to be paid from the Settlement Fund. Findings and Order Preliminarily Certifying a Class for Settlement Purposes, Preliminarily Approving Proposed Settlement, Approving Form and Dissemination of Class Notice, and to Set Hearing on Final Approval ¶ 8, dated September 27, 2006.

Class Counsel's request for reimbursement of actual expenses incurred to date totaling $87,433.32 is hereby approved as fair and reasonable.

Case Contribution Awards

At the conclusion of a successful class action case, it is common for courts, exercising their discretion, to award special compensation to the class representatives in

recognition of the time and effort they have invested for the benefit of the class. *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D.Ohio 1997); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998) (an ERISA class action). Here, Plaintiffs and Class Counsel request that Mr. Smith and Mr. Carter each receive a case contribution award of $15,000 reflecting their efforts on behalf of the Class, No one has objected to this request.

Plaintiffs' request that the named plaintiffs receive case contribution awards of $15,000 each is hereby approved as fair and reasonable.

Order

NOW THEREFORE, IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

Attorneys fees are hereby awarded to Class Counsel in the amount of $1,235,000 (which represents 26% of the cash recovery obtained by the Class), to be paid from the common fund established for the Class.

Expenses of litigation are hereby awarded to Class Counsel in the amount of $87,433.32 as reimbursement of expenses actually and reasonably incurred for the benefit of the Class, to be paid from the common fund established for the Class.

Mr. Paul Smith and Mr. Alfie Carter are hereby awarded $15,000 each as case contribution awards, to be paid from the common fund established for the Class.

SO ORDERED.

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