

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

ROCK HILL DIVISION

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

Plaintiffs, Kevin Faile, Louis C. Roman, Alan R. DePalma, and Brian Scott Craton, all individually and on behalf of all other similarly situated individuals, by and through their undersigned attorneys hereby submit this Supplemental Brief in Support of Consent Motion to Approve Settlement Agreement, to Authorize Notice to Class, and to Schedule Fairness Hearing. Plaintiffs submit this Supplemental Brief at the request of the Court to clarify and further explain the potential damages in this case and how the proposed settlement amount and proposed apportionment were determined.

**I. Apportionment of Class Members’ Claims**

**A. State-Law Claim**

The State-Law claim refers to Plaintiffs’ cause of action under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq., for Defendant’s policy of requiring 24-hour shift employees to work 15 minutes “off the clock” at the end of each shift without compensation. Plaintiffs’ counsel and expert witnesses reviewed the County’s records regarding payroll and

schedules for EMS employees during the three-year period preceding the filing date of the lawsuit (Oct. 29, 2007 to Oct. 29, 2010). The statute of limitations under the Payment of Wages Act is three years. S.C. Code Ann. § 41-10-80(C). For each potential member of the Plaintiff class, Plaintiffs' experts counted how many instances occurred where the employee appeared to work a full shift of at least 16 hours (up to 8 hours of each 24-hour shift was deducted as unpaid sleep time). Plaintiffs' expert then calculated the value of 15-minutes per shift worked by multiplying the number of shifts times 0.25 hours (i.e., 15 minutes), times the employee's overtime hourly rate, which is 1.5 times the employee's "regular rate" of pay. For purposes of this calculation, the overtime rate was used regardless of how many shifts the employee actually worked in a work-week, because it was not cost effective to analyze whether each employee was already over the 40-hour overtime threshold every week. Also, for purposes of this calculation, the expert used what he termed the "true" hourly rate for each employee, which incorporated the short-week payments (if any) received by full-time employees. For full-time employees who received short-week payments of 16 hours every six weeks, their "true" hourly rate was approximately 107.14% of the stated hourly rate. For part-time employees or full-time employees who did not receive any short-week payments during the relevant time, the stated hourly rate and the "true" hourly rate are equal.

When Plaintiffs state that each class member will receive 100% of their back-pay claim under the South Carolina Payment of Wages Act, that means that each employee will receive exactly what the Plaintiffs' expert determined to be the amount they should have been paid for the "off the clock" work of 15 minutes per shift. Although the Payment of Wages Act includes a potential remedy against an employer for treble damages, S.C. Code Ann. § 41-10-80(C), there is some authority that indicates that the treble damages remedy is in the nature of a penalty or punitive damages, which are

generally unavailable against a public employer.

Defendant has also argued that the “off the clock” claim cannot be brought under the South Carolina Payment of Wages Act, but can only be brought under the FLSA, because the EMS Department’s Policies and Procedures Handbook implies that employees will not be paid for the 15-minute period at the end of every 24-hours shift. Based on Plaintiffs’ perceived strength on this claim, however, the Plaintiffs’ Steering Committee believed that it would be fair to pay all potential class members the full value of their back-pay claim for this component of the case. If any of Defendant’s EMS employees have already received payments equal to or in excess of their calculated amount of back-pay for this portion of the claim, they will not receive any additional payment under the proposed settlement.

The total amount paid for the State-Law Claim is \$91,881.87, which is the sum of all eligible Plaintiffs’ individual claims for back pay under the S.C. Payment of Wages Act.

#### **B. FLSA Section 7(k) Claim**

The next component of the proposed settlement payment is Plaintiffs’ claims for overtime compensation because of Defendant’s unlawful use of Section 7(k) of the FLSA. Section 7(k) is a provision that allows public employers to pay fire fighters and police officers overtime compensation under a different set of rules than the normal rule of overtime after 40 hours in any work-week. Compare 29 U.S.C. § 207(a)(1) (general rule requiring overtime premium of 1.5 times regular rate for working more than 40 hours in any single work week), with 29 U.S.C. § 207(k) (partial exemption allowing public employers to use a different set of rules to calculate overtime pay for employees engaged in fire protection or law enforcement activities). Section 7(k) allows employers to combine up to four work weeks at a time and take an average to determine whether overtime pay

is owed. For fire fighters, employees are eligible for overtime after working an average of 53 hours per week, rather than after 40 hours per week. 29 C.F.R. § 553.230. Here, Lancaster County paid its EMS employees under the fire-fighter exemption, paying overtime to employees only after they worked more than 106 hours in a two-week pay period.

To calculate the amount of back pay under the Section 7(k) component of the FLSA claim, Plaintiffs' counsel and expert witnesses again reviewed the County's records regarding payroll and schedules for EMS employees during the three-year period preceding the filing date of the lawsuit (Oct. 29, 2007 to Oct. 29, 2010). For each work week, Plaintiffs' expert re-calculated the amount of compensation that each employee should have earned without applying Section 7(k) (i.e., any hours over 40 in any single week should have been compensated at time-and-a-half), and compared the recalculated amount to the amount the employee was actually paid by the County. The cumulative underpayment for the 3-year period in question shown by this calculation represents each opt-in Plaintiff's back-pay claim under the Section 7(k) portion of the FLSA claim.

Again, for purposes of the proposed apportionment, Plaintiffs are using the calculations based on the "true" hourly rate for each employee, rather than the stated hourly rate for each employee. (Again, this difference only exists for full-time employees who received the short-week payments). Plaintiffs' proposed apportionment also uses a back-pay period of 3 years from the original filing date of the lawsuit because it would not be cost effective to re-run each employee's calculations based on their actual opt-in date. The general statute of limitations under the FLSA is 2 years from the date each employee's opt-in form is filed, which can be extended to 3 years upon a showing of willfulness. 29 U.S.C. § 255(a). For expediency purposes, under the proposed apportionment each opt-in Plaintiff will receive 3 full years of payment, from the date of the filing of the lawsuit, of their

back-pay amounts on the Section 7(k) claim.

When Plaintiffs state that each opt-in class member will receive 100% of their back-pay amount under the Section 7(k) claim, that means that each opt-in Plaintiff will receive exactly what the Plaintiffs' expert determined to be the amount they should have been paid in overtime under the regular FLSA rules, compared with what they were actually paid by the County's unlawful use of Section 7(k) for three years. The FLSA does include a potential remedy for liquidated damages in an amount equal to the back pay award, 29 U.S.C. § 216(b); however, the award of liquidated damages is discretionary with the Court. If the employer can make a showing of good faith, it can avoid liability for liquidated damages. See Roy v. Lexington County, South Carolina, 141 F.3d 533, 548 (4th Cir. 1998) (affirming trial court's refusal to award liquidated damages, as well as trial court's use of 2-year statute of limitations, in claim for unpaid overtime under FLSA).

Although Defendant has conceded that its use of Section 7(k) was unlawful, Defendant strongly disputes Plaintiffs' back-pay calculations. Defendant asserts that the short-week payments were unauthorized and should be set-off against any potential liability Defendant has to each opt-in Plaintiff, because Plaintiffs received 16 hours' pay under each short-week payment without performing any additional work. Defendant's expert actually expressed the opinion that some opt-in Plaintiffs have been over-paid during the period in question because of such asserted set-offs for the short-week payments.

Based on Plaintiffs' perceived strength on this claim, the Plaintiffs' Steering Committee believed that it would be fair to pay all opt-in class members the full value of their back-pay claim for this component of the case as well. Again, if any of the opt-in Plaintiffs have already received payments equal to or in excess of their calculated amount of back-pay for this portion of the claim,

they will not receive any additional payment under the proposed settlement, or their payments would be reduced by the amounts already received from the County.

The total amount paid for the Section 7(k) claim is \$500,578.76, which is the sum of all opt-in Plaintiffs' individual claims for back pay under this portion of the FLSA claim.

### **C. Additional Component of FLSA Claim**

The third component of the settlement distribution to the opt-in members of the Plaintiff class is a pro-rata distribution of the remaining settlement amount after payment of the two 100% back-pay components discussed above and payment of all attorney's fees, costs, service/incentive payments to the named Plaintiffs and the members of the Plaintiffs' Steering Committee. Under the proposed apportionment, there is a total of \$305,039.37 available to be distributed to the opt-in Plaintiffs after all of the amounts described in the preceding sentence have been paid.

Plaintiffs propose to apportion this remainder to the opt-in Plaintiffs on a pro-rata basis comparing each opt-in member's individual share to the total amount of all opt-in Plaintiffs collectively of the back-pay calculation under the best-case scenario, including the sleep-time component of the FLSA claim. This third aspect of the claim is essentially intended to compensate the opt-in class members for their respective portions of the highest potential recovery under the FLSA, which assumes that Defendant could not qualify for the sleep-time deduction under 29 C.F.R. § 785.22. Plaintiffs' expert calculated this amount by assuming that every 24-hour shift worked by any opt-in Plaintiff during the relevant period should be compensated at the full 24 hours, without regard to any potential deduction for sleep time. In other words, Plaintiffs' expert reviewed the payroll and schedule data for each opt-in class member during the three-year period and re-calculated what each employee's compensation would have been if no sleep deduction were allowed on any

shift. (Many shifts were already paid at the 24-hour amount, so payments for those shifts would not change). Plaintiffs' expert's "best-case scenario" calculation is based on three years, at the "true" hourly rate, with no deductions for sleep time.

The total back-pay amount for all of the opt-in Plaintiffs collectively under the best-case scenario is \$2,163,661.96. This figure actually includes the Section 7(k) numbers because it calculates overtime after 40 hours each work week, compared to what the employees were actually paid by the County under the unlawful Section 7(k) plan. The best-case scenario number also includes the 15-minute per shift, State Law claim. Deducting the Section 7(k) amount of \$500,578.76 and the State Law claim amount for the opt-in members only reveals that the sleep-time claim accounts for \$1,571,908.55 (or approximately 72.6%) of the best-case scenario number.

The sleep-time claim is clearly the Plaintiffs' most tenuous claim. To prevail on the sleep-time argument would require the District Court to distinguish the Fourth Circuit's holding (or at least very strong dicta) in Roy v. Lexington County, South Carolina, 141 F.3d 533, 548 (4th Cir. 1998), or it would require the Fourth Circuit to reverse itself on appeal from the District Court or, ultimately, would require Plaintiffs to request that the United States Supreme Court address this issue. The facts of the Roy case were very similar to the underlying facts here, involving deductions for sleep time and meal times for employees of the Lexington County EMS Department.

The Plaintiffs' Steering Committee did not believe that the gamble on the sleep-time issue justified turning down the settlement offer made by the County at the mediation, especially because of the additional expense and delay that would be involved in proving the sleep-time claim. Plaintiffs previously attempted to have the Court strike the sleep-time deduction as a matter of law by challenging the propriety of the exemption in a motion for partial summary judgment. The Court

denied that portion of Plaintiffs' motion without prejudice. Whether or not sleep-time could be deducted would likely be a mixed question of law and fact for the trial, which poses significant risks and uncertainty, along with additional costs and delays. All of these considerations factored in to the decision to settle the case for the amount set forth in the Settlement Agreement.

## **II. Range of Potential Outcomes**

Plaintiffs' expert performed two sets of calculations: one at each employee's stated hourly rate as reflected in their personnel records at various dates during the 3-year period in question; and one at the "true" hourly rate, which incorporated the short-week payments for full-time employees whose pay records reflected receipt of the short-week payments. Again, only full-time employees who actually received the short-week payments have a difference between their stated hourly rate and the "true" hourly rate. Within these two sets of calculations, Plaintiffs' expert performed back-pay calculations for 2- and 3-year periods, corresponding to the potential statute of limitations that might apply to the claims as a matter of law or fact (i.e., whether Plaintiffs could establish willfulness under the FLSA to extend the statute of limitations to 3 years, and whether the S.C. Payment of Wages Act applied to the "off the clock" claims). The following tables summarize the range of back-pay calculations produced by Plaintiffs' expert for the class as a whole:



Table 1--Stated Hourly Rate

<b>2-years</b>	15-minute claim	Section 7(k)	Sleep-time	Total
Opt-ins	\$58,964.65	\$267,172.99	\$1,009,168.83	\$1,335,306.47
State-Law Only	74.59	N/A	N/A	74.59
Total	\$59,039.24	\$267,172.99	\$1,009,168.83	\$1,335,381.06
<b>3-years</b>				
Opt-ins	\$85,327.21	\$387,429.07	\$1,479,034.83	\$1,951,791.11
State-Law Only	673.71	N/A	N/A	673.71
Total	\$86,000.92	\$387,429.07	\$1,479,034.83	\$1,952,464.82

Table 2--“True” Hourly Rate

<b>2-years</b>	15-minute claim	Section 7(k)	Sleep-time	Total
Opt-ins	\$63,046.18	\$347,594.48	\$1,073,247.23	\$1,483,887.89
State-Law Only	74.59	N/A	N/A	74.59
Total	\$63,120.77	\$347,594.48	\$1,073,247.23	\$1,483,962.48
<b>3-years</b>				
Opt-ins	\$91,174.65	\$500,578.76	\$1,571,908.55	\$2,163,661.96
State-Law Only	707.22	N/A	N/A	707.22
Total	\$91,881.87	\$500,578.76	\$1,571,908.55	\$2,164,369.18

To further summarize the calculations of Plaintiffs’ expert, Plaintiffs view their realistic worst-case scenario as payment in full for 3 years under the 15-minute claim for all class members at the stated hourly rates, plus 2 years of the Section 7(k) claim at the stated hourly rate, which totals a back-pay amount of \$353,173.91. On the other end of the spectrum, the best-case scenario is 3

years under the 15-minute claim for all class members at the “true” hourly rates, plus 3 years of the sleep-time and Section 7(k) claims combined, for a total of \$2,164,369.18. The best-case scenario without any recovery for sleep-time would be a back-pay amount of \$592,460.63, which includes the 3-year, 15-minute claim and the 3-year, Section 7(k) claim, both at the “true” hourly rate.

Of course, the FLSA does provide the potential for recovering liquidated damages, or an amount equal to the back pay amount, for unlawful payments of overtime compensation. If Plaintiffs were to prevail at all on the sleep-time claim, it most likely would have been only for two years and no liquidated damages because of the uncertainty of the law on this issue. In other words, a more realistic best-case scenario for the back-pay amount would be three years under both the 15-minute claim and the Section 7(k) claim, but only 2 years under the sleep-time claim. According to the tables set forth above, that total would be approximately \$1.665 million in back pay, which is a much more accurate reflection of the true upper bound of the potential value of the case than the figure of \$2.164.

Defendant’s expert economist produced dramatically different calculations than those of Plaintiffs’ expert. According to Defendant’s expert, the opt-in Plaintiffs in this case were underpaid by a cumulative total of \$333,771.89, which includes both the Section 7(k) claim and the 15-minute “off the clock” claim for the full 3-year period immediately preceding the filing of the lawsuit. Defendant’s expert actually expresses the opinion that two opt-in class members were actually overpaid during the period in question, by as much as \$1,700 or \$2,000. When all Lancaster County EMS employees are included in the calculations, Defendant’s expert states that the total underpayment increases to \$353,437.25, of which the County has already paid \$22,491.67 to current or former employees of the EMS Department who had not opted in to this case at the time those

payments were made. Defendant's expert also calculated that a number of EMS employees were overpaid in the total amount of \$19,128.67 during the same period. Defendant's expert does not assign any value at all for the potential sleep-time claim.

The difference in Defendant's expert's results can be attributed to several factors. First, as discussed above, Defendant's expert assumed that the short-week payments for full-time employees were unauthorized and, therefore, should be set-off against the amount of any back-pay liability for improperly paid overtime. Second, Defendant's expert performed his wage calculations using a different data set regarding the number of hours worked by each EMS employee. Plaintiffs' expert used the actual hand-written, contemporaneous attendance records compiled by the operations manager every two weeks for payroll. Defendant's expert used computerized scheduling data to reflect how many hours each employee worked on any given shift. Third, Defendant's expert erroneously included individuals who were not actually potential members of the plaintiff class, such as office or administrative workers and part-time workers who did not generally work 24-hour shifts during the 3-year period in question. Finally, Defendant's expert used only the stated hourly rates in performing his calculations. Although Plaintiffs are very confident in the calculations performed by their expert witness, Plaintiffs must concede that there is always some risk that a jury or judge might find some of the calculations of Defendant's expert persuasive and could reach a compromise verdict.

### **III. Apportionment Between Back Pay and Liquidated Damages**

The parties have agreed to apportion the settlement amounts paid to the class members as follows: 50% to back pay, subject to regular payroll withholdings for state and federal income tax, Social Security, Medicare, and SC State Retirement (and for which W-2 statements will be issued);

and 50% to liquidated damages, which although taxable to the recipients as income, is not subject to withholdings (and for which 1099 statements will be issued). The basis for this apportionment is four-fold.

First, the County asserts that it based its negotiations on an assumption that half of the net settlement payments to class members would be apportioned to back pay and half would be apportioned to liquidated damages. According to Defendant's counsel, the County's evaluation of its potential liability exposure in this case was largely based on the Section 7(k) claim, plus liquidated damages. The actual individualized apportionments as proposed by Plaintiffs had not yet been finalized at the time the \$1.5 million settlement amount was agreed upon. The proposed apportionment between back pay and liquidated damages was decided first, as part of the arms-length settlement negotiations.

Second, the award of liquidated damages on any claim is far from certain, especially on the sleep-time claim. There is a much higher probability for receiving an award of liquidated damages on the Section 7(k) claim, and perhaps even the 15-minute, off-the-clock claim (to the extent that such claim might be cognizable only under the FLSA and not the S.C. Payment of Wages Act), than on the sleep-time claim. Even so, liquidated damages are not guaranteed, but are within the discretion of the Court. In counsels' experience (especially Defendant's counsel's, who represents many state, county, municipal, and local employers in employment matters), it is very rare to receive an award of liquidated damages against a public employer. In reality, the third component of the opt-in class members' FLSA claims discussed above can be thought of either as additional consideration for liquidated damages or as compensation for the sleep-time, or a combination thereof. Because of the potential variations in the calculation of back pay, including what hourly rate to use, what

statute of limitations applies, and whether any set-off would be appropriate, the half-back-pay, half-liquidated damages allocation is fully justified and has a rational basis.

Next, the liquidated damages portion of the claim could be no larger than 50% of the back-pay portion of the claim, because under the FLSA, liquidated damages (where awarded) are defined as an amount equal to the back pay amount. It would be impossible under the FLSA to receive a liquidated damages amount greater than the back-pay amount. There is plainly a statutory basis in the FLSA for treating half of the net, pre-tax settlement proceeds as back-pay and half as liquidated damages.

Finally, both parties would generally prefer the proposed apportionment because it subjects less of the settlement amount to Social Security and Medicare, which contains both an employer portion and an employee portion of withholdings. Defendant's total liability for settling this case includes its portion of Social Security and Medicare as well as contributions to the South Carolina Retirement System on behalf of the Plaintiff class members on top of the \$1.5 million gross settlement payment. Defendant has estimated that it will bear a load of approximately 17% of any amounts designated as "back pay" to account for its withholding liability for Social Security, Medicare, and S.C. State Retirement System contributions. In addition, most Plaintiffs would prefer to have more money up front immediately, rather than withheld for income tax purposes. Although all of the settlement proceeds are taxable income for purposes of state and federal income taxes, only the back-pay portion is subject to mandatory payroll withholdings. The collateral liability for payroll taxes associated with the settlement payments was fully discussed during the mediation and formed an integral part of the settlement negotiations.

### **III. Conclusion**

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

Respectfully submitted,

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January 19, 2012

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