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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 DIMITRI DIXON and RYAN SELTZ, individually,
12 and on behalf of all others similarly situated,

13 Plaintiffs,

14 vs.

15 CUSHMAN & WAKEFIELD WESTERN, INC.,
16 CUSHMAN & WAKEFIELD, INC., and
17 CUSHMAN & WAKEFIELD OF WASHINGTON
DC, INC., and DOES 1-50, inclusive

18 Defendants.

Case No. 3:18-cv-05813-JSC

**SUPPLEMENTAL DECLARATION OF
DEIRDRE A. AARON IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS,
COLLECTIVE, AND REPRESENTATIVE
ACTION SETTLEMENT**

Date: September 2, 2021
Time: 9:00 a.m.
Dept: Courtroom E, 15th Floor
Before: Hon. Magistrate Judge Jacqueline
Scott Corley

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1 I, Deirdre Aaron, declare as follows:

2 1. I am a partner at Outten & Golden LLP (“O&G”), and together with Laura Ho and
3 Ginger Grimes of Goldstein, Borgen, Dardarian & Ho and Paolo Meireles of Shavitz Law Group, P.A.,
4 attorneys for the Plaintiffs in the above-captioned matter (“Class Counsel”). I make these statements
5 based on personal knowledge and would so testify if called as a witness.

6 2. This Declaration is submitted in support of Plaintiffs’ Supplemental Briefing in Support
7 of Plaintiffs’ Motion for Preliminary Approval of Class, Collective, and Representative Action
8 Settlement.

9 3. I am a member in good standing of the bar of the State of New York and the
10 Commonwealth of Pennsylvania, and am admitted *pro hac vice* in this matter.

11 **One-Step FLSA Collective Action Settlements**

12 4. My firm has settled FLSA-only settlements for which the defendant does not fund a
13 portion of the settlement used to pay for awards ultimately unclaimed or a portion of the settlement is
14 paid back to the defendant after it provided funds to the administrator. *See, e.g., Przytula v. Bed Bath*
15 *& Beyond Inc.*, No. 1:17-cv-05124 (MTM), ECF No. 123 (N.D. Ill. Jan. 29, 2019) (granting one-step
16 approval of Plaintiffs’ Counsel’s FLSA case in which unclaimed funds and uncashed check amounts
17 were not paid by defendant); *Schrivver v. Golden Corral Corp.*, No. 4:17-cv-00136, ECF No. 67 (N.D.
18 Ohio May 31, 2018) (same); *Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17 Civ. 10219, 2017 WL
19 6460244, at *1 (D. Mass. June 8, 2017) (granting one-step approval of FLSA case where funds
20 attributable to collective members who did not submit claim forms were returned to defendant).

21 5. Attached as Exhibit A is a true and correct copy of the order Granting Final Approval of
22 Settlement, Service Awards, and Attorneys’ Fees and Costs in *Przytula v. Bed Bath & Beyond Inc.*,
23 dated January 29, 2019. Attached as Exhibit B is the Memorandum of Law in Support of Plaintiffs’
24 Motion for Approval of Settlement, dated January 18, 2019, ECF No. 118. The Memorandum explains
25 that “[a]ny unclaimed funds, including any uncashed checks, will revert to Defendant.” *See id.* at 3.

26 6. Attached as Exhibit C is a true and correct copy of the order Granting Final Approval of
27 Settlement, Service Awards, and Attorneys’ Fees and Costs in *Schrivver v. Golden Corral Corp.*, dated
28 May 31, 2018. Attached as Exhibit D is Plaintiffs’ Motion for Approval of Settlement, dated May 21,

1 2018, ECF No. 66. The Memorandum of Law in Support of Plaintiffs' Motion explains that "[a]ny
2 portion of the Net Settlement Fund that remains unclaimed by eligible collective members will revert
3 to Golden Corral." *See id.* at 5.

4 7. Attached as Exhibit E is a true and correct copy of the Settlement Agreement in *Lauture*
5 *v. A.C. Moore Arts & Crafts, Inc.*, providing that unclaimed funds and uncashed checks shall be
6 returned to the defendant. See Ex. E at Sections 3.1(v), 3.4(iv).

7 **Hybrid Rule 23 Class Action and FLSA Collective Action Settlements**

8 8. My firm has settled cases in which FLSA collective members who were not also class
9 members were not provided the right to object to the settlement. *See e.g., Zorrilla v. Carlson*
10 *Restaurants Inc.*, No. 14 Civ. 2740, 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (finally
11 approving settlement in which FLSA collective members not provided right to object). In that
12 settlement, the highest estimated award was anticipated to be \$5,707.42, the lowest estimated award
13 was anticipated to be \$5.75 and the average estimated award was anticipated to be \$562.83. Attached
14 as Exhibit F is a true and correct copy of the court-approved notice sent to collective members in
15 *Zorrilla*.

16 **Cy Pres**

17 9. I have never served on the Board of Directors of NELP and do not have a close
18 affiliation with the organization. O&G once co-counseled a case with NELP, but that case ended
19 nearly 20 years ago, in 2002, and no one who has worked on this case was involved in that litigation.

20 Dated: August 19, 2021

Respectfully submitted,

21 /s/ Deirdre A. Aaron

22 Deirdre A. Aaron

23 Deirdre Aaron (*admitted pro hac vice*)

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28 *Collective Members, and Aggrieved Employees*

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**MARY PRZYTULA and BRAD BREDE,
individually and on behalf of all others similarly
situated,**

Plaintiffs,

v.

BED BATH & BEYOND INC.,

Defendant.

No. 1:17-cv-05124 (MTM)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR APPROVAL OF SETTLEMENT,
SERVICE AWARDS, AND ATTORNEYS' FEES AND COSTS**

This matter comes before the Court on Plaintiffs' unopposed Motion for Approval of Settlement, Service Awards, and Attorneys' Fees and Costs. Having considered Plaintiffs' Motion and supporting Memorandum and exhibits, the Court hereby GRANTS Plaintiffs' Motion and ORDERS as follows:

1. The settlement in this Fair Labor Standards Act action is fair, reasonable, and just. The settlement is approved, and the terms of the agreement are incorporated herein.
2. Plaintiffs' proposed Settlement Notice, and the plan for its distribution, is approved.
3. The Service Awards are approved.
4. The Settlement Administrator's fees and costs are approved.
5. Plaintiffs' Counsel's request for attorneys' fees and out-of-pocket costs and expenses is granted.

6. This action is dismissed without prejudice, which will become dismissal with prejudice 55 days thereafter upon fulfillment of all the settlement's terms.

IT IS SO ORDERED.

Dated: January 29, 2019


Hon. Michael T. Mason

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**MARY PRZYTULA and BRAD BREDE,
individually and on behalf of all others similarly
situated,**

Plaintiffs,

v.

BED BATH & BEYOND INC.,

Defendant.

No. 1:17-cv-05124 (MTM)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR APPROVAL OF SETTLEMENT,
SERVICE AWARDS, AND ATTORNEYS' FEES AND COSTS**

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INTRODUCTION

The Parties have resolved this wage-and-hour lawsuit on a collective-wide basis for \$8,500,000 after discovery, motion practice, two private mediation sessions, and further negotiations. Plaintiffs respectfully request that the Court approve the Joint Stipulation of Settlement and Release (“Settlement Agreement”) (Ex. 1 to the Swartz Decl.),¹ adopt the Proposed Order (Ex. A to the Settlement Agreement), and approve the Settlement Notice and Claim Form (Ex. B to the Settlement Agreement), the requested Service Awards, the requested attorneys’ fees and expenses, and the Settlement Administrator’s fees and costs. The Settlement satisfies all criteria for approval and provides good value to the approximately 3,150 workers.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are former employees of Defendant who worked as assistant store managers (“ASMs”) at Defendant’s retail stores throughout the United States. Swartz Decl. ¶ 6. Plaintiffs allege that Defendant misclassified them as exempt under the FLSA and various state laws and failed to pay them overtime compensation for working more than 40 hours per week. Defendant denies these allegations.

In a letter dated February 17, 2017, Plaintiffs’ Counsel informed Defendant of Plaintiffs’ allegations and of their intent to litigate if a pre-litigation settlement could not be reached. *Id.* ¶ 7. Defendant declined to negotiate. *Id.* Before initiating this action, Plaintiffs’ Counsel thoroughly investigated and researched the claims and defenses, including various theories of liability, measures of damages, and certification issues. *Id.* ¶ 8. This included reviewing publicly available information and interviewing ASMs from several states. *Id.*

¹ Unless otherwise indicated, all exhibits are attached to the Swartz Decl., and all capitalized terms are defined in the Glossary of Terms (Ex. 2 to the Swartz Decl.) consistent with the definitions set forth in the Settlement Agreement.

On July 11, 2017, Plaintiffs filed their Complaint on behalf of ASMs nationwide under the FLSA and Illinois and New York state labor laws. *See* ECF No. 1. On November 7, 2017, Plaintiffs filed a motion for court-authorized notice pursuant to Section 216(b) of the FLSA. *See* ECF Nos. 2-3. As of January 9, 2018, the motion was fully briefed. *See* ECF Nos. 57-76, 78-79.

Meanwhile, the Parties engaged in discovery. Swartz Decl. ¶ 9. Defendant moved to compel certain depositions but the Court rejected this request. *See* ECF No. 77. Plaintiffs served discovery demands on October 13, 2017 and obtained and reviewed responsive information, including voluminous ESI. Swartz Decl. ¶ 9. The Parties engaged in approximately nine discovery meet and confers and attended several status conferences. *Id.*

In the spring of 2018, while Plaintiffs' 216(b) motion was pending, the parties agreed to attend private mediation with Michael D. Young, a well-regarded, experienced mediator on August 22, 2018. *Id.* ¶ 10. As part of the mediation process, Defendant produced additional, targeted class-wide discovery and data showing the number of potential class members in the job title, salaries, and weeks worked, which Plaintiffs' Counsel analyzed and to construct a damages model. *Id.* ¶ 11. The Parties also submitted detailed mediation statements. *Id.*

The August 22, 2018 mediation session did not resolve the case, but the parties agreed to continue negotiating with the mediator's assistance. *Id.* ¶ 12. After continued negotiations and a second mediation session on October 23, 2018, the parties reached an agreement in principle. *Id.* Thereafter, the parties finalized the terms of the Settlement, which were memorialized in formal Settlement Agreement on January 18, 2019. *Id.*

SUMMARY OF THE SETTLEMENT TERMS

I. The Settlement Fund and Eligible Employees

The Settlement Agreement establishes a fund of \$8,500,000.00 ("Fund") from which

Class Members may claim settlement awards. The Fund covers any Court-approved Service Awards, attorneys' fees and expenses, Settlement Administrator's fees, payroll taxes, and class member awards. Ex. 1 ¶¶ 1.12, 1.8, 3.1(i).

All current and former ASMs other than those ASMs who worked exclusively in New Jersey stores are Eligible Settlement Class Members. *Id.* ¶¶ 1.9.²

II. Claims Procedure, Releases, and Allocation Formula

The parties negotiated a simple claims process with no barriers to participation. The Settlement Administrator will mail a plain language notice and a simple claim form to all Eligible Settlement Class Members, informing them of the claims, the settlement terms, their individual settlement allocations, the release, and their right to participate. *Id.* ¶ 2.7; *see id.* at Ex. B (Settlement Notice and Claim Form). Eligible Settlement Class Members will have 60 days to submit claim forms (45 days after a re-mailing). *Id.* ¶ 1.4. The Settlement Administrator will send a reminder postcard 30 days after the initial mailing. *Id.* ¶ 2.9.

The Settlement Administrator will mail checks to all Participating Settlement Class Members at the end of the claims period. *Id.* ¶¶ 1.19, 3.1(iii). Settlement payments for Eligible Settlement Class Members will be determined by an allocation formula based on the number of weeks they worked during the Relevant Period. *Id.* ¶ 3.4.

Class Members who do not return executed claim forms will not release any claims. *Id.* ¶ 4.2. Class Members who participate will release all FLSA and state-law wage and hour claims arising from their employment as ASMs. *Id.* ¶ 4.1. Any unclaimed funds, including any uncashed checks, will revert to Defendant. *Id.* ¶¶ 3.1(iv), 3.4(iv). The Settlement Administrator

² The Settlement also carves out the plaintiffs in *Carter v. Bed Bath & Beyond, Inc.*, No. MID-L 06178-16 (N.J. Superior Ct.) (a class action under New Jersey law), any ASMs who worked exclusively in New Jersey stores during the Relevant Period, and the eight plaintiffs in *Thomas et al. v. Bed Bath and Beyond, Inc.*, 1:16 Civ. 8160 (S.D.N.Y.). *Id.* ¶ 1.9.

will send reminders to individuals who have not cashed their checks after 30 days. *Id.* ¶ 3.4(v).

III. Service Awards

With Court approval, the Named Plaintiffs, Przytula and Brede, will each receive \$9,500 Service Awards, and the Opt-In Declarants, Temple, Mitchell, Kempner, Dunne, Dykeman, Forde, Kehoe, Reha, and Popp, will each receive \$1,400. This recognizes their assistance in vindicating the rights of the approximately 3,150 ASMs who will benefit from the settlement, and the risks they took as early participants. *Id.* ¶¶ 1.16, 1.31, 3.3(i); Swartz Decl. ¶¶ 25-27.

IV. Settlement Claims Administration

Plaintiffs' Counsel has retained Rust Consulting, Inc. ("Rust"), an experienced settlement claims administrator, as the Settlement Administrator. *Id.* ¶ 30. Courts have routinely approved Rust as a settlement administrator. *See* Swartz Decl. ¶ 18. Rust's fees are capped at \$50,000 and will be paid from the Fund. Ex. 1 ¶ 1.11; *see also* Swartz Decl. ¶ 18.

V. Attorneys' Fees and Expenses

Subject to Court approval, Plaintiffs' Counsel will receive \$2,833,333.33 (one-third of the \$8,500,000 settlement) as attorneys' fees, plus reimbursement of \$35,917.09, the actual reasonable out-of-pocket expenses incurred litigating and resolving this matter. *See* Ex. 1 ¶ 3.2(i); Swartz Decl. ¶ 19 & Ex. 3 (Summary of Costs).

ARGUMENT

I. A One-Step Approval Process Is Appropriate.

A one-step approval process is appropriate in a wage and hour settlement that does not include a class-wide Rule 23 release. An opt-in settlement, like this one, does not implicate the due process concerns that a Rule 23 class action settlement implicates because there are no

absent class members whose rights are affected.³ The only individuals whose rights are affected are those who affirmatively execute and return a claim form. Ex. 1 ¶ 4.2.⁴

Accordingly, courts should not impose the same approval process for Rule 23 class action settlements on FLSA settlements. *See, e.g., Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 476 (S.D.N.Y. 2013); *see also Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982) (discussing due process concerns present in Rule 23 class actions that are not present in FLSA collective actions); *Koszyk*, 2016 WL 5109196, at *1. There is no need for the settlement to allow opt-outs or objections where individuals are not part of the settlement unless they decide to participate in it. *See Prena v. BMO Fin. Corp.*, 2015 WL 2344949, at *1; *Woods*, 686 F.2d at 580 (“The difference between a Rule 23 class action and a section 16(b) class action is thus that in the latter the class member must opt in to be bound, while in the former he must opt out not to be bound.”).

³ *See, e.g., Bainter v. Akram Investments, LLC*, No. 17 Civ. 7064, 2018 WL 4943884, at *2 (N.D. Ill. Oct. 9, 2018) (finding the “one-step [FLSA] settlement approval process is appropriate”); *Brewer v. Molina Healthcare, Inc.*, No. 16 Civ. 9523, 2018 WL 2966956, at *1 (N.D. Ill. June 12, 2018) (same); *Briggs v. PNC Fin. Servs. Grp. Inc.*, No. 15 Civ. 10447, 2016 WL 7018566, at *1 (N.D. Ill. Nov. 29, 2016) (same); *Koszyk v. Country Fin.*, No. 16 Civ. 3571, 2016 WL 5109196, at *1 (N.D. Ill. Sept. 16, 2016) (same); *Prena v. BMO Fin. Corp.*, No. 15 Civ. 9175, 2015 WL 2344949, at *1 (N.D. Ill. May 15, 2015) (“One step is appropriate because this is an FLSA collective action, where collective members must affirmatively opt-in in order to be bound by the settlement (including the settlement’s release provision).”); *see also Roberts v. Apple Sauce, Inc.*, No. 12 Civ. 830, 2014 WL 4804252, at *1 (N.D. Ind. Sept. 25, 2014); *Campbell v. Advantage Sales & Mktg. LLC*, No. 09 Civ. 1430, 2012 WL 1424417, at *1 (S.D. Ind. Apr. 24, 2012); *Blum v. Merrill Lynch & Co., Inc.*, No. 15 Civ. 1636, 2017 WL 8784449 (S.D.N.Y. May 15, 2017); *Bozak v. Fedex Ground Package Sys., Inc.*, No. 11 Civ. 738, 2014 WL 3778211, at *2 (D. Conn. July 31, 2014).

⁴ “Rule 23 actions are fundamentally different from collective actions under the FLSA.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). Collective actions under Section 216(b) require workers to affirmatively opt in to the litigation, unlike in a Rule 23 class action. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 771-72 (7th Cir. 2013); *see also* Under the FLSA, “parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date.” *McKenna v. Champion Int’l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984), *abrogated on other grounds by Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

II. The Settlement Is Fair and Reasonable and Should Be Approved.

The Seventh Circuit “encourages settlements” in complex matters. *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979). In the FLSA context, courts must “determine whether the proposed settlement is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.” *Butler v. Am. Cable & Tel., LLC*, No. 09 Civ. 5336, 2011 WL 4729789, at *9 n.9 (N.D. Ill. Oct. 6, 2011) (“*Butler I*”) (Mason, M.J.). If the settlement reflects a reasonable compromise over contested issues, the court should approve it. *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982); *Roberts*, 2014 WL 4804252, at *2. Settlements that follow contested litigation are likely to be approved. *See, e.g., Lynn’s Food Stores*, 679 F.2d at 1355; *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 994-95 (N.D. Ind. 2010); *see also Butler I*, 2011 WL 4729789, at *8-9.

The Settlement meets the standard for approval. It follows a thorough pre-suit investigation, contested litigation and discovery, and results from substantial arm’s-length negotiations. *See supra* at 1-2. Recognizing the uncertain legal and factual issues involved, the Parties settled after two all-day sessions with an experienced mediator. Swartz Decl. ¶ 20.

The \$8,500,000 settlement amount is substantial, especially in light of the considerable risk that Plaintiffs faced. First, the average net settlement award will be approximately \$1,750 per person (after fees, service awards, and costs, including settlement administration costs), which is a substantial percentage of the average participant’s alleged lost wages. *Id.* ¶ 21.

Second, there was a risk that Plaintiffs would not succeed on their motion for FLSA notice, or in maintaining a collective through trial. Defendant would continue to argue that the differences among various stores and other individualized questions precluded certification, or

would warrant decertification of a collective. *See* ECF No. 57 (Def.’s Br.) at 14-17 (listing variations among ASMs). Although Plaintiffs disagree, other defendants have prevailed on similar arguments. *See, e.g., Gromek v. Big Lots, Inc.*, No. 10 Civ. 4070, 2010 WL 5313792, at *5 (N.D. Ill. Dec. 17, 2010) (denying FLSA certification of assistant manager claims because “significant differences are present between the job duties of individual[s]”); *see also Beckman*, 293 F.R.D. at 480 (collecting misclassification cases where courts decertified FLSA collectives).

Third, a trial would present significant risks as to liability and damages. The status of ASMs under the FLSA is fact-intensive and uncertain. *See, e.g., Ottaviano v. Home Depot, Inc., USA*, 701 F. Supp. 2d 1005, 1007-10 (N.D. Ill. 2010) (dismissing claims of assistant store managers and finding they were properly classified as exempt under Illinois wage and hour laws); *Jackson v. Go-Tane Servs., Inc.*, No. 99 Civ. 5686, 2001 WL 826867, at *3-4 (N.D. Ill. July 18, 2001) (granting summary judgment to employer on claims of certain assistant managers).

The proposed allocation is also reasonable. It is based on the number of weeks worked as an ASM, which is a reasonable approximation of damages. Ex. 1 ¶ 3.4(i)(a)-(b) (allocation plan); *see Summers v. UAL Corp. ESOP Comm.*, No. 03 Civ. 1537, 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005) (approving allocation plan as reasonable where the funds were “disbursed on a pro rata basis”).

The Court should also approve the proposed Settlement Notice and Claim Form. *See* Ex. 1 at Ex. B. The Notice clearly informs Eligible Settlement Class Members of the terms of the settlement, including the allocation formula, how to participate, the payment to which they are entitled, the release, and the request for attorneys’ fees and costs. *Id.*; *see also Koszyk*, 2016 WL 5109196, at *2 (approving class notice that, *inter alia*, described settlement terms and fee

allocation); *Zolkos v. Scriptfleet, Inc.*, No. 12 Civ. 8230, 2014 WL 7011819, at *6 (N.D. Ill. Dec. 12, 2014) (same). The Claim Form is a straightforward one-page form requiring minimal information. *See* Ex. 1 at Ex. B.

III. The Service Awards Should Be Approved as Fair and Reasonable.

The Service Awards that Plaintiffs request are reasonable and should be approved. Individual plaintiffs play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Service awards serve the important purpose of compensating plaintiffs for assisting in the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and other burdens. *See, e.g., Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012).⁵ “This is especially true in employment litigation.” *Castillo v. Noodles & Co.*, No. 16 Civ. 3036, 2016 WL 7451626, at *2 (N.D. Ill. Dec. 23, 2016).

In evaluating a requested service award, courts consider: (1) the work the plaintiffs have taken to protect the interests of the class, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing the litigation. *Cook*, 142 F.3d at 1016; *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 Civ. 2898, 09 Civ. 2026, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012). Here, Named Plaintiffs and Opt-In Declarants satisfy all three factors.

First, Named Plaintiffs’ and Opt-In Declarants’ worked for the common good resulted in

⁵ *See also Cook*, 142 F.3d at 1016; *Massiah v. MetroPlus Health Plan, Inc.*, No. 11 Civ. 5669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012); *cf. Follansbee v. Discover Fin. Servs., Inc.*, No. 99 Civ. 3827, 2000 WL 804690, at *7 (N.D. Ill. June 21, 2000) (recognizing incentive awards’ importance). Service awards are commonly awarded to those who serve the class’s interests. *Massiah*, 2012 WL 5874655, at *8 (collecting cases); *accord Chesemore v. Alliance Holdings, Inc.*, No. 09 Civ. 413, 2014 WL 4415919, at *4 (W.D. Wis. Sept. 5, 2014); *Hawkins v. Securitas Sec. Servs. USA, Inc.*, 280 F.R.D. 388, 395 (N.D. Ill. 2011).

a substantial benefit. They provided documents, helped articulate the claims, helped prepare for mediation, participated in discovery, and submitted detailed declarations. Swartz Decl. ¶ 25. Courts routinely approve service awards for similar contributions. *See, e.g., Koszyk*, 2016 WL 5109196, at *3 (approving service awards for assistance early in lawsuit); *Zolkos v. Scriptfleet, Inc.*, 2015 WL 4275540 (N.D. Ill. Jul. 13, 2015), at *3 (same).

Second, Plaintiffs undertook risk. They agreed to bring the action in their names, to be deposed, and to testify if there was a trial. Swartz Decl. ¶ 26. In so doing, they assumed the risk that they would be liable for costs and fees. “The incentive reward is designed to compensate [named plaintiffs] for bearing these risks.” *Espenscheid*, 688 F.3d at 876-77 (internal citations omitted); *accord Koszyk*, 2016 WL 5109196, at *3. Moreover, Plaintiffs risked reputational harm in the eyes of future employers. Swartz Decl. ¶ 26; *Beesley v. Int’l Paper Co.*, No. 06 Civ. 703, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (suits against employers carry professional and personal risks).⁶

Third, Plaintiffs spent a significant amount of time and effort in pursuing this litigation on behalf of the Eligible Settlement Class Members. This included helping counsel investigate, assisting with the complaint, and preparing for the mediation. Swartz Decl. ¶ 27; *see Koszyk*, 2016 WL 5109196, at *3.

⁶ *See also, Singleton v. Domino’s Pizza, LLC*, 976 F. Supp. 2d 665, 691 (D. Md. 2013) (named plaintiffs risk future employers finding out, through a simple Google search, that they filed a class action lawsuit against their prior employer); *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *14 (S.D.N.Y. Apr. 16, 2012) (“[F]ormer employees . . . fac[e] potential risks of being blacklisted as ‘problem’ employees.”); *see also* Ex. 4 (Hr’g Tr. at 8, *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637, (E.D.N.Y. July 30, 2015)) (“I will note that given the rise of the information technology age that we’re in [being a plaintiff] is not without risk . . . it’s something that stays with you forever.”); *Guippone v. BH S & B Holdings, LLC*, No. 09 Civ. 1029, 2011 WL 5148650, at *7 (S.D.N.Y. Oct. 28, 2011) (“Today, the fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person.”).

Courts routinely approve service awards equal to or greater than the awards requested here. *See Koszyk*, 2016 WL 5109196, at *3 (\$10,000 service awards for assistance to collective early in lawsuit); *Zolkos*, 2015 WL 4275540, at *3 (service awards of \$5,000 and \$10,000). The requested Service Awards — \$40,000 in total — are also reasonable because they amount to less than 0.5% of the total recovery. Swartz Decl. ¶ 28; *see Butler v. Am. Cable & Tel., LLC*, No. 09 Civ. 5336, 2012 WL 13123576, at *7 (N.D. Ill. Jan. 23, 2012) (“*Butler II*”) (Mason, M.J.) (approving awards of approximately 3.2%); *Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011) (approving awards of approximately 16.6%).

IV. The Attorneys’ Fees and Costs Should Be Approved as Fair and Reasonable.

A. The Court Should Use the Percentage of the Fund Method.

The Court should award attorneys’ fees as a percentage of the total fund made available to the Class. When counsel’s efforts result in the creation of a common fund, counsel is entitled to a reasonable attorney’s fee from the fund as a whole. *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 548 (7th Cir. 2003) (creation of common fund “entitles [counsel] to a share of that benefit as a fee”). This is “based on the equitable notion that those who have benefited from litigation should share in its costs.” *Sutton v. Bernard*, 504 F.3d 688, 691-692 (7th Cir. 2007).

Although there are two ways to compensate attorneys for successful prosecution of statutory claims—the lodestar method and the percentage-of-the-fund method, *see Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565-66 (7th Cir. 1994)—the trend in the Seventh Circuit is to use the percentage-of-the-fund method, *see Wong v. Accretive Health, Inc.*, 773 F.3d 859, 862 (7th Cir. 2014), especially in FLSA matters. *See Campbell*, 2012 WL 1424417, at *2 (FLSA settlement); *see also Koszyk*, 2016 WL 5109196, at *3-4; *Prena*, 2015 WL 2344949, at *1.

The percentage method promotes early resolution, and removes the incentive for

plaintiffs' lawyers to engage in wasteful litigation to increase their billable hours. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003). The percentage method also preserves judicial resources because it saves the Court from the task of reviewing billing documents. *See Florin*, 34 F.3d at 566 (noting "advantages" of percentage of the fund method's "relative simplicity of administration"); *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1040 (N.D. Ill. 2011) (same).⁷

B. The Benefits Conferred Upon the Class Justify the Fee Award.

This Settlement will provide the participants with substantial cash payments, which they can obtain with little effort. The settlement represents significant value given the attendant risks of litigation. *See supra* at 6; Swartz Decl. ¶¶ 20-24.⁸

The Settlement negotiations were not collusive. They followed contested litigation and involved a well-respected class action employment law mediator. *Id.* ¶¶ 6-12; *see also Long v. HSBC USA Inc.*, No. 14 Civ. 6233, 2015 WL 5444651 (S.D.N.Y. Sept. 22, 2015) (approving settlement mediated by Michael D. Young).⁹

⁷ The Seventh Circuit's opinion in *Pierce v. Visteon Corp.*, 791 F.3d 782 (7th Cir. 2015), has no impact on longstanding Seventh Circuit jurisprudence that in class settlements, class counsel should be awarded a portion of the fund their work creates. In *Pierce*, the Court addressed a unique situation where a lawyer obtained a judgment in his or her client's favor, recovered an attorneys' fee on a lodestar basis that the court found to be a reasonable fee, and then sought a second fee recovery on a percentage-of-the-fund basis. *Id.* at 783-88.

⁸ This estimated recovery is made according to the fluctuating work week, pursuant to *Urnikis-Negro v. American Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010).

⁹ This case does not present indicia of collusion that would support reducing the fee allocation based on the rate at which class members participate in the settlement. *Cf. Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014) (in consumer case, noting the "danger of collusion in class actions between class counsel and the defendant, to the detriment of the class members" and examining the ratio of the fee to the post-claims recovery). Unlike in cases where courts have adopted such safeguards, in this case, no Eligible Settlement Class Members will release claims without affirmatively deciding to join the case. Moreover, there is reason to expect a significant claims rate because the settlement provides significant cash value on an

C. An Analysis of the Market For Legal Services Supports Plaintiffs' Request.

In awarding fees, courts ultimately “must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001); *Koszyk*, 2016 WL 5109196, at *3. District courts “undertake an analysis of the terms to which the private plaintiffs and their attorneys would have contracted at the outset of the litigation when the risk of loss still existed.” *Sutton*, 504 F.3d at 692. They must “do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, [and] information from other cases[.]” *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

1. Plaintiffs' Request for One-Third of the Settlement Is the Normal Rate of Compensation in the Northern District of Illinois Market.

The attorneys' fees that Plaintiffs' Counsel request are based on the market in the Northern District of Illinois. *Id.* at 600 (approving attorneys' fees based on, *inter alia*, “legal hurdles that lead counsel faced in proving liability”) (citing *Donovan v. Estate of Frank E. Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985)); *see, e.g., N.P. v. Standard Innovation Corp.*, No. 16 Civ. 8655, 2017 WL 10544061, at *3 (N.D. Ill. July 25, 2017) (Mason, M.J.) (“[C]ourts have held that fees in the range of 25% to 40% of the settlement fund are reasonable, depending on the facts of each case.”)), *adopted by*, ECF No. 54 (N.D. Ill. Aug. 15, 2017); *McDaniel v. Qwest Commc'ns Corp.*, No. 05 Civ. 1008, 2011 WL 13257336, at *4 (N.D. Ill. Aug. 29, 2011) (“As decisions of the Seventh Circuit have confirmed, the real-world market range for contingent fee cases is 33% to 40%.”). Plaintiffs' Counsel are nationally recognized for their expertise in

individual basis, the notice is straightforward, and the notice plan includes robust efforts to locate Class Members.

litigating complex class and collective actions, including wage and hour cases like this one, and are justified in seeking compensation in the form of one-third of any potential settlement (plus costs) for their efforts. Swartz Decl. ¶ 4.

Before agreeing to take on this matter, Plaintiffs' Counsel agreed with the Named Plaintiffs to request one-third of any (at that time uncertain) future recovery, plus expenses. *See Id.* ¶ 29. This is evidence of what private plaintiffs "would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)," *In re Synthroid Mktg. Litig.*, 264 F.3d at 718, because the Named Plaintiffs did just that. *See In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 844-45 (N.D. Ill. 2015) (stating "presumption of market-rate reasonableness" would have attached if parties had "established[ed] a fee structure at the outset of [the] lawsuit"); *see also Koszyk*, 2016 WL 5109196, at *4.

It was reasonable for the Named Plaintiffs to contract for one-third of the settlement fund to be paid to Plaintiffs' Counsel. In the Northern District of Illinois, class and collective action employment lawyers routinely contract to receive one-third of any potential settlement as compensation for taking on the risk of funding a potential multi-year litigation without any assurance of recovery. *See Briggs*, 2016 WL 7018566, at *4; *Koszyk*, 2016 WL 5109196, at *4. In addition, one-third is the standard contingent percentage that employment lawyers in the District charge individual clients. *Id.* These multiple data points, confirming that plaintiffs routinely are willing to agree to a one-third contingency fee arrangement, reinforces that Plaintiffs' Counsel request the proper market rate. *See In re Synthroid*, 325 F.3d at 976.

Courts regularly agree that "a counsel fee of 33.3% of the common fund is comfortably within the range typically charged as a contingency fee by plaintiffs' lawyers in an FLSA action." *Burkholder*, 750 F. Supp. 2d at 997 (quotation marks omitted, collecting cases); *see*

Briggs, 2016 WL 7018566, at *4; (approving award of one-third settlement plus costs in wage and hour litigation); *Koszyk*, 2016 WL 5109196, at *3 (same); *Rusin v. Chicago Tribune Co.*, No. 12 Civ. 1135, 2013 WL 12377129, at *2 (N.D. Ill. June 26, 2013) (same); *Campbell*, 2012 WL 1424417, at *2 (same).

Here, Plaintiffs' Counsel's requested fee is well within the market rate for common fund wage and hour actions within the Northern District of Illinois.¹⁰ *See id.* at 599-600 (noting class actions in the Northern District of Illinois have awarded fees of 30-39% of the settlement fund); *Gaskill v. Gordon*, 160 F.3d 361, 364 (7th Cir. 1998) (affirming award of 38% of fund); *Woods v. Club Cabaret, Inc.*, No. 15 Civ. 01213, 2017 WL 4054523, at *10 (C.D. Ill. May 17, 2017) ("In Illinois, courts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement, including wage and hour settlements." (quotations and alterations incorporated, citations omitted)); *Briggs*, 2016 WL 7018566, at *4; (awarding fees as one-third of fund); *Koszyk*, 2016 WL 5109196, at *4 (same); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 842 (same); *Beatty v. Capital One Fin. Corp.*, No. 12 Civ. 434 (N.D. Ill. Dec. 13, 2012) (Mason, M.J.) (attached as Exhibit 5) (same); *Zolkos v. Scriptfleet, Inc.*, 2015 WL 4275540, at *3 (N.D. Ill. Jul. 13, 2015) (same); *Goldsmith v. Tech. Solutions Co.*, No. 92 Civ. 4374, 1995 WL 17009594, at *7-8 (N.D. Ill. Oct. 10, 1995) (same and noting that "where the

¹⁰ Courts in this Circuit do not usually engage in a lodestar "cross-check" of plaintiffs' counsel's fee requests. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 n.27 (N.D. Ill. 2011) ("[U]se of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."); *Kaplan v. Houlihan Smith & Co.*, No. 12 Civ. 5134, 2014 WL 2808801, at *3-4 (N.D. Ill. June 20, 2014) (rejecting plaintiffs' cross-check lodestar but finding contingency rate reasonable because it was "well within the range of market prices"); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 849 ("Ultimately, the Court sees no utility in considering this somewhat-arbitrary (and under-vetted) [lodestar] calculation, and thus disregards this evidence for purposes of this fee petition."); *see also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("consideration of a lodestar check is not an issue of required methodology"). However, if helpful to the Court, Plaintiffs can submit lodestar summaries in a supplemental filing.

percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); *Butler II*, 2012 WL 13123576, at *5 (awarding fees of 30% of the gross recovery and noting that one-third contingency is common).

2. The Risk of Nonpayment Was Significant.

Plaintiffs' Counsel's decision to charge the market rate is also reasonable in light of the significant risks of nonpayment that Plaintiffs' Counsel faced. At the outset of the representation, Plaintiffs' Counsel took "on a significant degree of risk of nonpayment" in agreeing to represent Plaintiffs. *Taubenfeld*, 415 F.3d at 600 (approving of district court's reliance on this factor in evaluating attorneys' fees). Plaintiffs' Counsel took this case on a contingent basis, meaning that there was a strong risk that they would not be paid. Swartz Decl. ¶ 30; *Sutton*, 504 F.3d at 693-94 ("We recognized [in an earlier case] that there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit."). Should the Court reject the settlement, Plaintiffs' Counsel also face significant legal hurdles in establishing certification and proving liability. *See* Argument, *supra* § II. These risks include litigating the merits and a potential finding that the ASMs were properly classified by Defendant as exempt. As the Seventh Circuit has noted, Plaintiffs' Counsel "could have lost [and still could lose] everything" they invested. *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992); *Koszyk*, 2016 WL 5109196, at *4.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court issue an order substantially in the form of Plaintiffs' Proposed Order attached as Exhibit A to the Settlement Agreement.

Dated: New York, New York
January 18, 2019

By: /s/ Justin M. Swartz
Justin M. Swartz

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*Attorneys for Plaintiffs and the Proposed FLSA
Collective*

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, the above document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Justin M. Swartz
Justin M. Swartz

Exhibit C

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, YOUNGSTOWN**

ROBERT SCHRIVER, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

GOLDEN CORRAL CORPORATION,

Defendant.

Case No. 4:17-cv-00136

Judge Benita Y. Pearson

**ORDER GRANTING PLAINTIFF’S UNOPPOSED MOTION FOR APPROVAL OF
SETTLEMENT, SERVICE AWARD,
AND ATTORNEYS’ FEES AND COSTS**

This matter comes before the Court on Plaintiff’s Unopposed Motion for Approval of Settlement, Service Awards, and Attorneys’ Fees and Costs (“Motion”). Having considered Plaintiff’s unopposed Motion and supporting Memorandum and exhibits, including the parties’ Settlement Agreement, the Court hereby GRANTS Plaintiff’s Motion and ORDERS as follows:

1. The Court finds that the parties’ settlement in this Fair Labor Standards Act (“FLSA”) action is fair, adequate, and reasonable. The parties’ settlement is approved and the terms of the parties’ agreement are incorporated herein.
2. The parties’ agreed form of Notice of Settlement and Opportunity to Join (“Settlement Notice”) and the plan for its distribution are approved.
3. The Service Award for Plaintiff Robert Schriver is approved.
4. Plaintiff’s Counsel’s request for attorneys’ fees and out-of-pocket costs and expenses is granted.
5. American Legal Claim Services LLC is approved as the Settlement

Administrator.

6. The previously certified Rule 23 classes are decertified.
7. This action is dismissed without prejudice, with leave to reinstate on or before one hundred and eighty (180) days after the settlement checks are distributed.
8. The Court will retain jurisdiction to enforce the settlement.

IT IS SO ORDERED.

Dated: May 31, 2018

/s/ Benita Y. Pearson
HONORABLE BENITA Y. PEARSON
UNITED STATES DISTRICT JUDGE

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, YOUNGSTOWN

ROBERT SCHRIVER, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

GOLDEN CORRAL CORPORATION,

Defendant.

Case No. 4:17-cv-00136

Judge Benita Y. Pearson

**NOTICE OF PLAINTIFF'S UNOPPOSED MOTION FOR APPROVAL OF
SETTLEMENT, SERVICE AWARD, AND ATTORNEYS' FEES AND COSTS**

Plaintiff respectfully submits the following Unopposed Motion for Approval of Settlement, Service Awards, and Attorneys' Fees and Costs ("Motion"). For the reasons set forth in the Memorandum of Law in Support of Plaintiff's Motion, the Declaration of Melissa L. Stewart in Support of Plaintiff's Motion ("Stewart Decl."), and the exhibits attached thereto, Plaintiff respectfully requests that the Court enter an Order:

(1) approving the \$3,900,000.00 collective action settlement set forth in the Settlement Agreement ("Settlement Agreement"), attached as Exhibit 1 to the Stewart Decl.;

(2) approving the proposed Notice of Settlement and Opportunity to Join ("Settlement Notice") (attached as Exhibit A to the Settlement Agreement) and directing its distribution;

(3) approving a Service Award for Plaintiff Robert Schriver;

(4) approving Plaintiff's request for one-third of the settlement fund for attorneys' fees, plus reimbursement of costs and expenses;

(5) approving American Legal Claim Services LLC as the Settlement Administrator and approving payment of its fees, expenses, and costs;

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(6) decertifying the previously certified Rule 23 classes; and

(6) incorporating the terms of the Settlement Agreement.

Dated: New York, New York
May 21, 2018

Respectfully submitted,

By: /s/ Melissa L. Stewart
Melissa L. Stewart

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, the above document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By: /s/ Melissa L. Stewart
Melissa L. Stewart

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, YOUNGSTOWN**

ROBERT SCHRIVER, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

GOLDEN CORRAL CORPORATION,

Defendant.

Case No. 4:17-cv-00136

Judge Benita Y. Pearson

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED
MOTION FOR APPROVAL OF SETTLEMENT, SERVICE
AWARD, AND ATTORNEYS' FEES AND COSTS**

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INTRODUCTION

Plaintiff Robert Schriver and Defendant Golden Corral Corporation (“Golden Corral”) have agreed, subject to Court approval, to resolve this wage and hour lawsuit on a collective action basis for significant monetary relief. The settlement should be approved because it resolves a bona-fide dispute, was the result of arm’s-length negotiations between experienced counsel assisted by a private mediator, and provides excellent value to the workers it will benefit.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Allegations

Golden Corral is a buffet-style restaurant chain that operates approximately 50 company-owned restaurants. ECF No. 1 (Compl.) ¶ 5. To become an Associate Manager at one of Golden Corral’s restaurants, a worker must first undergo a training program. Declaration of Melissa L. Stewart (“Stewart Decl.”) ¶ 13. Plaintiff alleges that Golden Corral unlawfully paid him and other AM Trainees a fixed “lump sum” each week during this training program, rather than an overtime premium for all hours worked over 40, in violation of federal and state wage laws. ECF No. 1 (Compl.) ¶¶ 9-11, 46; 29 C.F.R. § 778.310.

II. Overview of Litigation and Negotiations

Plaintiff commenced this action on January 18, 2017, after a pre-suit attempt to resolve the claims was not successful. ECF No. 1. Shortly thereafter, the parties agreed to a stay for additional settlement discussions. ECF No. 26. After mediation sessions with mediator Carole Katz on May 31 and July 27, 2017, the parties were still unable to reach agreement. ECF No. 37.

From August 24, 2017, through December 2017, the parties exchanged pre-certification discovery, including requests for documents, interrogatories, and requests for admissions, and Defendant produced hundreds of pages of document discovery. Stewart Decl. ¶ 15.

The parties also stipulated to conditional FLSA certification of a collective action, ECF No. 38, and Defendant agreed not to oppose Plaintiff's motion for certification of Ohio and Pennsylvania AM Trainee classes, ECF No. 52, which the Court granted on December 11, 2017. ECF No. 55. Although Defendant agreed to conditional certification and did not contest class certification, it reserved its right to seek decertification of both at a later stage. ECF No. 52.

Before notice issued to the class and collective, the parties agreed to attempt once more to resolve the claims in this litigation through private mediation. Stewart Decl. ¶ 22; ECF Nos. 56-57. The Court stayed the issuance of notice to the class and collective pending the parties' settlement discussions. ECF No. 57. The parties engaged mediator Hunter Hughes to mediate this matter on January 22, 2018. Stewart Decl. ¶ 24. In preparation for mediation, Golden Corral produced personnel data. *Id.* ¶ 25. Plaintiff's Counsel analyzed these data and constructed a damages model. *Id.* After a full day mediation, the parties were still unable to resolve the matter but continued to engage in extensive settlement discussions. *Id.* ¶ 26.

On March 7, 2018, the parties reached an agreement in principle, and so informed the Court. *Id.* ¶ 27. The Court dismissed the case and ordered the parties to file approval papers by May 7, 2018, which the Court later extended to May 21, 2018. ECF No. 63. Over the next several weeks, the parties finalized the terms of the settlement and executed the formal Joint Stipulation of Settlement and Release ("Agreement") on May 19, 2018. Stewart Decl. ¶ 28.

SUMMARY OF KEY SETTLEMENT TERMS

I. The Settlement Fund

The Agreement establishes a Gross Settlement Amount of \$3,900,000, from which individual Settlement Awards will be paid to eligible collective members who join the

settlement. Ex. 1 (Agreement) ¶ 3.1.¹ The Gross Settlement Amount also covers any Court-approved Service Award, the Settlement Administrator's fees and costs, and Plaintiff's Counsel's Court-approved attorneys' fees and costs, as described further below. *Id.*

II. Eligible Employees

Eligible collective members include individuals who were employed by Golden Corral as AM Trainees from March 13, 2013, through March 30, 2017, when the company changed its compensation policy in response to this lawsuit. *Id.* ¶¶ 1.3, 1.25. The settlement collective includes all the members of the previously certified Rule 23 classes. Stewart Decl. ¶ 29.

III. Settlement Notice Procedure

The Settlement Notice will inform eligible collective members of the nature of the claims, the terms of the Settlement, estimated Settlement Awards, the scope of the release, and their right to decide whether to participate in the settlement. Ex. 1 (Agreement, Ex. A (Notice)). The Administrator will mail Settlement Notices to all eligible collective members and post the Settlement Notice on a website. Ex. 1 (Agreement) ¶ 2.2. The Administrator will take all reasonable steps to obtain the correct address of any eligible collective member for whom the Settlement Notice is returned as undeliverable, and will attempt re-mailings in the event better address information is obtained. *Id.* ¶ 2.8. Eligible collective members will have 45 calendar days to return a properly-executed and completed Consent to Join and Release Form ("Consent Form") to the Administrator via mail or fax. *Id.* ¶¶ 1.5, 2.2, Ex. A (Notice). The Administrator will mail a reminder notice to any eligible collective member who has not yet returned a completed Consent Form halfway through the notice period. Ex. 1 (Agreement) ¶¶ 2.8-9, Ex. B

¹ Unless otherwise indicated, all exhibits are attached to Stewart Decl., and all capitalized terms have the definitions set forth in the Settlement Agreement.

(Reminder Notice). Eligible collective members who submit a valid, timely Consent Form will be considered participating collective members and will receive a portion of the Net Settlement Amount.² *See* Ex. 1 (Agreement) ¶ 1.19.

IV. Release

Only individuals who participate in the settlement will release any claims – those who do not participate will not release any claims. *Id.* ¶ 4.2. Participating collective members will release state and federal claims for unpaid overtime, and related claims for penalties, interest, liquidated damages, that accrued during their employment as AM Trainees from March 13, 2013 through March 30, 2017, as well as attorneys’ fees, costs, and expenses. *Id.* ¶ 4.1.

V. Allocation Formula

Eligible collective members’ individual Settlement Awards will be calculated with an allocation formula based on the weeks they worked as AM Trainees during the relevant period. *See id.* ¶ 3.4(i). Eligible collective members will be assigned one point for each week where they were employed as an AM Trainee. *Id.* ¶ 3.4(i)(a). To calculate the proportionate share of the Net Settlement Fund for each eligible collective member, the Administrator will add all points for all collective members together to obtain the “Denominator.” *Id.* ¶ 3.4(i)(b)(1). The Administrator will then divide the number of points for each collective member by the Denominator to obtain each person’s “Portion of the Net Settlement Fund.” *Id.* ¶ 3.4(i)(b)(2). The Administrator will then multiply that fractional amount by the Net Settlement Fund to determine each person’s estimated award. *Id.* ¶ 3.4(i)(b)(3).

² The Net Settlement Amount is remainder of the Gross Settlement Amount after deductions for Court-approved Service Award, the Administrator’s fees and costs, and Plaintiff’s Counsel’s Court-approved attorneys’ fees and costs. Ex. 1 (Agreement) ¶ 1.18.

For tax purposes, 50 percent of the Settlement Award for each collective member will be treated as back wages and 50 percent of the Settlement Award will be treated as interest, any applicable penalties, liquidated damages, and other non-wage relief. *Id.* ¶ 3.4(v)(a). Any portion of the Net Settlement Fund that remains unclaimed by eligible collective members will revert to Golden Corral. *Id.* ¶¶ 3.4(iv), 3.5. In addition, 120 days after the issuance of settlement checks, any check not cashed shall become part of the reversion to Golden Corral. *Id.* ¶ 3.4(iv).

VI. Service Award

The Agreement provides that, subject to Court approval, Plaintiff Robert Schriver will receive a \$10,000 service award, in recognition of assistance he rendered in obtaining the benefits of the settlement for the collective, as well as the risks he took to do so, and in consideration of executing a general release. *Id.* ¶¶ 3.3(i), 4.3.

VII. Settlement Administration

The parties have retained American Legal Claim Services, LLC (“ALCS”), a third-party claims administrator, to serve as the Settlement Administrator. Stewart Decl. ¶ 30. Courts routinely approve ALCS as an administrator. *See, e.g., Azogue v. 16 for 8 Hosp. LLC*, No. 13 Civ. 7899, 2016 WL 4411422, at *6 (S.D.N.Y. Aug. 19, 2016). ALCS’s fee, not to exceed \$27,615.00, will be paid from the Gross Settlement Amount. Ex. 1 (Agreement) ¶ 3.1(i).

VIII. Attorneys’ Fees and Litigation Costs

Under the Agreement, subject to Court approval, Plaintiff’s Counsel will receive \$1,300,000.00 (one-third of the \$3,900,000.00 settlement) as attorneys’ fees, plus reimbursement of \$32,727.62, which represents reasonable out-of-pocket costs and expenses incurred in litigation and resolving this matter. Stewart Decl. ¶ 31; Declaration of Gregg I. Shavitz (“Shavitz Decl.”) ¶ 15; Declaration of Drew Legando (“Legando Decl.”) ¶ 10.

ARGUMENT

I. The Court Should Approve The Collective Action Settlement Procedure.

This settlement resolves the claims of AM Trainees through an FLSA collective action procedure, rather than through a Rule 23 class action opt-out procedure. As a result, a one-step approval process should apply, rather than the two-step process for approval of class actions.³

The collective action settlement structure is in the best interest of AM Trainees because it avoids passive Rule 23 releases.⁴ The parties have agreed that only potential plaintiffs who return a consent form and receive payment will release claims; those who elect not to participate in the settlement will not release any claims. In contrast, in a claims-made Rule 23 settlement, all class members release their claims by operation of Rule 23, even if they do not receive a payment, absent an exclusion request. *See Sutton v. Hopkins Cty., Ky.*, No. 03 Civ. 003, 2007 WL 119892, at *9 (W.D. Ky. Jan. 11, 2007) (under Rule 23, “[e]very member of the [Rule 23] class who d[oes] not opt out w[ill] be bound” (quoting *Dodge v. Cty. of Orange*, 226 F.R.D. 177, 184 (S.D.N.Y. 2005))).⁵

³ *See, e.g., Osman v. Grube*, No. 16 Civ. 00802, 2018 WL 2095172, at *2 (N.D. Ohio May 4, 2018) (“A one-step settlement approval process in FLSA collective actions is appropriate.”) (citing cases); *Edwards v. City of Mansfield*, No. 15 Civ. 959, 2016 WL 2853619, at *4 (N.D. Ohio May 16, 2016) (approving FLSA settlement in one step); *Bradford v. Legacy Health Servs.*, No. 13 Civ. 218, 2014 WL 7185453, at *2 (N.D. Ohio Dec. 16, 2014) (same); *Prena v. BMO Fin. Corp.*, No. 15 Civ. 9175, 2015 WL 2344949, at *1 (N.D. Ill. May 15, 2015).

⁴ Critically, the collective action settlement will benefit the same group of potential plaintiffs, because all the members of the previously certified Ohio and Pennsylvania classes are also members of the putative collective.

⁵ *See also In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, No. 01 Civ. 9000, 2001 WL 1842315, at *21 (N.D. Ohio Oct. 20, 2001) (in Rule 23 settlement, class members who do not opt-out are deemed to have released their claims); *cf. Osman*, 2018 WL 2095172, at *2 (in contrast, “the failure to opt in to an FLSA lawsuit does not prevent potential members of the collective from bringing their own suits”).

A one-step collective settlement will also expedite payment of settlement awards and promote judicial economy. Collective action settlements are more streamlined because there is no need for a lengthy two-step process involving successive rounds of preliminary and final approval briefing, and a final fairness hearing. *See In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350 (N.D. Ohio 2001) (discussing two-step approval process required under Rule 23); *see also Knox v. Jones Grp.*, No. 15 Civ. 1738, 2017 WL 3834929, at *2 (S.D. Ind. Aug. 31, 2017) (approving one-step settlement process because “FLSA collective actions do not implicate the same due process concerns as do Rule 23 actions”).⁶ Collective members will also receive their settlement payments more quickly.⁷

To effectuate this collective action settlement, the Court should decertify the Pennsylvania and Ohio Rule 23 classes. District courts have broad discretion to “alter[] or amend[]” a certification order at any time “before final judgment.” Fed. R. Civ. P. 23(c)(1)(C); *see Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (“Even after a [class] certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.”).⁸ Decertification is appropriate here because settlement through a collective action

⁶ *See also Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17 Civ. 10219, 2017 WL 6460244, at *1 (D. Mass. June 8, 2017) (same, collecting cases).

⁷ A streamlined collective settlement will also reduce claims administration costs associated with the processing of potential opt-outs or objections, resulting in a larger percentage of the settlement fund going to collective members as opposed to administration costs. *See Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982) (“The difference between a Rule 23 class action and a section 16(b) class action is . . . that in the latter the class member must opt in to be bound, while in the former he must opt out not to be bound.”).

⁸ *See also Hurt v. Commerce Energy, Inc.*, No. 12 Civ. 758, 2014 WL 3735460, at *1 (N.D. Ohio July 28, 2014) (district court has duty to monitor class and redefine, subclass or decertify, as appropriate, as case progresses); 1 McLaughlin on Class Actions § 3:6 (14th ed.) (“There is no exhaustive list of developments that could lead a court to exercise its broad discretion to decertify a class.”).

procedure offers significant advantages to AM Trainees without compromising their claims or prejudicing them in any way.⁹ Although not necessarily required, in an abundance of caution, counsel proposes including notice to class members regarding the certification and decertification of the Rule 23 classes and the statutes of limitations for state law claims as part of the notice regarding the parties' collective action settlement.¹⁰

II. The Settlement Is Fair And Reasonable And Should Be Approved.

Courts approve wage and hour settlements when they are reached as a result of contested litigation to resolve bona fide disputes.¹¹ If a proposed settlement reflects a reasonable compromise over contested issues, a court should approve the settlement. *Crawford v. Lexington-Fayette Urban Cty. Gov't*, No. 06 Civ. 299, 2008 WL 4724499, at *2 (E.D. Ky. Oct. 23, 2008); *see also Hainey v. Parrott*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007).

The settlement in this case easily meets the standard for approval. The settlement is the result of extensive investigation, contested litigation, exchange of formal and informal discovery, and extensive arm's-length negotiations between experienced counsel assisted by two private

⁹ *See Headlee v. Wolford*, No. 09 Civ. 92, 2012 U.S. Dist. LEXIS 44257, at *2-3 (S.D. Ga. March 29, 2012) (decertifying class in settlement context upon the parties' joint motion, and finding that decertification would not prejudice class members because notice had not yet issued); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 158 F.R.D. 301, 302-04 (S.D.N.Y. 1994) (granting motion to decertify where decertification would give class members "the freedom to choose the forum in which to pursue their claims" and therefore was in the "best interest" of class members).

¹⁰ By operation of *American Pipe* tolling and Defendant's agreement, the statute of limitations for class members' state law claims were tolled from March 11, 2016, so they did not suffer any prejudice while they were members of the certified classes. *See* ECF No. 1 (Compl.) ¶ 17 (discussing parties' agreement); *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (commencement of suit tolls statute of limitations for class claims).

¹¹ *See, e.g., Schneider v. Goodyear Tire & Rubber Co.*, No. 13 Civ. 2741, 2014 WL 2579637, at *2-3 (N.D. Ohio June 9, 2014); *Dillworth v. Case Farms Processing, Inc.*, No. 05 Civ. 1694, 2010 WL 776933, at *5-6 (N.D. Ohio Mar. 8, 2010); *Kritzer v. Safelite Solutions, LLC*, No. 10 Civ. 0729, 2012 WL 1945144, at * 5, *10 (S.D. Ohio, May 30, 2012).

mediators. Stewart Decl. ¶¶ 32-34, 43; *see Swigart v. Fifth Third Bank*, No. 11 Civ. 88, 2014 WL 3447947, at *2, *8 (S.D. Ohio July 11, 2014).

The settlement amount is substantial by any measure, particularly in light of the risks of litigation. *Id.* ¶ 44. The average net Settlement Award (after fees, the Service Award, and costs, including settlement administration costs, are deducted) will be approximately \$5,882.92 on average per collective member, or \$628.71 per training week. *Id.* By Plaintiff's estimate, this is nearly all of the unpaid wages collective members stood to recover at trial—not including liquidated damages or attorneys' fees and costs—based on a time-and-half overtime rate, and the estimate that AM Trainees worked approximately 19 overtime hours per week during the training period.¹² *Id.* ¶ 45.

Although Plaintiff believes his case is strong, it is subject to litigation risk. “[R]isks are inherent in litigation.” *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *8 (S.D.N.Y. Apr. 16, 2012); *accord IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 596 (E.D. Mich. 2006) (“[T]here is no such thing as risk-free, expense-free litigation.”). Indeed, “[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.” *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969). For example, at trial, Golden Corral would argue that the wages it paid to AM Trainees were proper under the FLSA, the regulation on which Plaintiff relies was not properly promulgated, any alleged violation was not willful, and that Plaintiff's measure of damages is improper. *See generally* ECF No. 11 (Answer). Plaintiff would dispute these arguments, but a trial would be risky and

¹² This is an average based on several AM Trainees' estimated overtime hours worked. *See* ECF No. 1 (Compl.) ¶ 23 (approximately 25 overtime hours); ECF No. 52 Ex. D (Whalen Decl.) ¶ 4 (approximately 22.5 overtime hours); Ex. E (Schoenberger Decl.) ¶ 4 (approximately 15 overtime hours); Ex. F (Holcomb Decl.) ¶ 3 (same); Ex. G (Stevens Decl.) ¶ 3 (same).

entail a “long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court.” *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 556 (S.D. Ohio 2000). Regardless of the strength of Plaintiff’s claims, the inherent risk and expense of litigation is an ever-present reality that confronts Plaintiff in establishing liability and damages.

The proposed allocation of the settlement is also reasonable: it is based on the number of weeks collective members worked AM Trainees. This is a reasonable approximation of their overtime damages. Ex. 1 (Agreement) ¶ 3.4(i); *see, e.g., Rotuna v. W. Customer Mgmt. Grp., LLC*, No. 09 Civ. 1608, 2010 WL 2490989, at *6 (N.D. Ohio June 15, 2010).

III. The Proposed Settlement Notice Is Proper.

The Court should approve the proposed Settlement Notice. *See* Ex. 1 (Agreement, Ex. A (Notice)). The proposed Settlement Notice sufficiently informs eligible collective members of the allocation formula, the steps they must follow to participate, the consequences of non-participation, the monetary amount to which they are entitled under the Settlement, the scope and mechanism of the release of claims, the request for attorneys’ fees and costs, and other terms of the Agreement. *See Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989). The Settlement Notice also informs members of the previously certified state law classes about their rights with respect to certification and decertification.

The proposed Settlement Notice provides “accurate and timely notice concerning the pendency of the collective action so that each individual has the opportunity to make an informed decision regarding whether to opt-in to the settlement.” *Bassett v. Tenn. Valley Auth.*, No. 09 Civ. 39, 2010 WL 3092251, at *2 (W.D. Ky. Aug. 5, 2010) (citation omitted).

IV. The Service Award Should Be Approved as Fair And Reasonable.

Plaintiff requests approval of a \$10,000.00 Service Award. Ex. 1 (Agreement) ¶ 3.3(i).

The Service Award recognizes the time and effort Plaintiff Robert Schriver expended in furtherance of the litigation and settlement, including initiating the lawsuit and informing counsel of the facts initially, providing information and documents to counsel, submitting a declaration, conferring with counsel about the lawsuit, and assisting with the mediation and damages analyses. Stewart Decl. ¶ 46.

Courts in the Sixth Circuit recognize that in common fund cases and where the settlement agreement provides for service awards, plaintiffs who have had extensive involvement in the litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.¹³ Service awards “are common in class action settlement[s] . . . to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Kritzer*, 2012 WL 1945144, at *8 (quoting *Rotuna*, 2010 WL 2490989, at *7) (internal quotation marks omitted).¹⁴

The proposed Service Award is well within the range of awards that courts within this judicial circuit regularly and routinely grant under these circumstances.¹⁵

¹³ See *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (“Incentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit.”); see also *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) (approving and noting incentive awards are typical in Sixth Circuit), *on reconsideration in part* (July 21, 2010).

¹⁴ See also, e.g., *Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) (approving theory behind incentive awards in Title VII class action); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (approving \$50,000 to each of the six class representatives from a common fund); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (approving awards in the amounts of \$35,000 and \$55,000 to five class representatives from a common fund).

¹⁵ See, e.g., *Wagoner v. U.S. Bancorp*, No. 14 Civ. 1626, 2016 WL 7474408, at *4 (N.D. Ohio Dec. 29, 2016) (approving service awards of \$10,000 each for the named plaintiff); *Kritzer*, 2012 WL 1945144, at *18 (awarding \$15,000 to the named plaintiffs in FLSA settlement).

V. Attorneys' Fees And Costs Should Be Approved As Fair And Reasonable.

Plaintiff's request for one-third of the Gross Settlement Amount for their attorneys' fees plus reimbursement of actual out-of-pocket costs and expenses is reasonable. *See* Ex. 1 (Agreement) ¶ 3.2.

A. The Percentage Method Is Appropriate For Awarding Attorneys' Fees.

When counsel's efforts result in the creation of a common fund, counsel is "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 699-700 (S.D. Ohio 1986). This is "founded on the equitable principle that those who have profited from litigation should share its costs." *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995).

Although there are two ways to compensate attorneys for successful prosecution of statutory claims—the lodestar method and the percentage-of-the-fund method¹⁶—courts routinely favor awarding fees in common fund cases based upon a percentage of the fund. *Id.* at 307 ("use of the [percentage of the fund] method in common fund cases is the prevailing praxis"); *see also Swigart*, 2014 WL 3447947, at *5 (adopting the percentage approach as "the most appropriate method for determining reasonable attorneys' fees" in wage and hour case); *Feiertag v. DDP Holdings, LLC*, No. 14 Civ. 2643, 2016 WL 4721208, at *1, *7 (S.D. Ohio

¹⁶ *See, e.g., Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016), *cert. denied sub nom. Blackman v. Gascho*, 137 S. Ct. 1065 (2017), and *cert. denied sub nom. Zik v. Gascho*, 137 S. Ct. 1065 (2017); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516-17 (6th Cir. 1993); *Bailey v. AK Steel Corp.*, No. 06 Civ. 468, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008).

Sept. 9, 2016); *Rotuna*, 2010 WL 2490989, at *1, *8; *Dillworth*, 2010 WL 776933, at *7-8.

There are several reasons why courts choose the percentage method. First, this method is appropriate in wage and hour cases where “the damages which could have been claimed by each class member [are] relatively modest ... for it rewards counsel for taking on a case which might not otherwise be economically feasible.” *Bessey v. Packerland Plainwell, Inc.*, No. 06 Civ. 95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007). The Supreme Court “has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than [themselves] or [their] client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Id.* (quoting *Boeing*, 444 U.S. at 478). As a result, courts in the Sixth Circuit and around the country routinely approve requests for one-third of the fund in FLSA collective actions. *See, e.g., Dillworth*, 2010 WL 776933, at *21 (one-third of the fund is “fair and reasonable” in light of the “exceptional” result for class members) (collecting cases); *Swigart*, 2014 WL 3447947, at *7 (awarding 33% of \$4 million settlement and finding award “well within the range of fees requested in class and collective actions in Ohio federal district courts”).¹⁷

Second, the percentage of the fund method promotes judicial economy because it “encourages early settlement, which avoids protracted litigation,” *Gascho*, 822 F.3d at 279, and

¹⁷ *See also In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997) (“[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund”), *rev’d on other grounds*, 24 Fed. App’x 520 (6th Cir. 2001); *Waggoner*, 2016 WL 7474408, at *4 (N.D. Ohio Dec. 29, 2016) (one-third of \$1.5 million collective action settlement); *Castillo v. Morales, Inc.*, No. 12 Civ. 650, 2015 WL 13021899, at *2 (S.D. Ohio Dec. 22, 2015) (one-third of \$2.2 million common fund); *Lapan v. Dick’s Sporting Goods*, No. 13 Civ. 11390 (D. Mass. April 19, 2016) (one-third of \$3.3 million settlement); *Aboud v. Charles Schwab & Co.*, No. 14 Civ. 2712, 2014 WL 5794655, at *1, *5 (S.D.N.Y. Nov. 4, 2014) (one-third of the \$3.8 million fund); *Clem v. Keybank, N.A.*, No. 13 Civ. 789, 2014 WL 2895918, at *9-10 (S.D.N.Y. June 20, 2014) (33% of \$3.4 million settlement); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (33% of \$4.9 million settlement).

removes the incentive for plaintiffs' lawyers to engage in wasteful litigation to increase their billable hours. *See Rawlings*, 9 F.3d at 517 (lodestar method "provides incentives for overbilling"); *In re Thirteen Appeals*, 56 F.3d at 307 (percentage method "enhances efficiency"). It "provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). As the Ninth Circuit has explained, "the lodestar method does not reward early settlement" and "class counsel should [not] necessarily receive a lesser fee for settling a case quickly." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002).

Third, recovery of fees based on the percentage of the fund method allows the court to "spread[] fees proportionately among those benefited by the suit." *Boeing*, 444 U.S. at 478; *see also Chesher v. Neyer*, No. 01 Civ. 0566, 2007 WL 4553908, at *1 (S.D. Ohio Dec. 19, 2007) ("where, as here, a class plaintiff successfully recovers a common benefit for the class, the costs of litigation should be spread among the beneficiaries").

Fourth, the percentage method preserves judicial resources because it permits courts to focus on the benefit conferred upon a class or collective rather than the cumbersome task of reviewing complicated and lengthy billing documents. *In re Thirteen Appeals*, 56 F.3d at 301 ("[T]he [percentage of the fund] method permits the judge to focus on a showing that the fund conferring a benefit on the class resulted from the lawyers' efforts.") (citation and internal quotation marks omitted); *Rawlings*, 9 F.3d at 516 ("[T]he lodestar method has been criticized for being too time-consuming of scarce judicial resources.").

B. The Sixth Circuit's Award Factors Support Approval of Attorneys' Fees.

Reasonableness is the touchstone for determining attorneys' fees. In determining what constitutes a reasonable percentage of the fund for attorneys' fees, the Sixth Circuit approved six

factors: (1) the value of the benefit rendered to the collective; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on contingency; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

1. The Settlement Bestows Significant Benefit On The Collective.

Plaintiffs' Counsel's fee request is reasonable in light of the significant benefit their efforts conferred on the collective. By Plaintiff's Counsel's estimation, the recovery represents nearly all of the collective's lost wages, or an average of \$5,882.92 per collective member – an outstanding recovery that is the direct result of the work done by Counsel.¹⁸ Stewart Decl. ¶¶ 44-45.

2. Plaintiff's Counsel Expended Substantial Time And Labor.

Achieving the \$3,900,000.00 settlement required significant effort by Plaintiff's Counsel. At the outset of the representation, Plaintiff's Counsel investigated and evaluated the claims and the damages to which collective members were entitled. *Id.* ¶ 32. Before settlement, Plaintiff's Counsel vigorously litigated these claims, including researching and preparing the complaint, preparing, serving and responding to discovery requests, meeting and conferring to resolve discovery disputes, reviewing voluminous discovery produced by Defendant, and negotiating

¹⁸ Plaintiff's Counsel's fee should be calculated as a percentage of the full amount of money that the settlement makes available to the Eligible Settlement Collective Members. This is the best measure of what Plaintiff's Counsel accomplished. *See Gascho*, 822 F.3d at 282 (class plaintiffs' "right to share the harvest of the suit . . . , whether or not they exercise it, is a benefit in the fund created by the efforts of class representatives and their counsel") (quoting *Boeing*, 444 U.S. at 480) (emphasis in original); *Gokare v. Fed. Express Corp.*, No. 11 Civ. 2131, 2013 WL 12094887, at *6 (W.D. Tenn. Nov. 22, 2013) (not "appropriate for Class Counsel to receive a lower award because Settlement Class Members choose not to claim funds").

certification issues. *Id.* ¶ 33. Plaintiff's counsel also devoted significant effort to settlement of this matter: analyzing payroll data to perform a detailed damages analysis, preparing detailed mediation briefs, participating in four full-day mediation sessions with two separate mediators, and successfully negotiating this settlement. *Id.* ¶ 34.

Plaintiff's Counsel expended significant time and resources to investigate, file, litigate, and resolve the matter: co-counsel firms' attorneys, staff, and paralegals worked approximately 1,225.3 hours on this matter to date, or an aggregate lodestar of approximately \$539,584.00. *Id.* ¶ 35; Shavitz Decl. ¶ 16; Legando Decl. ¶ 11. These hours are reasonable and were compiled from contemporaneous time records maintained by each attorney, paralegal, and support staff member participating in the case.¹⁹ Stewart Decl. ¶ 35; Shavitz Decl. ¶ 16; Legando Decl. ¶ 11. Plaintiff's Counsel used a small team of attorneys at any one time in order to minimize duplication of efforts and maximize billing judgment and made every effort to have the work performed by the attorney or paralegal with the lowest hourly rate who was able to effectively perform it. Stewart Decl. ¶ 36.

Moreover, the requested fee is not based solely on time and effort already expended. It should also compensate Plaintiff's Counsel for time that will be spent administering the settlement in the future. Stewart Decl. ¶ 37; *cf. In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014). In Plaintiff's Counsel's experience, administering a settlement of this nature requires an ongoing commitment. Stewart Decl. ¶ 37. As is common in wage and hour collective actions, Plaintiff's Counsel expects to respond to inquiries from

¹⁹ If the Court requires additional detail regarding the time and efforts of Plaintiff's Counsel, we will provide further records upon request.

collective members after approval of the settlement and when checks are issued.²⁰ *Id.*

3. Plaintiff's Counsel Undertook The Litigation On A Contingent Basis.

Plaintiff's Counsel prosecuted this wage and hour collective action without any assurance of payment for their services, litigating the case on a wholly contingent basis in the face of litigation risk. Stewart Decl. ¶ 38. "Wage-and-hour collective and class actions are, by their very nature, complicated and time-consuming." *Swigart*, 2014 WL 3447947, at *7. Any lawyer undertaking representation of large numbers of affected employees in such actions inevitably must be prepared to make a tremendous investment of time, energy, and resources. *Id.* Due also to the contingent nature of the fee shifting statute, lawyers are asked to be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. *Id.* at *6. Plaintiff's Counsel stood to gain nothing in the event the case was unsuccessful. *Id.*; see *In re Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.*, No. 08 Civ. 65000, 2016 WL 5338012, at *23 (N.D. Ohio, Sept. 23, 2016) (on a contingent basis, "counsel has borne all the risk . . . , including the prospect . . . that the investment . . . would be lost").

²⁰ The one-third fee requested here is approximately 2.4 times Plaintiff's counsel's lodestar amount to date, which is well within the range that courts award in common fund settlements, in recognition of the "risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 794-95 (N.D. Ohio 2010), *on reconsideration in part* (July 21, 2010); see *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (approximately 7.6 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05 Civ. 11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approximately 8.3 multiplier); *Bailey v. AK Steel Corp.*, No. 06 Civ. 468, 2008 WL 553764, at *3 (S.D. Ohio Feb. 28, 2008) (3.04 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approximately 6.96 multiplier); *Sulzer*, 268 F. Supp. 2d, at 939 (2.4 multiplier); *Manners v. Am. Gen. Life Ins. Co.*, No. 98 Civ. 0266, 1999 WL 33581944, at *31 (M.D. Tenn. Aug. 11, 1999) (3.8 multiplier); *Vizciano v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing nationwide settlements with multipliers up to 19.6); Newberg on Class Actions § 14.6 (4th ed. 2009) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.").

Plaintiff's Counsel takes on difficult cases like this one because we believe that they are important. Stewart Decl. ¶ 39. Plaintiff's Counsel takes seriously our responsibility to push the law in a direction favorable for employees, especially those who suffer unpaid wages. *Id.* Plaintiff's Counsel continues to do so despite, unfortunately, having experienced several major (and very expensive) losses in wage and hour cases over the years. *Id.* Plaintiff's Counsel are experienced and realistic, and understand that the resolution of liability issues, the outcome of trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. *Id.* ¶ 40. In light of the risk of continued litigation, as well as the excellent monetary benefit to the collective, this factor weighs in favor of granting Plaintiff's Counsel's requested fees. *Rotuna*, 2010 WL 2490989, at *8; *Dillworth*, 2010 WL 776933, at *8.

4. Public Interest Favors Approval of Attorneys' Fees.

Public policy considerations weigh in favor of granting Plaintiff's Counsel's requested fees. The FLSA is a remedial statute designed to protect the wages of workers. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Adequate compensation for attorneys who protect those rights by taking on such litigation furthers the remedial purpose of such statutes. “[S]ociety has a stake in rewarding the efforts of the attorneys who bring wage and hour cases, as these are frequently complex matters.” *Gentrup v. Renovo Servs., LLC*, No. 07 Civ. 430, 2011 WL 2532922, at *4 (S.D. Ohio June 24, 2011). Accordingly, “[e]ncouraging qualified counsel to bring inherently difficult and risky but beneficial class actions . . . benefits society.” *Whitlock v. FSL Mgmt., LLC*, No. 10 Civ. 00562, 2015 WL 9413142, at *9 (W.D. Ky. Dec. 22, 2015).

Courts have recognized that fee awards in cases like this serve the dual purposes of encouraging “private attorney[s] general” to seek redress for violations and discouraging future misconduct of a similar nature. *See Deposit Guar. Nat'l Bank v. Roper, Jackson, Miss.*, 445 U.S.

326, 338-39 (1980). Where, as here, many of the eligible collective members are financially unable to pursue an action on their own and may have damages that are too small to justify the litigation, “attorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process and should be rewarded for their efforts.” *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 08 Civ. 01998, 2010 WL 3341200, at *9 (W.D. Ky. Aug. 23, 2010) (internal quotation marks omitted). Accordingly, “the public has an interest in compensating [Plaintiff’s] Counsel here, because recoveries in this case are far too small if pursued on an individual basis, leaving only contingent-fee class actions as a mechanism to pursue viable claims.” *In re Whirlpool*, 2016 WL 5338012, at *23; *see also Feiertag*, 2016 WL 4721208, at *7; *Kritzer*, 2012 WL 1945144, at *9.

5. This Wage And Hour Collective Action Is Complex.

Wage and hour collective actions are “frequently complex matters.” *Gentrup*, 2011 WL 2532922, at *4; *see also Beckman*, 293 F.R.D. at 479. This case involved more than 430 collective members, numerous disputed issues of law and fact, and a case theory without precedent directly on point. Stewart Decl. ¶ 41. This factor also supports the requested fees.

6. The Quality of Representation And Professional Skill of Plaintiff’s And Defendants’ Counsel Support Approval of The Requested Fees.

Plaintiff’s Counsel has significant experience prosecuting large-scale wage and hour class and collective actions. Stewart Decl. ¶ 12 (listing cases); Shavitz Decl. ¶ 7 (same); Legando Decl. ¶ 6 (same). Plaintiff’s Counsel’s skill and experience were directly responsible for the favorable settlement and weigh in favor of granting the requested fees.

C. Plaintiff’s Counsel Are Entitled to Reimbursement of Reasonable Expenses.

Plaintiff’s Counsel request reimbursement of \$32,727.62 in out-of-pocket expenses to be paid from the Gross Settlement Amount. Stewart Decl. ¶ 42; Shavitz Decl. ¶ 15; Legando Decl.

¶ 10. An award of a “reasonable attorneys’ fee” includes the authority to award reasonable out-of-pocket expenses incurred by the attorney and which are normally charged to a fee-paying client in the course of providing legal services. *Northcross v. Bd. of Educ. of Memphis City Schs.*, 611 F.2d 624, 639 (6th Cir. 1979) (applying 42 U.S.C. § 1988) (*abrogation on other grounds recognized by L & W Supply Corp. v. Acuity*, 475 F.3d 737 (6th Cir. 2007)). “Where attorneys’ fees are expressly authorized by statute, . . . the court . . . is authorized to include litigation expenses as part of a reasonable attorneys’ fee.” *Renfro v. Ind. Mich. Power Co.*, No. 99 Civ. 877, 2007 WL 710138, at *1 (W.D. Mich. Mar. 6, 2007), *overruled on other grounds*, 497 F.3d 573 (6th Cir. 2007).

Plaintiff’s Counsel’s expenses of \$32,727.62 were necessary to the representation of the eligible collective members. Stewart Decl. ¶ 42; Shavitz Decl. ¶ 15; Legando Decl. ¶ 10. These include court fees, Plaintiff’s portion of mediator’s fees for multiple mediation sessions, postage, travel expenses, working meals, photocopies, and electronic research. Stewart Decl. ¶ 42; Shavitz Decl. ¶ 15; Legando Decl. ¶ 10. As such, these costs should be awarded.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court issue an order: (1) approving the settlement set forth in the Agreement; (2) approving the proposed Settlement Notice and directing its distribution; (3) approving the Service Award to the Named Plaintiff; (4) approving Plaintiff’s request for attorneys’ fees, plus reimbursement of costs and expenses; (5) approving ALCS as the Settlement Administrator and approving payment of its fees and costs; (6) decertifying the previously certified classes; and (7) incorporating the terms of the Agreement.

Dated: May 21, 2018

Respectfully submitted,

By: /s/ Melissa L. Stewart
Melissa L. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, the above document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By: /s/ Melissa L. Stewart
Melissa L. Stewart

Exhibit E

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JEREMY ROSSMEISL AND GUY
LAUTURE, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

No. _____

A.C. MOORE ARTS & CRAFTS, INC.,

Defendant.

JOINT STIPULATION OF SETTLEMENT AND RELEASE

This Joint Stipulation of Settlement and Release (the “Agreement”) is entered into by and between Jeremy Rossmeisl and Guy Lauture (collectively, the “Named Plaintiffs”), individually and on behalf of the class of individuals that they seek to represent (collectively with Named Plaintiffs, “Plaintiffs”), and Defendant A.C. Moore Arts & Crafts, Inc. (“Defendant”) (together with Plaintiffs, the “Parties”).

RECITALS

WHEREAS, the Named Plaintiffs have filed a Collective Action Complaint asserting claims against Defendant under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, for the alleged failure to pay overtime compensation to Plaintiffs (the “Litigation”);

WHEREAS, the purpose of this Agreement is to settle fully and finally all claims asserted in the Litigation and those claims that could have been asserted, relating to the non-payment of overtime to individuals employed in the position of Assistant General Managers (“AGMs”), or similar titles, for overtime hours worked between February 8, 2011 and November 27, 2016 in Maine and New York and between February 8, 2014 and November 27, 2016 in all other states.

WHEREAS, Defendant denies all of the allegations made by Named Plaintiffs in the Litigation and denies that it is liable or owes damages to anyone with respect to the alleged facts or causes of action asserted in the Litigation. Nonetheless, without admitting or conceding any liability or damages whatsoever, Defendant has agreed to settle the Litigation on the terms and conditions set forth in this Agreement, to avoid the burden, expense, and uncertainty of continuing the Litigation;

WHEREAS, the Parties agreed in February 2016 to engage in negotiation discussions regarding the possibility of a voluntary resolution of the claims asserted in the Litigation;

WHEREAS, on August 24, 2016, the Parties participated in a mediation session of this matter in Philadelphia, Pennsylvania, which was conducted by experienced mediator and former United States District Court judge, Hon. Diane Welsh, and reached an accord resulting in this Agreement; and

WHEREAS, Plaintiffs' Counsel analyzed and evaluated the merits of the claims made against Defendant in the Litigation, conducted interviews with Named Plaintiffs, obtained and reviewed documents relating to Defendant's compensation policies and practices, and analyzed payroll data, and based upon their analysis and evaluation of a number of factors, and recognizing the substantial risks of litigation, including the possibility that the Litigation, if not settled now, might not result in any recovery or might result in a recovery less favorable, and that any recovery would not occur for several years, Plaintiffs' Counsel are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate and that this Agreement is in the best interests of the Plaintiffs,

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth in this Agreement, as well as the good and valuable consideration provided for herein, the Parties agree to a full and complete settlement of the Litigation on the following terms and conditions.

1. DEFINITIONS

The defined terms set forth in this Agreement have the meanings ascribed to them below.

- 1.1** "Agreement" means this agreement and the exhibits hereto, which the Parties understand and agree set forth all material terms and conditions of the Settlement between them, and which is subject to Court approval.
- 1.2** "Assistant General Manager" or "AGM" means any employee of Defendant who held the position of Assistant General Manager (however variously titled) at any time between February 8, 2011 and November 27, 2016 in Maine and New York and between February 8, 2014 and November 27, 2016 in all other states.
- 1.3** "Claim Forms" shall mean the claim form included in the Settlement Notice, as defined below, for Eligible Settlement Class Members to opt-in to the litigation.
- 1.4** "Claim Period" shall mean: (i) the 45-calendar day period beginning immediately after the Settlement Administrator first mails a Settlement Notice and Claim Form to any of the Eligible Settlement Class Members; or (ii) for individuals receiving a re-mailing, the forty-five (45) days from the Settlement Administrator's last re-mailing of a Settlement Notice and Claim Form that was returned as undeliverable.¹
- 1.5** "Court" means the United States District Court for the District of Massachusetts.
- 1.6** "Defendant" means A.C. Moore Arts & Crafts, Inc.

¹ All time periods provided by this Agreement are stated in calendar days, not business days unless otherwise specifically identified.

- 1.7 “Defendant’s Counsel” means Brown & Connery, LLP and Peabody & Arnold LLP.
- 1.8 “Effective Date” means the date on which this Agreement becomes effective, which shall mean the later of (i) 30 days following the Court’s Order Granting Approval of the Agreement if no appeal is taken of such Order, or (ii) the Court’s entry of a final order and judgment after any appeals are resolved.
- 1.9 “Eligible Settlement Class Member” means any and all current and former employees employed by Defendant in the position of AGM, however variously titled, in the Relevant Period, as defined below.
- 1.10 “Employer Payroll Taxes” means all taxes and withholdings an employer is required to make arising out of or based upon the payment of employment/wage compensation in this Litigation, including FICA, FUTA, and SUTA obligations.
- 1.11 “Gross Settlement Amount” means Two Million and Nine Hundred Thousand Dollars (\$2,900,000.00), which is the maximum amount that Defendant has agreed to pay to fully resolve and settle this Litigation, including any claim for attorneys’ fees and costs approved by the Court; any and all amounts to be paid to Participating Settlement Class Members; the cost of settlement administration; any Court-approved Service Awards; and Employer Payroll Taxes for each Participating Settlement Class Member. Defendant will not be required to pay any more than the gross total of Two Million Nine Hundred Thousand Dollars (\$2,900,000.00). There are exactly 342 Eligible Settlement Class Members.
- 1.12 “Last Known Address” or “Last Known Addresses” means the most recently recorded personal mailing address for an Eligible Settlement Class Member as shown in Defendant’s records.
- 1.13 “Last Known Telephone Number” or “Last Known Telephone Numbers” means the most recently recorded personal mobile and/or home telephone number for an Eligible Settlement Class Member as shown in Defendant’s records.
- 1.14 “Litigation” or the “Lawsuit” or the “Action” mean the lawsuit entitled *Rossmeis, et al. v. A.C. Moore Arts & Crafts, Inc.*, in the United States District Court for the District of Massachusetts. “Complaint” means the Collective Action Complaint dated February 8, 2017.
- 1.15 “Named Plaintiffs” means Jeremy Rossmeis and Guy Lature.
- 1.16 “Net Settlement Fund” means the remainder of the Gross Settlement Amount after deductions/payments for Court-approved: (i) Settlement Administration fees and costs; (ii) Plaintiffs’ Counsel’s attorneys’ fees and costs; and (iii) Service Awards to Named Plaintiffs.
- 1.17 “Order Granting Approval of Settlement” or “Approval Order” means an order entered by the Court, which gives final approval to the Settlement and this Agreement, and enters final judgment.

- 1.18** “Participating Settlement Class Member” means all Eligible Settlement Class Members who timely execute and returns a Claim Form. Named Plaintiffs shall be considered Participating Settlement Class Members regardless of whether they return a timely executed Claim Form.
- 1.19** “Parties” collectively means the Named Plaintiffs and Defendant.
- 1.20** “Plaintiffs” means the Named Plaintiffs and the class of individuals that they seek to represent.
- 1.21** “Plaintiffs’ Counsel” means Outten & Golden LLP, Shavitz Law Group, P.A., and Fair Work, P.C.
- 1.22** “Qualified Settlement Fund” or “QSF” means the account established by the Settlement Administrator from the Gross Settlement Amount paid by Defendant. The QSF will be controlled by the Settlement Administrator subject to the terms of this Agreement and the Court’s order(s). Interest, if any, earned on any monies in the QSF will become part of the Net Settlement Fund.
- 1.23** “Releasees” means Defendant and the other companies that comprise A.C. Moore Arts & Crafts, Inc. and their officers, directors, employees, agents, insurers, successors, predecessors, affiliates, parents, subsidiaries, attorneys, and other related entities.
- 1.24** “Relevant Period” means the time period of each Eligible Settlement Class Member’s employment with Defendant that is eligible for overtime payment pursuant to this Agreement. The Relevant Period covers the time period between February 8, 2011 and November 27, 2016 in Maine and New York and between February 8, 2014 and November 27, 2016 in all other states.
- 1.25** “Settlement” means the settlement between the Parties embodied and contained in this Agreement.
- 1.26** “Settlement Administrator” means Rust Consulting.
- 1.27** “Settlement Amount” or “Settlement Amounts” means each Eligible Settlement Class Member’s proportionate share of the Net Settlement Fund calculated in accordance with this Agreement.
- 1.28** “Settlement Check” means the check issued to each Participating Settlement Class Member for their proportionate share of the Net Settlement Fund calculated in accordance with this Agreement.
- 1.29** “Settlement Notice” means the document entitled Notice of Settlement and Opportunity to Join Collective Action and Claim Form, to be approved by the Court in a form substantially similar to Exhibit B attached hereto.

2. APPROVAL AND NOTICE TO ELIGIBLE SETTLEMENT CLASS MEMBERS

- 2.1** This Agreement is a binding agreement and contains all material agreed-upon terms for the Parties to seek a full and final settlement of the Litigation.
- 2.2** The Settlement Administrator will be responsible for establishing a QSF account; preparing and mailing the Settlement Notice and reminder postcards to Eligible Settlement Class Members; creating and maintaining a website containing information about the settlement and a method for Eligible Settlement Class Members to submit Claim Forms; preparing and mailing Settlement Checks; distributing approved Service Awards and attorneys' fees and expenses; calculating and paying all appropriate taxes and complying with all applicable tax reporting obligations, including preparing and filing all applicable tax forms; calculating all Settlement Amounts to be paid to Participating Settlement Class Members; retaining and providing a copy of Settlement Checks and redacted Claim Forms signed by the Participating Settlement Class Members to Defendant's Counsel, and a copy of Claim Forms signed by Participating Settlement Class Members to Plaintiffs' Counsel. Disputed claims will be resolved by the Claims Administrator.
- 2.3** The Parties will have equal access to the Settlement Administrator and all information related to the administration of the Settlement, except that identifying information regarding Plaintiffs shall not be disclosed to Plaintiffs' Counsel unless and until such time as an individual submits a Claim Form to the Settlement Administrator. The Settlement Administrator shall provide such information to either Party upon request. The Settlement Administrator will provide regular reports to counsel for the Parties regarding the status of the mailing of the Settlement Notice and Claim Form, the claims administration process, and distribution of the Settlement Checks. The Settlement Administrator will provide a list containing the Names, Last Known Addresses, Last Known Telephone Numbers, social security numbers, and dates of employment for all Participating Settlement Class Members who submitted Claim Forms no later than 14 days after the Claim Period.
- 2.4** Defendant agrees to cooperate with the Settlement Administrator, provide accurate information, to the extent reasonably available, necessary to calculate the Settlement Amounts, and assist the Settlement Administrator in locating Eligible Settlement Class Members. Defendant's records shall be presumed accurate.
- 2.5** The Plaintiffs shall use their best efforts to file a Motion for Order Approving Settlement of Collective Action and Authorizing Notice of Settlement and Opportunity to Join Collective Action ("Approval Motion") no earlier than February 10, 2017. Plaintiffs' Counsel will provide Defendant's Counsel with a draft of the Approval Motion for review and comment at least seven (7) days prior to filing it with the Court, and Defendant's Counsel will provide Plaintiffs' Counsel with their comments within five (5) days of receiving the draft Approval Motion. With the Approval Motion, Plaintiffs' Counsel also will file the Agreement together with the Settlement Notice and Claim Form, attached hereto as Exhibits A and B, respectively. Among other things, the Approval Motion will ask the Court to: (i) issue and enter an Approval Order approving

the Settlement as fair, adequate, and reasonable; (ii) approve the proposed Settlement Notice to be sent to Eligible Settlement Class Members and the Settlement Notice distribution process; (iii) incorporate the terms of this Settlement; (iv) enter Judgment dismissing the case without prejudice, with leave to reinstate on or before 180 days after the first Settlement Notices are sent pursuant to the terms of the Settlement, and deemed with prejudice without further order of the Court if no such motion to reinstate is filed within that time; and (v) retain jurisdiction to enforce the Agreement.

- 2.6** By February 22, 2017, Defendant shall give the Settlement Administrator a list, in electronic form, of all Eligible Settlement Class Members' names, Last Known Addresses, Last Known Telephone Numbers, social security numbers, and the dates of employment during the Relevant Period ("Class List").
- 2.7** Settlement Notices will be mailed, via First Class United States Mail (with an enclosed, postage paid return envelope) to Eligible Settlement Class Members by the Settlement Administrator within twenty (20) days of the Effective Date. The Settlement Notice will advise Eligible Settlement Class Members of their estimated Settlement Amount and of a website where they can submit their Claim Form and review additional information regarding the Settlement. Before mailing the Settlement Notice to Eligible Settlement Class Members, the Settlement Administrator will perform a skip trace on all Eligible Settlement Class Members' addresses to obtain the most current address for each Eligible Settlement Class Member.
- 2.8** The Settlement Administrator shall take all reasonable steps to obtain the correct address for any Eligible Settlement Class Member or Participating Settlement Class Member for whom the Settlement Notice or Settlement Check, respectively, is returned by the post office as undeliverable, including using social security numbers to obtain better address information, and shall attempt re-mailings. Any Settlement Notices or Settlement Check returned as undeliverable shall be traced up to one time to obtain a new address and be re-mailed by First Class United States Mail.
- 2.9** The Settlement Administrator will also send reminder postcards via First Class U.S. Mail twenty-one (21) days after the initial mailing or, for those Eligible Settlement Class Members who receive a re-mailing, twenty-one (21) days after the re-mailing of the Settlement Notice to any Eligible Settlement Class Members who, at the time of mailing the reminder postcard, have not returned an executed Claim Form. The reminder postcards will advise Eligible Settlement Class Members of the last date on which they can timely return a Claim Form and of the website where they can submit their Claim Form and review additional information regarding the Settlement.
- 2.10** The submission and processing of Claim Forms from Eligible Settlement Class Members shall be in accordance with the following procedures.
- i. To be timely, a Claim Form must be completed and provide the information as instructed on the Claim Form and be signed, dated and postmarked or otherwise returned (via, for example, fax, e-mail, or online submission) to the Settlement Administrator within the Claim Period.

Claim Forms that are not timely returned are null and void, unless otherwise agreed to in writing by the Parties, if good cause is determined by the Claims Administrator, or approved by the Court.

- ii. If a Claim Form is returned to the Settlement Administrator and not properly completed as described above, within five (5) business days of its receipt, the Settlement Administrator shall send a notice to the relevant Eligible Settlement Class Member via First Class United States Mail and e-mail (if available) advising the Eligible Settlement Class Member of the defects (“Cure Letter”) and include a new Claim Form to be completed (with an enclosed, postage paid return envelope). The Settlement Administrator shall provide Plaintiffs’ Counsel with a copy of the Cure Letter for approval prior to its issuance. The Eligible Settlement Class Member shall then have the remainder of the Claim Period or fifteen (15) days from mailing of the Cure Letter (“Cure Period”), whichever is longer, to return the new Claim Form and provide the missing information. If a Claim Form is not received within that period, the Claim Form shall be null and void, unless otherwise agreed to in writing by the Parties, approved by the Court, or approved by the Claims Administrator on a case-by-case basis for good cause shown.
- iii. By the close of the Claim Period, Eligible Settlement Class Members for whom a Claim Form has not been returned to the Claims Administrator or whose Claim Form is not a valid Claim Form in compliance with this Section are not Participating Settlement Class Members and do not release their claims against the Releasees as described in Section 4 below, but do waive any right to receive any payment associated with the Settlement.

2.11 Plaintiffs’ Counsel and Defendant’s Counsel have the right to make inquiries and receive any information from the Settlement Administrator related to the claims administration process, except that Defendant’s Counsel is not entitled to updated contact information located by Settlement Administrator for Eligible Settlement Class Members or provided by Participating Settlement Class Members, or communications sent to and from Eligible Settlement Class Members as such communications are subject to the attorney-client privilege. The Settlement Administrator will periodically update Plaintiffs’ Counsel and Defendant’s Counsel regarding returned mailings for which it is unable to obtain corrected addresses.

2.12 In the event that the Court fails to approve this Agreement, the Parties (a) must attempt to renegotiate the Settlement for the purpose of obtaining Court approval of a renegotiated settlement and agreement (b) and/or any or all Parties may seek reconsideration or appellate review of the decision denying approval of the Agreement. In the event reconsideration and/or appellate review is denied, or a mutually agreed-upon settlement modification is not approved, and the Parties decide to forego further negotiation of a settlement, the Litigation will proceed as if no settlement had been attempted. In that event, nothing in the Settlement or Agreement may be used by or against any Party under Rule 408 of the Federal Rules of Evidence.

3. SETTLEMENT TERMS

3.1 Settlement Payments.

- i. Defendant agrees to pay Two Million Nine Hundred Thousand Dollars (\$2,900,000.00), which shall fully resolve and satisfy any and all amounts to be paid to Participating Settlement Class Members, any Court-approved Service Awards as more fully set forth herein, the Settlement Administrator's fees and costs, any claim for Plaintiffs' Counsel's fees and costs, and Employer Payroll Taxes for each Participating Settlement Class Member. Defendant will not be required to pay more than this amount under the terms of this Agreement.
- ii. Within one (1) day of the Effective Date, Defendant shall deposit the Gross Settlement Amount into the QSF.
- iii. Within ten (10) days of the Effective Date, the Settlement Administrator will partially distribute the money in the QSF by making the following payments:
 - (a) Paying Plaintiffs' Counsel's Court-approved attorneys' fees and costs as described in Section 3.2.
 - (b) Paying the Court-approved Service Awards as described in Section 3.3.
 - (c) Paying the costs of the Settlement Administrator as described in Section 3.1.
- iv. The Settlement Administrator will issue checks to Participating Settlement Class Members for their Settlement Amounts, as described in Section 3.4, within twenty-one (21) days after the Claim Period.
- v. Each Eligible Settlement Class Member's Settlement Amount will be printed on his or her Settlement Notice. Any amount of the Net Settlement Fund not claimed by Eligible Settlement Class Members will not be paid. Any and all amounts attributable to Eligible Settlement Class Members who do not opt in shall revert to Defendant.

3.2 Settlement Amounts Payable as Attorneys' Fees and Costs.

- i. In their Approval Motion, Plaintiffs' Counsel shall ask the Court to approve payment of one-third of the Gross Settlement Amount as an award of attorneys' fees. In addition, Plaintiffs' Counsel shall seek reimbursement of actual case-related costs and expenses from the Gross Settlement Amount. These amounts shall constitute full satisfaction of any claim for attorneys' fees or costs, and Plaintiffs agree that they shall not seek, nor be entitled to, any additional attorneys' fees or costs under

any theory or from any source, incurred in relation to this case other than for any fees and costs incurred related to any efforts to enforce the terms of this Agreement.

- ii. The substance of Plaintiffs' Counsel's application for attorneys' fees and costs is not part of this Agreement and is to be considered separately from the Court's consideration of the fairness, reasonableness, adequacy, and good faith of the Settlement and this Agreement. The outcome of any proceeding related to Plaintiffs' Counsel's application for attorneys' fees and costs shall not terminate this Agreement or otherwise affect the Court's ruling on the Approval Motion. In the event that the Court (or any appellate court) awards less than the requested amounts, only the awarded amounts shall be paid and shall constitute full satisfaction of the obligations of this Section and full payment hereunder. Any money requested for attorneys' fees or costs that are not approved by the Court shall become part of the Net Settlement Fund.

3.3 Service Awards to Named Plaintiffs.

- i. In their Approval Motion, Named Plaintiffs will apply to the Court to receive \$15,000 each from the Gross Settlement Amount for the services they rendered to the Settlement Class.
- ii. These Service Awards and any requirements for obtaining any such payment are separate and apart from, and in addition to, Named Plaintiffs' recovery from the Net Settlement Fund as an Eligible Settlement Class Member. The substance of the Named Plaintiffs' application for a Service Award is not part of this Agreement and is to be considered separately from the Court's consideration of the fairness, reasonableness, adequacy and good faith of the Settlement and this Agreement. The outcome of the Court's ruling on the application for a Service Award shall not terminate this Agreement or otherwise affect the Court's ruling on the Approval Motion. Any Service Award money not approved by the Court shall become part of the Net Settlement Fund.

3.4 Distribution of Payments to Participating Settlement Class Members.

- i. Payments to Participating Settlement Class Members will be made from the Net Settlement Fund. To be a Participating Settlement Class Member and receive a Settlement Check, each Eligible Settlement Class Member must fill out and timely submit a Claim Form, as outlined in Section 2.10. The estimated Settlement Amount for each Eligible Settlement Class Member will be determined by the Settlement Administrator pursuant to the following formula:
 - (a) Each Eligible Settlement Class Member, including the Named Plaintiffs, shall be assigned one point for each full week in which

the individual was employed as an AGM during the Relevant Period.

- (b) To calculate each Eligible Settlement Class Member's proportionate Settlement Amount:
 - 1. Add all points for all Eligible Settlement Class Members together to obtain the "Denominator";
 - 2. Divide the number of points for each Eligible Settlement Class Member by the Denominator to obtain each Eligible Settlement Class Members' "Portion of the Net Settlement Fund";
 - 3. Multiply each Eligible Settlement Class Member's Portion of the Net Settlement Fund by the Net Settlement Fund to determine each Eligible Settlement Class Member's Settlement Amount.
- ii. The Settlement Administrator's calculations regarding Eligible Settlement Class Members' Settlement Amounts from the Net Settlement Fund will be final and binding.
- iii. The Settlement Administrator shall use reasonable efforts to make an additional mailing to Participating Settlement Class Members whose checks are returned because of incorrect addresses. Such efforts shall include: (a) obtaining correct addresses as described in Section 2.8; (b) using social security numbers to obtain better address information; and/or (c) attempting to reach Participating Settlement Class Members by phone and/or e-mail.
- iv. Participating Settlement Class Members shall have one hundred twenty (120) days following the issuance of Settlement Checks to negotiate their Settlement Checks. Any Settlement Checks not cashed within that period shall become void and the Settlement Administrator shall issue a "stop payment" thereon. Any such voided checks shall become a part of the reversion to Defendant. The Settlement Administrator shall issue a reminder postcard via e-mail and First Class United States Mail sixty (60) days after issuance of Settlement Checks to those Participating Settlement Class Members who, at the time of mailing the reminder postcard, have yet to negotiate their Settlement Checks, reminding them of the deadline to negotiate their Settlement Checks.
- v. Defendant's Payroll Tax Responsibility and Tax Characterization of Payments.
 - (a) For tax purposes, 50% of the payment to a Participating Settlement Class Member pursuant to this Agreement shall be treated as back

wages and 50% of such payment shall be treated as interest, any applicable penalties, liquidated damages and other non-wage relief.

- (b) Defendant's share of payroll taxes shall come out of the Gross Settlement Amount.
- (c) Payments treated as back wages shall be made net of all applicable employment taxes, including, without limitation, federal, state and local income tax withholding and the employee share of the FICA tax, and shall be reported to the Internal Revenue Service ("IRS") and the payee under the payee's name and Social Security number on an IRS Form W-2. Payments treated as Service Awards, interest and/or liquidated damages shall be made without withholding and shall be reported to the IRS and the payee, to the extent required by law, under the payee's name and Social Security number on an IRS Form 1099. The Settlement Administrator shall be responsible for determining the appropriate number of exemptions to be used in calculating payroll tax and withholding, deciding the appropriate tax rate, issuing the Settlement Checks and Service Awards and issuing IRS Forms W-2 and Forms 1099. Payments of attorneys' fees and costs pursuant to Section 3.2 shall be made without withholding, and be reported to the IRS and to each of Plaintiffs' Counsel payees under the payee's name and taxpayer identification number, which each such payee shall provide for this purpose, on an IRS Form 1099.
- (d) The employee portion of all applicable income and payroll taxes will be the sole responsibility of the individual Participating Settlement Class Member receiving a Settlement Check or Service Award. The Parties make no representations, and it is understood and agreed that the Parties have made no representations, as to the taxability of any portions of the settlement payments to any Participating Settlement Class Members, the payment of any costs or award of attorneys' fees, or any payments to the Named Plaintiffs. The Settlement Notice will advise Eligible Settlement Class Members to seek their own tax advice prior to acting in response to that Settlement Notice. Neither Plaintiffs' Counsel nor Defendant's Counsel intend anything contained herein to constitute legal advice regarding the taxability of any amount paid hereunder, nor will it be relied upon as such.
- (e) None of the amounts paid to the Named Plaintiffs or Participating Settlement Class Members shall create any credit for, be included in, or otherwise affect the calculation or the accrual of any employee benefits in any plans, programs, agreements or policies sponsored, maintained or contributed to by Defendant, including for purposes of any bonus of any kind.

4. RELEASE OF CLAIMS

- 4.1** All Settlement Checks shall contain, on the back of the check, the following limited endorsement:

By accepting this payment, I waive any right to bring suit for back wages under the Fair Labor Standards Act and all other applicable state and local laws for overtime wages claims through November 27, 2016. I agree that by accepting this payment, I have settled my claims for any unpaid wages, liquidated damages, interest, and associated fees and penalties through the date of my signature to endorse this check.

- 4.2** Release by Participating Settlement Class Members: Conditioned upon the Court's entry of an Approval Order, and in exchange for the monetary consideration recited in this Agreement, all Participating Settlement Class Members shall release Releasees from: (i) all wage and hour claims from February 8, 2011 through November 27, 2016 in Maine and New York and from February 8, 2014 through November 27, 2016 in all other states under the FLSA or any state Wage and Hour law, whether known or unknown, that were or could have been asserted in the Litigation and/or this matter, arising from that Participating Settlement Class Member's employment as an AGM during that period of time; and (ii) all claims for wages, penalties, liquidated damages, interest, attorneys' fees, costs or litigation expenses based on the claims listed in (i) above. The claims being released are referred to in this Agreement as "Released Claims".
- 4.3** Any Eligible Settlement Class Member who does not timely execute and return a Claim Form will not be bound by any release of claims.
- 4.4** Release by Named Plaintiffs: All Named Plaintiffs who receive and accept a Service Award will additionally waive, release and discharge Releasees from all demands, claims and actions, whether known or unknown, relating to their employment or termination of employment with Defendant, including but not limited to claims under the Americans With Disabilities Act, National Labor Relations Act, Fair Labor Standards Act (including but not limited to claims for overtime compensation), Equal Pay Act, Employee Retirement Income Security Act of 1974, Worker Adjustment and Retraining Notification Act, Title VII of the Civil Rights Act of 1964, Civil Rights Acts of 1866, 1871 and 1991, Family and Medical Leave Act, and any other federal, state or local statute, regulation, and order, and in common law, through the date the respective Named Plaintiff signs this Agreement; provided, however, that Named Plaintiffs do not waive the right to file a charge or complaint with any administrative agency but they do waive any right to recover any damages or other personal relief based on any demand, claim or action waived in this Paragraph brought on their own behalf or by any third party, including as a member of any collective or class action. Named Plaintiffs do not release any claim that cannot be released as a matter of law or rights under this Agreement.
- 4.5** By signing the Agreement, Named Plaintiffs become parties to the Agreement.

5. TOLLING AGREEMENT

5.1 The Parties tolled the statutes of limitations for AGMs with respect to FLSA claims and state law wage and hour claims by agreement dated February 22, 2016 (“Tolling Agreement”). The Tolling Agreement shall remain in effect until the Effective Date. Upon the Effective Date, the Tolling Agreement shall be cancelled *nunc pro tunc* without any further force or effect as though the Parties never entered into it. However, nothing in this Section shall be construed to limit the definition of “Eligible Settlement Class Members” herein or to reduce Eligible Settlement Class Members Settlement Amounts as defined herein.

6. PARTIES’ AUTHORITY

6.1 The signatories hereto hereby represent that they are fully authorized to enter into this Agreement and to bind the Parties hereto to the terms and conditions hereof.

7. MUTUAL COOPERATION

7.1 The Parties agree to reasonably cooperate with each other and to take all steps necessary and appropriate to obtain the Court’s approval of this Agreement and all of its terms and to effectuate the terms of this Agreement, including but not limited to, execution of such documents and to take such other action as may reasonably be necessary to implement the terms of this Agreement. The Parties to this Agreement shall use their commercially reasonable efforts, including all efforts contemplated by this Agreement and any other efforts that may become necessary by order of the Court, or otherwise, to effectuate this Agreement and the terms set forth herein. As soon as practicable after execution of this Agreement, and in accordance with its terms, Plaintiffs’ Counsel shall, with the assistance and cooperation of Defendant and its counsel, take all necessary steps to secure the Court’s approval of this Agreement.

8. NOTICES

8.1 Unless otherwise specifically provided herein, all notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given as of the third business day after mailing by United States registered or certified mail, return receipt requested, addressed as follows:

To Plaintiffs and/or Settlement Class:

Justin M. Swartz
Outten & Golden LLP
685 Third Avenue, 25th Floor
New York, NY 10017
(212) 245-1000
(646) 509-2057 (facsimile)
jms@outtengolden.com

Gregg I. Shavitz

Shavitz Law Group, P.A.
1515 South Federal Hwy.
Suite 404
Boca Raton, FL 33432
(561) 447-8888
(561) 447-8831 (facsimile)
gshavitz@shavitzlaw.com

Hillary Schwab
Fair Work, P.C.
192 South Street
Suite 450
Boston MA 02111
hillary@fairwork.com

To Defendant:

Christine O'Hearn
Brown & Connery
360 N Haddon Ave.
Westmont, NJ 08108
cohearn@brownconnery.com

Elizabeth Houlding
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

9. NO ADMISSION OF LIABILITY

- 9.1** Defendant denies all of the allegations made by Named Plaintiffs in the Litigation and denies that it is liable or owes damages to anyone with respect to the alleged facts or causes of action asserted in the Litigation. Nothing herein will be deemed or used as an admission that a class should be certified for any purposes other than for settlement. Nonetheless, without admitting or conceding any liability or damages whatsoever, Defendant has agreed to settle the Litigation on the terms and conditions set forth in this Agreement, to avoid the burden, expense, and uncertainty of continuing the Litigation.

10. INTERPRETATION AND ENFORCEMENT/MISCELLANEOUS TERMS

- 10.1** Further Acts. Each party, upon the request of any other party, agrees to perform such further acts and to execute and deliver such other documents as are reasonably necessary to carry out the provisions of this Agreement.

- 10.2** No Assignment. Named Plaintiffs represent and warrant that they have not assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein, including, but not limited to, any interest in the Litigation, or any related action, and any attempt to do so shall be of no force or effect.
- 10.3** Entire Agreement. This Agreement constitutes the entire agreement between the Parties with regard to the subject matter contained herein, and all prior and contemporaneous negotiations and understandings between the Parties shall be deemed merged into this Agreement.
- 10.4** Binding Effect. This Agreement shall be binding upon the Parties and, with respect to Defendant, their affiliates, parents, subsidiaries, predecessors, successors, employees and agents; and, with respect to Plaintiffs, their spouses, children, representatives, heirs, administrators, executors, beneficiaries, conservators, attorneys and assigns.
- 10.5** Arms' Length Transaction; Materiality of Terms. The Parties have negotiated all the terms and conditions of this Agreement at arms' length. All terms and conditions of this Agreement in the exact form set forth in this Agreement are material to this Agreement and have been relied upon by the Parties in entering into this Agreement, unless otherwise expressly stated.
- 10.6** Captions. The captions or headings of the Sections and paragraphs of this Agreement have been inserted for convenience of reference only and shall have no effect upon the construction or interpretation of any part of this Agreement.
- 10.7** Construction. The determination of the terms and conditions of this Agreement has been by mutual agreement of the Parties. Each party participated jointly in the drafting of this Agreement, and therefore the terms and conditions of this Agreement are not intended to be, and shall not be, construed against any party by virtue of draftsmanship.
- 10.8** Governing Law. This Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of Massachusetts, without regard to choice of law principles, except to the extent that the law of the United States governs any matter set forth herein, in which case such federal law shall govern.
- 10.9** Continuing Jurisdiction. The Court shall retain jurisdiction over the interpretation and implementation of this Agreement as well as any and all matters arising out of, or related to, the interpretation or implementation of this Agreement and of the Settlement contemplated thereby.
- 10.10** Waivers, etc. to Be in Writing. No waiver, modification or amendment of the terms of this Agreement, whether purportedly made before or after the Court's approval of this Agreement, shall be valid or binding unless in writing, signed by or on behalf of all Parties, and then only to the extent set forth in such written waiver, modification or amendment, with any required Court approval. Any failure by any party to insist upon the strict performance by the other party of any of the provisions of this Agreement shall not be deemed a waiver of future performance of the same provisions or of any of the other provisions of this Agreement, and such party, notwithstanding such failure, shall

have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement

10.11 Counterparts. The Parties may execute this Agreement in counterparts, and execution in counterparts shall have the same force and effect as if all Parties had signed the same original instrument.

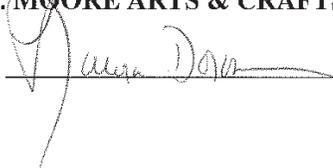
10.12 Facsimile and E-mail Signatures. Any party may execute this Agreement by signing, including by electronic means, or by causing its counsel to sign on the designated signature block below and transmitting that signature page via facsimile or e-mail to counsel for the other party. Any signature made and transmitted by facsimile or e-mail for the purpose of executing this Agreement shall be deemed an original signature for purposes of this Agreement and shall be binding upon the party whose counsel transmits the signature page by facsimile or e-mail.

10.13 Signatories. This Agreement is valid and binding if signed by Defendant's authorized representative and any one of the Named Plaintiffs.

WE AGREE TO THESE TERMS.

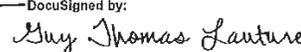
DATED: 2/22/2017

A.C. MOORE ARTS & CRAFTS, INC.

By: 

DATED: 2/8/2017

GUY LAUTURE

DocuSigned by:

95FC90109663458...

DATED: _____

JEREMY ROSSMEISL

have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement

10.11 Counterparts. The Parties may execute this Agreement in counterparts, and execution in counterparts shall have the same force and effect as if all Parties had signed the same original instrument.

10.12 Facsimile and E-mail Signatures. Any party may execute this Agreement by signing, including by electronic means, or by causing its counsel to sign on the designated signature block below and transmitting that signature page via facsimile or e-mail to counsel for the other party. Any signature made and transmitted by facsimile or e-mail for the purpose of executing this Agreement shall be deemed an original signature for purposes of this Agreement and shall be binding upon the party whose counsel transmits the signature page by facsimile or e-mail.

10.13 Signatories. This Agreement is valid and binding if signed by Defendant's authorized representative and any one of the Named Plaintiffs.

WE AGREE TO THESE TERMS.

DATED: _____

A.C. MOORE ARTS & CRAFTS, INC.

By: _____

DATED: _____

GUY LAUTURE

DATED: 2/7/2017

JEREMY ROSSMEISL

DocuSigned by:
Jeremy Rossmeisl
CA44DE35BF264A9...

Exhibit F

**JULIO ZORRILLA, TASHAUNA REID, MATTHEW
MACKEY, JOSE FERNANDEZ, BENJAMIN KRAMER,
AMANDA STEWART, AMBER SWAN, KRISTINE
ZEFFIELD, SYDNI SMITH, NICHOLE MARINO,
AMBER BUTLER, JOHN VERDIN, JANE BATEMAN,
and JOSEPH LOMBARD on behalf of themselves and all
others similarly situated,**

No. 14 Civ. 2740 (AT)

Plaintiffs,

-against-

**CARLSON RESTAURANTS INC., CARLSON
RESTAURANTS WORLDWIDE INC., and T.G.I.
FRIDAY’S INC.,**

Defendants.

NOTICE OF PROPOSED COLLECTIVE ACTION SETTLEMENT

A federal court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

If you have been employed as a tipped server, busser, runner, bartender, barback, or host, and/or have worked in another tipped position at a corporate-owned T.G.I. Friday’s at any time from April 17, 2011 to the [insert date], please read this Notice. You may be entitled to a payment from a collective action settlement.

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I. Background of the Case

Plaintiffs Julio Zorrilla, Tashauna Reid, Matthew Mackey, Jose Fernandez, Benjamin Kramer, Amanda Stewart, Amber Swan, Kristine Zeffield, Sydni Smith, Nichole Marino, John Verdin, Jane Bateman and Joseph Lombard (the “Named Plaintiffs”) on behalf of themselves and all others similarly situated, filed claims in the United States District Court for the Southern District of New York against Defendants Carlson Restaurants Inc. (“Carlson”), Carlson Restaurants Worldwide Inc. (“Carlson Worldwide”), and T.G.I. Friday’s Inc. (“Friday’s”) (collectively, “Defendants”), alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (“FLSA”), and certain wage and hour laws under the laws of the states of California, Colorado, Connecticut, Florida, Illinois, Maryland, Michigan, New Jersey, and New York (discussed below) (referred to herein as the “Class Action Litigation”). This lawsuit is entitled *Zorrilla, et al., v. Carlson Restaurants Inc., et al.*, Case No. 14-CV-2740 (AT) (S.D.N.Y.), and was filed on April 17, 2014. After extensive negotiations, the Parties reached an agreement to settle the Class Action Litigation subject to the Court’s approval of the settlement.

This settlement (the “Settlement”) represents a compromise and settlement of highly disputed claims in the Class Action Litigation. Defendants deny all the claims asserted in the Class Action Litigation, deny any and all liability or wrongdoing of any kind associated with any of the facts or claims alleged in the Class Action Litigation, and make no concessions or admissions of wrongdoing or liability of any kind whatsoever. Nothing in the Settlement is intended or will be construed as an admission by Defendants that the Named Plaintiffs’ or any of the class claims alleged in the Class Action Litigation have merit or that they have any liability to the Class Members on those claims.

II. Summary of the Settlement

1. Why are you included in the Settlement?

If you are receiving this Notice, you are an Opt-in Plaintiff who previously submitted a Consent to Join the Class Action Litigation and will receive a payment from the Settlement.

2. What may you receive in the Settlement?

Defendants have agreed to pay a total of up to \$19.1 million (hereafter the “Gross Settlement Fund”) to settle this Class Action Litigation.

You are eligible to receive a specified share of the Gross Settlement Fund, less certain deductions described below, based on a formula approved by the Court. Amounts that are not claimed by Class Members and are not necessary to cover expenses and fees associated with the Class Action Litigation and/or the Settlement will be returned to Defendants.

The following adjustments will be made to the \$19.1 million amount prior to distribution of the settlement funds to Class Members and Opt-in Plaintiffs:

- Service payments to the Named Plaintiffs and Deposed Opt-in Plaintiffs: If the Court approves such payments, a total of \$170,000 in Service Payments will be made as set forth in Section III below. These payments are made because the Named Plaintiffs and Deposed Opt-in Plaintiffs provided service to the Class by helping Class Counsel to formulate claims, providing declarations, and/or providing deposition testimony. The payments outlined in this paragraph are separate from and in addition to the shares of the settlement fund that these individuals may be eligible to receive as Class Members or Opt-in Plaintiffs.
- Administration Costs: If the Court approves such payment, the Administration costs, which covers costs incurred in administering the claims process and distributing settlement checks to Class Members and Opt-in Plaintiffs, will be paid out of the settlement.
- Attorneys' Fees and Costs: Class Counsel will apply to the Court for attorneys' fees as set forth in Section IV below not to exceed one-third of the Gross Settlement Fund, plus reasonable costs. These fees request will be requested based on the amount of time Class Counsel spent in pursuing this case on behalf of the Class Members, the risks that Class Counsel took that no fees would ever be recovered, and the result achieved for the class. In litigating this matter, Class Counsel has conducted extensive investigation and prosecution of this case, including, but not limited to, interviewing dozens of workers, reviewing thousands of documents produced by Defendants, deposing corporate representatives, defending depositions of Tipped Workers, reviewing deposition transcripts of Defendants' corporate employees, reviewing and analyzing payroll data, filing motions for conditional certification under 29 U.S.C. § 216(b), class certification and summary judgment, and participating in three mediations. Class Counsel will also apply for an amount to reimburse Class Counsel for actual out-of-pocket expenses paid by Class Counsel to litigate this case. These expenses included copying charges, deposition transcripts, mediation expenses, and similar litigation expenses.
- Taxes: The state and federal payroll taxes imposed by applicable law, including the employer's share of Federal Insurance Contribution Act or FICA tax and any other federal and state unemployment taxes, will be paid out of the settlement, with respect to the amounts treated as wages.

The remaining amount (the "Net Settlement Fund") will be distributed according to the method set forth below:

Each Class Member and Opt-in Plaintiff's share of the Net Settlement Fund will be determined by the Claims Administrator on a points system as described below.

- Opt-in Plaintiffs shall be assigned two (2) points for each pay period during which they worked as a Tipped Worker between April 17, 2011, and the Preliminary Approval Date.

- Any Opt-in Plaintiff who is also a member of the putative New York Class shall receive:
 - o An additional three (3) points for each pay period during which they worked as a Tipped Worker in New York state between April 17, 2011, and the date of Preliminary Approval Date; and
 - o An additional two (2) points for every pay period during which they worked as a Tipped Worker in New York state between April 17, 2008, and April 16, 2011.
- Any Opt-in Plaintiff who is also a member of the putative Florida Class shall receive an additional one (1) point for each pay period they worked as a Tipped Worker in Florida between January 19, 2011, and April 16, 2011.
- Any Opt-in Plaintiff who is also a member of the California Class shall receive an additional one-half (.5) point for each pay period they worked as a Tipped Worker in California between January 19, 2012, and the Preliminary Approval Date.
- Members of the New York Class who are not Opt-in Plaintiffs shall be assigned four (4) points for each pay period during which they worked as a Tipped Worker in New York state between April 17, 2008, and the Preliminary Approval Date and an additional one (1) point for each pay period they worked as a Tipped Worker in New York state for the three year period preceding the Preliminary Approval Date.
- Members of the California Class who are not Opt-in Plaintiffs shall be assigned one-and-a-half (1.5) points for each pay period during which they worked as a Tipped Worker in California between January 19, 2012, and the Preliminary Approval Date plus one (1) point for each pay period they worked as a Tipped Worker in California for the three-year period preceding the Preliminary Approval Date.
- Class Members who are not Opt-in Plaintiffs and who are not members of the New York Class or the California Class shall be assigned one (1) point for each pay period they worked as a Tipped Worker for the three-year period preceding the Preliminary Approval Date and an additional one (1) point as follows:
 - o For members of the New Jersey Class, for each pay period they worked as a Tipped Worker in New Jersey, between January 30, 2013, and the Preliminary Approval Date.
 - o For members of the Colorado Class, for each pay period they worked as a Tipped Worker in Colorado, between January 19, 2013, and the Preliminary Approval Date.
 - o For members of the Illinois Class, for each pay period they worked as a Tipped Worker in Illinois, between January 19, 2013, and the Preliminary Approval Date.

- o For members of the Connecticut Class, for each pay period they worked as a Tipped Worker in Connecticut, between January 19, 2014, and the Preliminary Approval Date.
- o For members of the Florida Class, for each pay period they worked as a Tipped Worker in Florida, between January 19, 2011, and the Preliminary Approval Date.
- o For members of the Maryland Class, for each pay period they worked as a Tipped Worker in Maryland, between January 19, 2013, and the Preliminary Approval Date.
- o For members of the Michigan Class, for each pay period they worked as a Tipped Worker in Michigan, between January 19, 2013, and the Preliminary Approval Date.

To calculate the portion of the Net Settlement Fund that shall be apportioned to each Class Member and/or Opt-in Plaintiff, the Claims Administrator shall (i) determine the sum of the total number of points for all Opt-in Plaintiffs and/or Class Members; (ii) divide the Net Settlement Fund by the sum calculated in subsection (i) of this Paragraph to find the amount allocated to each point; and (iii) multiply the amount allocated to each point by the number of points assigned to each Class Member and/or Opt-in Plaintiff to determine such Class Member's and/or Opt-in Plaintiff's Allocated Amount.

For purposes of your personal allocation, Defendants' records reflect that you worked as a Tipped Worker in a T.G.I. Friday's corporate-owned location for [Insert # of pay periods reflected in Database] pay periods. Based on your pay periods, and the formula described above, you are entitled to receive approximately \$_____, half of which is subject to applicable employment taxes and withholding. The foregoing amount is an estimate, and the amount that you actually receive may be higher or lower than the estimate because of numerous factors.

3. When will you get paid?

Because you previously opted into this case, you do not need to take any additional action to receive a Settlement Payment. You will be paid your Settlement Payment, calculated as described above, after final Court approval of the Settlement and after all rights to appeal or review are exhausted or any appeal or review has been resolved in favor of the Settlement. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps more than a year. Please be patient.

You must deposit your Settlement Payment no later than 150 days after it is mailed to you.

4. What claims are being released?

By receiving a payment from the Settlement, you, on behalf of yourself and each of your heirs, representatives, successors, assigns, and attorneys, fully, finally, and forever settle and release all claims asserted in the Fourth Amended Class Action Complaint under the Fair Labor Standards Act, including, but not limited to any claims for alleged failure to pay minimum wage

or overtime wages, unlawful deductions, unlawful withholdings, failure to pay uniform maintenance, failure to pay all spread of hours pay, wage notice violations, wage statement violations, failure to pay all wages due upon termination of employment, failure to provide meal breaks, failure to provide rest breaks, or tip misappropriation during the time period covered by the settlement, and any claim for liquidated damages, interest, attorneys' fees or costs, declaratory relief, equitable relief, or injunctive relief for any such claim. You will not release claims pled in *Williams v. T.G.I. Friday's Inc.*, No. 16 Civ. 0486 pending in the Eastern District of Illinois, if applicable.

III. Service Payments

The following individuals will be paid the additional amounts listed below, subject to Court approval, for their services on behalf of the Class and in exchange for executing a waiver and release of claims:

- a payment of \$15,000.00 to Named Plaintiffs Julio Zorrilla, Matthew Mackey and Tashauna Reid;
- a payment of \$10,000.00 to Named Plaintiffs Jose Fernandez, Benjamin Kramer, Amanda Stewart, Amber Swan, Kristine Zeffield, Sydni Smith, Nichole Marino, John Verdin, Jane Bateman and Joseph Lombard;
- a payment of \$2,500.00 to Patrick Pink, Gene Ellis, Alyssa Sweet, Scott Miozzi, Emily Horn, Breanna Lackey, Samantha McMillan, Megan Shay, Kyle Septoski and Megan Marty.

These payments will be made from the Gross Settlement Fund. These payments do not include any payments to which such individuals may be entitled under the Settlement Agreement as Opt-in Plaintiffs and/or Class Members.

IV. Attorneys' Fees and Costs

The Court has appointed the law firms of Outten & Golden LLP and Fitapelli & Schaffer, LLP as Class Counsel in this matter. More information about Class Counsel can be found at their respective websites: www.outtengolden.com and www.fslawfirm.com.

Class Counsel will seek approval from the Court for payment of attorneys' fees of one third of the Gross Settlement Fund, and reimbursement for their out-of-pocket costs reasonably incurred in the Class Action Litigation, which, if approved by the Court, will be paid out of the Gross Settlement Fund. Class Counsel believes the amounts for attorneys' fees and costs requested are fair and reasonable, and Defendants will not oppose a request for fees up to one-third of the Gross Settlement Fund, plus costs, consistent with applicable law.

V. Tax Treatment

For tax purposes, 50% of your individual settlement payment will be considered back wages subject to lawful deductions and W-2 reporting. For this amount, normal payroll taxes

and withholdings will be deducted pursuant to applicable federal, state and/or city laws. The remaining 50% of your individual settlement payment will be considered liquidated damages and interest subject to 1099 reporting as non-wage income. At the end of the calendar year, the Claims Administrator will issue you (provided you cashed your settlement check) an IRS Form W-2 for the wage portion of your settlement payment, and an IRS Form 1099 for the non-wage portion of your settlement payment. You are ultimately responsible for the appropriate payment of any of your taxes on the payments you receive.

This notice does not constitute tax advice. You should speak to your accountant as to any questions about the tax treatment of your settlement payment.

If you are presently a party to an individual bankruptcy proceeding, it may be necessary for you to advise the trustee of this settlement.

VI. Plaintiffs' and Class Counsel's Support of the Settlement

The Named Plaintiffs and Class Counsel support the Settlement. Class Counsel believes this Settlement to be a good result for the Opt-in Plaintiffs and Class Members, especially in light of the risks of a trial on the merits or that class certification may not be granted, and the inherent delays and uncertainties associated with litigation, including appeals. Based on Class Counsel's experience litigating similar cases, Class Counsel believes that further proceedings in this case, including a trial and probable appeals, would be very expensive and protracted. No one can confidently predict how the various legal questions at issue, including the amount of damages, would ultimately be resolved. Therefore, Class Counsel believes that the Settlement is fair, reasonable, and adequate.

VII. Administration of the Settlement

The Court has appointed Rust Consulting, Inc. to act as an independent Claims Administrator and to resolve any dispute concerning the number of pay periods during which any Class Member or Opt-in Plaintiff worked as a Tipped Worker for a corporate-owned T.G.I. Friday's location. If you wish to dispute the number of pay periods with which you have been credited, as set forth in Paragraph 2 of this Notice, please contact the Claims Administrator directly by mail of your dispute and provide an explanation and documentation to support your disputed claim. Your dispute must be postmarked by [63 DAYS FROM DATE OF MAILING] for your disputed claim to be considered.

The Claims Administrator's fees and expenses will be paid from the Gross Settlement Fund.

VIII. The Final Approval Hearing

The Court will hold a Final Approval Hearing on _____, 2017 in Courtroom 15D, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312 at ____ a.m., to determine whether the Settlement should be finally approved as fair, reasonable, and adequate. In addition to approving the Settlement, the Court will also be asked to approve Class Counsel's

request for costs and attorneys' fees and the Service Payments. The hearing may be postponed without further notice.

IX. Getting More Information

The above is a summary of the basic terms of the Settlement. If you wish, you can review the complete Settlement Agreement on file with the Clerk of the Court, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312. The pleadings and other records in the Class Action Litigation, including the Settlement Agreement, may be examined at any time during regular business hours at the Court.

If you have questions about the settlement administration process, you can contact the Claims Administrator at:

XXXXXXXX

If you have additional questions, you can contact Class Counsel as follows:

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PLEASE DO NOT TELEPHONE THE COURT, ANY DEFENDANT, OR DEFENDANTS' COUNSEL FOR INFORMATION REGARDING THE SETTLEMENT, YOUR LEGAL RIGHTS OR THE CLAIM PROCESS.