UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

DIANNA ESTES, *et al.*, Plaintiffs, v. P.A.M. TRANSPORT, INC., Defendant.	Case No.: 13-5199

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT AND RELATED RELIEF

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I. INTRODUCTION

This action was originally filed by Dianna Estes on August 22, 2013. The lawsuit asserts that P.A.M. failed to pay at least minimum wage for all hours worked by its over-the-road truck drivers while such drivers were in orientation, in training, and over-the-road. Following conditional certification of this matter pursuant to the FLSA, 2,671 drivers filed Consent Forms to become party plaintiffs. In addition, there are 6,918 drivers who stand to benefit from a Rule 23 class-wide settlement.

As this Court is aware, prior to settlement negotiations, significant discovery and motion practice occurred. Written discovery has been extensive and time consuming. Plaintiffs requested, and Defendant produced, policy and practice documents pertaining to each of the alleged policies Plaintiffs contended were unlawful. Defendant further produced over a million (1,000,000+) driver log entries pertaining to more than 1,700 drivers in the class. Full pay records were also produced for such individuals. Plaintiffs and Defendant both retained separate experts to analyze the records to determine the extent of damages under Plaintiffs' theories of liability.

In addition, there have been a significant number of depositions taken. Defendant deposed the Named Plaintiff and 15 opt-in plaintiffs in four states to determine whether the claims were appropriate for collective or class treatment and to test the veracity of Plaintiffs' factual allegations. Plaintiffs deposed four corporate representatives to better understand the policies and practices they asserted were unlawful. Through these depositions, the Parties were able to test how the alleged policies and practices were implemented and how such policies and practices affected class members in this litigation.

Furthermore, Defendant served written discovery requests consisting of 10 interrogatories and 4 requests for production on 10% of the opt-in class. While not every Plaintiff responded, Plaintiffs ultimately responded to 170 sets of discovery, collectively answering nearly 3,000

interrogatory requests and 680 document requests. Such efforts allowed both sides to further understand the allegations and potential exposure at issue. It was only following this extensive discovery that the Parties attended a private mediation before Hunter Hughes.[1]

The pending settlement proposal is the product of adversarial negotiations following two years of litigation that involved substantial discovery efforts and expense. Counsel for the Parties and the Parties themselves have carefully evaluated the risks, time, and costs associated with continuing this litigation. The settlement proposal ultimately reached does not provide Plaintiffs the equivalent of their best day in court; it clearly, however, provides them substantially with more than they would receive on their worst day in court. It represents a fair compromise to what will otherwise be a long and uncertain path of litigation.

The Settlement Agreement provides that P.A.M. will fund a Settlement Fund of $3,450,000 to settle this action. After the payment of litigation costs and attorneys' fees, claims administration costs, service awards, and employer-side employment taxes, the remaining fund will be divided in half, with half going to FLSA Collective Action Members (defined as a class member who

[1] Hunter Hughes has been recognized by numerous courts for his experience and skill as a class action mediator. *See, e.g.*, *Clark v. Ecolab Inc.*, 2010 U.S. Dist. LEXIS 47036, 11 (S.D.N.Y. May 11, 2010) (noting that Hunter Hughes is "an experienced class action mediator" and approving $6,000,000 class settlement which was reached during a mediation before Hughes); *Kiefer v. Moran Foods, LLC*, 2014 U.S. Dist. LEXIS 106924, 30 (D. Conn. July 31, 2014) (noting experience of Hughes as a class action mediator and giving final approval to settlement which followed two mediation sessions before Hughes); *Crawford v. Lexington-Fayette Urban County Gov't*, 2008 U.S. Dist. LEXIS 90070, 20 (E.D. Ky. Oct. 23, 2008) (finding that Hughes is "an experienced, neutral, third-party mediator [who] had mediated FLSA collective action and litigated FLSA collective action for both plaintiffs and defendants").

Accordingly, the settlement was not the result of some type of backdoor agreement but instead the result of the parties and counsel fully evaluating the risks of litigation and the benefits of settlement under the auspices of an experienced class action, employment law mediator.

previously filed a Consent Form to join this action) and half going to non-FLSA Collective Action Members (defined as class members who did not file a Consent Form to join the FLSA Collective Action but who are Rule 23 class members under Plaintiffs' state law claims). Noteworthy is that *there is no "claims made" mechanism or similar procedure which will be required of class members to receive payment*; rather every class member will be issued a check from the Settlement Fund in exchange for releasing wage and hour claims they have against P.A.M. which were incurred through the end of the Class Period, *i.e.*, through December 5, 2013.

Since the filing of Plaintiffs' initial motion for preliminary approval, the Claims Administrator has sent notice[2] of the settlement to 9,591 FLSA and Rule 23 Class Claimants, collected opt-out information, and calculated the settlement payments to class members. (*See* Exhibit 2, Declaration of Jenny Shawver at ¶4). Under the current settlement, all FLSA claimants will receive a flat amount of $50 and all Rule 23 Class Claimants will receive a flat amount of $35, plus all will receive an additional amount calculated based on the number of weeks the claimant worked for Defendant. Depending on the length of their employment with Defendant, FLSA collective action members will receive between $48.33 and $1,941.35, with the average member receiving $394.83. (*Id.* at ¶20). Rule 23 Class Members (whose claims are only premised on Arkansas law which, at all times during the class period, had a *lower* minimum wage than the federal standard), will receive between $32.88 and $628.90, with the average Rule 23 class member receiving $152.36. (*Id.* at ¶21).

The reaction of the class speaks volumes as to the fairness of the proposed settlement. Consistent with the Court's approval order, the Claims Administrator effectuated notice on all

[2] Although the Notices were to be mailed in a yellow envelope, the Claims Administrator inadvertently mailed the Notices in a white envelope. Counsel conferred and determined that a re-mailing was not necessary based on this technicality.

class and collective action members, totaling 9,591 individuals. There has only been one single objection filed to the settlement. (*Id.* at ¶19). And as discussed below, the objection, while well-intended, is misplaced, as the objector's most significant concern is not related to whether the settlement fairly pays him for asserted minimum wage violations, but rather, is premised upon the class member not receiving compensation for causes of action (fraud) against a separate entity (a driving school, and not Defendant) which were not pled in the Complaint, not investigated in this litigation, and not released or waived by the settlement in this litigation. (*See* ECF Doc. Nos. 87 and 90). Thus, the objection is not a basis to deny the benefits of this settlement to a class of nearly 10,000.

The positive reaction of the class members demonstrates that the class members want to be paid now and are pleased with the compromise reached in this settlement. Additionally, and importantly, all of the relevant factors this Court is to examine when determining the reasonableness and fairness of the settlement heavily weigh in favor of approving the settlement.

Plaintiffs further seek this Court to approve the requested attorneys' fees and costs, and the requested service payments to the Named Plaintiff and the opt-in Plaintiffs who sat for deposition in this matter. As briefed below, Class Counsel has litigated this matter for over 2 years, and has spent more than 1,300 hours of attorney time litigating this action, and the requested fee is well in line with fees routinely awarded to class counsel in wage and hour class action settlements. Likewise, the service payments to the Named Plaintiff and the opt-in deponents are well in line with service payments typically approved.

Thus, for the reasons stated above and fully briefed below, this Court should grant final approval to the settlement.

II. LEGAL ARGUMENT

A. Final Approval is Appropriate.

The law favors compromise and settlement of collective and class action suits. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990) (in a class action context, providing that "[a] strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor"); *Ortega v. Uponor, Inc. (In re Uponor, Inc.),* 716 F.3d 1057, 1063 (8th Cir. 2013) (in a class action context, providing that "[a] settlement agreement is presumptively valid."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotations omitted); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation."); *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation."); NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *In re Uponor, Inc.*, 716 F.3d at 1063, 1065; *Churchill Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 575 (9th Cir. 2004); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts must determine whether the class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Uponor Inc.*, 716 F.3d at 1063. Similarly, collective action settlements under the FLSA must be approved by the

district court. *Robles v. Brake Masters Sys.*, 2011 U.S. Dist. LEXIS 14432, *50 (D.N.M. Jan. 31, 2011) (*citing Lynn's Food Stores v. United States,* 679 F.2d 1350, 1354 (11th Cir. 1982)); *Peterson v. Mortg. Sources, Corp.*, 2011 U.S. Dist. LEXIS 95523, *17 (D. Kan. Aug. 24, 2011). In determining whether approval is appropriate, courts consider whether the settlement "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Id.*

B. The Claims at Issue

The Plaintiff class is composed of current and former over-the-road truck drivers who worked for and were paid by Defendant during the class period. As over-the-road truck drivers, Plaintiffs were at all time exempt from the overtime requirements of both federal and state law. *See* Fair Labor Standards Act at 29 U.S.C. §213(b)(1); Arkansas Minimum Wage Act at §11-4-211(d). Both laws, however, required Defendant to pay at least minimum wage for all hours worked. During the entire class period, the minimum wage under federal law was $7.25 per hour; under the state law, the minimum wage was $6.25 per hour.[3]

In the Complaint, Plaintiffs alleged they were not fully paid for all compensable hours during (1) orientation; (2) over-the-road training and (3) driving over the road post-training. (ECF Doc. No. 1).

With respect to the failure to pay minimum wage during orientation claim, Plaintiffs asserted that they were denied minimum wage during the multi-day initial orientation, where Plaintiffs contended that the $50 per 10-hour day provided to them each day only paid $5 per hour, resulting in a minimum wage violation during the period of approximately $22.50 each day under federal law and $12.50 under state law. (*See, e.g.* Deposition of opt-in Plaintiff Karime Abdo at

[3] Arkansas recently increased its minimum wage to $7.50 per hour; however, the class period (and the release) in this litigation relate to events which occurred on or prior to December 5, 2013. During this entire period, the minimum wage in Arkansas was $6.25 per hour.

p. 14, attached to Swidler Decl. as Exhibit 1-B) (testifying that orientation started at 7 am and ended at 5 pm each day). Defendant, in turn, argued that the orientation period and length thereof varied depending on the time period and whether the driver was an experienced driver. (*See* Deposition Transcript of Christensen Andrew, 30(b)(6) designee at p. 9, attached to Swidler Decl. at Exhibit 1-C). According to Defendant, orientation consisted of a 40-hour workweek and new hires were paid $300 for the 40-hour orientation course. (*Id.* at pp. 28; 45; 48). Nevertheless, Defendant admitted that for experienced drivers the orientation was unpaid, because, according to Defendant, the drivers in orientation were not yet employed. (*Id.* at p. 26). Thus, Defendant disputed at all times that its orientation program violated the law.

With respect to the claims premised upon minimum wage damages which occurred while drivers were over-the-road, the central dispute resolved around which hours constitute "work." Plaintiffs in this action were required to log their time consistent with the hours of service regulations set by the Department of Transportation ("D.O.T."). Drivers logged their time on one of four duty statuses throughout the day. Those statuses are as follows: (1) off-duty; (2) sleeper berth; (3) driving; and (4) on-duty not driving. (*Id.* at 90-99).

Plaintiffs asserted in their Complaint that all but 8 hours of sleeping time was compensable work time for over-the-road truck drivers who were on a tour of duty, thus entitling them to 16 hours of minimum wage for each day of work. However, through discovery, Plaintiffs determined that class members were not owed for all time logged on the first duty status (off-duty). The off-duty status was used by class members to log non-compensable events as well, such as bona fide meal periods and home time. As a result, Plaintiffs only sought compensation for the compensable off-duty periods of 20 minutes or less in duration; the monetary consequence of same was that Plaintiffs sought less than 16 hours per day of minimum wage compensation. Additionally, while

the Complaint asserted that Plaintiffs were paid $200 per workweek for training, discovery revealed that Defendant paid $300 per workweek for such training. (*See* Deposition Transcript of Christensen Andrew, 30(b)(6) designee at p. 52).

Plaintiffs maintained that the following activities all constituted compensable work for which Plaintiffs were entitled to be paid minimum wage: (1) all time logged as driving (line 3) and on-duty not driving (line 4); (2) all time logged as off-duty (line 1) or in a truck's sleeper berth (line 2) where the total time logged in such period was 20 minutes or less; and (3) all time logged in a truck's sleeper berth (line 2) beyond 8 hours per calendar day. Defendant did not dispute that time logged as "driving" or "on-duty not driving" constituted compensable work, but argued that the remaining periods were not compensable and that no compensation was due for such time.

1. Damages alleged to be due for "driving" and "on duty not driving" time.

There was no dispute that time a driver accurately logged as either "driving" or "on duty not driving" was compensable work time. However, the Parties disputed the amount of damages due to Plaintiffs and the Rule 23 class for such time.

To calculate damages, Plaintiffs obtained driver logs and pay records for the collective action members. These records were then analyzed by data analyst Daniel Regard, of iDiscoverySolutions[4], who reviewed the records and performed calculations on the data to determine the extent of underpayments. (Swider Decl. at ¶3). The formulas used for the calculations were provided by Plaintiffs' counsel. Plaintiffs calculated damages by performing the following calculations: (1) Plaintiffs determined the amount of hours worked under this theory by totaling, for each workweek, the amount of time the driver logged "driving" and "on duty not

[4] Mr. Regard's CV is available at http://idiscoverysolutions.com/bios/regard-daniel.

driving;" (2) Plaintiffs multiplied the number of hours worked by the applicable minimum wage to determine the least amount of compensation the driver should have received for the workweek; (3) if the compensation paid to the driver was less than the amount computed, the difference was recorded as damages.

As an example, employee JACJ22 (identified by employee code) was employed by Defendant during the workweek of May 5, 2012. During that week, the employee logged 39.4 hours of time as "on duty" or "on duty not driving." The employee was paid $246.96 for the workweek. To determine damages under the FLSA, Plaintiffs multiplied 39.4 hours by $7.25 to arrive at the minimum wage requirement of: $285.65. Accordingly, Plaintiffs recorded the difference of $38.69 ($285.65 - $246.96) as potential FLSA damages. To determine damages under Arkansas law, Plaintiffs performed the same calculation, but utilized the Arkansas minimum wage of $6.25 per hour to determine damages. Thus, in this example, Plaintiffs multiplied the 39.4 hours of work by $6.25 to arrive at $246.25. Because that amount is less than what the driver was paid, for this workweek there would be no asserted damages under Arkansas law under this theory of liability.

Based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid FLSA collective action members approximately $375,744.53 as a result of Defendant's failure to pay minimum wage for all such hours, which averages to $139.11 per collective action member. Likewise, based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid Rule 23 class members who were not FLSA plaintiffs (as any damages owed under Arkansas law

would be subsumed in the FLSA damages) $331,393.32, which averages to $47.90 per class member. (Swidler Decl. at ¶4).

As discussed above, Defendant did not dispute that it was required to pay minimum wage for "driving" and "on duty not driving" hours. However, Defendant argued at all times that the methodology utilized by Plaintiffs was incorrect and resulted in an overstatement of damages. Specifically, Defendant argued that the pay provided to a driver for a given workweek (hereinafter, "workweek 1") in many instances exceeded the amount provided in the paycheck for workweek 1, because in a later paycheck the driver received additional pay for work that was performed during workweek 1, because Defendant did not pay a driver for a load until after certain paperwork was a received. Defendant argued that Plaintiffs did not account for such late payments, and as a result, overstated the minimum wages due. Defendant retained the experts at Charles River Associates ("CRA")[5] to review Plaintiffs' calculations.

Plaintiffs asserted that a driver must be paid at least minimum wage on the designated payday for the workweek, and that any late payments accordingly could not be utilized to offset wages due. *Biggs v. Wilson*, 1 F.3d 1537, 1539-1540 (9th Cir. 1993) ("'Unpaid minimum wages' have to be 'unpaid' as of some distinct point . . .The only logical point that wages become 'unpaid' is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid - on payday."); *McDonald v. Jp Mktg. Assocs., LLC*, 2007 U.S. Dist. LEXIS 27747 (D. Minn. Apr. 13, 2007) (cause of action under FLSA "accrues when the employer fails to pay required compensation for any workweek at the regular pay day for the period in which the workweek ends").

[5] Information on CRA is available at http://www.crai.com/.

Defendant further argued that the methodology used by Plaintiffs' expert would be subject to a *Daubert* challenge. But a similar *Daubert* challenge was denied in *Petrone v. Werner Enters.*, where Werner made a similar argument to the Defendant here. *See* 2015 U.S. Dist. LEXIS 99675 (D. Neb. July 30, 2015).

2. Damages alleged to be due for rest breaks of 20 minutes or less in duration.

With respect to breaks which are 20 minutes or less in duration, Plaintiffs contend that such periods were *per se* compensable. *See* 29 C.F.R. §785.18 ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked."); *see also* AR DOL Rule No. 010.14-108(c)(1) (same).

To calculate damages, Plaintiffs reviewed the records and performed calculations on the data to determine the extent of underpayments. Plaintiffs calculated damages under this theory by performing the following calculations: (1) Plaintiffs determined the amount of hours worked under this theory by totaling, for each workweek, the amount of time the driver logged in short rest breaks *in addition to the amount of time* the driver logged "driving" and "on duty not driving"; (2) Plaintiffs multiplied the number of hours worked by the applicable minimum wage to determine the least amount of compensation the driver should have received for the workweek; (3) if the compensation paid to the driver was less that the amount computed, Plaintiffs asserted as damages the lower of: (a) the difference between the amount of the calculation under subpart 2 by the amount actually paid; and (b) minimum wage multiplied by the number of hours logged in short rest breaks. The calculation was performed this way to ensure that damages attributable to the first theory were not double counted.

As an example, employee ABDK2 (identified by employee code) was employed by Defendant during the workweek of April 28, 2012. During that week, the employee logged 48.75 hours of time as "on duty" or "on duty not driving," and took 8 short rest breaks totaling 1.7 hours (totaling 50.45 hours). The employee was paid $300 for the workweek. To determine damages under the FLSA, Plaintiffs multiplied 50.45 hours by $7.25 to arrive at the minimum wage requirement of: $365.76. Because this is more than what the driver was paid, Plaintiffs then performed the two calculations described above (*i.e.*. $365.76 - $300 = $65.76; 1.7 hours * $7.25 = $12.33) and asserted FLSA damages under this theory of $12.33. Likewise, to determine damages under Arkansas law, Plaintiffs performed the same calculation, but utilized the Arkansas minimum wage of $6.25 per hour to determine damages. Thus, in this example, Plaintiffs multiplied the 50.45 hours of work by $6.25 to arrive at $304.69. Because this is more than what the driver was paid, Plaintiffs then performed the two calculations described above (*i.e.*. $304.69 - $300 = $4.69; 1.7 hours * $6.25 = $10.63) and asserted Arkansas damages under this theory of $4.69.

Based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid FLSA collective action members $41,812.08 as a result of Defendant's failure to pay minimum wage for all such hours, which averages to $15.48 per collective action member. (Swidler Decl. at ¶5). Likewise, based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid Rule 23 class members who were not FLSA plaintiffs (as any damages owed under Arkansas law would be subsumed in the FLSA damages) $41,811.48, which averages to $5.80 per class member. (*Id.*).

3. Damages alleged to be due for sleeper berth periods beyond 8 hours per day.

As discussed in Plaintiffs' brief in support of preliminary approval, the law regarding the compensability of sleeper berth for over-the-road drivers is continuing to develop. Plaintiffs contend that the DOL regulatory framework provides that sleeper berth time beyond 8 hours per day is compensable. *See* 29 C.F.R. § 785.22; United States Dept. of Labor Field Operations Handbook, Chapter 31, 31(b)(09), *Hours worked by truck drivers, including team drivers* (current as of June 1, 2015, revised September 19, 1996), *available online at* http://www.dol.gov/whd/FOH/FOH_Ch31.pdf. Further, two district courts have issued decisions favorable to Plaintiffs' claims. *See Petrone v. Werner Enters*., 2015 U.S. Dist. LEXIS 101053 (D. Neb. Aug. 3, 2015) (awarding class-wide summary judgment to a class of over-the-road truck drivers who sought compensation for sleeper berth time in excess of 8 hours per day and for short rest breaks of 20 minutes or less in duration)[6]; *Punter v. Jasmin Int'l Corp*., 2014 U.S. Dist. LEXIS 138490 (D. NJ. 2014) (a default judgment case allowing recovery for sleeper berth time beyond 8 hours per day for over-the-road truck drivers who are on a continuous tour of duty).

Defendant, on the other hand, disagrees that this time is compensable and points to authority it contends supports its position. Defendant contends that the D.O.T. hours of service rules, rather than D.O.L. standards, govern this issue. Additionally, Defendant asserts that *Nance v. May Trucking Co.*, Case No. 3:12-cv-01655-HZ (D. Or. Jan. 15, 2014) holds that the sleeper berth time at issue would be non-compensable. While Plaintiffs believe that *Nance* is distinguishable in both law and fact (and while Plaintiffs believe that *Petrone* is analogous both

[6] The *Petrone* decision was issued after the Parties here agreed to a settlement in principal, and represents a significant development in the law in favor of Plaintiffs. However, the decision, while persuasive as it is factually analogous and from a district court within the Eighth Circuit, is not binding on this Court. Thus, considerable risk remains to both sides should litigation continue.

legally and factually), Plaintiffs recognize that should this case proceed through dispositive motion practice and/or trial, the result is far from certain. Moreover, many class members would prefer to be paid now than wait for trial and a lengthy appeals process.

Here again, Plaintiffs reviewed the records and performed calculations on the data to determine the extent of underpayments. Plaintiffs calculated damages under this theory by performing the following calculations: (1) Plaintiffs determined the amount of hours worked under this theory by totaling, for each workweek, the amount of time the driver logged in a truck's sleeper berth beyond 8 hours per day *in addition to the amount of time* the driver logged "driving" and "on duty not driving"; (2) Plaintiffs multiplied the number of hours worked by the applicable minimum wage to determine the least amount of compensation the driver should have received for the workweek; (3) if the compensation paid to the driver was less that the amount computed, Plaintiffs asserted as damages the lower of: (a) the difference between the amount of the calculation under subpart 2 by the amount actually paid; and (b) minimum wage multiplied by the number of compensable hours under this theory .

As an example, employee ZIED (identified by employee code) was employed by Defendant during the workweek of November 17, 2012. During that week, the employee logged 59.85 hours of time as "on duty" or "on duty not driving," and logged 44.87 hours in a truck's sleeper berth beyond 8 hours per day (totaling 104.72 hours). The employee was paid $611.80 for the workweek. To determine damages under the FLSA, Plaintiffs multiplied 104.72 hours by $7.25 to arrive at the minimum wage requirement of: $759.22. Because this is more than what he was paid, Plaintiffs then performed the two calculations described above (*i.e.*. $759.22 - $611.80 = $147.42; 44.87 hours * $7.25 = $325.30) and asserted FLSA damages under this theory of $142.72. Likewise, to determine damages under Arkansas law, Plaintiffs performed the same

calculation, but utilized the Arkansas minimum wage to determine damages. Thus, in this example, Plaintiffs multiplied the 104.72 hours of work by $6.25 to arrive at $654.50. Because this is more than what he was paid, Plaintiffs then performed the two calculations described above (*i.e.*. $654.50 - $611.80 = $42.70; 44.87 hours * $6.25 = $280.44) and asserted Arkansas damages under this theory of $42.70.

Based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid FLSA collective action members $1,900,518.40 as a result of Defendant's failure to pay minimum wage for all such hours, which averages to $703.63 per collective action member. Likewise, based on the driver logs and the pay records produced by Defendant, and the methodology discussed above, Plaintiffs asserted that during the class period, Defendant underpaid Rule 23 class members who were not FLSA plaintiffs (as any damages owed under Arkansas law would be subsumed in the FLSA damages) $2,573,040.75, which averages to $371.88 per class member. (Swidler Decl. at ¶6).

As stated above, Defendant at all times disputed damages under this theory by both contesting the compensability of the sleeper berth periods and by contesting the methodology upon which Plaintiffs calculated damages. While Plaintiffs believe they have a meritorious position and would ultimately prevail on all claims before the Court, Plaintiffs and their counsel are realistic about the risks of litigation and thus believe the proposed settlement, which provides Defendant a substantial discount on the sleeper berth claims, represents a reasonable compromise for obtaining a certain payment without the prolong expense and risk of continued litigation.

C. <u>The Rule 23 Settlement Should be Approved.</u>

In evaluating a class action settlement, courts in the Eighth Circuit generally consider the factors set forth in *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988), which include

determining (1) the merits of the plaintiffs' case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. All four factors weigh in favor of approving the settlement.

1. The Merits of Plaintiffs' Claims and the Legal and Factual Complexity of the Claims (factors 1 and 3)

The merits of Plaintiffs' claims are fully addressed in the preceding section of this brief, which discusses the factual basis and the potential damages under each of Plaintiffs' pursued theories. As noted above, the law regarding the compensability of certain rest time for over-the-road drivers is continuing to develop. Additionally, there are disputes relating to when the class members actually became employed by Defendant, and whether certain payments provided to class members could be used to offset Defendant's minimum wage obligations.

To prevail on such claims, Plaintiffs would have needed to demonstrate that the time at issue constitutes compensable work time under federal and state law in the face of Defendant's position that such time is not. Plaintiffs further would have needed to demonstrate that their damage calculations allocated damages in a proper manner. Defendant's expert disagreed with Plaintiffs' expert's calculations, and should the case continue through litigation, a battle of the experts may ensue. *See In re Safety Components Int'l*, 166 F. Supp. 2d 72, 90 (D.N.J. 2001) (granting final approval to settlement where "to establish damages, plaintiffs' counsel [would have had to employ] expert witnesses . . . [and] [t]he defendants likely would have employed their own experts to attack the accuracy and reliability of the models and formulae utilized . . . [thus] many risks would have faced lead plaintiffs in establishing damages").

Accordingly, the unresolved legal issues make this case a good candidate for settlement, because the merits of both sides' position and the ultimate holdings of the Court if the case

continued through trial are far from certain. Furthermore, the claims are factually complex due to the nature of Plaintiffs' employment where individuals work over-the-road away from a centralized location and due to the fact that, in the aggregate, the claims cover more than 1,000 years of working time.

Hence, these factors weigh in favor of approval of the settlement.

2. The Defendant's Financial Condition

Defendant's financial condition was not a factor in the ultimate settlement value of this case. Rather, the case was settled based on the potential exposure of Defendant compared with the substantial risk and delay which would have been required of continued adversarial litigation.

However, even if Defendant could withstand a greater judgment, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005).

Hence, this factor does not hinder this Court from granting final approval.

3. The Amount of Opposition to the Settlement

Following the Court's preliminary approval order, the Claims Administrator mailed the Court-ordered notice discussing the terms of the settlement to all 9,590 class members. At the end of a relatively long notice period, there has only been a single objector to the entire settlement. The objection rate is thus 1/100th of 1%. The extremely low number of objectors speaks volumes to the fairness of the settlement, and further supports final approval of the class-wide settlement.

Additionally, the concerns brought forth by the lone objector,[7] Mr. Ferguson, are entirely misplaced and should be overruled. Mr. Ferguson's filings with the Court assert the following objections to the settlement:

(1) Mr. Ferguson believes it is unfair that the settlement distribution provides a higher payout to FLSA plaintiffs (who filed Consent Forms to join the case) versus Rule 23 plaintiffs (who did not file Consent Forms to join the case) (*See* ECF Doc. No. 87 at pp. 2-3).

(2) Mr. Ferguson believes that the claims are worth more than the settlement provides, and argues that a proper settlement would be in the vicinity of $45 million - $51.5 million (*Id.* at pp. 3-6). Mr. Ferguson later states that the appropriate amount of damages should be "about $76,826,000.00." (*Id.* at p. 7).

(3) Mr. Ferguson believes that he and other class members were defrauded by "Driver Solutions," which he contends is a "20 year affiliate of PAM Transportation" and as a consequence of the fraud, they were required to pay thousands of dollars for driving school. Mr. Ferguson does not believe the proposed settlement compensates him or others for such alleged financial injury. (*Id.* at pp. 6-7).

(4) Mr. Ferguson believes the driving school charges an unconscionable interest rate on student loans provided to drivers, and Mr. Ferguson does not believe that the proposed settlement fairly compensates him or others for such alleged injury;

[7] Two other individuals – Edwards Miller, II (the opt-out relating to Mr. Miller is odd, referring to Mr. Miller as "'THE ARTIFICIAL PERSON' (legal fiction/ENS LEGIS). . . having returned from 'beyond the sea'…" and it is uncertain whether it is written by Mr. Miller) and Nilesh Patel – submitted correspondence to the Claims Administrator seeking to opt-out of the settlement. (*See* Exhibit 2-D). However, an individual who chooses to opt-out of the settlement is by definition not part of the settlement class and is not affected by the settlement. Thus, there is no basis to deny approval based on a few opt-out requests.

(5) Mr. Ferguson further has requested discovery from Defendant relating to its affiliation with Driver Solutions and the amount of debt student drivers have incurred in going to the school. (*See generally id.* at pp. 9-10; *see also* ECF Doc. No. 90).

The first objection raised by Mr. Ferguson is that those individuals who signed and filed FLSA consent forms during the conditional certification phase will obtain a higher recovery than those who did not. At first blush, it could seem unfair to award individuals more money simply because they signed and filed a form. But unfortunately for workers around the country, the FLSA requires individuals who wish to assert claims under the FLSA in Court to sign and file a consent form. 29 U.S.C. 216(b). And because Mr. Ferguson and others did not submit such a form, the statute does not permit them to recover damages under the FLSA. Thus, these individuals can only recovery under a state-law theory, which, as discussed above, results in a significant reduction of damages under each of Plaintiffs' theories. Thus, the non-FLSA class members should receive less in a settlement because, if there was no settlement and the Plaintiffs prevailed at trial, these individuals would receive less.

It is also worth mentioning that the instant settlement only releases claims through December 5 of 2013, which is more than 2 years ago. Mr. Ferguson, meanwhile, stopped working for Defendant in September of 2012 – more than 3 years ago. Because an individual must file a consent form to join an FLSA lawsuit prior to his or her statute of limitations expiring, and because the FLSA has a 2-year or 3-year statute of limitations (depending on whether the employer's conduct was willful), Mr. Ferguson has no ability to recover under the FLSA because his statute of limitations has expired. Thus, regardless of whether Mr. Ferguson believes it unfair that he is to receive less compensation than those who filed FLSA consent forms to join the litigation prior their statute of limitations expiring, it would be fundamentally unfair to the FLSA plaintiffs if they

did not fare better in a settlement where they were legally entitled to more compensation than those who did not join the FLSA litigation.

The remaining objections made by Mr. Ferguson are all misplaced and irrelevant to the claims made in this litigation and the release provided in the settlement. As this Court is aware, the release in this settlement is limited to wage and hour claims of the Plaintiffs and class members during the class period. There is no release for claims of fraud, and likewise, there is no consideration for any alleged fraud claims. Plaintiffs' counsel does not contend that Plaintiffs investigated the $45 million+ claim that Mr. Ferguson believes exists with respect to a fraud perpetuated by Driver Solutions upon PAM employees. Nor does Plaintiffs' counsel suggest the settlement would somehow provide a recovery under such a theory. Rather, this litigation has always focused on minimum wages due and not paid while the Plaintiffs and class members were employed by Defendant. The settlement release is limited to such claims, as is the consideration given to Plaintiffs and class members for such release. Thus, in this regard, Mr. Ferguson's objection that the settlement does not provide compensation for the alleged fraud, while true, is completely irrelevant to the fairness of the settlement and should be overruled.

Accordingly, these factors weigh in favor of granting final approval to the Rule 23 settlement.

D. The Court should Stay its Order Approving Settlement through April 1, 2016, to Allow the CAFA Notice Period to Expire.

The Class Action Fairness Act ("CAFA") mandates that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." *See* 28 U.S.C. § 1715(d). Notice of the proposed settlement is to be

provided to within ten days following submission of a proposed settlement to the Court. *See* 28 U.S.C. § 1715(b).

Here, the parties were under the mistaken belief that the claims administrator would notify the appropriate State and Federal officials. In late December of 2015, it was brought to the attention of the Parties that the administrator had not mailed the notice required by 28 U.S.C. § 1715. At this point, the Parties promptly arranged for the notice to be sent to the attorney generals of each state in which a class member resides and the United States Attorney General. A copy of the Notice mailed to each attorney general is attached hereto as Exhibit 2-B. The CAFA notice was mailed on December 29, 2015. (Exhibit 2 at ¶15). Therefore, the 90-day period will not elapse until March 28, 2016.

Numerous federal courts have been confronted with this technical lapse in the settlement process. In this instance, the courts used their discretion to structure the timing of final approval orders to excuse a failure to timely provide CAFA notice. *See, e.g., Battaline v. Advest, Inc.*, No. 2008 U.S. Dist. LEXIS 77164, at *1-2 (W.D. Pa. Oct. 1, 2008) (Court found Judgment to be effective after expiration of 90 day period when CAFA notices were not sent until after fairness hearing and final approval of the settlement); *D.S. ex rel. S.S. v. New York City Dept. of Educ.*, 255 F.R.D. 59, 79 (E.D.N.Y. 2008) (holding the fairness hearing prior to CAFA notice being issued, but providing that the proposed final approval order would not become final until the defendant had submitted its CAFA notice, 90 days had elapsed, and no relevant authority had objected or requested a hearing); *Ault v. Walt Disney World Co.*, 2009 WL 3242028, at *1, n.4 (M.D. Fla. October 6, 2009) (class members may not refuse to be bound to settlement even though CAFA notice not provided within ten days following filing of the proposed settlement); *Kay Co. v. Equitable Prod. Co.*, No. 06 Civ. 00612, 2010 WL 1734869, at *4 (S.D.W. Va. Apr. 28, 2010)

(the Court received final approval briefing, held a fairness hearing, and held the final approval order, until after the 90 day period had elapsed); *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 258 n. 12 (E.D.Pa. 2012) (the Court proceeded with the final approval hearing and held its decision for final approval in abeyance until 90 days passed); *In re Pool Products Distribution Market Antitrust Litigation*, 2015 WL 4528880 (E.D. LA July 27, 2015) (state and federal officials had "sufficient notice and opportunity to be heard" even though notice was not timely provided).

The Court in *Adoma v. University of Phoenix, Inc.*, 913 F.Supp.2d 964 (2012), explained the rational for approving of the late notice:

> The court reads [28 U.S.C. § 1715(e)(2)] to mean that even if defendants are late in serving notice to state and federal officials, class members may not exempt themselves from a settlement so long as at least 90 days elapse between service of the notice and entry of an order granting final approval of the settlement, as required by [28 U.S.C. § 1715(e)(2)]. To hold otherwise and allow class members to opt out of the class settlement based on late notice would result in the voiding of the settlement herein; this seems an unduly harsh result for failing to comply with a technical requirement, especially given that state and federal officials have had the statutory period to file objections with the court.
>
> In reaching this conclusion, the court is guided by the decisions of numerous courts that late mailing of notices to state and federal officials under CAFA is not fatal to approval of settlements. (citations omitted).

913 F. Supp.2d at 973.

Plaintiffs and Defendant respectfully request that the Court hold the Final Approval hearing on January 20, 2016, but hold an Order granting final approval in abeyance until April 1, 2016 (4 days following the expiration of the 90-day period), absent any objections or requests for hearings being received from any Federal or State official. Holding the Order until after the 90 day period has elapsed will ensure compliance with 28 U.S.C. § 1715. Given that class action members have

had an opportunity to object or opt out of the settlement, no party will suffer prejudice. It is further not anticipated that any Federal or State official will object to the settlement.

E. The Court should Grant Final Approval to the FLSA Collective Action Settlement.

Additionally, the Court should approve the settlement of the FLSA Collective Action. With respect to a court-authorized settlement of FLSA claims, the court must determine that the settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. United States Dep't of Labor*, 679 F.2d 1350, 1355 (11th Cir. 1982). If a settlement in an employee FLSA suit reflects "a reasonable compromise over issues," such as FLSA coverage or computation of back wages that are "actually in dispute," the court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." *Id.* at 1354.

In order to provide the court with sufficient information to determine whether a bona fide dispute exists, the parties must present: (1) a description of the nature of the dispute; (2) a description of the employer's business and the type of work performed by the employee; (3) the employer's reasons for disputing the employee's right to the claimed wages; (4) the employee's justification for the disputed wages; and (5) if the parties dispute the computation of wages owed, each party's estimate of the number of hours worked and the applicable wage. *Felix v. Thai Basil At Thornton, Inc.*, 2015 U.S. Dist. LEXIS 62020, *3 (D. Colo. May 6, 2015).

As discussed *supra* at length, a bona fide dispute exists over whether and to what extent Defendant violated the FLSA.

1. The Settlement is fair and reasonable based on the attendant risks of continued litigation.

"The Settlement Agreement was reached as a result of a contested litigation to resolve bona fide disputes—both factual and legal disputes that remain unresolved." *Forauer v. Vt. Country*

Store, Inc., 2015 U.S. Dist. LEXIS 5604, *15-16 (D. Vt. Jan. 16, 2015) (upholding fairness of settlement where the parties were represented by counsel, there was a bona fide dispute, and the settlement was fair and reasonable); *see also Bozak v. FedEx Ground Package Sys., Inc*., 2014 U.S. Dist. LEXIS 106042, 2014 WL 3778211, at *3 (D. Conn. July 31, 2014) (approving FLSA settlement and noting that settlement was reached after negotiations concerning "the uncertain legal and factual issues involved").

Additionally, the claims were investigated both factually and legally by both sides. To calculate the hours worked by over-the-road truck drivers (and to determine potential damages), Plaintiffs retained an expert data analyst, Daniel Regard of iDiscoverySolutions, to calculate minimum wage violations assuming that the time alleged to be compensable under Plaintiffs' theories of liability was held compensable. Mr. Regard reviewed over one million driver log records and time records for over 1,700 class members, as well as their pay records for such time, which were used to extrapolate damages class-wide. Those damage calculations are referenced above. Those amounts do not include liquidated damages, which could potentially double the award. However, neither liquidated damages nor compensatory damages were assured if litigation continued. And while both sides in this litigation believe they have meritorious positions, both concede that their positions are subject to considerable risk as to liability and damages. In particular, a trial on the merits would involve significant risks to Plaintiffs in light of the defenses available to Defendant.

To prove liability, Plaintiffs would have to defeat Defendant's arguments that Plaintiffs were properly paid for all compensable time and Defendant's legal arguments that the resting time at issue is not compensable. Defendant further disputed the accuracy and reliability of Plaintiffs' damage calculations.

While Plaintiffs believe their claims are meritorious and Defendant likewise believes its defenses are meritorious, counsel for the Parties are experienced and realistic, and understand that the resolution of liability issues, the outcome of the trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. The proposed settlement alleviates such uncertainty in a fair and reasonable manner.

Accordingly, the settlement falls within the range of reasonableness and justifies final approval.

2. The Settlement was reached as a result of arm's length bargaining in the midst of adversarial litigation and is not collusive.

The Settlement Agreement here was entered into "after an investigation of the claims and defenses," *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 180 (S.D.N.Y. 2014), and after the Parties engaged in "extensive discovery and damages calculations." *Flores v. One Hanover, LLC, 2014 U.S. Dist. LEXIS 78269*, at *6 (S.D.N.Y. June 9, 2014). The Settlement Agreement is "the product of negotiation between represented parties," which supports a finding that it "did not come about because of 'overreaching' by the employer." *Lliguichuzhca v. Cinema 60*, 948 F. Supp. 2d 362, 365-66 (S.D.N.Y. June 5, 2013) ("Arm's length bargaining between represented parties weighs in favor of finding a settlement reasonable."); *accord Hernandez v. Tabak*, 2013 U.S. Dist. LEXIS 51852, 2013 WL 1562803, at *1 (S.D.N.Y. Apr. 10, 2013) (concluding settlement "negotiated at arm's length [was] not the product of coercion"); *see also Forauer v. Vt. Country Store, Inc.*, 2015 U.S. Dist. LEXIS 5604, *15-16 (D. Vt. Jan. 16, 2015).

Additionally, Plaintiffs are represented by counsel who are well informed and practiced in collective wage and hour litigation, and are realistic about and knowledgeable of the risks and benefits of the settlement. Plaintiffs' counsel has substantial experience litigating complex wage

and hour actions, including class actions and certified collective actions with tens of thousands of class members. (Exhibit 1, Swidler Declaration at ¶¶26-27). *See also Campbell v. C.R. England, Inc.*, 2015 U.S. Dist. LEXIS 134235, *18 (D. Utah Sept. 30, 2015) (Swartz Swidler, LLC "has a reputation in the trucking industry as being one of the prominent firms to engage in FLSA litigation on behalf of truck drivers."); *Keller v. T.D. Bank, N.A.*, 2014 U.S. Dist. LEXIS 155889 14 (E.D. Pa. 2014) (finding that Mr. Swartz and Swidler "have considerable experience handling class and collective action disputes" and noting that they "represented the Named Plaintiffs and the prospective class competently, diligently, and with professionalism throughout the course of this litigation."); *McGee v. Annes Choice*, 2014 U.S. Dist. LEXIS 75840 (E.D. Pa. 2013) (finding Mr. Swartz and Mr. Swidler to be "well-versed in FLSA cases and skilled in litigating and settling wage-and-hour litigation"); *Stoneback v. Artsquest, Inc.*, 2013 U.S. Dist. LEXIS 86457 (E.D. Pa. 2013) (finding that Mr. Swidler and Mr. Swartz have "handled numerous class action lawsuits" and that their firm "is qualified to represent the class as class counsel"). Plaintiffs' counsel has further been certified as class counsel in similar litigation wherein they represent tens of thousands of over-the-road drivers for alleged violations of state and federal minimum wage laws. *See Petrone v. Werner Enters.*, 2013 U.S. Dist. LEXIS 96375 (D. Neb. July 10, 2013); *Baouch v. Werner Enters.*, 2014 U.S. Dist. LEXIS 64981 (D. Neb. May 12, 2014).

3. The reaction of class members has been positive.

As discussed above, the reaction to the class has been extremely positive, with only one objector (Mr. Ferguson). Thus, this factor also weighs in favor of granting approval to the FLSA settlement. Accordingly, the Court should also grant approval of the FLSA Collective Action Settlement.

F. The Attorney's Fee Request should be Approved.

Class Counsel is entitled to a fee paid out of the common fund for the benefit of the Class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). In class action suits where a fund is recovered and fees are awarded therefrom by the court, the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is a proper approach. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Eighth Circuit recognizes the propriety of the percentage-of-the fund method when awarding fees. *See In re U.S. Bancorp. Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming percentage-of-the fee fund recovery for 36% of the fund plus out-of-pocket litigation costs); *see also Barfield v. Sho-Me Power Elec. Coop.*, 2015 U.S. Dist. LEXIS 70166 (W.D. Mo. June 1, 2015) (approving fee award of 33 1/3 percentage of fund and finding that "[a] one-third of the value of the KAMO Settlement as a whole, the fee-and-expense award falls within the range of percentage-fee awards found reasonable in the Eighth Circuit."); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 U.S. Dist. LEXIS 130180, at *18 (N.D. Iowa Nov. 9, 2011) (awarding attorneys 36.04% of $18.5 million common fund in fees, plus separate reimbursement from settlement fund of over $900,000 in expenses); *West v. PSS World Med., Inc.*, 2014 U.S. Dist. LEXIS 57150, at *4 (E.D. Mo. Apr. 24, 2014) ("In this case, the court believes that 33 percent is a reasonable percentage for attorney's fees. It is appropriate to apply a reasonable percentage to the gross settlement fund."); *Wiles*, 2011 U.S. Dist. LEXIS 64163, at *10-11 (W.D. Mo. June 9, 2011) (awarding attorneys one-third of $900,000 common fund); *Ray v. Lundstrom*, 2012 U.S. Dist. LEXIS 160089, at *11-12 (D. Neb. Nov. 8, 2012) (awarding one-third of $3.1 million fund in fees, plus separate reimbursement from the settlement fund of $77,900 in expenses); *Brehm v. Engle*, 2011 U.S. Dist. LEXIS 35127, at *6 (D. Neb. Mar. 30, 2011) (awarding one-third of $340,000 settlement fund in fees, plus separate reimbursement from the fund of $45,000 in expenses); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 571 (S.D. Iowa 2011) (awarding

33% of the settlement award in fees); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061, 1067-68 (D. Minn. 2010) (awarding one-third of $16 million settlement fund, plus separate reimbursement from the fund of $245,000 in expenses).

Although the Eighth Circuit "has not formally established fee-evaluation factors, it has approved consideration of the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974)." *In re Iowa Ready-Mix Concrete*, 2011 U.S. Dist. LEXIS 130180, at *15 (N.D. Iowa Nov. 9, 2011); *Barfield*, 2015 U.S. Dist. LEXIS 70166, at *13. Those factors are as follows: (1) time and labor required; (2) novelty and difficulty of question presented by the case; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorneys due to acceptance of the case; (5) customary fee, (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or circumstances; (8) amount involved and results obtained; (9) experience, reputation and ability of the attorneys; (10) "undesirability" of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. *Allen v. Tobacco Superstore, Inc*., 475 F.3d 931, 944 n.3 (8th Cir. 2007) (*citing Johnson*, 488 F.2d at 717-19). Courts also look to the number of objectors to the settlement and the attorney's fees request in determining the reasonableness of the settlement. *In re U.S. Bancorp. Litig.*, 291 F.3d at 1038.

Although the Court may consider any or all of the *Johnson* factors, "rarely are all of the *Johnson* factors applicable," particularly in common fund cases. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988); *see also Yarrington v. Solvay Pharms.*, Inc., 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) ("Many of the factors to be considered by the Court overlap. Further, not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor.") (internal citations omitted).

Additionally, Class Counsel has provided a lodestar analysis for this Court to have a full understanding of the reasonableness of the fee request. However, in common fund cases, while a lodestar analysis can be useful to "double-check the result of the percentage-of-the-benefit method[,] . . . [it] is not necessary if the fee does not seem excessive as a percentage of the recovery." *Ramsey v. Sprint Communs., Co.*, 2012 U.S. Dist. LEXIS 171145 (D. Neb. Dec. 3, 2012).

1. Time and Labor Required

Class Counsel spent more than 1,300 hours working on this matter over the more than two years the case has been pending. (Swidler Decl. at ¶7). Class Counsel estimates that it will spend approximately 50 additional hours after the filing of this motion. As this Court is well aware, the instant case involved substantial discovery and motion practice effort.

There were nearly 3,000 collective action plaintiffs who joined the litigation. Defendant sought written discovery from 10% of the opt-in plaintiffs, and Plaintiffs ultimately provided Defendant with response to more than 170 sets of written discovery, which collectively responded to 2,890 interrogatory requests and 680 document requests. (*See* Opposition to Motion to Compel, ECF Doc. No. 67 at pp. 1-2). To respond to such discovery, Plaintiffs' counsel was required to individually confer with each of the responding Plaintiffs to obtain the necessary information and verification.

Additionally, the Parties engaged in significant deposition efforts. Plaintiffs deposed three corporate designees of Defendant, and Defendant in turn deposed the Named Plaintiff as well as 15 opt-in Plaintiffs, in depositions which occurred in four states. These discovery efforts allowed the Parties to fully understand the strengths and weaknesses of each party's position, which greatly assisted in the settlement of this matter.

Additionally, the paper and electronic discovery in this matter has been immense and time consuming. To investigate the claims, Class Counsel obtained and reviewed well over one million driver logs, along with tens of thousands of pay records from Defendant. As discussed above, Plaintiffs retained an ESI expert and developed algorithms capable of computing class-wide damages. It was only with the use of all the information that Plaintiffs were then able to build a damage algorithm, and with the help of experts, compute Defendant's potential exposure on a class-wide basis.

As a result of the significant litigation efforts of both sides, a significant amount of labor and time was required to successfully prosecute this matter. Thus, this factor weighs in favor of the fee request.

2. Novelty and Difficulty of Question Presented

The legal issues presented in this case are both novel and difficult. In this litigation, the largest issue was whether, and under what circumstances, over-the-road truck drivers were entitled to minimum wage for time spent in a truck's sleeper berth. There is very little legal precedent addressing such issues, and the little precedent that does exist did not exist at the time this case was filed. *See Punter v. Jasmin Int'l Corp*., 2014 U.S. Dist. LEXIS 138490 (D. NJ. Sept. 30, 2014) (holding, in a default judgment case, that such time was compensable work time); *See Petrone v. Werner Enters*., 2015 U.S. Dist. LEXIS 101053 (D. Neb. Aug. 3, 2015) (class-wide summary judgment on similar claims), *motion to petition for interlocutory appeal granted*, 2015 U.S. Dist. LEXIS 112407 (D. Neb. Aug. 25, 2015) (finding that the legal issues involved are "unclear" and that there is "substantial ground for difference of opinion"), *petition denied*, 15-8015 (8th Cir. Sept. 25, 2015); *Nance v. May Trucking Co.*, Case No. 3:12-cv-01655-HZ (D. Or. Jan. 15, 2014) (holding that sleeper berth time was not compensable time where the plaintiffs sought

compensation for *all* sleeper berth time when the truck was moving, not just the hours above 8 hours per day), *appeal pending*, 14-35640 (9th Cir. July 30, 2014).

Thus, the legal issues presented in this case were not easily resolved nor are they routine. Instead, Plaintiffs' counsel has sought recovery under novel legal theories which require significant legal analysis.

Thus, this factor weighs in favor of the fee request.

3. Skill Requisite to Perform the Legal Service Properly

Class Counsel demonstrated skill in analyzing the potential claims under the Arkansas Minimum Wage Act, the FLSA, and the DOL regulatory framework and in prosecuting these claims with diligence and zeal for more than two years. Given the complexities and the unresolved legal nature of the claims asserted, highly skilled counsel was required to achieve the benefit obtained for the class.

Here, Class Counsel has substantial experience in litigating class action wage and hour cases. As discussed in the accompanying declaration, Justin Swidler and Richard Swartz have litigated more than 60 putative federal wage and hour class actions in the last 5 years, and are currently certified class or collective counsel in 18 wage and hour class actions throughout the United States, collectively representing well over 100,000 workers. (Swidler Decl. at ¶¶ 26-27). Class Counsel has been previously recognized by other federal courts as being particularly skilled in this area of the law. *See, e.g. Campbell v. C.R. Eng., Inc.*, 2015 U.S. Dist. LEXIS 134235, *19-20 (D. Utah Sept. 30, 2015) (finding that Mr. Swartz and Mr. Swidler "litigated [the FLSA collective action] for more than two years with competence, diligence, and professionalism . . . [and finding] that [Swartz Swidler, LLC] has significant experience in litigating wage and hour cases"); *Keller v. T.D. Bank, N.A.*, 2014 U.S. Dist. LEXIS 155889, *14 (E.D. Pa. 2014) (Restrepo,

J.) (finding that Mr. Swartz and Mr. Swidler "have considerable experience handling class and collective action disputes" and noting that they "represented the Named Plaintiffs and the prospective class competently, diligently, and with professionalism throughout the course of this litigation"); *McGee v. Anne's Choice, Inc.,* 2014 U.S. Dist. LEXIS 75840 (E.D. Pa., June 4, 2014) (Schiller, J.) (finding Mr. Swartz and Mr. Swidler to be "well-versed in FLSA cases and skilled in litigating and settling wage-and-hour litigation"); *Stoneback v. ArtsQuest*, 2013 U.S. Dist. LEXIS 86457 (E.D. Pa. June 19, 2013) (Gardner, J.) (finding that Mr. Swidler and Mr. Swartz have "handled numerous class action lawsuits" and that their firm "is qualified to represent the class as class counsel").

Thus, this factor also weighs in favor of granting approval of the fee request here.

4. Preclusion of Other Employment by the Attorneys

As discussed above and provided in the attached declaration of Mr. Swidler, Class Counsel dedicated well over 1,300 attorney hours to this case over the last two years. The bulk of that time was dedicated by Mr. Swartz and Mr. Swidler, who were also required to travel cross-country on numerous occasions in their duties as Class Counsel. As a result of the time spent on this matter, Class Counsel's ability to accept and work on other cases was impeded.

Thus, this factor also weighs in favor of the fee request.

5. Customary Fee / Awards in Similar Cases

Class Counsel seeks to be paid 1/3 of the settlement fund as its contingent fee and as reimbursement of its costs in this matter. In contingent class action cases, a 1/3 contingent fee is normal and routine in this circuit. *See, e.g., In re U.S. Bancorp. Litig.*, 291 F.3d at 1038 (36% plus out-of-pocket litigation costs); *Barfield*, 2015 U.S. Dist. LEXIS 70166 (W.D. Mo. June 1, 2015) (33 1/3%); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 U.S. Dist. LEXIS 130180, at *18

(N.D. Iowa Nov. 9, 2011) (36.04% plus out-of-pocket litigation costs); *West v. PSS World Med., Inc.*, 2014 U.S. Dist. LEXIS 57150, at *4 (E.D. Mo. Apr. 24, 2014) (33 1/3%); *Wiles*, 2011 U.S. Dist. LEXIS 64163, at *10-11 (W.D. Mo. June 9, 2011) (same); *Ray v. Lundstrom*, 2012 U.S. Dist. LEXIS 160089, at *11-12 (D. Neb. Nov. 8, 2012) (same); *Brehm v. Engle*, 2011 U.S. Dist. LEXIS 35127, at *6 (D. Neb. Mar. 30, 2011) (same); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 571 (S.D. Iowa 2011) (same).

Thus, these factors weigh in favor of the fee request.

6. Whether the Fee is Fixed or Contingent

The risk of nonpayment to Plaintiffs and the Class was high in this case. As discussed above, this case poses a number of factual and legal issues, which created risks as to both liability and damages.

Despite these risks, Class Counsel took this case on a pure contingency, and would have received no compensation if they did not obtain a positive result for the Class. The class notice provided to class members in early 2014, after this matter was conditionally certified as a collective action, was very clear on this issue:

> Plaintiffs' attorneys have taken this case on a contingency fee. . . **If there is no recovery or judgment in Plaintiffs' favor, Plaintiffs' attorneys will not seek any attorneys' fees or costs from any of the Plaintiffs.**

(January 10, 2014 Order, ECF Doc. No. 23-1 at p. 3) (emphasis added).

As of the date of this filing, Class Counsel has expended more than 1,300 attorney hours on the instant matter, without having received any compensation for such work or promise of compensation for such work. In addition, Class Counsel incurred more than $45,000 in litigation costs, none of which would have been reimbursed to Class Counsel in the case of a loss. (Swidler Decl. at ¶8).

Thus, there was substantial risk of Class Counsel receiving no compensation for their time, as well as risk the expenses incurred for the benefit of class members would go unreimbursed. Thus, the contingent nature of Class Counsel's representation also weighs in favor of awarding the requested fee.

7. Amounts Involved and the Results Obtained

The total fund created equals $3.45 million dollars ($3,450,000). As discussed above, the settlement will provide an average payout, after fees and expenses are paid, of $394.83 to each FLSA plaintiff, and $152.36 to each Rule 23 class member.

The recovery is a fair result for class members, who faced considerable risks of non-payment or recovery of less than the current settlement provided. While at first blush the settlement allocations may seem low, it is important to note that the instant matter only sought minimum wages for drivers employed by Defendants. Unlike in many FLSA and Arkansas Minimum Wage Act matters, the employees here are exempt from the overtime requirements of these laws, and thus were only entitled (and only asserted) that they should have been paid the minimum wage as required by the applicable law. As a result, the potential recovery in this matter was significantly more limited than in most wage and hour matters (which assert overtime violations) where there are thousands of opt-in plaintiffs.

Furthermore, it is important to note that the release in this matter is also relatively limited. First, Plaintiffs are only waiving wage and hour claims that they have against Defendant. Second, the waiver only relates to conduct which occurred on or prior to December 5, 2013, more than two years ago. The statute of limitations under the FLSA is either two or three years depending on whether Defendant's conduct was ultimately deemed willful, and the statute of limitations under the Arkansas Minimum Wage Act is three years. *Douglas v. First Student, Inc.*, 385 S.W.3d 225,

225 (Ark. 2011). Thus, the compensation provided to Rule 23 class members and FLSA members are for claims which many could not assert outside this litigation because their statute of limitations would have expired.

Moreover, as discussed above, there is no guarantee that the Plaintiffs would recover more than $3.45 million at trial, at it is unclear who would have prevailed on the sleeper berth claim in light of the facts of this case, and the immediate settlement provides a significant value on these claims.

The settlement provides for immediate payment (without any "claims made' or similar procedure designed to reduce the amount of individuals who will be paid) to all Plaintiffs and class members. Accordingly, the result obtained in this matter is very favorable to class members and weighs in favor of the fee request.

8. Experience, Reputation, and Ability of Class Counsel

As discussed above, Class Counsel has been recognized by numerous federal courts as being experienced wage and hour class action attorneys. *See, e.g. Keller,* 2014 U.S. Dist. LEXIS 155889, *14 (finding that Mr. Swartz and Swidler "have considerable experience handling class and collective action disputes" and noting that they "represented the Named Plaintiffs and the prospective class competently, diligently, and with professionalism throughout the course of this litigation"); *McGee,* 2014 U.S. Dist. LEXIS 75840 (finding Mr. Swartz and Mr. Swidler to be "well-versed in FLSA cases and skilled in litigating and settling wage-and-hour litigation"); *Stoneback,* 2013 U.S. Dist. LEXIS 86457 (finding that Mr. Swidler and Mr. Swartz have "handled numerous class action lawsuits" and that their firm "is qualified to represent the class as class counsel"); *Baouch v. Werner Enters.,* 2014 U.S. Dist. LEXIS 64981, *9 (D. Neb. May 12, 2014) (finding that Swartz Swidler, LLC, Justin Swidler, and Richard Swartz have "experience in class

actions [and] knowledge of the law" in an FLSA and state law minimum wage case). As stated above, Class Counsel currently represents more than 100,000 workers nationwide in various wage and hour litigation.

Additionally, Class Counsel "has a reputation in the trucking industry as being one of the prominent firms to engage in FLSA litigation on behalf of truck drivers." *See Campbell*, 2015 U.S. Dist. LEXIS 134235 at *18. Recently, an article was published by Transport Topics, the Newspaper of Trucking and Freight Transportation, which is published by the American Trucking Association. The article discussed legal challenges facing the trucking industry with respect to pay practices and specifically, concerns relating to the failure to pay the federal minimum wage. The article discusses six separate certified minimum wage lawsuits, and notes that Class Counsel is counsel to plaintiffs in each of the six cited cases. *See* Gilroy, Roger, *Drivers, Fleets Embroiled in Lawsuits over Wages*, Transport Topics, September 7, 2015, *available online at* http://www.ttnews.com/articles/petemplate.aspx?storyid=39369.

Additionally, Class Counsel recently succeeded in obtaining a class-wide summary judgment victory for more than 50,000 truck drivers of Werner Enterprises, in a case that asserted that Werner had violated the minimum wage provisions of the FLSA and Nebraska state law during its training program. The decision further provides evidence that Class Counsel is an experienced law firm with a reputation in this industry to vigorously pursue such claims. It is, in part, due to the Firm's reputation that such a successful result was obtained. *See Petrone*, 2015 U.S. Dist. LEXIS 101053.

Thus, this factor also weighs in favor of the fee request.

9. The "undesirability" of the case.

A case is undesirable when it requires a significant time and financial investment coupled with risk of no payment. *See In re Shell Oil Refinery*, 155 F.R.D. 552, 572 (E.D. La. 1993). Here, Class Counsel spent north of 1,300 hours litigating this matter over two years. Class Counsel has also spent more than $45,000 in out-of-pocket costs litigating this matter. Due to the contingent nature of Class Counsel's representation, such cost and time would have been lost if there was no recovery for the class.

In addition, as discussed above, the case law remains unsettled as to who would have prevailed if the case continued through litigation. Additionally, Defendant intended to pursue a motion for decertification after the close of discovery, arguing that individualized circumstances and defenses preclude this Court from resolving this case on a collective basis. Should they have prevailed on such a motion, Class Counsel would have been unable to recover for the vast amount of time and expenses incurred in this matter, even if the Named Plaintiffs prevailed on their minimum wage claims.

Thus, this factor also weighs in favor of the fee request.

10. The Nature and Length of the Professional Relationship with Named opt-in Plaintiffs.

The instant matter was filed in August of 2013 and was certified as a collective action in January of 2014. Most opt-in plaintiffs joined this action in early 2014. Thus, Class Counsel has represented the Named Plaintiffs and opt-in Plaintiffs for approximately two years.

Accordingly, Class Counsel has had a relatively lengthy professional relationship with the Named Plaintiffs and the opt-in Plaintiffs, and this factor accordingly also weighs in favor of the fee request.

11. The Lodestar Cross-Check Confirms the Reasonableness of the Fee Request.

While not required, Courts which award attorney's fees based upon the percentage of the fund may crosscheck the requested fee award by the lodestar amount. "[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1051 (9th Cir. 2002) (confirming fee request where percentage of the fund resulted in a lodestar multiplier of 3.65), *cert. denied*, 537 U.S. 1018, 123 S. Ct. 536, 154 L. Ed. 2d 425 (2002);

"The lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case. The resulting multiplier need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1065 (D. Minn. 2010). In applying the crosscheck multipliers, courts in this circuit have approved fees which result in multipliers of more than than six in common fund cases. *See, e.g. In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (approving multiplier of 6.5); *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (finding lodestar multiplier of 4.7 reasonable); *In re St. Paul Travelers Sec. Litig.*, 2006 U.S. Dist. LEXIS 23191, at *1 (D. Minn. Apr. 25, 2006) (approving multiplier of 3.9); *Yarrington*, 697 F. Supp. 2d at 1065 (multiplier of 2.26); *In re Rite Aid*, 396 F.3d 294, 306 (3d. Cir. 2005) (*citing Task Force Report*, 108 F.R.D. at 243) (approving a lodestar multiplier of 4.07).

In determining the lodestar for cross-check purposes, the Court need not engage in a "full-blown lodestar inquiry," *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 169 n.6 (3d Cir. 2006), or "mathematical precision," *In re Rite Aid Corp*., 396 F.3d at 306-07. A court need not involve itself with "a review of actual [attorney] time sheets." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d

546, 592-93 (D. NJ. 2010). Additionally, while lodestar multipliers are a relevant consideration in determining if the fee request is reasonable, "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 307 (3d Cir. 2005).

In the instant matter, Class Counsel has performed 1314.9 hours litigating and prosecuting this matter and estimates that another 50 hours will be performed following the filing of the instant motion. (Swidler Declaration at ¶7).[8] The work was performed by attorneys Justin Swidler, Richard Swartz, Joshua Boyette, Daniel Horowitz, and Travis Martindale. (*See* Attorney Time Records, Exhibit 1-A).

Richard Swartz was admitted to the bar in 1997. (Swidler Decl. at ¶¶14-16). Justin Swidler was admitted to the bar in 2007. (*Id.* at ¶¶11-13). Both have litigated more than 60 putative wage and hour cases, and as discussed above and in their supporting affidavits, both are currently class counsel in 15 certified wage and hour cases, cumulatively representing more than 100,000 workers. (*Id.* at ¶¶26-27). Numerous federal courts have held that a reasonable hourly billing rate for Mr. Swidler and Mr. Swartz when litigating class action wage and hour matters is $500 per hour. *See McGee*, 2014 U.S. Dist. LEXIS 75840 (finding $500 per hour to be reasonable rate for Mr. Swidler and Mr. Swartz in a certified FLSA collective action); *See Keller*, 2014 U.S. Dist. LEXIS 155889, *42 (same).

[8] Class Counsel does not require paralegals to track their time, and accordingly, while a significant amount of paralegal work was performed in this matter, Class Counsel does not seek directly seek fees for reimbursement of such time. However, that Class Counsel has not sought compensation for such time further supports the reasonableness of the fee request. This is especially true in light of the extraordinary amount of paralegal and administrative work necessary to process the more than 2,800 Consent Forms received.

The associates who worked on this matter have, on average, 5 years of experience practicing law. (Swidler Decl. at ¶17-25). Two years ago, a federal court found that a reasonable blended rate for the associates of Swartz Swidler was $350 per hour, when the associates had on average significantly less experience. *Keller*, 2014 U.S Dist. LEXIS 155889, *42. Nevertheless, Class Counsel here seeks this Court approve the same blended rate of $350 per hour in this matter when calculating the lodestar cross-check. [9]

It is true that "[a]s a ***general*** rule, a reasonable hourly rate is the prevailing market rate, that is, 'the ordinary rate for similar work in the community where the case has been litigated.'" *Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (8th Cir. 2002) (*quoting Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001)) (emphasis added); *Cooper Clinic, P.A. v. Mercy Clinic Fort Smith Cmtys,* 2015 U.S. Dist. LEXIS 29815, at *3 (W.D. Ark. Mar. 11, 2015). This general rule, however "does not mean that our-of-town counsel must always be limited to lower local rates." *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982). Rather, where "the special expertise of counsel from a distant district" is necessary, counsel is entitled to a rate which is reasonable for the home district of the attorney. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 426 F.3d 694, 705 (3d Cir. 2005).

The matter before this Court involved extensive legal and factual analysis of unresolved and complex wage and hour issues on behalf of nearly 10,000 individuals. Class Counsel could locate no other case filed within this district that asserted minimum wage rights for over-the-road truck drivers by asserting that certain waiting and other non-active time constituted compensable

[9] "In utilizing the blended billing rates to calculate the lodestar, the courts allow the use of current billing rates at the time the calculation is made rather than the billing rates actually in effect at the time the hours were recorded. Although counterintuitive, this is intended to compensate for delay in receiving fees." *In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981 (D.N.J. Aug. 27, 2013).

work time for drivers. (Swidler Decl. at ¶28). And the only other case filed within the Eighth Circuit which could be located by undersigned counsel which makes similar claims are the cases of *Petrone v. Werner Enters.* (D. Neb. 11-cv-401), and *Abarca v. Werner Enters.* (D. Neb. 14-319), all filed in Nebraska, and all cases which undersigned counsel is certified class or interim class counsel. (*Id*).

Class Counsel recognizes that this Court denied a request to utilize an out-of-district rate in *Hewitt v. Gerber Prods. Co*., 2014 U.S. Dist. LEXIS 127676, at *5 (W.D. Ark. July 18, 2014). The facts in *Hewitt*, however, were quite different than the facts at bar. In *Hewitt*, the plaintiffs' claim was premised upon violations of state law only asserting that the employer failed to pay for donning and doffing time. Unlike the claims raised in the instant matter, there have been numerous donning and doffing cases filed in this district. *See, e.g.*, *Melgar v. O.K. Foods, Inc.*, 2015 U.S. Dist. LEXIS 41807 (W.D. Ark. Mar. 31, 2015); *In re Pilgrim's Pride Fair Labor Stds. Act Litig.,* 2008 U.S. Dist. LEXIS 93966 (W.D. Ark. Mar. 13, 2008); *De Lopez v. Ozark Mt. Poultry, Inc*., 2015 U.S. Dist. LEXIS 129316 (W.D. Ark. Sept. 25, 2015). Additionally, the fees awarded in *Hewitt* were not related to the time the attorneys spent litigating the merits of the litigation, but instead were rewarded because the attorney was required to defend against a frivolous procedural motion filed by the employer. *Hewitt*, 2015 U.S. Dist. LEXIS 127676, *6-7. Further, the claim in *Hewitt* was premised only upon state law and was ultimately litigated in state court, which seriously undermined the argument that national wage and hour counsel was necessary to litigate the matter. *Id.* Finally, the claims in *Hewitt* were being litigated, at least in part, by local counsel and a number of lawyers and law firms in central Arkansas. *Id.*

Thus, Class Counsel respectfully requests the Court utilize Class Counsel's hourly rates as requested above to calculate the lodestar cross-check.

Nevertheless, should the Court determine that a local rate should be utilized, Class Counsel respectfully requests the Court utilize $275 per hour for partners Richard Swartz and Justin Swidler and $225 per hour as a blended rate for the associates who worked on this matter. These rates are consistent with the rates awarded by this Court in 2014 in *Hewitt*. 2014 U.S. Dist. LEXIS 127676, at *7.

As discussed below, such rates produce a lodestar multiplier of 1.91 utilizing the national rate requested by Class Counsel or a multiplier of 3.29 using the local rate this Court approved in *Hewitt*.[10] The multiplier is calculated as follows:

National Rate

1. Multiplying the number of hours performed by partners Justin Swidler and Richard Swartz (818.4) by $500/hour, totaling: $409,200;

2. Multiplying the number of hours performed by associates Joshua Boyette, Daniel Horowitz, and Travis Martindale (496.5) by $350/hour, totaling: $173,775;

3. Multiplying the estimated number of hours to be performed after filing the instant motion (50) by a blended rate of $400 per hour, totaling: $20,000;

4. Adding the above together results in a lodestar of: $602,975;

5. Dividing the requested fee award ($1,150,000) by the lodestar ($602,975) provides a multiplier of 1.91.

Local Rate

1. Multiplying the number of hours performed by partners Justin Swidler and Richard Swartz (818.4) by $275/hour, totaling: $225,060;

2. Multiplying the number of hours performed by associates Joshua Boyette, Daniel Horowitz, and Travis Martindale (496.5) by $225/hour, totaling: $111,712.50;

[10] This calculation includes a conservative estimate of 50 hours of work which will be performed following the instant filing, including travel to/from and preparations for the Final Approval Hearing, finalizing and confirming settlement allocation calculations, and responding to inquiries from opt-in Plaintiffs.

3. Multiplying the estimated number of hours to be performed after filing the instant motion (50) by a blended rate of $250 per hour, totaling: $12,500;

4. Adding the above together results in a lodestar of: $349,272.50;

5. Dividing the requested fee award ($1,150,000) by the lodestar ($349,272.50) provides a multiplier of 3.29.

Thus, the lodestar cross-check further confirms the reasonableness of the fee request. Accordingly, Class Counsel respectfully requests this Court award the requested fee as it is reasonable upon consideration of the relevant *Johnson* factors, and the lodestar cross-check confirms the reasonableness of the request.

12. Class Counsel's Fee Application is Especially Reasonable as it Includes Reimbursement for Reasonable Out-of-Pocket Litigation Costs.

""Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses." *Newby v. Enron Corp.* (*In re Enron Corp. Sec., Derivative & ERISA Litig.*), 2008 U.S. Dist. LEXIS 52932, *56 (S.D. Tex. July 10, 2008), quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003); *see also Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1009 (D. Colo. 2014), quoting *Vaszlavik v. Storage Tech. Corp.*, 2000 U.S. Dist. LEXIS 21140, at *4 (D. Colo. Mar. 9, 2000).

Here, Class Counsel has incurred out-of-pocket costs totaling $45,181.55 including, expert fees, mailing and postage expenses (for facilitating the conditional certification notice), mediation fees, deposition transcript fees, expenses associated with Adobe Echosign (which was utilized to permit online Consent Forms), travel costs and filing fees (Swidler Declaration at ¶8).

While Class Counsel does not request explicit reimbursement for such costs, Class Counsel notes that the inclusion of these costs effectively reduces Class Counsel's fee request to $1,104,819, or 32% of the Settlement Fund. Thus, the consideration of these costs further evidences the reasonableness of the fee request.

G. The Claims Administrator should be provided its reasonable fee for facilitating notice of the preliminarily approved settlement, calculating allocations of the settlement, and distributing payments to opt-in plaintiffs.

The Settlement Agreement provides that the costs of administering the settlement shall be paid from the Settlement Fund. (*See* Settlement Agreement, at p. 4). Where a settlement agreement calls for the costs of administration to be borne by the settlement fund, the Court should approve same. *See, e.g., In re High-Tech Emple. Antitrust Litig*., 2013 U.S. Dist. LEXIS 180530, *19 (N.D. Cal. Oct. 30, 2013) ("[a]ll costs incurred in disseminating Notice and administering the Settlement shall be paid from the Settlement Fund pursuant to the Settlement Agreement").

The Claims Administrator in this matter provided notice to all opt-in Plaintiffs and Rule 23 class members of the Settlement, along with updating address information and skip tracing. (Exhibit 2 at ¶¶3-13). The Claims Administrator has further performed the calculations necessary to distribute the settlement, and provided the Court grants final approval, will hold the fund in trust and issue checks and Forms W-2 and 1099 to all beneficiaries of the settlement in accordance with the Court's order and the settlement agreement.

KCC has incurred fees and costs totaling $32,293.42 to date, and estimates that the total costs and fees associated with its work will be $68,551.34 although the exact amount will not be known until after approval (*Id.* at ¶22).

Thus, Plaintiffs respectfully request that this Court order that Claims Administrator shall be paid its reasonable fees and costs incurred out of the Settlement Fund, not to exceed $75,000.

H. This Court should award Named Plaintiffs and individuals who sat for deposition the requested service payments.

The class representative, Ms. Estes seeks a service award of $10,000. In addition, Plaintiffs have requested modest service payments of $300 each for each opt-in plaintiff who sat for a deposition (Ms. Estes who also sat for deposition, would not receive the extra $300).

"The purpose of [service] payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Bredbenner v. Liberty Travel, Inc.*, 2011 U.S. Dist. LEXIS 38663, 63-64 (D. NJ. Apr. 8, 2011). By bringing suit against a large company and having documents publicly filed with their names on them, named plaintiffs who assist in class action litigation "[take] on certain risks. By bringing suit against a major company[,]… they risk their good will and job security in the industry for the benefit of the class as a whole." *Id.*; *see also Camp v. Progressive Corp*., 2004 U.S. Dist. LEXIS 19172 (E.D. La. Sept. 23, 2004) (allowing incentive awards to named plaintiffs and other class members who participated in discovery); *In re Xcel*, 364 F.Supp.2d at 1000 ($100,000 award approved to lead plaintiffs); *Austin v. Metro. Council*, 2012 U.S. Dist. LEXIS 41750, *32 (D. Minn. Mar. 27, 2012) (approving $20,000 award)..

Here, Plaintiff Estes greatly assisted in the litigation and the resolution of this matter. Plaintiff Estes was the original individual who sought to bring this matter forward as a collective and class action. She provided most of the initial facts necessary prior to filing. She also reviewed significant amounts of discovery provided by Defendant. Ms. Estes further answered written

discovery, and took time off from work to be deposed. Ms. Estes was further instrumental in the settlement process, and participated in the mediation by phone. (Swidler Decl. at ¶9).[11]

Additionally, 15 opt-in plaintiffs sat for deposition. Their collective testimony provided invaluable benefits to Plaintiffs in that it established representative testimony as to the experiences of drivers and pay practices of Defendant. Each individual deposed took time to prepare with Class Counsel and answered all questioned posed by Defendant without the need of judicial intervention. These individuals all assisted the litigation significant more than the rest of the class, and it is thus fair to award these individuals a modest service payment of $300 each for their efforts. (Swidler Decl. at ¶10).

The service payments here are well within the amounts regularly provided in similar cases. *See, e.g. Whittington*, 2013 U.S. Dist. LEXIS 161665, *24 (approving service payment for the named plaintiff of $7,500); *Bredbenner*, 2011 U.S. Dist. LEXIS 38663 at *68 ($10,000 each for 8 named plaintiffs); *Dewey*, 728 F. Supp.2d at 610 ($10,000); *see also Newberg on Class Actions* § 11.38, at 11-80 (citing empirical study from 2006 that found average award per class representative to be $16,000).

For these reasons, the class has greatly benefited from the efforts of the Named Plaintiff and the Opt-in Plaintiffs who sat for deposition and it is accordingly requested that the service payments be awarded.

[11] Ms. Estes wanted to attend the final approval hearing, but was seriously injured on-the-job in a commercial vehicle accident while she was sleeping in the truck's sleeper berth. As a result of such injury, travel is extremely difficult. Ms. Estes currently in Georgia. (*See* Swidler Decl. at ¶9).

III. CONCLUSION

For the reasons as stated above, Plaintiffs request that the Court give final approval to the settlement, and award the attorney's fees, expense reimbursement, and service payment as requested.

Respectfully Submitted,

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