

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
COLUMBUS DIVISION**

**MARK A. JOHNSON on Behalf of Himself  
and All Others Similarly Situated**

Plaintiff,

v.

**MIDWEST LOGISTICS SYSTEMS, LTD.**

Defendant.

CASE NO. 2:11-CV-1061

UNITED STATES DISTRICT JUDGE  
ALGENON L. MARBLEY

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**AMENDED STIPULATION OF SETTLEMENT**

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This matter has come before this Court for approval of the terms and conditions of a Stipulation of Settlement (“Stipulation”) made and entered into, as of October 3, 2012, by and among Named Plaintiff, Mark Johnson (“Johnson”), on behalf of himself and the Class Members (as defined below), and Defendant Midwest Logistics Systems, LTD. (“Midwest”) (as defined below) (collectively, “Settling Parties”). This Stipulation is intended by the Settling Parties to fully, finally and forever resolve, discharge and settle the Named Plaintiff’s Released Claims and Released Claims (as defined below), upon and subject to the terms and conditions hereof and subject to the Court’s approval (“Settlement”). The Stipulation by the parties, as represented by counsel, is as follows:

**I. THE FAIR CREDIT REPORTING ACT LITIGATION CLAIMS**

On November 28, 2011, Johnson filed a lawsuit in the United States District Court for the Southern District of Ohio, Columbus Division, styled *Mark Johnson on behalf of himself and all others similarly situated v. Midwest Logistics Systems, LTD.*, Case No. 2:11-CV-1061 (“Civil Action”). The Civil Action was filed on behalf of consumers residing in the United States who

applied for employment with Midwest and were the subject of a consumer report (defined below) obtained by Midwest for employment purposes. The Class Period applicable to the Civil Action is from November 28, 2006 through November 28, 2011. The Civil Action alleges that Midwest violated certain provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FCRA”) in connection with its use of Consumer Reports. Specifically, the Civil Action alleges that Midwest violated the following:

1. 15 U.S.C. § 1681b(b)(2)(A)(i) by failing to provide a clear and conspicuous written disclosure in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes;
2. 15 U.S.C. § 1681b(b)(2)(A)(ii) by failing to obtain a valid authorization in writing to procure a consumer report for employment purposes;
3. 15 U.S.C. § 1681b(b)(3)(A)(i) by failing to provide a copy of the consumer report used to make an employment decision before taking adverse action that was based in whole or in part on that report;
4. 15 U.S.C. § 1681b(b)(3)(A)(ii) by failing to provide a copy of the summary of rights required by this section before taking adverse action that was based in whole or in part on the consumer report;
5. 15 U.S.C. § 1681m(a)(2)(B) by failing to provide oral, written or electronic notice that the consumer reporting agency did not make the decision to take adverse action and is unable to provide the consumer with the specific reasons why the adverse action was taken; and,
6. 15 U.S.C. § 1681m(a)(3)(A) by failing to provide oral, written or electronic notice of the consumer’s right to obtain, within 60 days, a free copy of the consumer report regarding the consumer from the consumer reporting agency that prepared the report.

The Civil Action seeks to recover statutory damages per consumer between \$100.00 and \$1,000.00, together with punitive damages, and attorney fees and costs. Johnson and putative class members in the Civil Action are represented by Dennis M. O’Toole, Matthew A. Dooley, Anthony Pecora of the law firm of Stumphauer | O’Toole (“Class Counsel”). Midwest is represented by Jeffrey S. Hiller and Chad J. Kaldor of Littler Mendelson (“Defense Counsel”).

Following the filing of the Civil Action, the Settling Parties engaged in informal discovery and provided Class Counsel with information concerning among other things, the number of consumers who were the subject of consumer reports during the Class Period as well as those who were denied employment because of the same. In effort to resolve this dispute in the early phase of litigation, the parties agreed to mediation with attorney John McDonald of Ice Miller LLP. Following in-person mediation and many subsequent negotiations, the Parties reached a preliminary settlement.

## **II. MIDWEST'S DENIAL OF WRONGDOING AND LIABILITY**

Midwest denies all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Civil Action. Specifically, it is Midwest's position that it, in good faith, complied with the provisions of the FCRA and all other applicable laws. Notwithstanding the denial of wrongdoing, Midwest has concluded that continuing to litigate the Civil Action would be protracted and expensive, and has also taken into account the uncertainty and risks inherent in any litigation, especially in complex cases like the Civil Action. Midwest has determined that it is desirable and beneficial to the company that the Civil Action be settled in the manner and on the terms and conditions set forth in this Stipulation.

## **III. CLAIMS OF CLASS MEMBERS AND BENEFITS OF SETTLEMENT**

Johnson believes that the claims asserted in the Civil Action have merit and that if the case did not settle he would prevail at trial. However, Johnson and Class Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Civil Action against Midwest through trial and through appeals. Johnson and Class Counsel also have taken into account the uncertain outcome and the risk of any litigation, including proceedings

involving class certification. Johnson and Class Counsel believe that the settlement set forth in this Stipulation confers substantial benefits on the Settlement Class and is fair, reasonable and adequate, and in the best interests of Johnson and the Settlement Class.

#### **IV. TERMS OF THE STIPULATION AND AGREEMENT OF SETTLEMENT**

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Settling Parties, by and through their respective attorneys, that, subject to the approval of the Court, the Civil Action and the Named Plaintiff's Released Claims and Released Claims shall be finally and fully compromised, settled, and released, and the Civil Action shall be dismissed with prejudice upon and subject to the terms and conditions of the Stipulation as follows:

##### **1. Definitions**

1.0 "Affiliate" means any entity or entities controlling, controlled by, or under common control with, the other specified entity.

1.1 "CAFA" means the Class Action Fairness Act of 2005, 28 U.S.C. § 1711, *et seq.*

1.2 "CAFA Notice" means the notice described in Section 4.8.

1.3 "Civil Action" means the lawsuit styled *Mark Johnson v. Midwest Logistics Systems, Ltd.* currently pending in United States District Court for the Southern District of Ohio, Columbus Division, Docket No. 2:11-CV-1061.

1.4 "Class Counsel" means Dennis M. O'Toole, Anthony R. Pecora, and Matthew A. Dooley of Stumphauzer, O'Toole, McLaughlin & Loughman, Co. LPA.

1.5 "Class Member(s)" means any member(s) of the Preliminary Settlement Class and the Settlement Class, as set forth in Sections 2.1 and 2.2, but specifically does not include those individuals who timely opt-out of the Settlement as set forth in Section 5.5.

1.6 “Class Period” means the period from November 28, 2006 through November 28, 2011.

1.7 “Consumer Report” has the same meaning it does in the FCRA. 15 U.S.C. § 1681a(d).

1.8 “Court” means the United States District Court for the Southern District of Ohio, Columbus Division.

1.9 “Defendant” or “Midwest” means Midwest Logistics Systems, Ltd.

1.10 “Opt-Out” means to timely request exclusion from the Settlement pursuant to Federal Rule Civil Procedure 23(c)(2)(B).

1.11 “Effective Date” means the date on which the Judgment finally approving this Stipulation and the Settlement becomes Final.

1.12 “Final” means the date on which all appellate rights with respect to the Judgment have expired or have been exhausted in such a manner as to affirm the Judgment, and when no further appeals are possible, including review by the United States Supreme Court.

1.13 “Final Fairness Hearing” means the hearing at which the Court will consider final approval of this Stipulation and Settlement.

1.14 “FCRA” means the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*

1.15 “Judgment” means a judgment and order of dismissal entered by the Court in the Civil Action granting final approval of the Settlement and entering a judgment according to the terms set forth in this Stipulation.

1.16 “Incentive Award” means the one-time payment to the Named Plaintiff for the time and resources he has put into representing the Class Members, as set forth in Section 8.4.

1.17 “Notice Order” means the order proposed and submitted by the parties as set forth in 5.1.

1.18 “Person” means an individual, corporation, limited liability corporation, professional corporation, limited liability partnership, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assignees.

1.19 “Named Plaintiff” means Mark A. Johnson.

1.20(a) “Released Claims” means all Class Member claims that were alleged or could have been alleged in the Civil Action (including “Unknown Claims” as defined herein), and all Class Member demands, rights, liabilities, and causes of action under the FCRA, with exception to claims arising under 15 U.S.C. § 1681s-2(b), and other federal or state law regarding consumer reporting, whether based on statutory or common law or equity, whether class or individual in nature, known or unknown, concealed or hidden.

1.20(b) “Named Plaintiff’s Released Claims” means all claims, demands, rights, liabilities, and causes of action which Named Plaintiff ever had, may now have or may hereafter have against Released Defendant, whether based on statutory or common law or equity, including, but not limited to the FCRA.

1.21 “Released Defendant” means Midwest and its current and former parents, subsidiaries, affiliates, divisions, associates, agents, successors, assignors, assignees, and/or assigns and their respective subsidiaries, affiliates, divisions, associates, agents, successors, assignors, assignees and/or assigns, and each of their respective present, former or future

officers, directors, shareholders, agents, control persons, advisors, employees, representatives, consultants, insurers and reinsurers, accountants, attorneys, and any representative of the above.

1.22 “Settlement” means the terms and conditions of settlement as described in this Stipulation.

1.23 “Settlement Administrator” means Dahl Administration, LLC which has been selected by Midwest (and approved by Class Counsel) to administer the settlement pursuant to this Stipulation and orders of the Court.

1.24 “Settlement Class” has the meaning set forth in Sections 2.1 and 2.2.

1.24 “Settlement Funds” means the amounts set forth in Section 2.4.

1.25 “Settlement Notice” means the form of notice to be provided to the Settlement Class after preliminary approval of this Stipulation by the Court, as further described in Sections 4.1- 4.2 herein.

1.26 “Settling Parties” means Named Plaintiff and Defendant as described in Sections 1.9 and 1.19.

1.27 “Stipulation” means this Stipulation of Settlement, including its exhibits.

1.28 “Preliminary Settlement Class” shall have the meaning set forth in Section 2.4.

1.29 “Termination Notice” shall have the meaning set forth in Section 9.

1.30 “Unknown Claims” means any Named Plaintiff’s Released Claims or Released Claims that Named Plaintiff or any Class Member does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Defendant, which, if know by him, her, or it, might have affected his, her, or its settlement with and release of the Released Defendant, or might have affected his, her, or its decision(s) with respect to the Settlement.

This Stipulation of Settlement does not release Class Members' claims arising under 15 U.S.C. § 1681s-2(b).

## **2. The Settlement**

2.1 For the purposes of effectuating the Settlement only, Class Members and Midwest agree jointly to request that the Court certify a nationwide Preliminary Settlement Class as alleged in Plaintiff's Complaint which was filed on November 28, 2011. The Preliminary Settlement Class consists of Consumers residing in the United States who applied for employment with Midwest or were employed by Midwest during the Class Period and for whom Midwest procured a consumer report. There is also a subclass known as the "Pre-Adverse Action Class", which consists of Consumers described above who had their application for employment denied by Midwest based on information contained in their Consumer Report. These sub-class members' claims are encompassed by 15 U.S.C. §§ 1681b(b)(3)(A)(i) and 1681b(b)(3)(A)(ii) as defined in Count II of the Complaint;

2.2 On the Effective Date, the Preliminary Settlement Class set forth in 2.1 above shall become permanently certified ("Settlement Class") unless the Judgment does not become Final.

2.3 In the event the Settlement is not preliminarily and finally approved and implemented, or the Judgment does not become final, the Preliminary Settlement Class and Pre-Adverse Action Class are dissolved without prejudice or inference regarding the appropriateness of class certification and thereafter the issue of class certification will be decided *de novo*, and Midwest is not precluded from challenging class certification.

2.4 In exchange for a full and complete release of all Released Claims, Midwest agrees to pay a maximum of Four Hundred Fifty-Two Thousand Three Hundred Eighty Dollars

and no cents (\$452,380.00) to settle the claims set forth by the Preliminary Settlement Class, including the sub-class set forth in Section 2.1 (the “Settlement Funds”). Midwest shall deposit the Settlement Funds into an interest-bearing escrow account with the financial institution mutually agreed upon by the Settling Parties within thirty (30) calendar days of the Court’s preliminary approval of the Settlement. For Midwest’s accounting purposes, such distribution shall be treated as an incurred expense, subject to the condition subsequent of the failure of this Settlement to obtain final approval. The parties acknowledge that each class member shall receive the following from the Settlement Funds:

- **Preliminary Settlement Class:** Each member of the Preliminary Settlement Class who is not a member of the Pre-Adverse Action Class shall receive a gross sum of \$260.00 from which Class Counsel’s attorneys’ fees and costs and the Incentive Award shall be deducted.
- **Pre-Adverse Action Class:** Each member of the Pre-Adverse Action Class shall receive a gross sum of \$1,000.00 from which Class Counsel’s attorneys’ fees and costs and the Incentive Award shall be deducted.

2.5 Upon final approval of the Settlement at the final Settlement Hearing, the Civil Action will be dismissed with prejudice in its entirety.

2.6 Midwest will be responsible for the cost of notice and administration as set forth in paragraph 4.3. Midwest shall not be responsible to pay any other sum of money except as stated in paragraph 2.4, which encompasses Class Member recoveries, attorneys’ fees and Incentive Award payments.

### **3. Release**

3.1 Upon the Effective Date, Named Plaintiff and each member of the Settlement Class who has not opted out of the proposed settlement, and each of their respective spouses, executors, representatives, heirs, successors, bankruptcy trustees, guardians, wards, joint tenants, tenants in common, tenants in the entirety, co-borrowers, agents, successors, assignees and assigns, and all those others who also claim through them or who assert claims on their behalf (including the government in its capacity as *parens patriae*) shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged all of Named Plaintiff's Released Claims and the Released Claims against the Released Defendant. The Parties hereby acknowledge that the Released Defendant is an expressly intended beneficiary of this Release.

Also, upon the Effective Date, Named Plaintiff and each member of the Settlement Class who has not opted out of the proposed settlement shall be permanently enjoined and barred from filing, commencing, prosecuting, intervening (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding arising from any of the Named Plaintiff's Released Claims and the Released Claims. Subject to the Court's approval, this Stipulation shall bind all Class Members, and all of the Named Plaintiff's Released Claims and Released Claims, as applicable, shall be dismissed with prejudice and released as and against the Released Defendant.

3.2 With respect to any and all of the Named Plaintiff's Released Claims and the Released Claims, the Settling Parties stipulate and agree that, on the Effective Date, Named Plaintiff shall expressly waive, and each of the Class Members shall be deemed to have, and by operation of the Judgment shall have, expressly waived the provisions, rights, and benefits

conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code § 1542 which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The Named Plaintiff and Class Members may hereafter discover facts in addition to or different from those that any of them now knows or believes to be true related to the subject matter of the Named Plaintiff's Released Claims and Released Claims, but Plaintiff shall expressly and each Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled and released any and all of Named Plaintiff's Released Claims and Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Settling Parties acknowledge, and the Class Members and Released Defendant shall be deemed by operation of the Judgment to have acknowledged, that the inclusion of "Unknown Claims" in the definition of Named Plaintiff's Released Claims and Released Claims was separately bargained for and is a key element of the Settlement of which these releases are a part. This provision shall not pertain to Class Members' claims arising under 15 U.S.C. § 1681s-2(b).

#### **4. Notice of Order and Settlement Hearing**

4.1 On execution of this Stipulation, the Settling Parties shall jointly apply to the Court for preliminary approval of the Settlement set forth in this Stipulation. It is contemplated that

this joint application will be filed within seven days after the filing of this Stipulation of Settlement. The Parties shall submit to the Court the Stipulation, together with its Exhibits, and shall apply for entry of an order (the “Notice Order”), substantially in the form and content of Exhibit B to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23) , requesting, *inter alia*, (a) preliminary approval of the Settlement, (b) preliminary certification of the Preliminary Settlement Class, and (c) approval for the distribution of the Settlement Notice substantially in the form and content of Exhibit A to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23), and (d) a time and date for the final Settlement Hearing. Should any Court reject or materially alter the parties’ agreed upon Notice Order or Settlement Notice, then Midwest will have the option to void the Settlement if the parties are unable, after good faith negotiations, to agree on a form of Notice Order and Settlement Notice acceptable to the Court.

4.2 After preliminary approval of this Stipulation by the Court, Class Counsel, through the Settlement Administrator, shall provide to each member of the Preliminary Settlement Class a notice within forty-five (45) days after preliminary approval of February 14, 2013 in substantially similar form as the notice attached as Exhibit A to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23), notifying him or her of his or her right to participate in the settlement or to object to or opt out of the settlement (“Settlement Notice”). All putative class members who do not opt out or object within forty-five (45) days from the date they were sent the Settlement Notice, as described in the Settlement Notice, shall be considered Class Members and shall be bound by the terms of the Settlement. The Settlement Notices will be sent to the last known address that can be contemporaneously verified. These postal addresses shall be obtained by Midwest as set forth below, and then checked and updated against the National Change of Address database by the Settlement Administrator. The notice shall also be posted and made

available on the website <http://www.midwestclassaction.com> (“Notice Website”). Midwest shall use reasonable efforts to obtain the names and addresses of the Class Members and shall provide such information to Class Counsel, through the Class Administrator, upon receipt.

4.3. Each Class Member shall be informed in the Settlement Notice that he or she is entitled to the cash funds, as set forth in Section 2.4. The Settlement Administrator shall mail checks to the Class Members who have not opted out of the Settlement at the last known address on file, and those checks shall become void 90 days after issuance. The proceeds to be paid to thereby shall not become the property of the Class Member until and unless he or she cashes the check.

4.4. A Settlement Class Member may request to be excluded from the Settlement Class by sending a written request for exclusion to the Settlement Administrator at the address provided in the Notice. The Settlement Class Member’s Opt-Out request must contain the Class Member’s original signature, current postal address and a specific statement that the Class member wants to be excluded from the Settlement Class. Opt-Outs must be postmarked no later than the deadline set by the Court in the Preliminary Approval Order. In no event shall persons who purport to opt out of the Settlement Class as a group, on an aggregate basis or as a class involving more than one Class Member be considered valid Opt-Outs. Requests for exclusion that do not comply with any of the foregoing requirements are invalid. No later than seven (7) business days after the deadline for submission of request for exclusion of Opt-Out, Settlement Administrator shall provide Class Counsel and Midwest with a complete list of all persons who have properly Opted Out of the Settlement together with copies of the opt-out requests.

4.5. Any Class Member who does not opt out, but who instead wishes to object to the Settlement or any matters as described in the Notice, may do so by filing with Court a notice of

their intention to object (which shall set forth each objection and the basis therefore and containing the objecting Class Member's signature), with any papers in support of their position, and serve copies of all such papers on Class Counsel and the Defense Counsel. Objections must be filed and served no later than the deadline set by the Court in the Preliminary Approval Order. The objection must indicate whether the Class member and/or his attorney(s) intends to appear at the Final Fairness Hearing. Any attorney who intends to appear at the Final Fairness Hearing must enter a written Notice of Appearance of Counsel with the Clerk of Court no later than the deadline set by the Court in the Preliminary Approval Order.

4.6 The cash funds from any checks mailed pursuant to Section 4.3 that remain uncashed and become stale after the ninety (90) day period provided therein shall be distributed as follows:

- A. To Midwest as reimbursement for the costs, - for notice and administration; and,
- B. Any remaining sums, after reimbursement to Midwest for cost of notice and administration, shall be paid to the following cy pres beneficiary selected by the Parties and subject to approval by the Court: West Side Catholic Center, 3135 Lorain Avenue, Cleveland, Ohio 44113.

4.7 The parties agree to seek a final approval hearing ("Settlement Hearing") date approximately ninety-eight (98) days from the date of preliminary approval of the settlement.

4.8 Midwest shall cause notice of the proposed settlement that meets the requirements of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, to be served on the appropriate federal and state officials no later than ten days after the filing of this Stipulation with the Court ("CAFA Notice").

## **5. Final Settlement Hearing Judgment and Notice**

5.1 The final Settlement Hearing, as established in the Notice Order, shall be for the purpose of consideration of final approval of the Settlement set forth in the Stipulation.

5.2 On or before the final Settlement Hearing, Class Counsel will certify to the Court that they have fully complied with the notice provisions set forth Section 4.2 herein.

## **6. Administration and Supervision of the Settlement Fund**

6.1 The Settlement Administrator will directly administer the Settlement including controlling the Settlement Funds, subject to Court approval. The Settlement Administrator shall administer and oversee distribution from the Settlement Funds only with mutual approval of Midwest and Class Counsel. All funds shall be maintained in an escrow account unless the Midwest and Class Counsel agree otherwise. On completion of the administration of the Settlement, the Settlement Administrator shall provide or cause to be provided to the Court a final report on its administration of the Settlement. Class Counsel and Defense Counsel shall have reasonable access to documents relating to compliance and administration of the Settlement, with the right, but not the obligation, to review and audit the documents to determine full compliance with the terms of the Settlement.

6.2 No Person shall have any claim against Class Counsel based on the monetary payments made substantially in accordance with this Stipulation and the Settlement contained herein, or further order(s) of the Court.

## **7. Plaintiff's Counsel's Attorneys' Fees, Reimbursement of Expenses and Payment of Additional Costs**

7.1 Midwest will pay the cost of the settlement notices and other fees and costs associated with processing the notices and mailing any cash payments, which shall be paid directly to the Settlement Administrator.

7.2 In advance of the Court's deadline for submission of objections, Class Counsel shall make an application to the Court for an award from the Settlement Funds for attorney's fees, costs, and other expenses in an amount not to exceed thirty-three percent (33%) of the Settlement Funds. Midwest shall not oppose or object to this application. Nothing in this provision will require Midwest to pay funds with respect to the litigation over and above the Settlement Funds.

7.3 Mark Johnson shall receive compensation for serving as class representative in the amount of \$12,500.00 (the "Incentive Award"), which shall be in lieu of any sums to which he may have been entitled as a Class Member. This amount is payable from the Settlement Funds on the day that Judgment becomes final and unappealable. Nothing in this provision will require Midwest to pay funds with respect to the litigation over and above the Settlement Funds.

#### **8. Conditions of Settlement, Effect of Disapproval, Cancellation or Termination**

8.1 Named Plaintiff or Midwest, at either of their sole discretion, shall each have the right to terminate the Settlement and this Stipulation, including dissolution of the Preliminary Settlement Class, if any of the following conditions subsequently occurs ("Terminating Events"):

- a. the Court's refusal to preliminarily (pursuant to Section 4.1 above) or permanently approve this Stipulation or any material part of it;
- b. the Court requires a notice program in addition to or substantially different from that set forth herein;
- c. the Court orders Midwest to pay attorney's fees with respect to the litigation, other than as provided herein;
- d. the Court orders Midwest to pay, with respect to the litigation, any amount above the contribution to the Settlement Funds, other than as provided herein;
- e. the Court declines to enter the Judgment in any material respect; or

- f. the Judgment is reversed, vacated or modified in any material respect by the Sixth Circuit Court of Appeals, the United States Supreme Court, or adverse action being taken by any other trial court or appellate court in any jurisdiction.

8.2 Midwest in its sole discretion also shall have the right to terminate the Settlement and this Stipulation, including dissolution of the Preliminary Settlement Class, if more than five percent (5%) of the Settlement Class Members elect to Opt-Out.

8.3 The failure of the Court or any appellate court to approve in full the request by Class Counsel or Named Plaintiff for attorney's fees, incentive awards, costs and other expenses shall not be grounds for Named Plaintiff, the Settlement Class, or Class Counsel, to terminate this Stipulation.

8.4 If either party exercises their respective rights to terminate this Settlement and Stipulation pursuant to Section 8.1 or 8.2 herein, they shall terminate the Settlement and this Stipulation, including dissolving the Preliminary Settlement Class, by delivering written notice of the electing party's election to do so ("Termination Notice") to all other parties hereto within thirty (30) days of the discovery of a Terminating Event or within thirty (30) days of the discovery of any event described in Section 8.2 above. In the event that a Termination Notice is so provided, then the Settlement and this Stipulation shall be canceled and terminated unless and until Class Counsel and counsel for Midwest mutually agree in writing to proceed with the Stipulation.

8.5 In the event that the Settlement and this Stipulation are terminated as provided for herein, then (a) this Stipulation shall be null and void and of no further force and effect, including voiding the Preliminary Settlement Class; (b) the Settling Parties shall be restored to their respective positions in the Civil Action immediately prior to the execution of this

Stipulation; (c) this Stipulation shall not be used in the Civil Action or in any other proceeding for any purpose; and (d) any judgment or order entered by the Court in accordance with the terms of the Stipulation shall be treated as vacated, *nunc pro tunc*.

8.6 Upon the filing of the proposed Stipulation with the Court, all proceedings shall be stayed until further order of the Court except such proceedings as may be necessary either to implement the proposed Stipulation or to comply with or effectuate the terms of this Stipulation.

## **9. Final Judgment**

9.1 The Parties shall jointly seek entry by the Court of a Final Judgment that includes provisions:

- a. granting final approval of this Stipulation, and directing its implementation pursuant to its terms and provisions;
- b. ruling on Class Counsel's application for attorney's fees, costs and other expenses;
- c. discharging and releasing the Released Defendant from the Named Plaintiff's Released Claims and Released Claims as provided in Section 3 above;
- d. directing that the litigation be dismissed with prejudice, and
- e. reserving to the Court continuing and exclusive jurisdiction over the parties with respect to the Stipulation and the Final Judgment.

## **10. Miscellaneous Provisions**

10.1 The Settling Parties: (a) acknowledge that it is their intent to consummate this agreement, and (b) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Stipulation and to exercise their best efforts to accomplish the foregoing terms and conditions of this Stipulation.

10.2 Neither Midwest, nor Class Counsel, nor the Named Plaintiff will encourage any person to request exclusion from membership in the settlement class, encourage any person to object to the Settlement, and/or encourage or discourage any person from participating in the distribution of the proceeds of the Settlement.

10.3 Each counsel or other Person executing the Stipulation or any of its Exhibits on behalf of any party hereto hereby warrants that such Person has the full authority to do so.

10.4 Class Counsel, on behalf of the Settlement Class, is expressly authorized by Named Plaintiff to take all appropriate action required or permitted to be taken by the Settlement Class pursuant to the Stipulation to effectuate its terms and also are expressly authorized to enter into any modifications or amendments to the Stipulation on behalf of the Settlement Class which they deem appropriate.

10.5 This Stipulation shall be binding on, and inure to the benefit of, the successors and assigns of the parties hereto.

10.6 Neither the Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of the validity of any Released Claim, or of any wrongdoing or liability of Defendant; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of Defendant in any civil criminal or administrative proceeding in any court, administrative agency or other tribunal. Defendant may file the Stipulation and/or the Judgment in any action that may be brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10.7 The parties agree that any press release or other public comment related to the Civil Action or its resolution shall be limited to a factual description of the terms of the settlement and the remaining procedural steps necessary to secure final approval. In all events, the parties shall refrain from any accusations or wrongful or actionable conduct by either party and shall not otherwise suggest that the Settlement constitutes an admission of any claim or defense alleged.

10.8 Defendant and Named Plaintiff agree that each has complied fully with the strictures of Rule 11 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005, 28 U.S.C. § 1711, *et seq.*, and the final judgment will contain a statement to reflect this compliance.

10.9 All of the Exhibits to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23) are material and integral parts of the Stipulation and are fully incorporated herein by this reference.

10.10 This Stipulation and the Exhibits attached to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23) constitute the entire agreement between Plaintiff and Defendant and no representations, warranties or inducements have been made to any party concerning the Stipulation or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

10.11 This Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors in interest.

10.12 This Stipulation and the Exhibits to the Stipulation of Settlement filed on February 6, 2013 (Doc. 23) shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Ohio and the rights and obligations of the parties to this

Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of Ohio without giving effect to the State's choice of law provisions.

10.13 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Stipulation, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Stipulation.

10.14 The Parties and their counsel agree to use their best efforts to obtain Court approval of this Stipulation subject, however, to Defendant's right to terminate the Stipulation.

10.15 Except for the Settlement Notices and the CAFA Notice, all notices or formal communications under this Stipulation shall be in writing and shall be given (a) by hand delivery; (b) by registered or certified mail, return receipt requested, postage prepaid; or (c) by Federal Express or similar overnight courier to counsel for the Party to whom notice is directed at the following addresses.

For Named Plaintiff and the Settlement Class:

Dennis M. O'Toole, Esq.  
Anthony R. Pecora, Esq.  
Matthew A. Dooley, Esq.  
STUMPHAUZER | O'TOOLE  
5455 Detroit Road  
Sheffield Village, Ohio 44054

For Midwest:

Jeffrey Hiller, Esq.  
Chad Kaldor, Esq.  
LITTLER MENDELSON, P.C.  
21 East State Street, Suite 1600  
Columbus, OH 43215

10.16 This Stipulation is the entire, complete agreement of each and every term agreed to by the Named Plaintiff and the Settlement Class on the one hand and Defendant on the other hand. In entering into this Stipulation, the Named Plaintiff and the Settlement Class have not relied on any warranty or representation not specifically set forth herein. This Stipulation may be amended or modified only by a written instrument signed by Class Counsel and Defense Counsel.

10.17 Class Counsel and Named Plaintiff agree to refrain from defaming the Released Defendant and its parent companies, subsidiaries, affiliates, successors or assigns with respect to any issue related to this case. Class Counsel and Named Plaintiff agree to refrain from taking any action related to this matter designed to harm the public perception of the Released Defendant and its parent companies, subsidiaries, affiliates, successors or assigns regarding any issue related to this case, except they may provide sworn testimony if required by an order from a court of competent jurisdiction. Defendant agrees to refrain from defaming Named Plaintiff or Class Counsel publicly or in the media regarding any issue related to this case, except it may provide sworn testimony if required by an order from a court of competent jurisdiction. Failure to abide by this provision will constitute a breach of this Stipulation.

10.18 The headings in this Stipulation are for the convenience of the reader only and shall not affect the meaning or interpretation of this Stipulation.

10.19 In the event that any provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Stipulation shall continue in full force and effect without such provision, subject to the specific provisions of this Stipulation that would allow Settling Parties, or either of them, to terminate or otherwise void this Stipulation.

10.20 None of the Parties to this Stipulation shall be considered to be the primary drafter of this Stipulation or any provision hereof for the purposes of any rule of interpretation or construction that might cause any provision to be construed against the drafter.

10.21 This Stipulation shall be binding according to its terms upon, and inure to the benefit of, Named Plaintiff, the Settlement Class, and the Released Defendant.

10.22 The individuals signing this Stipulation on behalf of Midwest represents that they are fully authorized to enter into, and to execute, this Stipulation on behalf of Midwest. Class Counsel represent that they are fully authorized to conduct settlement negotiations on behalf of Named Plaintiff, and to enter into, and to execute, this Stipulation on behalf of the Settlement Class, subject to Court approval pursuant to Federal Rule of Civil Procedure 23(e). Named Plaintiff enters into and executes this Stipulation on behalf of himself, and as a representative of and on behalf of the Settlement Class, subject to court approval pursuant to Federal Rule of Civil Procedure 23(e).

10.23 Each of the Parties to this Stipulation has had an opportunity to receive, and has received, independent legal advice from his, her or its attorneys regarding the advisability of this proposed settlement, and to answer any questions about the settlement, and the legal consequences of this Stipulation, and fully understands and accepts the terms of this Stipulation.

10.24 Named Plaintiff, Class Counsel and Midwest may execute this Stipulation in counterparts, and the execution of counterparts shall have the same effect as if all Parties had signed the same instrument. Facsimile signatures shall be considered as valid signatures as of the date signed, although the original signature pages shall thereafter be appended to this Stipulation. This Stipulation shall not be deemed executed until signed by the named Plaintiff, Class Counsel and an authorized representative of Midwest.

Submitted and Stipulated by:

STUMPHAUZER | O'TOOLE

By: /s/ Anthony Pecora  
Matthew A. Dooley, Esq.  
Dennis M. O'Toole, Esq.  
Anthony R. Pecora, Esq.  
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*Counsel for Mark Johnson and the putative class*

LITTLER MENDELSON, P.C

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*Counsel for Midwest Logistics Systems, Ltd.*

The Court, having reviewed the Stipulation of Settlement, approves the same and Orders the parties to proceed as agreed.

**It is so Ordered.**

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ALGENON L. MARBLEY  
UNITED STATES DISTRICT COURT JUDGE