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

CECILIA MONTERO, on behalf of herself and all other similarly situated persons, known and unknown,

Plaintiff,

v.

JPMORGAN CHASE & CO., AND JPMORGAN CHASE BANK, N.A.,

Defendants.

Case No. 1:14-cv-09053

Hon. Susan E. Cox

JOINT MOTION IN SUPPORT OF FINAL SETTLEMENT APPROVAL

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Plaintiff, Cecilia Montero ("Montero"), on behalf of herself and all other similarly situated persons, by and through her attorneys, Caffarelli & Associates Ltd., and Defendants JP Morgan Chase & Co. and JPMorgan Chase Bank, N.A (collectively "Defendants" or "Chase")[1] respectfully move the Court for final approval of the nationwide collective and Illinois Rule 23 class action settlement ("Settlement") reached between Montero and Chase. The proposed Settlement resolves all claims in the above-entitled action.

I. INTRODUCTION

On November 30, 2017, this Court granted preliminary approval of the Settlement. (D.E. 160.) Per the Court-approved plan described in the motion for preliminary approval and ordered by this Court, direct individual notice of the Settlement was mailed to all 5,661 identified Class Members on December 29, 2017. A reminder postcard was mailed on February 16, 2018. **The Administrator received 1,997 timely filed claim forms (which represents over 35% of all forms mailed), three (3) requests for exclusion, and zero (0) objections.** Plaintiff and Defendants respectfully submit that the number of claims and complete lack of objections speaks to the fairness of the settlement, the effectiveness of the notice plan, and the ease and efficiency of the claims administration plan. The positive reaction from Class Members also underscores the value the Class places on the Settlement obtained. This is a fair and reasonable result, particularly in view of the risks and delays involved in litigating the merits of this claim and the difficulties inherent in pursuing these claims individually for a large percentage of Class Members.

[1] Defendants contend that Plaintiff's Complaint improperly names "JPMorgan Chase & Co." as a defendant. Defendants contend that Plaintiff was not employed by JPMorgan Chase & Co., but by JPMorgan Chase Bank, N.A., and reserves all rights and defenses thereto. Plaintiff refers to all of the named Defendants as "Defendants" and "Chase" interchangeably herein.

Under the Settlement Agreement, Chase is required to pay $3,000,000 into a settlement fund ("Settlement Fund"), from which the Claim Administrator will: (1) distribute settlement payments to all Participating Claimants, including both the employees' and employers' portions of payroll taxes; (2) distribute an enhancement award of $1,000 to Montero; (3) distribute Plaintiffs' counsel's approved attorneys' fees and costs; (4) distribute the Claim's Administrator's fees and costs; and (5) maintain a reserve fund as described in the Settlement Agreement. Eligible claimants will receive a *pro rata* share of the Settlement Sum based upon the amount of overtime compensation received during the Covered Period (as defined in the Settlement Agreement). For the reasons set forth below, the Settlement exceeds the standards for final approval, and should therefore be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Claims

Plaintiff worked for Defendants in Illinois as a Mortgage Banker from 2004 through July of 2014. From 2011 until the end of her employment, Chase paid Plaintiff a base rate plus incentive compensation. Chase issued payments on a bi-weekly (for part of the Covered Period) and semi-monthly (for part of the Covered Period) basis. In November 2014 Montero initially filed suit alleging collective and class wage claims under the Fair Labor Standards Act ("FLSA"), Illinois Minimum Wage Law ("IMWL"), and the Illinois Wage Payment and Collection Act ("IWPCA").[2] With the filing of her Third Amended Complaint, Montero alleges three violations of the FLSA and IMWL: (1) untimely payment of overtime wages; (2) failure to properly calculate regular and overtime rates of pay to include incentive compensation ("adjusted overtime"); and (3) failure to compensate for off-the-clock work. See D.E. 120. Plaintiff also

[2] Plaintiff's original IWPCA claim was dismissed. See D.E. 58. Plaintiff later amended her complaint to include additional IWPCA claims. See D.E. 120.

alleges a violation of the IWPCA claiming that her incentive compensation was paid more than thirteen days after the pay period in which they were earned. Id. Chase vigorously disputes these allegations and contends that it paid Plaintiff, and all Mortgage Bankers[3], all earned wages in a timely manner, and that Chase may have actually overpaid the adjusted overtime wages.

The parties have engaged in substantial discovery and motion practice. Defendants filed two Motions to Dismiss and succeeded in compelling a second Plaintiff, Anabel Rodriguez, to arbitration. See D.E. 21, 32, 58. The parties engaged in significant written discovery, with particular emphasis on Chase's pay policies and practices. Plaintiff has amended her Complaint three times. See D.E. 1, 20, 31, 120. Chase moved for Summary Judgment, Plaintiff moved to compel additional discovery, and Plaintiff attempted to re-introduce Ms. Rodriguez as a Named Plaintiff in to this matter, which attempt the Court rejected. See D.E. 79, 91, 99. Following briefing, the Court denied Plaintiff's original Motion for Order Authorizing Notice to Similarly Situated Persons Pursuant to 29 U.S.C. § 216(b). D.E. 121. After a second round of briefing, on March 22, 2017, the Court conditionally certified the FLSA collective on a nationwide basis for two of Plaintiff's overtime claims. D.E. 141. The parties then requested, and the Court granted, that the litigation be stayed and the statute of limitations tolled while the parties pursued mediation. D.E. 144, 146. On November 30, 2017, the Court granted Plaintiff's Unopposed Motion for Preliminary Approval and authorized Notice of the Settlement to be disseminated to all Class Members. D.E. 160.

[3] "Mortgage Bankers," for the purposes of settlement in this lawsuit, include all individuals with the following job titles, as reflected in Defendants' human resources information system during the relevant statute of limitations: MB Retail Mortgage Banker; MB Mortgage Banker RTL Out Mkt; MB BSC Mtg Banker; MB HE Mortgage Banker; MB CD Mortgage Banker; MB Retail Mortgage Banker CPC. "Mortgage Banker" shall also mean, from October 30, 2017 to the end of the Covered Period, the following job titles as reflected in Chase's human resources information system: Home Lending Advisor HE; Home Lending Advisor CD; Home Lending Advisor BSC Senior Home Lending Advisor.

B. The Parties' Mediation

In January of 2016, the parties discussed the possibility of attending mediation. See D.E. 59. However, they recognized that they needed to engage in further discovery to be sufficiently informed of the evidence for a mediation to be productive. The duration of 2016 was spent in discovery and motion practice. In April of 2017, when the parties revisited the possibility of mediation, they first negotiated and agreed to terms of attendance. Specifically, the parties agreed that Chase would produce, for mediation purposes only, time and pay records for the entire Collective, which Chase did. Chase further produced, for mediation purposes only, Incentive Compensation Plans, which contained their payment policies for Non-Retail Mortgage Bankers. Plaintiff's counsel was able to analyze this information and retain the assistance of a time and statistics expert to review and advise them in preparation for the mediation.

On August 22, 2017, the parties attended mediation for approximately 13.5 hours with mediator Michael Dickstein, Esq. Information about Mr. Dickstein's experience and qualifications may be found online, at http://www.dicksteindisputeresolution.com. In short, Mr. Dickstein is a nationally recognized and highly experienced mediator in wage and hour law. Although the parties failed to reach an agreement at the mediation, Mr. Dickstein continued to facilitate negotiations throughout the following six weeks. Ultimately, on October 5, 2017, upon Mr. Dickstein's recommendation, the parties reached an agreement on all material terms that they believe represent and full and fair resolution of all claims.

C. The Proposed Settlement

As is detailed in the Agreement, Motion for Preliminary Approval, and Preliminary Approval Order (D.E. 160), the Settlement requires Defendants to pay a total of up to $3,000,000 as the total maximum gross settlement sum. See Ex. A, Settlement Agreement

("Agreement"). Participating Class Members will receive a *pro rata* share of the Settlement Sum based upon the amount of overtime compensation received during the Covered Period (as defined in the Settlement Agreement). For purposes of administering the settlement, the parties selected KCC Class Action Services to serve as the third-party Claims Administrator ("Claims Administrator" or "KCC"), and the Claims Administrator used each Class Member's rates of pay and overtime hours during the Class Period to determine each his or her *pro rata* apportionment from the total Settlement Fund, with a minimum payment of $100. Class Counsel also seeks an award of attorneys' fees and costs in this matter in the amount of $1,000,000, which represents 1/3 of the settlement fund, as well as a service award to named plaintiff Cecilia Montero in the amount of $1,000. See Ex. A, Agreement at S. 3.2, 3.3 Notably, the Settlement Fund is non-reversionary (except for unredeemed settlement checks, which shall remain the property of Defendants), with the entire Fund, net of fees, taxes, and costs, being distributed to the claimants or being deposited into the reserve fund on behalf of the claimants. Id. at S. 3.7. The Settlement permits Plaintiff's counsel to petition the Court for fees up to one-third of the Settlement Fund, which they do in the concurrently filed Motion in Support of Attorneys' Fees, Costs, and Service Award seeking $1,000,000 in fees and costs – 1/3 of the Fund. As detailed *infra*, the Notice informed all Class Members of Counsel's intended fee petition, and no objections were filed.

1. The Settlement Classes

There are a total of 5,661 Illinois Class and FLSA Collective Members (collectively referred to as "Class Members"). The 5,661-member FLSA Collective consists of any Mortgage Banker employed by Chase within the United States during the period of April 5, 2014 through November 30, 2017 (i.e. the date of preliminary approval of the Settlement). Any Mortgage

Bankers who worked solely outside of the State of Illinois may *only* opt in to the FLSA Collective, and, therefore are not bound by this settlement unless they opted in, and are not subject to the Rule 23 opt-out procedures. Mortgage Bankers who worked in the State of Illinois at any point during the period of April 5, 2014 through November 30, 2017 may qualify as a member of both the FLSA Collective and the Rule 23 Illinois Class. A total of 979 individuals were eligible to participate in the Illinois Class. The Illinois Class consists of any Mortgage Bankers employed by Chase within the State of Illinois during the period of April 5, 2014 through the date of preliminary approval of the Settlement.

2. Administration and Notice

In compliance with the Agreement and the Order Granting Preliminary Approval, Chase provided KCC with a confidential list of 5,661 individuals identified as Class Members. See Ex. B, Decl. of Z. Cooley. The confidential list included names, addresses, Social Security Numbers, and overtime compensation received during the class period. The Claims Administrator cross-referenced the names and addresses with the U.S. Postal Service's ("USPS") National Change of Address Database and, through this method, updated 707 addresses. On December 29, 2017, KCC mailed the Class Notice and Claim Form to all Class Members. Id., see also Ex. B (Sub-Exhibit A). KCC also established a toll-free telephone number to answer any inquiries from Class Members, a fax number dedicated solely to receiving claims forms and correspondence from Class Members, and a website dedicated to providing information – including additional copies of the Settlement Agreement, Notice, and other case-related documents. After the initial mailing, USPS returned 165 Notices to KCC. Through additional searches, KCC was able to locate updated addresses for 112 out of these 165 Class Members and promptly re-mailed the Notices to the new addresses. Finally, the Claims

Administrator mailed a Reminder Postcard on February 16, 2018. After the conclusion of the claims period, KCC received 1,997 timely filed claim forms, 63 late-filed claim forms, and only three requests for exclusion. Including the late-filed claim forms, 2,060 Class Members (36%) elected to participate in the Settlement.

3. Class Release

There are 1,997 out of 5,661 Class Members (35%) who submitted a timely and valid claim form and are considered Participating Claimants. Plaintiff and all Participating Claimants of the Illinois Class agreed to release all FLSA claims and all claims under Illinois state and local wage and hour laws, including all claims that were or could have been pled in this action from November 11, 2004[4] through November 30, 2017. Plaintiff and all Participating Members of the FLSA Collective agreed to release all FLSA claims and all wage and hour claims, and derivative claims, including all claims that were or could have been pled in this matter during the period of April 5, 2014 through November 30, 2017. In addition, Montero agreed to a general release of all legally releasable claims, whether known or unknown, based upon any conduct, action or omission by Defendants up to and including the date that Plaintiff executed the release. Any members of the FLSA Collective who did not submit a claim form are not bound by this Settlement and have not released any claims.

4. Monetary Relief for Participating Claimants

From the gross Settlement Fund of $3,000,000, deductions will be made for (a) Montero's enhancement award ($1,000), pending the Court's approval; (b) administration costs ($82,000); (c) the Reserve Fund ($100,000); (d) taxes ($117.264.05); and (e) attorneys' fees and costs ($1,000,000), pending the Court's approval. Following these deductions, the Net

[4] The original Complaint was filed on November 11, 2014. D.E. 1. The statute of limitations for the IWPCA is 10 years, i.e. November 11, 2004.

Settlement Fund is $1,699,735.95, which pursuant to the terms of the Settlement Agreement will be fully distributed to the Claimants. In addition, 63 late-filed claims were submitted. Per the Agreement, Chase retains the discretion to accept these late claims and include them in the Settlement, and Chase has indicated it will accept these late claims. Accounting for the inclusion of these late claims, pursuant to the terms and conditions described in the Settlement Agreement, the average payment per Claimant is estimated to be $825.11. Actual payment amounts per person vary, since each Claimant will receive a *pro rata* share based upon his or her actual overtime compensation earned during the Class Period. Payments to Participating Claimants will be allocated as follows: 50% as wages, and 50% as liquidated damages. The portion treated as wages shall be paid net of all applicable employment taxes, and shall be reported to the Internal Revenue Service ("IRS") and the payee under the payee's name and social security number on an IRS Form W-2. The portion treated as liquidated damages and interest shall be paid without withholding and shall be reported to the IRS and the payee under the payee's name and social security number on an IRS Form 1099.

5. Class Representative Service Award

Concurrently with this Motion for Final Approval, Class Counsel has filed a Motion for Attorneys' Fees, Costs, and Service Award ("Fee Motion"). In exchange for her service on behalf of the Class Members, the Settlement Agreement provides for an Enhancement Award of $1,000 to be paid to Cecilia Kolbeck (f/k/a Cecilia Montero). As explained in the Fee Motion, Ms. Montero also attended the mediation, and provided great assistance to counsel both in advance of, and during, that negotiation. She took substantial direct and indirect risk by bringing the action in her name, and agreeing to participate fully in discovery and trial. The time, risk,

and effort Ms. Montero put into the case should be recognized and encouraged through the incentive award. Ms. Montero executed a general release of all legally releasable claims.

6. Attorneys' Fees and Costs

Plaintiff requests 1/3 of the Settlement Fund as attorneys' fees and costs, which, as explained in the Fee Motion, courts in this District commonly award. Here, it is similarly warranted and appropriate to compensate Class Counsel in the same manner as counsel are typically compensated in such cases, for the work they performed in litigating and procuring this settlement. See Briggs v. PNC Fin. Servs. Grp., Inc., No. 15-cv-10447, 2016 WL 7018566, at *4 (N.D. Ill. Nov. 29, 2016) (St. Eve, J.) (awarding $2 Million in fees, in addition to costs, out of a $6 Million total common fund FLSA settlement). Here, it is highly significant that the total amount of Plaintiff's requested fees and costs were clearly identified in the Class Notice and that zero (0) objections were received. For the reasons identified herein and more specifically in the Fee Motion, the requested attorneys' fees and costs of $1,000,000 should be awarded.

III. FINAL APPROVAL IS WARRANTED

A. The Settlement Approval Process

Under Fed. R. Civ. P. 23(e)(1)(C), a court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion." There is usually a presumption of fairness when a proposed class settlement "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experiences." 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002); Boggess v. Hogan, 410 F. Supp. 433, 438 (N.D. Ill. 1975). Similarly, when considering a proposed FLSA settlement, the Court has a duty to "determine whether the proposed settlement is a fair and reasonable resolution of a bona fide dispute over FLSA provisions."

Butler v. Am. Cable & Tel., LLC, No. 09-CV-5336, 2011 WL 4729789, at *9 n.9 (N.D. Ill. Oct. 6, 2011). Courts approve wage and hour settlements when they are reached as a result of contested litigation to resolve bona fide disputes. See Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982); Fosbinder-Bittorf v. SSM Health Care of Wis., Inc., No. 11-cv-592, 2013 WL 5745102, at *1 (W.D. Wis. Oct. 23, 2013). If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement. Lynn's Food Stores, 679 F.2d at 1354; Roberts v. Apple Sauce, Inc., No. 3:12-cv-830-TLS, 2014 WL 4804252 (N.D. Ind. Sept. 25, 2014).

As the Seventh Circuit has recognized, federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain:

> It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee, 616 F.2d 305, 312-13 (7th Cir. 1980) (citations and quotations omitted), overruled on other grounds by Felzen v. Andreas, 134 F.3d 873, 875 (7th Cir. 1998); see also Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases). The traditional means for handling claims like those at issue here— individual litigation—would unduly tax the court system, require a massive expenditure of public and private resources and, given the relatively small value of the claims of certain individual Class Members, would be impracticable. Thus, the proposed

Settlement is the best vehicle for Class Members to receive relief to which they are entitled in a prompt and efficient manner.

The *Manual for Complex Litigation* (Fourth) (2004) § 21.63 describes a three-step procedure for approval of class action settlements:

> (1) Preliminary approval of the proposed settlement at an informal hearing;
>
> (2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
>
> (3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

This procedure safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. 4 *Newberg* § 11.25. The first two steps in this process have occurred. With this Motion, Plaintiff respectfully requests that the Court take the third and final step in the process by granting final approval of the Settlement.

B. The Settlement is Fair, Reasonable, Adequate, and Should Be Approved

A proposed class action settlement should be approved if the Court that the settlement is "fair, reasonable, and adequate." See Fed. R. Civ. P. 23(e)(2). The Seventh Circuit explained in Isby: "Federal courts naturally favor the settlement of class action litigation. Although such settlements must be approved by the district court, its inquiry is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." 75 F.3d at 1196. In determining whether a settlement is "fair, reasonable, and adequate" at the final approval stage, the Court should consider the following factors: "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected

parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." Id.

In this case, an examination of these factors demonstrates that the Settlement is fair, reasonable, and adequate to the members of the class, and should be granted final approval by the Court. The Settlement was reached after nearly three years of litigation, comprehensive analysis by Class Counsel of the copious and detailed records provided by Chase with the assistance of an expert retained by Plaintiff's counsel at their own expense, extensive briefing on a multitude of substantive and procedural issues, and after the parties' counsel weighed the strengths and weaknesses of the case throughout the course of a lengthy private mediation. The negotiations took place at arms-length between attorneys experienced in the litigation, certification, trial and settlement of class actions. The mediator was a neutral third-party with considerable experience with class actions, specifically including wage-and-hour actions. Counsel for both parties are experienced in wage litigation, and understand the legal and factual issues involved in the case. As a result, the attorneys for the parties were well positioned to evaluate the strengths and weaknesses of their clients' positions, as well as the appropriate basis upon which to settle the claims. The amounts to be paid to the Class Members per the Settlement are significant, as described above. Class Counsel and Plaintiff strongly endorse this Settlement. These facts weigh heavily in favor of final approval. See McKinnie v. JP Morgan Chase Bank, N.A., 678 F. Supp. 2d. 806, 812 (E.D. Wis. 2009) (factors including that "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator . . . suggest that the settlement is fair and merits final approval").

The markedly positive Class Member response to the Settlement is a testament to its fairness and adequacy, and weighs in favor of final approval. Of the 5,661 Class Members,

2,060 filed claims, which is a 36% response rate. This response rate is much higher than the typical participation rate for a claims-made settlement. See *McLaughlin on Class Actions § 6:24* (8th ed.) ("Claims-made settlements typically have a participation rate in the 10–15 percent range."); see also Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 52 (D. Me. 2005) ("'claims made' settlements regularly yield response rates of 10 percent or less"); Chambery v. Tuxedo Junction Inc., No. 12-cv-06539, 2014 WL 3725157, at *6 (W.D.N.Y. July 25, 2014) (noting that a 37% claims rate "is an unusually high participation rate for a 'claims made' settlement agreement."). Not one out of the 5,661 Class Members filed an objection to the Settlement. The lack of objectors denotes support for the Settlement and strongly favors a finding that it is "fair and reasonable." Am. Civil Liberties Union v. United States Gen. Servs. Admin., 235 F. Supp. 2d 816, 819 (N.D. Ill. 2002). Only three people opted out of participation – which is a mere 0.0005% of the total Class. See In re Southwest Airlines Voucher Litig., No. 11-cv-8176, 2013 WL 6406084 (N.D. Ill. Dec. 6, 2013) (finding that the "low level of opposition" amounting to 0.01% of the class "supports the reasonableness of the settlement"). The fact that "99.9% of class members have neither opted-out nor filed objections to the proposed settlements... [is] strong circumstantial evidence favoring settlement." In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2000). As such, the final approval is justified and should be granted.

The proposed allocation is also reasonable as it is calculated based upon the actual overtime compensation Claimants earned. See Summers v. UAL Corp. ESOP Comm., No. 03-cv-1537, 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005) (approving allocation plan as reasonable when "settlement funds . . . will be disbursed on a pro rata basis"); Hens v. Clientlogic Operating Corp., No. 05-cv-381, 2010 WL 5490833, at *2 (W.D.N.Y. Dec. 21,

2010) (allocation formula based on plaintiffs' length of service). Moreover, it ensures that all participating Class Members will receive at least minimum payment of $100 and the average estimated payment is in excess of $800.00. This is a substantial per-person recovery that leaves little doubt that the benefit to the Class is quite positive.

Moreover, in the opinion of counsel, the terms of the proposed settlement are fair and provide reasonable compensation to the Class Members, especially after considering the potential length, risks, complexity, and available damages. As this Court previously addressed, the parties have engaged in forceful prosecution and defense of their claims. Without settlement, this litigation would necessarily continue apace, greatly increasing both parties' expenses, as well as the investment of time by the parties and the Court. Although this case has been pending for three years, the size of the class and the nature of the issues would likely result in several more years of litigation – even with an aggressive and closely managed discovery schedule. Instead of facing the uncertainty of a potential award (or loss) years from now, the Settlement allows Plaintiff and the Class Members to receive immediate, certain, and sizeable relief. See Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (citation omitted) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation").

The positive response and number of Class Members who benefit from the Settlement must also be considered in the light of the substantial risks Plaintiff faces to maintain a collective or certify a Rule 23 class should the litigation continue. If Defendants succeed at decertification, or Plaintiff is unable to obtain Rule 23 certification, the majority of Class Members would be deprived of any benefit or recovery. Indeed, the U.S. Supreme Court is currently considering Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), cert. granted, 137 S. Ct. 809, 196

L. Ed. 2d 595 (2017). Although mandatory arbitration agreements containing class waivers as a condition of employment are currently unenforceable in the 7th Circuit, if Epic is overturned, it would have a substantial and immediate impact on the Class Members in this matter. If Chase seeks to enforce these arbitration agreements, the parties, and the Court, will have to engage in a person-by-person analysis of each arbitration agreement to determine its validity, which will result in an enormous increase in the length, risk, and cost of the litigation and may result in the decertification of the Collective. Further, there is a risk that certain Class Members may be bound by the Court's prior decision with respect to former plaintiff Anabel Rodriguez that Chase's arbitration agreement is binding and enforceable, regardless of the current law of the circuit in which they reside. See D.E. 141 ("[T]he Court is not reaching a decision on whether such putative class members will ultimately be bound by the decision relating to Rodriguez's binding arbitration agreement.").

In addition, the majority of this litigation has focused on the adjusted calculation of overtime rates to include earned incentive compensation due to the novelty and complexity of the issues. Plaintiff's claims rest primarily upon complex calculations to determine whether incentive compensation was attributed to the correct time period and whether the regular rates were re-calculated in compliance with the 29 CFR 778.120, which Plaintiff contends is binding and provides the only legally permissible methods of calculating adjusted overtime. This process also applies to Plaintiff's allegations that the adjusted overtime was untimely paid. The complexity of the calculations notwithstanding, Defendants have asserted that they not only paid Plaintiff properly, they actually overpaid the adjusted overtime. See D.E. 101.

Moreover, Defendants contend that the formulas set forth in the CFR are not binding, but are advisory, provide *examples* of legally permissible ways to calculate adjusted overtime (i.e.,

the regulation states that "the following methods *may* be used"), and actually expressly allow for any "other reasonable and equitable method" to be adopted. Consequently, Defendants' calculation method may be deemed lawful even if it is not exactly one of the exemplary methods set forth in the CFR. Id. See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding FLSA Guidance is "not controlling upon the courts by reason of their authority"); Shaw v. Prentice Hall Computer Pub., Inc., 151 F.3d 640, 624 (7th Cir. 2015) ("These interpretive regulations [of the FLSA] do not have the force of binding law."). These questions of law are unsettled, which poses a significant risk to Plaintiff's claims, would add to the length of continued litigation, and increases the likelihood that appeals would be pursued by one or both parties.

Plaintiff also alleged that she was untimely paid. Per the DOL's regulations, "[t]here is no requirement in the [FLSA] that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 CFR 778.106. Moreover, "in no event may payment be delayed beyond the next payday after such computation can be made," except that overtime may be paid after the regular pay period when the correct amount of overtime compensation cannot be determined until some time after that pay period. Id. In order to prevail in her untimely wage claims, Plaintiff would have to prove that the commissions were earned and calculable at an earlier date and show that the overtime wages were paid after the regular payday for the period in which they were earned. However, if Chase can establish that the alleged delay was reasonably necessary to calculate the overtime compensation or arrange for payment, then Plaintiff's untimely payments claims could be defeated. See Ortega v. Due Fratelli, Inc., No. 14-cv-06669, 2015 WL 7731863, at *7 (N.D. Ill. Dec. 1, 2015).

Finally, the proposed settlement provides Plaintiff and the Class Members with a substantial recovery. If successful on the adjusted overtime claim, Plaintiff would only be able to recover the difference between the adjusted overtime already paid and the adjusted overtime re-calculated – which in many or all cases could be zero, since Chase contends that its method resulted in Plaintiff and the Class Members receiving *more* compensation than they would have had Chase used one of the CFR's exemplary methods. If successful on the untimely payment claims, because the overtime wages were actually paid, albeit untimely, under the IMWL and IWPCA, Plaintiff could only recover (at most) statutory damages of 2% for the month(s) between when the wages were earned and when they were paid. Under the FLSA, if successful in her claims of untimely overtime payments, the Plaintiff could recover liquidated damages. See Dominici v. Bd. Of Educ. Of City of Chicago, 881 F. Supp. 315 (N.D. Ill. 1995). However, if the Defendants can establish that they acted in good faith and upon reasonable grounds, which they believe they can do, it would remain within the Court's discretion to deny liquidated damages or refuse to award the full amount of liquidated damages. Id.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order granting final approval of the Settlement, including all of the relief requested herein and in the proposed final approval order. A copy of the proposed final approval order has been submitted to the Court via e-mail at proposed_order_cox@ilnd.uscourts.gov.

Dated: April 18, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the attached, **Joint Motion in Support of Final Settlement Approval,** was served upon the parties below by electronically filing with the Clerk of the U.S. District Court of the Northern District of Illinois on April 18th, 2018.

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