IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOBBI-JO SMILEY, AMBER BLOW, AND KELSEY TURNER, **Plaintiffs,** **v.** **E. I. DU PONT DE NEMOURS AND COMPANY AND ADECCO U.S.A., INC.,** **Defendants.**	**Case No. 12-cv-02380** **(Judge Malachy E. Mannion)**

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION FOR FINAL
CLASS AND COLLECTIVE ACTION SETTLEMENT APPROVAL

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INTRODUCTION

Bobbi-Jo Smiley, Amber Blow and Kelsey Turner ("Named Plaintiffs") respectfully submit this Memorandum of Law in support of their Unopposed Motion for Final Settlement Approval in the above-captioned case. As discussed throughout this filing, this Court should grant final approval to the Parties' proposed settlement because it reflects mutual compromises informed by diligent discovery efforts, is based on extensive, arm's-length negotiations, has been strongly endorsed by the Class members following a robust, Court-supervised notice process and is expected to provide an average payment of more than $5,000.00 to 380 FLSA Collective and Rule 23 Class members. *See* Sections II and V(C), below.

I. PROCEDURAL HISTORY

On November 28, 2012, Plaintiffs filed this lawsuit as a putative collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and as a putative Rule 23 class action under the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1, *et seq*. Complaint [Doc. 1]; Amended Complaint [Doc. 44]. Plaintiffs sought unpaid overtime wages due for off-the-clock work consisting of "shift relief" work and for donning and doffing uniforms and protective gear. *Id.*

On June 18, 2013, the Court entered an Order granting Plaintiffs' Conditional Certification motion and certifying an FLSA class defined to include:

"all non-exempt twelve-hour shift employees who worked at DuPont's Towanda facility within three years from the date this action was filed." June 18, 2013 Order, p.10 [Doc. 59] (identifying "non-exempt, hourly employees who worked 12-hour shifts requiring shift relief and/or donning and doffing"). Approximately 164 people returned consent forms to join the FLSA claim. *See* Notices of Filing [Docs. 1, 5-15, 55, 67-74, 76, 80-82, 85-88].

Defendants filed Motions for Summary Judgment in mid-2014 that this Court granted on November 5, 2014.[1] *See* Nov 5, 2014 Order [Doc. 146]. Plaintiffs appealed this Order and the Third Circuit Court of Appeals reversed on appeal. *Smiley v. E.I. du Pont de Nemours & Co.*, 839 F.3d 325, 335 (3d Cir. 2016). Defendants filed a petition for writ of *certiorari* to the United States Supreme Court, *see* Motion to Stay [Doc. 156] and, on June 28, 2018, the Supreme Court denied *certiorari*, with three Justices dissenting (*i.e.*, believing the issues presented in Defendants' petition were worthy of consideration by the Supreme Court), clearing the way for Plaintiffs to resume their claims. *E.I. du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018).

[1] Defendants also filed FLSA decertification motions, *see* [Docs. 113-114] which the District Court denied as moot after its summary judgment ruling. *See* Nov. 5, 2014 Order [Doc. 145]. Plaintiffs filed a R.23 class certification motion, *see* [Doc. 126] which the District Court denied as moot after its summary judgment ruling. *See* Nov. 5, 2014 Order [Doc. 145].

In July 2018, the Parties began to explore settlement. Declaration of David J. Cohen ("Cohen Dec."), ¶ 2 (Exhibit 2). After several conferral sessions, Defendants began a necessarily long process of collecting and producing employee-specific time and pay data from 2009 to 2018, the entire period covered by Plaintiffs' claims. Cohen Dec. at ¶ 2 (Exhibit 2). DuPont completed its production in mid-February 2019 and Adecco completed its production in late-April 2019. *Id.* (Exhibit 2). Thereafter, the Parties began a months'-long process of reviewing, analyzing and conferring about this data, performing damages calculations and conferring on various issues that eventually led them to schedule a private mediation session. *Id.* (Exhibit 2).[2]

On December 11, 2019, the Parties participated in a full-day mediation with Hon. Diane M. Welsh (Ret.). *Id.* at ¶3 (Exhibit 2). During this session, the Parties identified and discussed several key issues separating their valuations and agreed to engage in further settlement talks overseen by Judge Welsh. *Id.*; Joint Report

[2] The efforts required to negotiate a settlement in this case were particularly complicated and protracted because the work done on damages issues by Plaintiffs' former co-counsel (who thereafter abandoned the case) was so disorganized as to be unintelligible and could not be put to any useful purpose. Cohen Dec. at ¶ 3 (Exhibit 2). Accordingly, Class Counsel were required to perform a "*de novo*" damages analysis that involved, in summary, negotiating for productions to obtain current, complete time and pay data in a usable format for all Plaintiffs across the entire relevant period, analyzing this data and the record evidence to prepare defensible assumptions for a damages model, performing class-wide damage calculations and conferring with Defendants about these data, calculations assumptions and settlement issues. *Id.* (Exhibit 2).

[Doc. 177]. From mid-December 2019 to early March 2020, the Parties continued their efforts to reach agreement on key terms. Joint Reports [Docs. 179, 181, 183, 185, 187]. By April 20, 2020, the Parties had signed a Settlement Agreement commemorating these terms. Settlement Agreement [Doc. 188-3]. This Court granted preliminary approval to the Parties' proposed Class and Collective Action Settlement Agreement on June 9, 2020 [Doc. 189].

II. THE PARTIES' SETTLEMENT AGREEMENT

The Agreement provides that Defendants will pay $5,000,000.00 to resolve this litigation. Settlement Agreement, § 2(a) [Doc. 188-3]. This payment includes the following components, each subject to Court approval: up to $2,804,000.00 to pay claims for back wages and liquidated damages to the Class members; up to $150,000.00 in Service Awards to be divided among the three Named Plaintiffs; up to $2,000,000.00 in attorney's fees; and up to $46,000.00 in cost reimbursements to Class Counsel. *Id*. at § 2(b)-(c) [Doc. 188-3].

The Agreement provides that all of the FLSA Collective members will automatically receive settlement payments, but that the Rule 23 Class members (who did not affirmatively join the FLSA claim) must return a claim form to receive a settlement payment. *Id*. at § 6 [Doc. 188-3]. Any portion of the class member fund attributable to Rule 23 Class members who do not return a claim form, and not otherwise attributable to the Named Plaintiffs' Service Payments or

Class Counsel's attorney's fees and costs, will be retained by Defendants. *Id*. [Doc. 188-3]. Based on preliminary information from Analytics, Class Counsel estimate that 380 of the 541 FLSA Collective and Rule 23 Class members (70%) stand to receive an average payment of approximately $5,250.00 from the proposed Settlement. Cohen Dec. at ¶ 5 (Exhibit 2).

The Agreement provides that, in consideration for the payments they receive, the FLSA Collective and Rule 23 Class members will release Defendants from any and all wage-related claims of any kind flowing from the conduct alleged in the Complaint, including all claims relating to overtime pay, minimum wages, penalties, liquidated damages, attorney's fees and expenses. Settlement Agreement at §§ 9-10 [Doc. 188-3].

All Parties recognize and acknowledge the benefits of settling this case. Plaintiffs believe their claims for unpaid "shift relief" and donning and doffing work have merit and that the information obtained to date supports these claims. Cohen Dec. at ¶ 6 (Exhibit 2). Despite the strength of these claims, Plaintiffs recognize and acknowledge the risks and uncertainty associated with complex litigation, including the risk that the Court might ultimately deny a renewed class certification motion. *Id.* (Exhibit 2). Having filed this case almost eight years ago, Plaintiffs are also acutely aware of the additional delays, burdens and costs that would likely result from continuing this litigation, including increased burdens

and economic issues related to the COVID-19 pandemic. *Id.* (Exhibit 2). Plaintiffs therefore believe that the Settlement set forth in this Agreement is fair, reasonable, adequate and in the best interests of the putative FLSA Collective and Rule 23 Class members. *Id.* (Exhibit 2).

Defendants maintain that Plaintiffs' claims are not appropriate for final FLSA or Rule 23 class certification, and that they have a number of meritorious defenses to the claims asserted in this action. Specifically, Defendants believe that they paid all of their employees fairly and in accordance with applicable Federal and State law, and that their policies and procedures comply with all applicable legal requirements. Nevertheless, Defendants believe that the significant expense associated with defending class actions, the costs of any appeals and the continued disruption to their business operations relating to this litigation outweigh their interest in continuing to litigate these claims. As such, Defendants agree with all of the terms of the proposed settlement and recommend it to the Court.

III. THE SETTLEMENT NOTICE MAILING

Following preliminary approval, Plaintiffs promptly retained Analytics Consulting LLC ("Analytics") to administer the Notice mailing. By June 17, 2020, Defendants' counsel e-mailed Excel files to Analytics with names and addresses of 536 FLSA Collective and Rule 23 Class members. Declaration of Jeff Mitchell ("Mitchell Dec"), ¶¶ 3-5 (Exhibit 1). Analytics processed this data, confirmed the

absence of duplicate entries and compared the notice mailing list against the U.S. Post Office National Change of Address Database to confirm the delivery addresses. *Id.* at ¶ 4 (Exhibit 1). On June 26, 2020, Analytics mailed the Notice by First Class U.S. Mail to all 536 FLSA Collective and Rule 23 Class members. *Id.* at ¶ 5 (Exhibit 1). Thereafter, Analytics tracked all returned Notice Packets, searched for updated addresses, made all possible re-delivery attempts and, on July 24, 2020, mailed a reminder notice to all FLSA Collective and Rule 23 Class members who had not yet retuned a completed claim form. *Id.* at ¶¶ 6, 9 (Exhibit 1). Analytics' efforts caused the Notice to be delivered to 477 of the 536 (89%) FLSA Collective and Rule 23 Class members *Id.* at ¶ 13 (Exhibit 1).

During the Notice period, Analytics identified five additional Class members, providing a revised total of 541 FLSA Collective and Rule 23 Class members. *Id.* at ¶¶ 10-11 (Exhibit 1). Analytics received two requests for exclusion from the settlement and did not receive any objections to the settlement. *Id.* at ¶¶ 13-14 (Exhibit 1). Class Counsel have not received any objections to the settlement, any requests to be excluded from the settlement, or any complaint about the terms of the settlement from any FLSA Collective or Rule 23 Class member. Cohen Dec. at ¶ 7 (Exhibit 2).

The events described above demonstrate that the FLSA Collective and Rule 23 Class members' due process rights have been fulfilled because the Court-

approved Settlement Notice contained sufficient information to allow them to make an informed decision about whether to participate in the proposed settlement, Analytics made reasonable efforts to disseminate notice of the proposed settlement and the FLSA Collective and Rule 23 Class members had a reasonable period of time to evaluate the proposed settlement and decide whether to participate.

IV. THE COURT SHOULD CERTIFY THE RULE 23 CLASS FOR SETTLEMENT PURPOSES

The Court has preliminarily certified the Rule 23 Class and FLSA Collective for settlement purposes. June 9, 2020 Order at ¶¶ 1-2 [Doc. 189]. To grant final settlement approval, the Court must find that the proposed Settlement Class meets the requirements of Rule 23 by a preponderance of the evidence and that the proposed FLSA Settlement Collective merits final FLSA certification. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011). As discussed below, the proposed Settlement Class and FLSA Settlement Collective meet the requirements for final certification which, in turn, supports entry of the Final Approval Order. [3]

[3] The standard applied to certification of a settlement class is different than the standard applied to certification of a litigation class, insofar as there are no manageability concerns. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 303 (3d Cir. 2011) ("The proposed settlement here obviates the difficulties inherent in proving the elements of varied claims at trial or in instructing a jury on varied state laws"); *Wallace v. Powell*, 288 F.R.D. 347, 366 (M.D. Pa. 2012) ("the difficulties in managing a class action need not be considered since the Settlement will avoid trial"); *Newberg On*

A. The Rule 23 Class Satisfies The Requirements Of Rule 23(a)

Under Rule 23(a), a party seeking certification must demonstrate four things:

1. the class is so numerous that joinder of all members is impracticable;

2. there are questions of law or fact common to the class;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). As discussed below, the proposed Settlement Class satisfies each of these requirements for settlement purposes.[4]

1. The Rule 23 Class is sufficiently numerous

To receive certification, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no specific minimum number of plaintiffs required to maintain a class action. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 250 (3d Cir. 2016), *as amended* (Sept. 29, 2016) (approving certification of a 22-person class). In deciding whether a given class satisfies the numerosity requirement, it is important to consider several factors that

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Class Actions, § 11:28 (4th ed.) ("Since *Amchem*, approval of settlement classes is generally routine and courts are fairly forgiving of problems that might hinder class certification were the case not to be settled").

[4] Defendants agree that the Class meets all of the Requirements of Rule 23(a) for settlement purposes.

may contribute to the impracticability of joining all its members in a single case, including: judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the class members' financial resources, the class members' geographic dispersion, and whether the class members' claims seek injunctive relief or damages. *Id.* at 253; *In re Processed Egg Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 85853 (E.D. Pa. June 30, 2016).

Here, the WPCL Class includes 541 non-exempt 12-hour shift employees who worked in DuPont's Towanda plant during the relevant limitations period. Mitchell Dec. at ¶ 11 (Exhibit 1). Since it is impracticable to join so many individual plaintiffs in a single lawsuit, *see* Fed. R. Civ. P. 23(a)(1), the numerosity requirement is plainly satisfied. *Stewart v. Abraham*, 275 F.3d 220, 226- 27 (3d Cir. 2001) (class of 40 or more members presumptively satisfies numerosity requirement); *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 307 (E.D. Pa. 2012) ("While there is no set minimum, if the potential class is greater than forty, the numerosity requirement is generally met").

2. The Rule 23 Class meets the commonality requirement

The "commonality" prerequisite examines the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Notably, the commonality requirement does not mean that all claims or facts among class members must be identical. *Noye v. Yale Associates, Inc.*, 2019 WL 3837507

(M.D. Pa. August 15, 2019). Rather, a single common question of law or fact will suffice. *In re Processed Egg Prods. Antitrust Litig*., 312 F.R.D. 124 (E.D. Pa. 2015), *citing Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013) ("the commonality bar "is not a high one").

Here, the Settlement Class members were governed by a litany of common policies and practices, including: common scheduling and timekeeping policies and procedures; a common payroll system; and common policies and procedures requiring the Class members to engage in more than *de minimis* donning and doffing and shift relief activities. *See* Amended Complaint at ¶¶1-6, 13-29 [Doc. 44]. Because Plaintiffs contend that the claims of all Settlement Class members arise from the same policies and practices, these claims are susceptible to common proof sufficient to meet the commonality requirement. *See Wallace v. Powell*, 288 F.R.D. 347, 362 (M.D. Pa. 2012).

3. The Rule 23 Class meets the typicality requirement

The third prerequisite is that the claims of the representative plaintiff be "typical" of the claims of the class. See Fed. R. Civ. P. 23(a)(3). The threshold for establishing typicality is low: "[e]ven relatively pronounced factual differences will generally not preclude a finding of typicality…" *Noye*, 2019 WL 3837507 at *4, *quoting In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F. 3d 283, 311 (3d Cir. 1998). So long as the class and its

representative present similar legal theories arising from the same event, practice, or course of conduct, the requirement is met. *See In Re Shop-Vac Marketing and Sales Practices Litigation*, 2016 WL 3015219 (M.D. Pa. May 26, 2016).

Here, Plaintiffs contend that the Settlement Class members worked in similar jobs at DuPont's Towanda, PA plant, had similar duties and were governed by common policies and procedures, so posit that the Class members' claims arise from the same course of conduct (*i.e.*, the performance of unpaid, off-the-clock donning and doffing and shift relief work). *See generally* Amended Complaint [Doc. 44]. Further, Plaintiffs assert that the Class members suffered similar harm (*i.e.*, the denial of required overtime wages). *Id.* Because Plaintiffs contend that all Settlement Class members' claims are based on the same facts and practices and grounded in the same legal theory, the typicality requirement is satisfied for settlement purposes.

4. Plaintiffs and their counsel adequately represent the Rule 23 Class

Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy is satisfied by showing that class counsel is competent and qualified to conduct the litigation and class representatives have no conflicts of interests with the class. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293 (3d Cir. 2007); *Rougvie v. Ascena Retail Grp., Inc.,* 2016 U.S. Dist. LEXIS 99235 (E.D.

Pa. July 29, 2016) ("adequacy inquiry ensures absence of conflicts of interest between named parties and the class they seek to represent"); *Gonzalez v. Corning*, 2016 U.S. Dist. LEXIS 43707, *152 (W.D. Pa. Mar. 31, 2016) (adequacy requirement concerns both "the experience and performance of class counsel"). Both prongs of the adequacy test are met here for settlement purposes.

Here, Class Counsel have significant experience prosecuting class and collective actions, including wage and hour claims. *See* Declaration of Thomas More Marrone ("Marrone Dec.") (Exhibit 3); Stephan Zouras Firm Profile (Exhibit 4). Courts in this Circuit have repeatedly approved Plaintiffs' counsel to serve as lead or co-lead counsel in state-wide and multi-state wage and hour cases. *Id*. Class Counsels' adequacy is further supported by their determination to pursue a complex appeal to the Third Circuit and defeat Defendants' bid for reversal by the United States Supreme Court – neither of which would have occurred without Mr. Marrone's efforts. Cohen Dec. at ¶ 8 (Exhibit 2).

Further, the Named Plaintiffs do not possess any interests that obviously conflict with the interests of any other Class member. *See Stone v. Troy Constr., LLC*, 2015 WL 7736827, *6 (M.D. Pa. Dec. 1, 2015) (the adequacy requirement "serves to uncover any conflicts of interest between the named parties and the class they seek to represent."). Indeed, the interests of Named Plaintiffs and the Class members appear to be aligned: Named Plaintiffs are members of the Rule

23 Class they seek to represent and share the same claims and interests in obtaining relief as all other Class members. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157-58 (1982) (noting that where the claims of the class and class representatives are coextensive, there is no conflict).

B. The Rule 23 Class Satisfies The Requirements Of Rule 23(b)(3)

Plaintiffs must also show this action meets one of the requirements of Rule 23(b). Plaintiffs submit that the Settlement Class comports with Rule 23(b)(3), which provides that a class action may be maintained: "if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

1. The Rule 23 Class meets the predominance requirement

The predominance inquiry "tests whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Basile v. Stream Energy Pennsylvania*, 2018 WL 2441363 at *5 (M.D. Pa. May 31, 2018), quoting *Sullivan*, 667 F.3d at 298. Predominance requires that "proposed class actions are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623-24. In other words, common issues of law and fact must

predominate over individual issues. *Wallace v. Powell,* 301 F.R.D. 144, 157 (M.D. Pa. 2014).

In this case, Plaintiffs have identified several shared questions of law and fact that relate to all Class members' claims, including: whether Defendants caused the Class members to perform donning and doffing and shift relief work off-the-clock; whether Defendants properly tracked the Class members' donning and doffing and shift relief work; whether Defendants had reason to know the Class members were performing unpaid work; whether Defendants paid the Class members all overtime wages owed; and whether Defendants willfully failed to comply with their obligations under federal and state wage laws. *See generally* Amended Complaint [Doc. 44].

This case meets the predominance test for settlement purposes, because these questions would all be answered with common evidence. *See Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 316-317 (E.D. Pa. 2012) (certifying settlement class for alleged overtime violations where employees allegedly uncompensated for off-the-clock work due to defendant's timekeeping and payroll policies); *In Re Shop-Vac*, 2016 WL 3015219 at *5 (certifying settlement class where "issues relevant to the settlement class center on Defendant's conduct, rather than Plaintiffs' actions").

2. The Rule 23 Class meets the superiority requirement

Rule 23(b)(3), the superiority inquiry, requires the Court to find that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Relevant considerations include: class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D). The superiority analysis requires courts to "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." *In re Cmty. Bank of N. Virginia Mortgage Lending Practices Litig*., 795 F.3d 380, 409 (3d Cir. 2015).

Here, where the proposed Rule 23 Class consists of 541 workers, individual litigation is an unsuitable alternative to the class action device. Plaintiffs submit that requiring the filing and litigation of hundreds of individual claims would result in many claims going unheard, since the amount of money any given Class member could hope to recover would not clearly justify the pursuit of an individual lawsuit. Thus, in the context of certifying a settlement class, a class action is superior in this case because it will promote judicial

economy and result in fair and consistent outcomes for all Class members.

C. The Court Should Grant Final FLSA Certification To The FLSA Collective

As a condition of approving the Parties' settlement, the Court must find the FLSA Collective members' claims merit final FLSA certification. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011).[5]

The standard applied at the final certification stage "is whether the proposed collective plaintiffs are 'similarly situated.'" *Wood v. AmeriHealth Caritas Servs.*, LLC, 2020 WL 1694549, *7 (E.D. Pa. Apr. 7, 2020). The factors relevant to this inquiry include: "whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." *Id*. Where class members advance the same claims and worked under similar circumstances of employment and the defendant does not oppose final certification, a court may grant final certification without an exhaustive inquiry. *Id*. [6]

[5] Defendants agree that final FLSA certification is appropriate for settlement purposes.

[6] In *Wood*, the Court granted final FLSA certification to the FLSA Collective for settlement purposes with minimal analysis: "No one has opposed final certification of Plaintiffs' FLSA collective. All its members advance the same claims – that they were misclassified as overtime-exempt and not paid for overtime. They were

1. The FLSA Collective members are employed in the same corporate department, division, and location

The FLSA Collective members all worked for Defendants in the same DuPont plant in Towanda, PA. June 18, 2013 Order, p.10 [Doc. 59]. *See Hall v. Accolade, Inc.*, 2020 WL 1477688, *7 (E.D. Pa. Mar. 25, 2020) ("all members of the Collective worked as health assistants employed by Accolade"); *Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 492 (E.D. Pa. 2018) (granting final FLSA certification to class members who all worked for the defendant in a single location in Eagleville, PA).

2. The FLSA Collective members advance similar claims and seek substantially the same form of relief

The FLSA Collective members all advance the same claim (*i.e.*, that they were not paid overtime wages for donning and doffing and shift relief work they performed) and seek the same form of relief (*i.e.*, recovery of unpaid overtime wages). *See* Amended Complaint at ¶¶ 17-29 [Doc. 44]. Class-wide claims for unpaid overtime are routinely held to satisfy the "similarly situated" requirement for purposes of final FLSA certification. *See, e.g., Wood*, 2020 WL 1694549, at *7 (all class members claim "they were misclassified as overtime-exempt and not paid for overtime"); *Alvarez v. BI Inc.*, 2020 WL 1694294, *4 (E.D. Pa. Apr. 6, 2020) (plaintiffs claim "unpaid off-the-clock work, on-call time, and time related to home

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all [similar workers] for Defendant with similar employment circumstances." 2020 WL 1694549, at *7.

visits"); *Hall*, 2020 WL 1477688, at *7 ("all members of the Collective advance the same claims - that they were… underpaid for overtime").

3. The FLSA Collective members have similar salaries and circumstances of employment

Last, the FLSA Collective members had similar salaries and circumstances of employment. The FLSA Collective members worked for Defendants in similar positions and performed similar manufacturing jobs. Amended Complaint at ¶¶ 13-29, 37-38 [Doc. 44]. Defendants required all of the FLSA Collective members to arrive at work before their scheduled shifts to change into required protective uniforms and gear, stay at work after their scheduled shifts to change out of their required protective uniforms and gear and be present at their assigned work locations before and after their scheduled shifts to perform shift relief work, Amended Complaint at ¶¶ 17-29 [Doc. 44], all of which constitute "similar circumstances of employment" supporting final FLSA certification. *See Hall*, 2020 WL 1477688, at *7 ("because all Collective members were health assistants, they had sufficiently similar salaries and circumstances of employment"); *Beauregard v. Hunter*, 2019 WL 9355826, *5 (D.N.J. Sept. 27, 2019) ("Even where there are individual differences among plaintiffs, as long as a common plan is apparent, a class can be certified").

The Court should grant final FLSA certification for settlement purposes because the evidence establishes that the FLSA Collective members worked for

Defendants in a similar setting, in similar jobs and under similar terms and conditions of employment.

V. THE COURT SHOULD GRANT FINAL APPROVAL TO THE PARTIES' PROPOSED SETTLEMENT

A. Legal Standard Governing Final Settlement Approval

Generally, settlements are favored in the class action context. *Hall*, 274 F.R.D. at 168; *Rosenau v. Unifund Corp.*, 646 F. Supp. 2d 743, 751 (E.D. Pa. 2009). As the Third Circuit Court of Appeals has observed: "there is an overriding public interest in settling class action litigation." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *Moore v. Comcast Corporation*, 2011 U.S. Dist. LEXIS 6929, *7 (E.D. Pa. Jan. 24, 2011) ("Settlement of complex class action litigation conserves valuable judicial resources, avoids the expense of formal litigation, and resolves disputes that otherwise could linger for years"); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) ("[T]he extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy encouraging settlements to 'an overriding public interest").

B. The Settlement is Entitled to a Presumption of Fairness

In reviewing a settlement for final approval, the trial court should apply an initial presumption of fairness where: 1) the settlement negotiations occurred at arm's length; 2) there was sufficient discovery; 3) the proponents of the settlement

are experienced in similar litigation; and 4) only a small fraction of the class objected. *Carroll v. Stettler*, 2011 U.S. Dist. LEXIS 121185, *13 (E.D. Pa. Oct. 19, 2011), *citing In re Warfarin Sodium*, 391 F.3d at 535. The Parties' proposed settlement is entitled to an initial presumption of fairness because it meets all four of these criteria.[7]

First, the Parties' Settlement Agreement is the result of extensive arm's-length negotiations between experienced counsel from July 2018 to April 2020. Cohen Dec. at ¶ 9 (Exhibit 2). The arm's-length nature of the Parties' negotiations and the absence of collusion are amply supported by the involvement of Hon. Diane Welsh (Ret.), an experienced wage and hour mediator, from December 11, 2019 to April 20, 2020. *Id.* at ¶ 10 (Exhibit 2).

Second, the Parties' settlement negotiations were informed by substantial discovery that included the production of identifying information, employment dates and pay rates for all 541 FLSA Collective and Rule 23 Class members from 2009 to December 31, 2018, when Defendants changed the practices underlying Plaintiffs' claims. *Id.* at ¶ 11 (Exhibit 2). This extensive production permitted an in-depth analysis of Defendants' pay practices, the assumptions supporting Plaintiffs' damage calculations, the value of the unpaid time at issue in this litigation and the strengths, weaknesses and risks of the Parties' respective

[7] Defendants agree that the Parties' proposed settlement is entitled to a presumption of fairness.

positions. *Id.*

Third, Plaintiffs were represented throughout these settlement negotiations by Thomas More Marrone and David J. Cohen, attorneys with decades of experience litigating and resolving dozens of complex class and collective actions, including an array of complex civil actions and class and collective wage and hour actions under federal and state law. Section IV(A)(4), above; Marrone Dec. (Exhibit 3); Stephan Zouras Firm Profile (Exhibit 4).

Finally, since Analytics mailed the Notice Packets, only two people (one FLSA Collective member and one Rule 23 Class member) have sought exclusion from the Class and *no one has objected to any provision of the Parties' proposed settlement*. Mitchell Dec. at ¶¶ 13-14 (Exhibit 1); Cohen Dec. at ¶ 7 (Exhibit 2). The absence of objections demonstrates the FLSA Collective and Rule 23 Class members' strong support for this settlement and entitles the Parties' settlement to a presumption of fairness.

C. The Proposed Settlement Falls Within The "Range Of Reasonableness"

After determining application of the initial presumption of fairness, courts in this Circuit typically consider whether the proposed settlement is fair, reasonable and adequate under the nine factors identified in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), namely:

1. The complexity, expense and likely duration of the litigation;
2. The reaction of the class to the settlement;
3. The stage of the proceedings and the amount of discovery completed;
4. The risks of establishing liability;
5. The risks of establishing damages;
6. The risks of maintaining the class action through the trial;
7. The ability of the defendants to withstand a greater judgment;
8. The range of reasonableness of the settlement fund in light of the best possible recovery; and
9. The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Potoski v. Wyoming Valley Health Care Sys., 2020 WL 207061, at *4 (M.D. Pa. Jan. 14, 2020), *citing Girsh*, 521 F.2d at 157. This Court should approve the Parties' proposed settlement because, as discussed below, all of the *Girsh* factors either weigh in favor of approval, or do not suggest the Parties' settlement is unfair. The Parties negotiated their settlement under the supervision of Hon. Diane M. Welsh (Ret.), a highly-respected former jurist and private mediator, which lends significant weight to this analysis.[8]

[8] Defendants agree that the Parties' proposed settlement falls within the "range of reasonableness" under all of the *Girsh* factors.

1. The settlement is fair, reasonable and adequate in light of the complexity, expense, and likely duration of the litigation

The first *Girsh* factor requires consideration of complexity, expense, and likely duration of the litigation. *Potoski,* 2020 WL 207061, at *4.

Absent a negotiated settlement, this case would likely proceed to renewed FLSA decertification and Rule 23 class certification motions followed by extensive pre-trial and trial practice. Cohen Dec. at ¶ 12 (Exhibit 2). These additional matters would likely draw out these proceedings (commenced in 2012) well into 2021, with substantial fees and costs expended on both sides and no certainty in the result on either side. *Id.* Thus, the complexity, expense, and likely duration of this litigation plainly support a finding that the Parties' proposed settlement is fair, reasonable and adequate. *Potoski,* 2020 WL 207061, at *4 ("if the litigation were to continue, as it likely would given the past eight years of contentiousness, it would be at great expense as the attorney's fee and other costs would continue to accumulate").

2. The settlement is fair, reasonable and adequate in light of the overwhelmingly favorable reaction of the Class to the settlement

The second *Girsh* factor attempts to gauge "the reaction of the class to the settlement." *Potoski,* 2020 WL 207061 at *4. To measure the class's reaction to a settlement, courts consider the "number and vociferousness" of the objectors.

Benjamin v. Dep't of Pub., 2011 U.S. Dist. LEXIS 99044, 13-14 (M.D. Pa. Sept. 2, 2011), *citing General Motors Pick-Up Fuel Tank Prod. Liab. Litig*., 55 F.3d 768, 812 (1995).

As previously described, since Analytics mailed the Notice Packet on June 26, 2020, only two people have requested exclusion from the Class and *no one has raised any objection to the proposed settlement*. Mitchell Dec. at ¶¶ 5, 13-14 (Exhibit 1); Cohen Dec. at ¶ 7 (Exhibit 2). This highly positive response demonstrates that the Parties' proposed settlement is fair, reasonable and adequate. *Stoetzner v. U.S. Steel Corp*., 897 F.2d 115, 118-19 (3d Cir. 1990) (affirming settlement approval for 281 class members with 29 objectors).

3. The settlement is fair, reasonable and adequate in light of the stage of the proceedings and the amount of discovery completed

The third *Girsh* factor tests the stage of the proceedings and the amount of discovery completed. *Potoski*, 2020 WL 207061 at *3.

In this case, the Parties spent almost two years litigating to a ruling on summary judgment and another four years fighting appeals on those issues. Cohen Dec. at ¶ 13 (Exhibit 2). After the Parties' appeals were resolved, they spent another two years collecting, exchanging and evaluating discovery to inform their litigation positions and value Plaintiffs' unpaid overtime claims. *Id.* (Exhibit 2). The Parties leaned heavily on these efforts in reaching what they submit is a hard-

fought settlement that provides fair and reasonable relief to the FLSA Collective and Rule 23 Class members, suggesting this prong of the *Girsh* analysis has been met. *Potoski*, 2020 WL 207061 at *4 ("this class just survived summary judgment and would likely next face evidentiary and other pre-trial motions as well as the issue of final certification and any additional discovery… This is to say that the litigation is far enough along that settlement is appropriate, but not so far along that it is clearly near completion").

4. The settlement is fair, reasonable and adequate in light of the risks of establishing liability and damages

The fourth and fifth *Girsh* factors require the Court to examine the risks of establishing liability and damages. *Potoski*, 2020 WL 207061 at *4. In assessing this factor, it is understood that "[a] very large bird in the hand… is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995); *see In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 510 (W.D. Pa. 2003); *In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 716 (E.D. Pa. 2001).

Here, Plaintiffs believe they have presented a strong case that Defendants failed to pay the FLSA Collective and Rule 23 Class members for certain overtime work they performed with Defendants' knowledge, so are confident the legal claims at the heart of their Amended Complaint would have survived summary judgment. Cohen Dec. at ¶ 14 (Exhibit 2). However, Defendants have preserved

arguments that each FLSA Collective and Rule 23 Class member worked under different conditions and performed their jobs differently and strongly assert that their wage and hour practices comply with all applicable laws. This situation demonstrates that the Parties' proposed settlement is fair, reasonable and adequate in light of the risks of establishing liability and damages. *Potoski*, 2020 WL 207061 at *4 (factors met where "the parties have clearly set forth the challenges that the Plaintiffs would face in establishing their case in this litigation… as well as proving the exact amount of damages each Plaintiff is owed given the lack of records").

5. The settlement is fair, reasonable and adequate in light of the risks Plaintiffs would face in maintaining the class action through trial

The sixth *Girsh* factor requires the court to consider the risks of maintaining the class action through trial. *Potoski*, 2020 WL 207061 at *4.

Here, absent a settlement, Defendants would likely have pursued decertification of Plaintiffs' FLSA claim based on arguments that the FLSA Collective performed their job duties differently, worked under different conditions and were overseen by different supervisors, meaning the Court would have to engage in individual inquiries to assess their claims. Under these circumstances, this *Girsh* factor supports approval of the proposed settlement. *Id.*, *citing Galt*, 310 F.Supp.3d at 494 (sixth *Girsh* factor weighs in favor of settlement where the

defendant is likely to pursue the decertification of the plaintiff's claims prior to trial).

6. The settlement is fair, reasonable and adequate in light of Defendants' ability to withstand a greater judgment

The seventh *Girsh* factor addresses whether a proposed settlement is fair in light of Defendants' ability to withstand a greater judgment. *Creed v. Benco Dental Supply Co*., 2013 WL 5276109, *4 (M.D. Pa. Sept. 17, 2013).

Defendants did not claim a settlement discount based on financial hardship during the Parties' settlement negotiations, so Defendants' financial condition and their ability to withstand a greater judgment were not paid significant attention during the discovery process. Cohen Dec. at ¶ 15 (Exhibit 2). However, since Defendants do not presently face any liability beyond their obligations under the Settlement Agreement, this factor should not have significant import to the Court's analysis. *Creed*, 2013 WL 5276109 at *4 ("even if Benco could afford to pay more, it could have no legal obligation to do so"); *In re Cigna Corp. Sec. Litig*., 2007 U.S. Dist. LEXIS 51089 (E.D. Pa. July 13, 2007) ("Even if we were to assume that the seventh *Girsh* factor – the defendant's ability to withstand a greater judgment – suggests we reject the settlement, this factor alone does not outweigh all the others").

7. The settlement is fair, reasonable and adequate in light of the best possible recovery and all the attendant risks of litigation

The eighth and ninth *Girsh* factors require an assessment of "whether the settlement represents a good value for a weak case or a poor value for a strong case." Potoski, 2020 WL 207061 at *4, *citing Altnor v. Preferred Freezer Services, Inc.*, 197 F.Supp.3d 746, 763 (E.D. Pa. 2016) ("The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial").

Plaintiffs' class-wide damage calculations, including a favorable assumption for the number of unpaid overtime hours worked and using each Class member's highest hourly rate, support a maximum compensatory damage figure of $5,090,015.00. Cohen Dec. at ¶ 16 (Exhibit 2). If approved by the Court, the Parties' proposed settlement will provide a maximum damages fund of $2,804,000.00, or 55% of their best-case value calculation, exclusive of service awards, fees and costs while the gross settlement figure is nearly 100% of the Class Members' best-case damages. *Id.* at ¶ 17 (Exhibit 2). This recovery represents a fair and reasonable result for the Class members in light of their best possible recovery and the attendant risks of litigation discussed at length above. *Potoski*, 2020 WL 207061 at *4 **,** *citing Creed*, 2013 WL 5276109 at *4 ("Given the many risks of litigation-including all the imponderable twists and turns that might not

become apparent until months or years into the case – this settlement represents more than a reasonable outcome for the Plaintiffs."); *Galt,* 310 F.Supp.3d at 495 ("In light of the risks associated with continued litigation, the Court finds the final two *Girsh* factors weigh in favor of settlement.").

VI. CONCLUSION

The Parties' proposed settlement was reached after extensive arm's-length negotiations by experienced lawyers. It provides a fair result for the FLSA Collective and Rule 23 Class members and has received their overwhelming support. The Parties have thoroughly investigated the issues of law and fact presented in this case and submit that their proposed settlement is favorable to the continued litigation of Plaintiffs' claims. Nothing in the Parties' negotiations, or in the Settlement Agreement, provides any basis for doubting the fairness of their compromise. For the reasons detailed here, and in the accompanying documents, Plaintiffs respectfully submit that the Parties' proposed settlement is reasonable and deserving of final approval.

Respectfully Submitted,

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