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

JEROME SMITH, FRANCISCO GARCIA, and VICTOR SOLORZANO, on behalf of themselves and other similarly situated persons,

Plaintiffs,

v.

DOLLAR TREE DISTRIBUTION, INC.,

Defendants.

Case No. 12 C 3240

Magistrate Judge Brown

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE PARTIES' STIPULATION OF SETTLEMENT AND FOR APPROVAL OF CLASS CERTIFICATION, FORM AND MANNER OF CLASS NOTICE, AND SCHEDULING FAIRNESS HEARING FOR FINAL APPROVAL OF SETTLEMENT

Plaintiffs Jerome Smith Francisco Garcia, and Victor Solorzano, on behalf of themselves and all others similarly situated, move this Court for an order preliminarily approving the Parties' Stipulation of Settlement (attached hereto as Attachment 1) (hereinafter, the "Settlement Agreement") and an order approving class certification for settlement purposes, the form and manner of class notice, and scheduling a Fairness Hearing for final approval of settlement. In further support of this Joint Motion, the Parties state as follows:

I. PROCEDURAL BACKGROUND AND SUMMARY OF THE COMPLAINT

On May 1, 2012, a class action lawsuit was filed in the U.S. District Court for the Northern District of Illinois. The case is presently titled *Jerome Smith, Francisco Garcia, and Victor Solorzano on behalf of themselves and all other persons similarly situated, known and unknown v. Dollar Tree Distribution, Inc.*, Case No. 11 C 3240. Count I of the Complaint asserts and is being resolved on a class-wide basis a violation of the IWPCA based on Dollar Tree's

alleged failure to pay its employees for all earned vacation pay and paid time off ("PTO") upon termination.

II. STANDARD FOR PRELIMINARY APPROVAL

The settlement or compromise of a class action requires district court approval. Fed.R.Civ.P. 23(e); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). The law encourages settlement of class actions, and a voluntary settlement is the preferred method of class action resolution. *Isby, et al. v. Bayh, et al.*, 75 F.3d 1191, 1196 (7th Cir. 1996).

In ruling on a motion for preliminary approval of a class action settlement, the district court must determine whether the proposed settlement is within a "range of reasonableness," such that sending notice to the class is warranted. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993) ("in assessing the settlement, the Court must determine whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation") (internal citations omitted). If the proposed agreement presents no apparent defects or other indicia of unfairness, then the court should direct that notice of a fairness hearing be given to the class members, where evidence and argument may be presented for and against the proposed settlement. *Staton v. Boeing Co., Inc.*, 327 F.3d 938 (9th Cir. 2003).

III. CERTIFICATION OF VACATION/PTO PAY CLASS IS APPROPRIATE

A district court has broad discretion in determining whether the parties have made a showing that class certification is appropriate. *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). In this regard, the Court should not resolve any factual disputes and should not conduct a preliminary inquiry into the merits of the suit. *Eisen v. Carlisle & Jacqelin*, 417 U.S. 156, 177 (1974); *Orlowski v. Dominicks's Finer Foods, Inc.*, 172 F.R.D. 370, 373-74 (N.D. Ill. 1997). Rather, the court should accept as true all well-pleaded allegations of the complaint. *Eisen*, 417 U.S. at 177-78; *Allen v. City of Chicago*, 828 F. Supp. 543, 550 (N.D. Ill. 1993). The Court's role

is to determine whether Plaintiffs are asserting a claim which, assuming its merits, would satisfy the requirements of Rule 23. See H. Newberg on Class Actions, §24.13 at 60 (3d ed. 1992)(hereafter "Newberg"); *Eisen*, 417 U.S. at 178.

A. IWPCA Vacation/PTO Pay Claim Should be Certified as a Class Action

Rule 23 requires a two-step analysis to determine whether class certification is appropriate. First, the action must satisfy all four requirements of Rule 23(a). That is, "the plaintiff must meet the prerequisites of numerosity, commonality, typicality, and adequacy of representation." *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993) (internal quotation marks omitted). Second, the action must satisfy one of the conditions of Rule 23(b). *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977).

Rule 23(b) is satisfied on a showing of one of three circumstances: (1) separate lawsuits would create the risk of inconsistent judgments or would be dispositive of the interests of nonparty class members; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) questions of law or fact common to the class predominate over questions affecting individual members, and the class action is superior to other available methods. Fed. R. Civ. P. 23(b)(1) – (3).

Plaintiffs' IWPCA claim meets the requirements for class treatment of this Lawsuit.[1]

1. Certification Under Rule 23(a)

a. Numerosity -- Rule 23(a)(1)

The class is so numerous that joinder of all members is impracticable. To determine whether joinder is impracticable courts must consider the circumstances unique to each case.

[1] As outlined in the settlement papers, Defendant Dollar Tree Distribution Inc. believes that class certification is warranted for settlement purposes only, and reserves all defenses to class certification in the event that the settlement class is not certified. To the extent that Plaintiff's arguments are not specifically limited to "for settlement purposes only," Defendant does not join in them.

Swanson v. Am. Consumer Indus., 415 F.2d 1326, 1333 (7th Cir. 1966). These circumstances include whether it is feasible for class members to bring individual suits and whether it is judicially efficient for the court to try such individual cases. *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56 (N.D. Ill. 1996). "To require a multiplicity of suits by similarly situated small claimants would run counter to one of the prime purposes of a class action." *Swanson*, 415 F.2d at 1333. "[W]hile there is no number requiring or barring a finding of numerosity, a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." *Toney v. Rosenwood Care Ctr., Inc.*, No. 98 C 0693, 1999 U.S. Dist. LEXIS 4744, at *22 (N.D. Ill. March 31, 1999); See also *Swanson,* 415 F.2d at 1333 n.9 (7th Cir. 1969) (40 class members establish numerosity). In this case, the Parties have established the exact size of the putative class, which is 325 people. A list of putative class members is attached as Exhibit E to the Stipulation of Settlement, attached hereto as Attachment 1.

The size of this putative class easily satisfies Rule 23(a)(1).

b. Commonality -- Rule 23(a)(2)

For a class to be certified, questions of law or fact must exist common to the class. Fed. R. Civ. P. 23(a)(2). "[T]he cases have not been overly restrictive in setting out the requirements for commonality, with the existence of a common nucleus of operative fact usually being enough to qualify …" *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). In order to satisfy this requirement, there needs to be just one common question of law or fact. *Arenson v. Whitehall Convalescent and Nursing Home*, 164 F.R.D. 659, 663 (N.D. Ill. 1996).[2]

[2] Further, differences among the class members regarding damages are not relevant for certification purposes. "The commonality requirement may be met if the common question goes to liability despite individual differences in damages." *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D. Minn. 1991).

A common question may be shown where claims of individual members are based on the common application of a statute, or where class members are aggrieved by the same or similar conduct. *Keele*, 149 F.3d at 592 (7th Cir. 1998). Where a movant shows that the successful adjudication of the class representatives' individual claims will establish a right of recovery, or resolve a core issue on behalf of the class members, this prerequisite is met.

Here, Plaintiffs' claims are based on questions of fact and law common to the class. Regarding the Count I IWPCA vacation/PTO pay class, each class member is, or was, employed by Dollar Tree and subject to Dollar Tree's' vacation and PTO plans during the Vacation/PTO Pay Class Period. The common question is whether the vacation and PTO plans causes a forfeiture of earned compensation in violation of the IWPCA.

c. Typicality -- Rule 23(a)(3)

The issue of typicality is closely related to that of commonality. *Rosario*, 963 F.2d at 1018. To satisfy the typicality requirement of Rule 23(a)(3), the class representative's claims must arise from the same practice or course of conduct and be based on the same legal theory as the claims of class members. *Keele*, 149 F.3d at 595; *De La Fuente v. Stokely-Van Camp, Inc*., 713 F.2d 225, 232 (7th Cir. 1983). "Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar v. Linvatec Corp*., 167 F.R.D. 51, 57 (N.D. Ill. 1996). Moreover, "typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. Nutrasweet Co*., 95 F.3d 527, 534 (7th Cir. 1996).

The claims here of Plaintiffs and class members arise from the same alleged conduct of Dollar Tree. Plaintiffs alleged Dollar Tree failed to pay them and class members earned compensation upon termination as a result of uniform application of its Vacation and PTO policies in violation of the IWPCA.

Typicality is meant to insure that the claims of the class representative have the "same essential characteristics as the claims of the class at large." *Retired Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). That is the case here.

d. Adequacy of Representation -- Rule 23(a)(4)

Rule 23(a)(4) requires the named class representatives "will fairly and adequately protect the interests of the class." "The adequacy of representation requirement has three elements: (1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class; (2) the named representative must have a "sufficient interest in the outcome to ensure vigorous advocacy; and, (3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *Gammon v. G.C. Services, Limited Partnership*, 162 F.R.D. 313, 317 (N.D. Ill. 1995)(internal citations omitted). "The burden of demonstrating adequacy under this standard, nevertheless, is not a heavy one." *Nielsen v. Greenwood*, No. 91 C 6537, 1996 U.S. Dist. LEXIS 14441, at *16 (N.D. Ill. Sept. 27, 1996).

Plaintiffs satisfy this standard here. Plaintiffs do not have antagonistic or conflicting claims with other members of the class. Plaintiffs and the class were all employed by Defendant and all seek earned vacation/PTO pay.

Plaintiffs also have a sufficient interest in the outcome to ensure vigorous advocacy. The burden of establishing this element is not difficult. A class representative need only possess general knowledge of the case and participate in discovery. *Sebo v. Rubenstein*, 188 F.R.D. 310, 316 (N.D. Ill. 1999). Plaintiffs here understand the general foundation of the case and each has participated in the Parties' informal discovery and information exchange. This qualifies them as "conscientious representative plaintiffs" and satisfies this element. *Robles v. Corporate Receivables, Inc*., 220 F.R.D. 306, 314 (N.D. Ill. 2004).

As explained, *infra*, Section V.(C)., Plaintiffs' attorneys are qualified and able to conduct the proposed litigation vigorously.

B. This Action Satisfies the Requirements of Rule 23(b)

In addition to meeting the requirements of Rule 23(a), a class action must also satisfy the requirements of one of the subdivisions of Rule 23(b). Rule 23(b)(3) provides that a class can be maintained if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs seek certification under Rule 23(b)(3). See *Allen v. International Truck and Engine Corp*., 358 F.2d 469, 472 (7th Cir. 2004).

Rule 23(b)(3) allows an action to be maintained as a class action if the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual class members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In determining "superiority", the court should look to non-exhaustive factors: the interest of class members in individually controlling separate actions, any litigation concerning the controversy already commenced, the desirability or undesirability of concentrating the litigation, and the manageability of the class action. *Id*. The Seventh Circuit has concluded that classes seeking substantial damages may be certified under Rule 23(b)(3). *Jefferson v. Ingersoll International Inc*., 195 F.3d 894, 898 (7th Cir. 1999). The courts have certified similar class claims seeking unpaid wages and statutory penalties under Rule 23(b)(3). *See De Leon-Granados v. Eller and Sons Trees, Inc.*, 497 F.3d 1214 (11th Cir. 2007) (claim for unpaid wages under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)); *Wang v. Chinese*

Daily News, Inc., 231 F.R.D. 602, 612-14 (C.D. Cal. 2005) (claim, *inter alia*, for unpaid wages and itemized payroll statements under California law).

The common questions of law and fact in this case predominate over any individual issues. The dominant legal issue is whether Dollar Tree's vacation and PTO plans violated the IWPCA (820 ILCS 115/5). The predominance requirement is also satisfied where a "common nucleus of operative fact," for which the law provides a remedy, exists among all class members. *Chandler v. Southwest Jeep-Eagle, Inc*., 162 F.R.D. 302, 310 (N.D. Ill. 1995). In this case, there is a common nucleus of operative fact that concerns the application of Dollar Tree's vacation and PTO plans (Count I).

Further, a class action is superior to other methods of adjudication in this case. Judicial economy and efficiency, as well as consistency of judgments would be achieved through the certification of the class. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181 (N.D. Ill 1992). The alternative is potentially *hundreds* of individual lawsuits and piecemeal litigation.

C. Plaintiffs' Counsel Should be Appointed Class Counsel

Rule 23(g) requires that courts consider the following four factors when appointing class counsel: (1) the work counsel has performed in identifying the potential class claims, (2) class counsel's experience in handling complex litigation and class actions, (3) counsel's knowledge of the applicable law, and (4) the resources that class counsel will commit to representing the class. Fed. R. Civ. P. 23(g).). In this case, all these requirements are met. Plaintiffs' attorneys have extensive experience and expertise in complex employment litigation and class action proceedings, and are qualified and able to conduct this litigation. Plaintiff's counsel, Christopher J. Williams, and Alvar Ayala have been lead counsel or co-counsel in over 300 wage and hour cases filed in the Circuit Court of Cook County and the Northern District of Illinois. The majority of these cases set forth class claims under the FLSA, the IMWL, the IWPCA, the

IDTLSA and the ECA and proceeded as class actions and/or collective actions under §216(b) of the FLSA.[3]

IV. THE PARTIES' PROPOSED SETTLEMENT

After extensive negotiations, including numerous in-person and telephonic meetings between counsel, investigation by the Parties and their Counsel, and a settlement conference before the honorable Magistrate Judge Geraldine Soat Brown, the Parties have reached an agreement to settle the vacation/PTO pay claim asserted in Count I of the Complaint on a class-wide basis. A summary of the settlement terms are outline below.

A. The Settlement Class Definition and Settlement Period

As part of the Settlement, the Vacation/PTO Pay Class is defined as:

> All former employees of Dollar Tree Distribution, Inc., who worked for Defendant in Illinois, and (a) were terminated between August 17, 2002 and [***insert the date of preliminary approval***], (b) completed a probationary period of employment; and (c) had not exhausted vacation or PTO pay at the time of termination and (d) did not receive compensation for their unused vacation time and PTO following termination.

B. The Settlement Amount

Under the terms of the Settlement Agreement, Defendant will pay a total Settlement Amount of Two Hundred Thousand and 00/100 Dollars ($200,000.00), to be apportioned as follows: (1) One Hundred and Thirty Four Thousand and 00/100 Dollars ($134,.000.00) to create

[3] Plaintiffs' Counsel has regularly been designated as class counsel in class action employment litigation including, but not limited to, most recently: *Bautista et al v. Real Time Staffing, Inc.*, Case No. 10-C-0644 (Closed 09/06/12); *Ochoa et al v. Fresh Farms International Market, Inc. et al.*, Case No.11-C-2229 (Closed 07/12/12); *Jones et al v. Paramount Insourcing Solutions, Inc.*, Case No. 11-C-3331 (Closed 05/04/12); *Francisco et al v. Remedial Environmental Manpower, Inc. et al.*, Case No. 11-C-2162, (Closed 04/25/12); *Alvarez et al v. Staffing Partners, Inc. et al.*, Case No. 10-C-6083 (Closed 01/17/12); *Craig et al v. Staffing Solutions Southeast, Inc.*, Case No. 11-C-3818 (Pending, Filed 06/06/11); *Andrade et al v. Ideal Staffing Solutions, Inc. et al.*, Case No. 08-C-4912 (Closed 03/29/10); *Arrez et al v. Kelly Services, Inc.*, Case No. 07-C-1289 (Closed 10/08/09); *Acosta et al v. Scott Labor LLC et al.*, Case No. 05-C-2518 (Closed 03/10/08); *Ortegon et al v. Staffing Network Holdings, LLC et al.*, Case No. 06-C-4053 (Closed 03/13/07); *Garcia et al v. Ron's Temporary Help Services, Inc. et al.*, Case No. 06-C-5066 (Closed 04/03/07); *Camacho et al v. Metrostaff, Inc. et al*., Case No. 05-C-2682 (Closed 05/17/06).

a Vacation/PTO Pay Class Settlement Fund; (2) Six Thousand and 00/100 ($6,000.00) to the three Named Plaintiffs; (3) Fifty Thousand and 00/100 Dollars ($50,000.00), for all attorneys' fees expended and that will be expended; and (4) Ten Thousand and 00/100 ($10,000.00) Dollars for the costs of claims administration. Additional settlement terms are set forth in the complete Settlement Agreement, filed contemporaneously herewith.

During settlement negotiations in this case, Class Counsel reviewed a significant amount of data exported from Defendant's Human Resources systems which contains information about paid time off ("PTO") and vacation time during the class period. The Parties used the information calculate the full amount of damages of vacation/PTO pay claims for the class based on Plaintiffs' theory of liability. Although Dollar Tree disputes Plaintiffs' theory of liability for the vacation/PTO pay claim, as part of the settlement, Dollar Tree has agreed to create a Vacation/PTO Pay Class Settlement Fund of One Hundred and Thirty Four Thousand and 00/100 Dollars ($134,000.00). In counsel for the Parties' experience less than 100% of class members return a claim for to the file a claim administrator. Counsel therefore believe that the Vacation/PTO Pay Class Settlement Fund will allow each class member to receive what the parties believe to be close to 100% of the disputed earned vacation and PTO pay. Each class member who files a successful vacation/PTO pay claim will be eligible to receive a *pro rata* share of the Vacation/PTO Pay Class Settlement Fund up to the full value of their vacation pay claim pursuant to calculations provided by Defendant as provided to and investigated by Plaintiffs in the settlement negotiation process.

C. Release and Bar of Claims

All Class Members who have not excluded themselves from the Settlement by filing timely "opt out" notices with the claims administrator shall be deemed to have relinquished all

claims as set forth in Section F of the Settlement Agreement, and to have released Dollar Tree and the other released parties from any and all liability arising out of those claims.

Upon granting final approval of the Settlement, the Court shall dismiss this matter *with prejudice*, retaining jurisdiction solely for the purpose of interpreting, implementing, and enforcing the Settlement Agreement consistent with its terms.

D. Named Plaintiff Payments

In addition, as part of the Agreement, Dollar Tree will pay a total of $6,000.00 **(of the total $200,000.00 payment described above)** as enhancement payments to Named Plaintiffs above Plaintiffs' proportional share of the settlement fund, in consideration for Plaintiffs releasing all claims which could have been raised in this lawsuit and for their role litigating this matter on behalf of the class.

E. Attorneys' Fees

Finally, Dollar Tree will pay $50,000.00 (of the total $200,000.00 payment described above), to Class Counsel as payment for all past and future attorneys' fees that have been or will be expended and for all costs incurred and that have or will be incurred in seeing this matter through Final Approval, securing the Final Order, and defending the settlement, including the conduct of any appellate action**.** Payment of attorneys' fees and costs pursuant to this section shall be paid from the Settlement Amount but shall be separate from and in addition to the Class Vacation/PTO Pay Settlement Fund. In the event that Plaintiffs' counsel's actual fees exceed $50,000.00, Plaintiffs' counsel may file a fee petition with the Court seeking up to $10,000.00 in additional fees. In the event that the Court grants any such request, the additional fee award shall be the first take from any Remainder Fund of the $134,000.00 Class payment.

V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL

A. Settlement and Class Action Approval Process

As a matter of "express public policy," 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. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting that "strong judicial policy. . . favors settlements, particularly where complex class action litigation is concerned"); *see also* 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.41 (3d ed. 1992) (gathering 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 the individual Class members, would be impracticable. The proposed Settlement therefore is the best vehicle for Class members to receive the relief to which they are entitled in a prompt and efficient manner.

The *Manual for Complex Litigation* 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.

Manual for Compl. Lit., at § 21.632–34. This procedure, used by courts in this Circuit and endorsed by class action commentator Prof. Herbert Newberg, safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. *See* 2 Newberg & Conte, at § 11.22, *et seq.*

With this motion, Plaintiffs request that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement. The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness," and thus whether notice to the class of the settlement's terms and the scheduling of a formal fairness hearing is worthwhile. *Id.* at § 11.25 at 11-36, 11-37. The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *See Moore v. Nat'l Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985) ("Rule 23 places the determination [to approve or reject a proposed settlement] within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation"); *City of Seattle*, 955 F.2d at 1276 (in context of class action settlement, appellate court cannot "substitute [its] notions of fairness for those of the [trial] judge and the parties to the agreement," and will reverse only upon strong showing of abuse of discretion).

The Court's grant of preliminary approval will allow all Class members to receive Notice of the proposed Settlement's terms and of the date and time of the fairness hearing, at which Class members may be heard regarding the Settlement, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented. *See Manual for Compl. Lit.*, at §§ 13.14, 21.632. Neither formal notice nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *Id.* § 13.14.

B. The Criteria for Preliminary Settlement Approval Are Satisfied.

1. The proposed Settlement offers a beneficial resolution to this litigation, thus warranting both this Court's preliminary approval and an opportunity for the Class members to consider its terms.

A proposed settlement may be approved by the trial court if it is determined to be "fundamentally fair, adequate, and reasonable." *City of Seattle*, at 1276. In affirming the trial court's approval of the settlement in *City of Seattle*, the Ninth Circuit noted that it "need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id.* at 1291 (internal quotation and citation omitted). The district court's ultimate determination "will involve a balancing of several factors" which may include:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel . . . and the reaction of the class members to the proposed settlement.
>
> Id.

Plaintiffs allege, on behalf of the identified class, that Dollar Tree failed to compensate them for vacation and PTO pay upon termination which had accrued and they had earned. Defendant states that its vacation and PTO policies and practices were not unlawful. *See Prettyman v. Commonwealth Edison Co.*, 273 Ill.App.3d 1090 (1995); *Kiefer v. Paul Krone Diecasting Co.*, 1988 WL 116589 (N.D. Ill. 1988) (holding that the language of the policy governs when vacation pay is "earned" under the Illinois Wage Payment and Collection Act). Moreover, Defendant believes that Plaintiffs could not achieve Rule 23 class certification absent a settlement of disputed claims.

Given the uncertainty of whether the claims could be certified for class treatment and the difficulties of proof, the terms of the Settlement Agreement compromising the class vacation/PTO pay claims are fair and reasonable. Counsel for both Parties are experienced in class action litigation. Based on their collective experience, the claim rate in class settlements in

this industry is typically very low, generally well below 50%. The Parties negotiated a Class Settlement Fund which Plaintiffs' Counsel believes is well over 50% of the amount of the allegedly owed vacation pay claims based on Plaintiffs' theory of liability but which will likely be adequate to pay the full actual damages, under this theory, of Class members who make a successful claim on the Class Settlement Fund. Dollar Tree believes that the amount of the fund exceeds the amount of any purported damages that Class members have incurred, but has determined that settlement is preferable to litigating this matter.

2. The Settlement Was Reached Through Arm's-Length Negotiations.

Arm's-length negotiations conducted by competent counsel constitute *prima facie* evidence of fair settlements. *Berenson v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("where . . . a proposed class settlement has been reached after meaningful discovery, after arm's-length negotiation by capable counsel, it is presumptively fair.").

The Settlement here is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation in general and with the legal and factual issues of the logistics industry in particular. In negotiating this settlement, Plaintiffs' counsel had the benefit of years of experience advocating the interests of low wage laborers combined with an in-depth familiarity with the facts of this case. In addition, Plaintiffs' Counsel has successfully litigated and resolved over 30 class actions involving low wage laborers in the logistics and temporary staffing industry. Similarly, Counsel for Dollar Tree are experienced class action litigators with substantial experience in the logistics industry.

Settlement negotiations in this case took place over the course of several months. After a period of extensive investigation and discovery, frequent meetings between Class Counsel and the Named Plaintiffs, and meetings between Class Counsel and Dollar Tree's Counsel, the Parties reached agreement through a court assisted settlement conference in this matter on

October 2, 2012. The Parties continued to negotiate diligently over the final terms of the Settlement Agreement, resulting in the Stipulation of Settlement attached hereto as Attachment 1. Plaintiffs' Counsel supports the resulting settlement as fair and as providing reasonable relief to the members of the class.

3. The Settlement Provides Substantial Relief for Class Members

The Settlement provides relief for all Class members. All Vacation/PTO Pay Claim Class members will receive a *pro rata* cash payment from the Class Settlement Fund equivalent to well over 50% ofthe full value of their vacation/PTO pay claim under Plaintiffs' theory of liability. In reality, Class members are more likely to receive the full value of their vacation/PTO pay claim. 50% of any residual amount remaining from the Class Settlement Fund will be distributed to a charitable organization of the Court's choosing.

4. Payments to Named Plaintiffs are Appropriate and Reasonable.

Named Plaintiffs shall receive a payment separate from the Class Settlement Fund as specified in Section E.4 of the Settlement Agreement and paragraph IV.D., *supra*, as an enhancement award for releasing all other claims that could have been raised in this lawsuit and for their role litigating this matter on behalf of a putative class. However, for their vacation/PTO pay claim, the Named Plaintiffs' recovery will be equivalent to that of Class members. As a result, the Named Plaintiffs are not receiving preferential treatment in the settlement of the vacation/PTO pay claim.

5. Plaintiffs' Request for Attorneys' Fees and Costs is Fair and Reasonable

Section E.3 of the Settlement Agreement provides that Plaintiffs' Counsel will receive one-fourth of the Settlement Amount (or $50,000.00) for all attorneys' fees and costs incurred and to be incurred in seeing this matter through Final Approval, including: (i) obtaining

Preliminary Approval from the Court; (ii) responding to inquiries from and otherwise assisting Class Members regarding the Settlement; (iii) assisting in the review of claims submitted by Class Members; (iv) assisting in resolving any objections; and (v) defending the Settlement and securing the Final Order, including the conduct of any appellate action**.**

When the amount of the Settlement Amount in this case was negotiated, Dollar Tree's offer was an "all in" global settlement offer, which included all aspects of the settlement consideration relief to the class, attorneys' fees, expenses, and costs. Such settlements, known as "common fund" settlements, are preferred by the law and fees are awarded from such settlement funds by the Court under "common fund" principles.

It is well settled under the "common fund" doctrine that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gement,* 444 U.S. 472, 478 (1980). The common fund doctrine permits plaintiffs' counsel to petition the court for fees out of a common fund created for the benefit of the plaintiff class. *Id.* The common fund doctrine is based on the idea that "those who have benefited from the litigation should share its costs." *Id.* at 563 (common fund principles "properly control a case which is initiated under a statute with a fee shifting provision, but is settled with the creation of a common fund"), citing *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1989). Where a common fund is created in return for release of a defendant's liability for damages and for statutory attorneys' fees, the district court's award of fees must be guided by equitable fund principles. *Skelton,* 860 F.2d at 256.

In 1984, the Supreme Court observed that, under the common fund doctrine, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984). Since *Blum*, a majority of the circuits, including our own, have

affirmed that the percentage-of-the-fund method is available to the district court. *Blackburn v. Sundstrand Corp*., 115 F.3d 493, 494 (7th Cir. 1997). "The common fund doctrine rests upon the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched." *Bishop v. Burgard*, 198 Ill.2d 495, 509, 764 N.E.2d 24, 33, 261 Ill. Dec. 733 (2002) (emphasis added) (citing *Boeing Co v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745(1980)).

The percentage-of-the-fund method is commonly used in awarding attorneys' fees in class action settlements of wage and hour cases bought under the IWPCA, and IMWL, by both federal and state court judges. In *Acosta v. Scott Labor, LLC et al.*, Case No. 05 C 2518, the court awarded 33% of the $275,000.00 common fund for attorneys' fees and costs to plaintiffs' counsel. In *Arrez v. Kelly Services, Inc.*, Case No. 07 C 1289, the court approved the IWPCA and IDTLSA classes and awarded class counsel, including Plaintiffs' Counsel in the instant matter, 30% of the $11,000,000.00 common fund. *See also e.g.*, *Herrera v. Chicago Mattress, Inc*., Case No. 06 C 1872, Minute Order dated April 27, 2007 (granting final approval of IMWL class action settlement and awarding attorneys' fees in the amount of 33 1/3% of $175,000.00 common fund). Other courts in this district also commonly award attorney's fees equal to one-third or more of the total recovery. *See e.g., Johnson, et al v. CHA, et al.*, 94 C 7692 (N.D.Ill.1998) (Plunkett, J.) (awarding one-third of the fund for attorneys' fees plus costs). Indeed, courts around the country frequently award fees in common fund cases in the 30% to 50% range. *See* 18 Class Action Reports at 537 (1995).

The fee requested here, representing one-fourth of the total Settlement Amount of $200,000.00, is actually less than typical amounts of awards made and fees negotiated in the Chicago area.

CONCLUSION

For the foregoing reasons, Plaintiffs make the unopposed request that the Court: (i) grant this Motion for Preliminary Approval of the Stipulation of Settlement; (ii) approve class certification of the class identified herein; (iii) approve the Notice of Class Action, Proposed Settlement and Hearing; (iv) authorize notice to the Class; (v) set a date for the Fairness Hearing; and (vi) grant all further relief deemed just and proper.

Respectfully submitted,

Dated: November 6, 2012

s/Alvar Ayala
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