IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| LEE W. STRUCK, CHRISTOPHER B. KUSSEROW, ALINA MARRERO, SARAH ELIZABETH GOODMAN, JOHN SKIDMORE, APRIL HOWELL, DARRYL SUTTON, LINDA ALTIERI, JAMI MCDERMOTT, THOMAS CAPALDI, VINCENT AIOSSA, BRIAN MAHRER, and TERRY WIYRICK, on behalf of themselves and others similarly situated,<br><br>Plaintiffs,<br>v.<br><br>PNC BANK, N. A.,<br><br>Defendant. | **Case No. 2:11-CV-00982**<br><br>**JUDGE ALGENON L. MARBLEY**<br><br>**Magistrate Judge Norah M. King** |

**PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM OF LAW FOR FINAL CLASS AND COLLECTIVE ACTION SETTLEMENT APPROVAL**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page(s)**



**Code and Regulations**



**Rules**

## INTRODUCTION

This is a collective and class action lawsuit for unpaid overtime wages brought by Plaintiffs Lee W. Struck, Christopher B. Kusserow, Alina Marrero, Sarah Elizabeth Goodman, John Skidmore, April Howell, Darryl Sutton, Linda Altieri, Jami McDermott, Thomas Capaldi, Vincent Aiossa, Brian Mahrer, and Terry Wiyrick ("Named Plaintiffs"), on behalf of themselves and all other Mortgage Loan Originators ("MLOs") employed by Defendant PNC Bank, N.A. (hereinafter "Defendant"). The parties reached a proposed settlement in this overtime class and collective action, which was preliminarily approved by the Court on January 2, 2014. (ECF No. 150, Preliminary Approval Order.) The proposed settlement secures for class and collective members significant monetary compensation for their claims and has been well received by them—there were no objections. The settlement is fair, reasonable, and adequate and, accordingly, should be finally approved for distribution.

## SUMMARY OF FACTS AND PROCEDURAL HISTORY

### I. PROCEDURAL POSTURE AND CASE HISTORY

In the original Complaint, Plaintiffs Struck and Kusserow alleged that Defendant violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), the Ohio Minimum Fair Wage Standards Act ("OWA"), O.R.C. §§ 4111.01, 4111.03, 4111.10, and the Ohio Prompt Pay Act ("OPPA"), O.R.C. §§ 4113.15) by misclassifying MLOs as exempt and thus failing to pay overtime wages during weeks in which they worked more than forty hours. (ECF No. 2.) Plaintiffs Struck and Kusserow also alleged that Defendant made improper deductions from their pay, and failed to pay them overtime in a timely manner.[1] (Id.)

[1] On December 16, 2011, Plaintiff Alina Marrero filed a lawsuit against Defendant in the United States District Court for the Northern District of Illinois, captioned Marrero, et al. v. PNC Bank, N.A., Case No. 1:11-CV-08949 (the "Marrero Action"). Plaintiff Marrero alleged a collective action claim under the Fair Labor Standards Act and a class action claim under Illinois law for

On August 7, 2013, Plaintiffs filed an Amended Complaint, adding Alina Marrero, Sarah Elizabeth Goodman, John Skidmore, April Howell, Linda Altieri, Darryl Sutton, Jami McDermott, Thomas Capaldi, Vincent Aiossa, Brian Mahrer, and Terry Wiyrick as named plaintiffs and adding class action claims under California, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Missouri, New Jersey, New York, Pennsylvania, and Washington wage and hour laws. (ECF No. 148.)

Defendant filed its Answer denying Plaintiffs' allegations on January 13, 2012. (ECF No. 25.) In its Answer, Defendant averred that it properly classified Plaintiffs and all MLOs as exempt employees under a number of different exemptions to the overtime pay requirement, including the administrative and outside sales exemptions. (Id.) Pursuant to 29 U.S.C. § 259, Defendant also pled an affirmative defense seeking blanket immunity from liability on the grounds that its "alleged failure to pay Plaintiffs or any putative class or collective member overtime wages, if at all, was in good faith inconformity [sic] with and in reliance on an administrative regulation, order, ruling, approval, interpretation, administrative practice, and/or enforcement policy of the United States Department of Labor and/or the Ohio Department of Commerce, Bureau of Wage and Hour." (Id.)

Plaintiffs moved for conditional certification of the collective class under the FLSA and

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an alleged failure to pay overtime on behalf of her and all other employees alleged to be similarly situated. On August 12, 2013, Plaintiff Marrero voluntarily dismissed the Marrero Action, without prejudice and without costs, and is now a named plaintiff in this action. Further, on February 20, 2013, Plaintiff Sarah Elizabeth Goodman filed a lawsuit against Defendant in the United States District Court for the Southern District of Indiana, captioned Goodman, et al. v. PNC Bank, N.A., Case No. 1:13-CV-00290 (the "Goodman Action"). Plaintiff Goodman alleged a class action claim under Indiana law for an alleged failure to pay overtime on behalf of her and all other employees alleged to be similarly situated. On August 12, 2013, Plaintiff Goodman voluntarily dismissed the Goodman Action, without prejudice and without costs, and is now a named plaintiff in this action.

on February 13, 2013, the Court granted their motion.[2] (ECF Nos. 52, 80.) Notice of the lawsuit was mailed to all eligible collective class members on March 28, 2013, and there are 909 eligible individuals who joined this lawsuit as FLSA Opt-in Plaintiffs. (Lukas Decl. ¶ 3.)

Subsequently, the parties agreed to attend a mediation, and retained Michael E. Dickstein, Esq. of Dickstein Dispute Resolution/MEDiate to serve as a neutral mediator. (Id. at ¶ 4.) Prior to the mediation, the parties provided Mr. Dickstein with detailed mediation briefs outlining their respective positions in this litigation, and the parties exchanged the briefs as well. (Id.) On June 18th, 2013, the parties participated in an all-day mediation session with Mr. Dickstein, and reached a tentative settlement with the execution of a five-page Memorandum of Understanding. (Id.) On June 24, 2013, the parties notified the Court of the settlement, (ECF No. 141), and memorialized the terms in a comprehensive settlement agreement. (ECF No. 149-2, Settlement Agreement.)

Plaintiffs filed a motion for preliminary settlement approval, which the Court granted on January 2, 2014. (ECF No. 150.) In its Order, the Court: (1) preliminarily approved the settlement as fair, reasonable and adequate; (2) certified the collective action pursuant to 29 U.S.C. § 216(b) pending final approval of the settlement; (3) certified a Rule 23 class for the purpose of settlement in New York, Kentucky, California, Illinois, Maryland, Pennsylvania, Washington, Ohio, Indiana, Massachusetts, Missouri and New Jersey; (4) appointed Nichols Kaster, PLLP, Oliver Law Offices, Inc., Meyer Wilson Co., LPA, Berger & Montague, P.C., and Schneider Wallace Cottrell Konecky LLP as Class Counsel for the Settlement Class, with Nichols Kaster, PLLP acting as lead Class Counsel; (5) approved Rust Consulting, Inc. as

[2] The Court further granted Plaintiffs' request to partially toll the statute of limitations, and so the notice of the lawsuit was mailed to all MLOs who worked for Defendant between March 19, 2009 and April 4, 2011. (ECF No. 89.)

Claims Administrator; (6) approved the proposed Notice Regarding Pendency of Class Action and distribution plan; (7) acknowledged that 13 ineligible individuals would be dismissed without prejudice and with 30 days' tolling as part of the Court's final approval order; and (8) setting the Fairness Hearing for January 28, 2014, which was later rescheduled to May 14, 2014. (ECF No. 150, Preliminary Approval Order; ECF No. 152, Revised Order Setting Date for Fairness Hearing.)

## II. THE SETTLEMENT CLASSES

There are two groups of MLOs who are eligible to participate in the Settlement:

> (1) All FLSA Opt-In Plaintiffs who filed consent to join forms with the Court between November 3, 2011 and July 1, 2013, who were employed by Defendant as a MLO between the earlier of March 19, 2009 or the date three years prior to the date they filed a consent to join form with the Court, and April 4, 2011, and who have not otherwise withdrawn their consent forms or been dismissed by the Court; and
>
> (2) All putative class members covered by the California, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Washington class action claims in the Amended Complaint. The statute of limitations for putative class members in each respective class is as follows: (i) New York: March 19, 2006 to April 4, 2011; (ii) Kentucky: March 19, 2007 to April 4, 2011; (iii) California: March 19, 2008 to April 4, 2011; (iv) Illinois: December 16, 2008 to April 4, 2011; (v) Maryland, Pennsylvania, and Washington: March 19, 2009 to April 4, 2011; (vi) Ohio: November 3, 2009 to April 4, 2011; and (vii) Indiana, Massachusetts, Missouri, and New Jersey: March 19, 2010 to April 4, 2011.

(ECF No. 149-2, Settlement Agreement at § 1.4.)

## III. SETTLEMENT AMOUNT AND ALLOCATION

The Parties agreed to settle all claims in the case for $7,000,000.00 with no funds reverting to Defendant. Following deductions for attorneys' fees for $2,310,000 (33% of the total settlement amount), litigation expenses and costs for $48,360.88,[3] $25,000 in

[3] Class counsel has filed a motion for approval of their attorneys' fees, costs and Named Plaintiff enhancement awards concurrently with the motion for final settlement approval.

administration costs, and Class Representative Awards totaling $42,500, if approved by the Court, $4,578,696.60[4] will be divided among the 1335 participating Class Members. (Lukas Decl. ¶ 6.)

Each individual's allocation was determined based on the following data produced by Defendant: (i) for each Opt-in Plaintiff, the number of weeks worked between March 19, 2009 and April 4, 2011; (ii) the total number of weeks worked by class members in the states of California, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Washington for the same time period; and (iii) payroll data for the Plaintiffs and Rule 23 class members for the relevant time periods. (Lukas Decl. ¶ 7.) From this data and for the preliminary allocations, Class Counsel calculated each individual's potential damages and assigned *pro rata* shares of the Settlement to each of the Plaintiffs and Rule 23 Class Members.[5] In addition, the parties valued the pro rata shares of the Settlement Class Members who joined the case prior to mediation (the opt-in Plaintiffs) higher than workweeks of Settlement Class Members who did not join prior to mediation (the Rule 23 class members).

There are good reasons for that allocation decision. Plaintiffs submit that the opt-in Plaintiffs' claims are more valuable than the Rule 23 class members' claims because they were asserted prior to mediation, which played a large role in Defendant's decision to agree to mediate and ultimately settle. (Lukas Decl. ¶ 8). Moreover, even if Defendant successfully decertified the FLSA collective, each opt-in Plaintiff could and presumably would pursue their individual claim while preserving their statutory period, which was tolled when they opted-in to the case. (Id.) Rule 23 class members, however, do not have the same luxury: if Plaintiffs

[4] This figure includes a total of $4,557.53 from the Reserve Fund, discussed infra, which has been applied towards the settlement allocations.

[5] The *pro rata* allocations to the Plaintiffs and Rule 23 Class Members were filed as Exhibit B to Plaintiffs' Unopposed Motion for Preliminary Approval. (ECF No. 149-3.)

moved for and lost class certification, their claims would not be tolled and they would likely never pursue their claims. (Id.) Finally, Plaintiffs submit that the opt-in Plaintiffs' claims should be valued slightly higher than non-opt-ins' claims, in acknowledgment of the fact that the opt-in Plaintiffs affirmatively acted at potential risk to their careers in the mortgage industry, while the Rule 23 class members were provided the opportunity to join when notice of the lawsuit was mailed on March 28, 2013 after the case was conditionally certified (before the parties agreed to mediate), but chose to remain silent. (Id.) In the end, both groups received substantial value for their claims: after deductions for attorneys' fees and costs, opt-in Plaintiffs and Rule 23 class members will receive payment for the equivalent of approximately four hours and three hours respectively of overtime for each week they worked for Defendant during the eligible time periods, including holidays and other weeks in which class members took vacation or sick days. (Id. at ¶ 9.)

After the deadline to respond to the Notice Regarding Pendency of a Class and Collective Action ("Notice") passed, Class Counsel calculated a final allocation of settlement amounts for the individuals who timely executed a Consent to Join Settlement Form. Any unclaimed funds (i.e., amounts allocated to non-responsive Class Members or Class Members who opted out) were reallocated to the individuals participating in the settlement. No settlement amounts revert back to Defendant.

The settlement represents a significant recovery for the Plaintiffs and Rule 23 Class Members. After attorneys' fees and costs have been deducted, the settlement allocation will provide an average recovery for each opt-in Plaintiff and Rule 23 Class Member of approximately $3,835 and $2,652 respectively. (Id. at ¶ 6; Ex. 1, Final Allocation Spreadsheet, redacted.)

## IV. NOTICE OF SETTLEMENT AND REACTION OF THE CLASS

Consistent with the Court's preliminary approval order, the Claims Administrator mailed the Notice to Class Members on February 6, 2014. (Declaration from Claims Administrator Stacy Roe ("Roe Decl.") ¶ 10.) The Notice of Settlement provided the Class Members information about the terms of the settlement, informed them about the allocation of attorneys' fees, explained their right to object to or exclude themselves from the settlement and provided specific information regarding the date, time and place of the Fairness Hearing. (ECF No. 149-2 at 55-63.) The Notice also included a statement indicating that by affirmatively opting into the settlement, he or she releases and discharges Defendant from any and all FLSA and state law wage and hour claims, causes of action, or liabilities based on or arising out of the allegation that Defendant did not properly compensate its MLOs for all hours worked through April 4, 2011. (Id.)

Prior to mailing the Notices, the Claims Administrator processed and updated the mailing addresses utilizing the National Change of Address Database maintained by the U.S. Postal Service. (Roe Decl. ¶ 9.) Over the course of the 45-day claims period, the Claims Administrator promptly performed traces for alternate addresses and re-mailed the Notices to any Class Members whose Notices were returned as undeliverable. (Id. at ¶ 13.) The Claims Administrator received a total of 29 undeliverable notices and either performed a trace to identify alternate addresses or received updated addresses from Class Counsel. Of the 29 undelivered Notices, the Claims Administrator mailed to alternate addresses for 18 Class Members, none of which were returned undeliverable. (Id.)

The Claims Administrator also mailed a reminder postcard on February 21, 2014 to Class Members who had not responded to the settlement at that time. (Id. at ¶ 12.) Of the

1,743 Class Members, 1,335 accepted the settlement by returning a Consent to Join Settlement Form, five submitted valid opt-out forms, and no one objected.[6] (Id. at ¶ 14, 15, 18.)

## ARGUMENT

### I. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE

Before a district court approves a settlement, it must find that the settlement is "fair, reasonable, and adequate." Johnson v. Midwest Logistics Sys., Ltd., 2013 WL 2295880 (S.D. Ohio May 24, 2013) (citing UAW v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)). A district court looks to seven factors in determining whether a class action settlement is fair, reasonable, and adequate:

> (1) the risk of fraud or collusion;
> (2) the complexity, expense and likely duration of the litigation;
> (3) the amount of discovery engaged in by the parties;
> (4) the likelihood of success on the merits;
> (5) the opinions of class counsel and class representatives;
> (6) the reaction of absent class members; and
> (7) the public interest.

Id. (citing UAW, 497 F.3d at 631). In reviewing a proposed class action settlement, the district court has "wide discretion in assessing the weight and applicability" of the relevant factors. Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205–06 (6th Cir.1992). As set forth below, the settlement easily meets the standard for final settlement approval and should be approved by the Court.

#### 1. The Absence of Collusion in the Settlement Favors Approval

[6] Following the Court's issuance of an Order granting final approval of the settlement and dismissing the case, the Claims Administrator will be responsible for: (1) issuing Settlement Payments to participating Plaintiffs and Class Members; (2) calculating and remitting all required payroll taxes to the IRS and state government entities; (3) calculating, issuing and mailing IRS Form W-2s and IRS Form 1099s to the participating Plaintiffs and Class Members; and (4) after settlement checks are mailed, providing Class Counsel with the names of any individuals who have not negotiated their settlement checks prior to the void date. Class Counsel will work with the Administrator to take all necessary steps to ensure that the Notice of Settlement and settlement checks are sent to the correct addresses.

It is beyond dispute that the settlement was the result of arm's-length negotiations, free of collusion or fraud, conducted by experienced counsel for all parties, and achieved through a formal mediation conducted by mediator Michael E. Dickstein, Esq. of Dickstein Dispute Resolution/MEDiate. See Bert v. AK Steel Corp., 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008) ("[t]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."). Counsel for the parties rigorously advocated for their respective clients before and during the full-day mediation that resulted in a settlement that counsel believes is fair and reasonable.

**2. The Complexity, Expense, and Likely Duration of this Case Weight in Favor of Final Approval**

This factor strongly favors approval because, absent settlement, continued litigation would require significant discovery and protracted motion practice concerning disputed issues, including: (i) whether the MLOs are overtime-exempt under the FLSA and the various state laws; (ii) the extent to which these MLOs actually worked overtime hours; (iii) if Defendant's alleged misclassification was "willful" for purposes utilizing the FLSA's three-year statute of limitations and seeking liquidated damages should Plaintiffs prevail; and (iv) whether MLOs could proceed to trial on a class and/or collective basis. (Lukas Decl. ¶ 33.) Resolution of these complex issues would substantially delay any potential payment by several years. Rather than continue further down this path, the settlement confers a substantial and immediate benefit upon opt-in Plaintiffs and Class Members in the form of an average individual recovery of $3,835 and $2,652, respectively. (Id. at ¶ 6.) This factor thus weighs in favor of approval.

**3. The Discovery Taken By the Parties Favors Approval of the Settlement**

Since filing the Complaint in November 2011, Class Counsel has extensively investigated the facts, claims, and defenses at issue in the case through interviews with the Named and Opt-in Plaintiffs, review of documents produced by Plaintiffs, and, in preparation for mediation, analyzed thousands of lines of electronic data relevant to the potential damages produced by Defendant. (Lukas Decl. ¶ 28; Cottrell Decl. ¶ 8-11; 30.[7])

Further, in connection with the mediation, the parties submitted exhaustive mediation briefs to the mediator and exchanged the briefs to each other as well. (Lukas Decl. ¶ 4.) Accordingly, the parties were well informed of the facts, evidence, and legal issues present in this case prior to the mediation during which the Settlement was reached.

**4. The Likelihood of Success on the Merits**

The Settlement provides relatively early relief to Class Members, and eliminates the risks that the parties would otherwise bear if this litigation were to continue. As discussed above, absent settlement, the parties would have engaged in extensive discovery (including written discovery and depositions), and contested class certification, FLSA collective decertification, and dispositive motions on merits and damages issues. While Plaintiffs continue to believe that they would ultimately prevail on these issues, they recognize the inherent risk of litigation and potentially proceeding to trial. See, e.g., Henry v. Quicken Loans, Inc., 698 F.3d 897, 902 (6th Cir. 2012) (affirming jury verdict that mortgage bankers were properly classified as exempt from the overtime pay requirements of the FLSA). By agreeing to the Settlement, those risks are eliminated and participating Class Members will receive an excellent recovery potentially in a matter of weeks, and in any event, certainly this year.

**5. The Opinions of Class Counsel and Class Representatives Favor Settlement**

[7] Carolyn Cottrell's declaration was filed in support of Class Counsel's Motion for Attorneys' Fees, Costs and Enhancement Payments filed concurrently with this motion.

Class Counsel, who have resolved many overtime rights cases on both a class-wide and individual basis, as well as many other class action cases, are convinced that this settlement is fair and reasonable both standing on its own and when viewed against other overtime settlements. (See ECF Nos. 149-1, 149-6, 149-7, 149-8, 149-9, Declarations of Paul J. Lukas, Matthew R. Wilson, Jami Oliver, Carolyn Cottrell, and Shanon Carson.)

Further, each of the thirteen Class Representatives signed the Settlement Agreement and returned timely Consent to Join Settlement Forms, confirming their support for the Settlement. (See ECF No. 149-2 at 33-46.) Accordingly, this factor weighs in favor of final approval.

**6. The Reaction of the Class Members**

The reaction of the class strongly supports approval. No one objected to the settlement and of the 1,743 Class Members, only five opted out. (Roe Decl. ¶¶ 10, 15) Further, a total of 1,335 accepted their settlement offers, comprising of 878 of 909 FLSA opt-ins (97%) and 457 of 834 Rule 23 class members (55%). (Id. at ¶14; Lukas Decl. ¶ 11.) The overwhelmingly positive reaction to the settlement supports approval.

**7. Approval of this Settlement is in the Public's Interest**

Public policy generally favors settlement of class action lawsuits. Hainey v. Parrott, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007) (citation omitted). The settlement provides relief for a substantial number of Class Members, avoids further litigation in a large and complex case and frees the Court's valuable judicial resources. Accordingly, the Court should conclude that this factor weighs in favor of approving the proposed Settlement because the public interest is served by resolution of this action.

**8. The Notice was Sufficient**

Lastly, the content of the Notice of Class Action Settlement, which was approved by the Court in its Order preliminarily approving the settlement, fully complies with due process and Rule 23. (See ECF No. 150 at ¶ 6.) Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

The Notice satisfied each of these requirements and was designed to advise Class Members of their rights. (See ECF No. 149-2 at 55-63.)

Further, the Claims Administrator mailed the Court-approved Notices to Class Members consistent with this Court's Preliminary Approval Order. (Lukas Decl. ¶ 10.) Before mailing the Notices, the Claims Administrator updated the list of addresses utilizing the National Change of Address Database. (Roe Decl. ¶ 9.) The Claims Administrator received a total of 29 undeliverable Notices, and of these Notices, only 11 were ultimately undeliverable. (Id. at ¶ 13.) Accordingly, only a tiny fraction of the Class did not have the opportunity to object, be excluded or otherwise be heard, despite the Claims Administrator's best efforts. As such, the Court should find that the parties have satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process, and that the Notice constituted the best notice practicable under the circumstances.

## II. THE COURT SHOULD APPROVE THE FLSA SETTLEMENT

Because Plaintiffs' FLSA claims are distinct from the Rule 23 Class Members' state law claims, Plaintiffs seek approval of the settlement of the FLSA claims separately. The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA

settlement does not implicate the same due process concerns as does a Rule 23 settlement. See McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984) (explaining that FLSA collective actions do not implicate the same due process concerns as Rule 23 actions because, under the FLSA, "parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date"). Courts approve FLSA 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, 1353 n.8 (l1th Cir. 1982); Kritzer v. Safelite Solutions, LLC, 2012 WL 1945144, at * 5-8 (S.D. Ohio, May 30, 2012) (approving a hybrid FLSA and Rule 23 action settlement because the settlement resolved a bona fide dispute and was fair, reasonable and adequate.) Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. Lynn Food Stores, 679 F.2d at 1353-54. If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement. Id. at 1354.

As set forth in Section I, supra, the settlement was the result of arm's-length negotiations. The parties contested the scope of coverage under the FLSA and the amount of unpaid time worked. Recognizing the uncertain legal and factual issues involved, the parties engaged in an all-day mediation session with an experienced mediator and ultimately reached the settlement pending before the Court. During the litigation and at the mediation, Plaintiffs and Defendant were represented by experienced counsel and the settlement was the result of good faith, arm's-length negotiations. Accordingly, Plaintiffs request that the Court approve the FLSA Settlement.

## III. CERTIFICATION OF THE RULE 23 SETTLEMENT CLASS AND FINAL CERTIFICATION OF THE FLSA COLLECTIVE CLASS ARE APPROPRIATE

The Court certified the FLSA Collective Action and the State Law Classes in its preliminary approval Order. (See ECF No. 150.) For the same reasons provided in Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement, ECF No. 149, the Court should maintain certification of the State Law Classes and FLSA Collective.

## IV. THE COURT SHOULD APPROVE THE PARTIES' PROPOSED CY PRES BENEFICIARY

The Settlement provides for certain settlement funds to be donated to a designated cy pres beneficiary, which the parties have agreed would be United Way of Central Ohio. Under the Settlement Agreement, this cy pre recipient would receive any unused amounts of the $20,000 Reserve Fund.[8] (ECF No. 149-2, Settlement Agreement at § 2.2.5.) As of the date of this motion, there is approximately $12,442.47 remaining in such fund. (Lukas Decl. ¶ 12.) Second, in the unlikely event that participating Class Members fail to cash their settlement checks before the expiration date (120 days from date of issuance), those funds would also be donated to the cy pres beneficiary. (ECF No. 149-2, Settlement Agreement at ¶ 2.7.4.) It is unlikely that there will be many funds, if any, from the latter source because at the 60-day mark of the 120-day check cashing period, the Claims Administrator must inform Class Counsel of any Class Members who have failed to cash their settlement checks, so that Class Counsel may contact them to remind them of the deadline. (Id.) Further, the Claims Administrator must work with Class Counsel to re-issue any lost or damaged settlement checks. (Id.) In short, to the extent there are any funds to distribute to the cy pres beneficiary, they will amount to only a

[8] The parties created a Reserve Fund in the amount of $20,000 to address good faith claims regarding settlement allocation disputes, individuals who were not identified as Class Members or any other reasonable purpose necessary to effectuate the settlement. (ECF No. 149-2, Settlement Agreement, § 2.2.5.)

small fraction of the total settlement amount. Accordingly, Plaintiffs request that, in connection with its Order granting this motion, the Court authorize these payments to be made to the parties' proposed cy pres beneficiary—United Way of Central Ohio. Kritzer, 2012 WL 1945144, at *10 (approving distribution of uncashed settlement checks to cy pres beneficiaries).

## CONCLUSION

For all of the reasons stated above, Plaintiffs respectfully request that the Court enter the proposed Order submitted herewith.

Respectfully submitted this 21st day of April, 2014.

s/Reena I. Desai
Paul J. Lukas, MN Bar No. 22084X*
Timothy C. Selander, MN Bar No. 0387016*
Reena I. Desai, MN Bar No. 0388311*
**NICHOLS KASTER, PLLP**
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2242
Telephone: (612) 256-3200
Facsimile: (612) 215-6870
lukas@nka.com
selander@nka.com
rdesai@nka.com

**admitted pro hac vice*

David P. Meyer (0065205)
Matthew R. Wilson (0072925)
**MEYER WILSON CO., LPA**
1320 Dublin Road, Suite 100
Columbus, Ohio 43215
Telephone: (614) 224-6000
Facsimile: (614) 224-6066
dmeyer@meyerwilson.com
mwilson@meyerwilson.com

Jami S. Oliver
**OLIVER LAW OFFICES, INC.**
132 Northwoods Blvd., Ste. B
Columbus, Ohio 43235
Telephone: (614) 220-9100
Facsimile: (866) 318-4580

joliver@jamioliver.com

Carolyn H. Cottrell
**SCHNEIDER WALLACE COTTRELL KONECKY LLP**
180 Montgomery Street, Ste. 2000
San Francisco, California 94104
Telephone: (415) 421-7100
Facsimile: (415) 421-7105
ccottrell@schneiderwallace.com

Shannon J. Carson
**BERGER & MONAGUE, P.C.**
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604
scarson@bm.net

**Counsel for Plaintiffs and the Classes**

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

| | |
|---|---|
| Andrew C. Smith: | acsmith@vorys.com, tlavery@vorys.com |
| Jami S. Oliver: | joliver@jamioliver.com |
| David P. Meyer: | dmeyer@meyerwilson.com, docket@meyerwilson.com |
| Matthew R. Wilson: | mwilson@meyerwilson.com, docket@dmlaws.com |
| Sarah E. Bouchard: | sbouchard@morganlewis.com |
| Paul J. Lukas: | lukas@nka.com, assistant@nka.com |
| John R. Richards: | jrrichards@morganlewis.com, cpenaloza@morganlewis.com echapman@morganlewis.com |
| Reena I. Desai: | rdesai@nka.com, assistant@nka.com |
| Timothy C. Selander: | selander@nka.com, assistant@nka.com |
| Steven R. Wall: | swall@morganlewis.com |
| Michael J. Boyle, Jr. | mboyle@meyerwilson.com |

Dated: April 21, 2014 NICHOLS KASTER, PLLP

/s/ Reena I. Desai

Reena I. Desai, MN Bar No. 0388311*
4600 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
T: (612) 256-3200
F: (612) 215-6870
E: rdesai@nka.com

**admitted pro hac vice*

**Counsel for Plaintiffs**