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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KELLY MARIE CAMP	CIVIL ACTION
VERSUS	NO. 01-2680 c/w 03-721, 04-1151, 04-1344, 04-1368 & 04-1921
THE PROGRESSIVE CORP. ET AL	SECTION "I" (2)
JOHNNY WAYNE KONKLE ET AL.	CIVIL ACTION
VERSUS	NO. 03-2507
THE PROGRESSIVE CORP. ET AL.	SECTION "I" (2)

CONDITIONAL DISMISSAL ORDER AND REASONS

On September 22, 2004, the court conducted a joint fairness hearing concerning a proposed settlement of all claims in Kelly Marie Camp v. The Progressive Corp. et al.,[1]

[1]Defendants are The Progressive Corporation, Progressive Casualty Insurance Company, Progressive Classic Insurance Company, Progressive Halcyon Insurance Company, Progressive Northern Insurance Company, Progressive Northwestern Insurance Company, Progressive Security Insurance

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Civil Action No. 01-2680, and the five cases consolidated with it. The court had previously conditionally certified Camp as a collective action to recover unpaid overtime wages from Progressive under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Record Doc. No. 71.

A fairness hearing concerning the proposed settlement was also conducted at the same time in the case of Johnny Wayne Konkle et al. v. The Progressive Corp. et al.,[2] Civil Action No. 03-2507. Plaintiffs also filed the Konkle action as a putative collective action to recover unpaid overtime wages under the FLSA. However, the case has not yet proceeded to the certification stage.

Participating in the joint fairness hearing were Edward Lilly, Edward J. Castaing, Jr., Jonathan M. Herman, William Cherbonnier and James M. Jacobs, representing plaintiffs in all of the captioned cases; and Ellis B. Murov and Gregory V. Mersol, representing defendants in all cases.

The proposed settlement includes a lump sum payable by Progressive to plaintiffs' attorneys for their fees and costs. Class Counsel filed a Motion for Approval of a Reasonable Attorneys' Fee and Reimbursement for Costs Expended, which addresses the

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Company and Progressive Specialty Insurance Company (collectively "Progressive").

[2]Defendants in this action are the same as those in the Camp action.

reasonableness of the proposed attorney's fees and costs. Record Doc. No. 1796. The issues raised by Progressive's partial opposition to that motion, Record Doc. No. 1797, were resolved by the court's minute entry dated July 1, 2004. Record Doc. No. 1808. Accordingly, the motion is unopposed.

Having considered the complaints, as amended; the record; the evidence; the Stipulation of Class Action Settlement and Release (the "Stipulation"), as amended orally in open court and as will be amended in writing consistent with the oral amendments; the written objections of class members to the settlement; and the applicable law, and for the following reasons, the court enters the order set forth below.

I. PROCEDURAL BACKGROUND

A. The *Camp* Litigation

Camp was formerly an insurance claims representative employed by one of the Progressive defendants. She filed the instant action, individually and on behalf of those similarly situated, in this court to recover unpaid overtime wages from Progressive under the FLSA. Camp also sought a declaratory judgment that Progressive had violated the FLSA by improperly classifying her and other claims representatives nationwide as administrative employees who are exempt from the overtime provisions of the FLSA. First Amended Complaint, Record Doc. No. 31. This matter was referred to the

undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 45.

On November 8, 2002, the court conditionally certified a nationwide class in Camp under Section 216(b) of the FLSA,

> consisting of all current and former salaried employees of the Progressive family of insurance companies ("Progressive Insurance Company"), located in the 50 States, who are or were employed as claims representatives or otherwise performed claims adjusting services consistent with the policies, procedures, scripts and manuals promulgated by Progressive Insurance Company and who did not receive overtime pay within the two years preceding the date of entry of the instant order or within the three years preceding the date of entry of the instant order if the violation was willful.

Record Doc. No. 71.

B. The *Farris* Litigation

Lynette Farris and other plaintiffs brought an FLSA action against Progressive in state court in Texas. That case was removed to federal court in the Northern District of Texas, which transferred it to this court under the first-to-file rule. It was filed as C.A. No. 03-721, consolidated with Camp, Record Doc. No. 5, and referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 6.

C. The *Walker* Litigation

John Walker and Kevin A. Krieg filed an action in federal court in the Western District of Washington, alleging misclassification of Progressive's claims representatives nationwide as exempt administrative employees, in violation of the overtime provisions of the FLSA and similar Washington state laws. The court dismissed the case in favor of the Camp litigation under the first-to-file rule.

Plaintiffs re-filed their class action complaint in Washington state court, alleging only violations of state law. Defendants removed it to federal court, where it was again dismissed in favor of the Camp litigation under the first-to-file rule. That dismissal is currently on appeal in the United States Court of Appeals for the Ninth Circuit.

After the dismissal, Walker and Krieg opted into the Camp litigation. Camp, Walker, and Krieg filed a Third Amended Complaint in Camp, as part of the settlement proposal, seeking to establish a settlement class under Washington law, while leaving the appeal to the Ninth Circuit undisturbed pending the settlement proceedings. Record Doc. No. 1788.

D. The *Dailey* Litigation

David G. Dailey filed a class action complaint in state court in Pennsylvania, alleging that Progressive had misclassified its claims representatives in Pennsylvania as

exempt in violation of state law. Progressive removed the action to federal court, but it was remanded to state court.

In connection with the proposed settlement, Dailey amended his complaint to assert an FLSA claim. Progressive then removed the suit to federal court in Pennsylvania, which transferred it to this court. It was filed under C.A. No. 04-1344 and consolidated with Camp. Record Doc. No. 2. This matter was subsequently referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 3.

E. The *Konkle* Litigation

Johnny Wayne Konkle and other plaintiffs filed this action in this court, alleging that Progressive had misclassified its claims representatives nationwide as exempt during their introductory training periods only, in violation of the FLSA. This matter was referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 18. This action has not been consolidated with Camp.

F. The *Jonas* Litigation

Camille Ephraim Jonas and Christine Maloney filed a class action complaint in state court in New York, alleging that Progressive violated New York law by classifying its claims representatives in the state as exempt. Progressive removed the action to federal court in the Eastern District of New York. The case was transferred to this court, filed under C.A. No. 04-1368, and consolidated with Camp. Record Doc. No. 3. This matter was subsequently referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 4.

G. The *Rorie* Litigation

David Rorie filed a class action in Maryland state court, alleging that Progressive violated state law by classifying its claims representatives in Maryland as exempt. Progressive removed the action to federal court for the District of Maryland, which transferred it to this court, where it was filed under C.A. No. 04-1151 and consolidated with Camp. Record Doc. No. 4. This matter was subsequently referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 5.

H. The *Ireland* Litigation

Stewart Ireland, III filed a class action complaint in federal court for the Eastern District of Michigan, alleging that Progressive violated Michigan law by misclassifying its claims representatives in that state as exempt. The action was transferred to this court, where it was filed under C.A. No. 04-1921 and consolidated with Camp. Record Doc. No. 7. This matter was subsequently referred to the undersigned magistrate judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 8.

I. Discovery and Motions

The parties in Camp and Konkle have exchanged extensive written discovery requests and responses and have conducted 35 depositions. Both sides have submitted partially dispositive motions in Camp, some of which have been resolved in favor of Progressive.

J. The Proposed Settlement

On June 18, 2004, I granted the parties' Joint Motion for Preliminary Approval of Settlement of Captioned Collective and Class Actions in all of the captioned cases. As part of the preliminary approval order, I ordered the Claims Administrator (as defined in the Stipulation, as amended) to mail a Notice of Class Action Settlement, Standard

Claim Form, and Request for Exclusion to each class member. Class members were ordered to file any written objections to the settlement agreement with the court no later than five days before the fairness hearing, which was set for August 18, 2004. Record Doc. No. 1794 in C.A. No. 01-2680; Record Doc. No. 54 in C.A. No. 03-2507.

The parties continued to negotiate a final stipulation of settlement. The court extended the deadline for filing the final stipulation and continued the fairness hearing until September 15, 2004. Record Doc. No. 1809 in C.A. No. 01-2680; Record Doc. No. 53 in C.A. No. 03-2507. The parties filed their Final Stipulation on July 19, 2004. Record Doc. No. 1810 in C.A. No. 01-2680; Record Doc. No. 54 in C.A. No. 03-2507. Because this court was closed on September 15, 2004 due to the approach of Hurricane Ivan, the fairness hearing was continued for one week to September 22, 2004. Record Doc. No. 1822 in C.A. No. 01-2680; Record Doc. No. 57 in C.A. No. 03-2507. The Stipulation was amended orally in open court by counsel for both parties during the hearing and will be amended in writing consistent with the oral amendments.

II. THE SETTLEMENT AGREEMENT IS APPROVED

A. Legal Standards for Approval of Settlement

Before the court may approve a settlement in a collective action brought under the FLSA, it must first determine whether the settlement involves the resolution of a bona

fide dispute over an FLSA provision and then decide whether the settlement is fair and reasonable. Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-55 (11th Cir. 1982); Jarrad v. Southern Shipbldg. Corp., 163 F.2d 960 (5th Cir. 1947); Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003) (quoting Lynn's Food Stores, Inc., 679 F.2d at 1354).

The instant actions brought under the FLSA presented bona fide disputes over FLSA provisions, including whether the administrative exemption from overtime pay is applicable to the named plaintiffs and class members during both their training and post-training periods, whether class members engaged in production activities, whether the applicable statutes of limitations might bar any class members' claims, whether class members were similarly situated for purposes of certification of a collective action, whether Progressive willfully violated the statute or acted in good faith, the extent of overtime actually worked, the amount of overtime pay that may be due, and the possibility of recovery of liquidated damages.

Like the FLSA, Fed. R. Civ. P. 23(e), which governs settlement of class actions, requires court approval before a proposed class action settlement may be finalized. Such a settlement must be "fair, adequate and reasonable" and cannot be the product of collusion between the parties. In re Beef Indus. Antitrust Litig., 607 F.2d 167, 179 (5th

Cir. 1976); Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977). Thus, the Rule 23(e) standard encompasses the "fair and reasonable" settlement standard of the FLSA collective action, and cases interpreting Rule 23(e) are analogous and applicable to the instant FLSA actions.

The transferred and consolidated cases brought under state law are opt-out class actions under the applicable state laws and are equivalent to Rule 23 class actions. Wash. R. Super. Ct. Civ. Ct. R. 23; Pa. R. Civ. P. 1711; N.Y. C.P.L.R. § 903; Md. R. Civ. P. 2-231; Mich. Ct. R. 3.501. Each state's laws require court approval of class settlements and provide the same "fair, adequate and reasonable" standard as Fed. R. Civ. P. 23(e). Pickett v. Holland Am. Line-Westours, Inc., 35 P.3d 351, 356 (Wash. 2001); Fischer v. Madway, 485 A.2d 809, 812 (Pa. Super. Ct. 1984); State v. Philip Morris, Inc., 686 N.Y.S.2d 564, 565 (N.Y. Sup. Ct. 1998); Dotson v. Bell Atlantic-Md., Inc., No. CAL 99-21004, 2003 WL 23508428, at *4 (Md. Cir. Ct. Nov. 13, 2003); Brener v. Marathon Oil Co., 565 N.W.2d 1, 3 (Mich. Ct. App. 1997).

In determining whether a settlement is fair, adequate and reasonable, the court should consider the following six factors:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and

(6) the opinions of the class counsel, class representatives, and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983) (citing Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir. 1982)).

When considering these factors, the court should keep in mind the "strong presumption" in favor of finding a settlement fair. Cotton, 559 F.2d at 1331; Henderson v. Eaton, No. 01-0138, 2002 WL 31415728, at *2 (E.D. La. Oct. 25, 2002) (Vance, J.). Moreover, the court is aware, as the parties must also be, that a "settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 806 (3d Cir. 1995) (citing Cotton, 559 F.2d at 1330).

B. Certification of Collective Action

Certification of a class for settlement purposes is useful in resolving major class action disputes. See, e.g., In re Corrugated Container Antitrust Litig., 643 F.2d 195, 207-10 (5th Cir. 1981); In re Beef Indus. Antitrust Litig., 607 F.2d at 173-77. Accordingly, IT IS ORDERED that two collective action classes are certified for settlement purposes only, as follows.

1. *The Training Class*

The Training Class for settlement purposes is that alleged in the Konkle litigation, i.e., any and all persons who went through one or more introductory training classes (Property Damage I, Casualty I, and/or Medical Representative I) in the entire United States between April 29, 1996 and December 31, 2001 ("Training Period"), and who did so while occupying the positions of (1) Associate Claims Representative, (2) Claims Representative I, (3) Medical Representative I, and/or (4) SIU Special Investigator I. Persons who are members of the Post-Training Class may also be part of the Training Class, provided that they occupied one of these positions during the Training Period.

Konkle is appointed the Class Representative for this class.

2. *The Post-Training Class*

The Post-Training Class consists of the class already conditionally certified in Camp. For settlement purposes only, the Post-Training Class consists of those who occupied the positions of (1) Associate Claims Representative, (2) Claims Representative I, (3) Claims Representative II, (4) Claims Specialist, (5) Medical Representative I, (6) Medical Representative II, (7) Medical Representative III, (8) PFP Claims Representative III, (10) SIU Special Investigator I, (11) SIU Special Investigator II, (12) Senior Claims Representative Certified, and/or (13) Senior Claims

Specialist. The class will also consist of those members of the classes in Walker, Dailey, Jonas, Rorie and Ireland who occupied the same 13 positions in the original forum states of those actions during the Class Period, as defined for each class in the Stipulation, as amended.

In addition, for purposes of settlement, Johnny Wayne Konkle, Christopher P. Vasil, Ronald Galbo, Debra Kiggins, Tracy Shane Taylor, Rose Ann Burford, Robert A. Mills, Amy Murphy, John Barnett, Alfonso A. Matamoros, Jr., Derrick Cooke, Jacquelyn R. Moran, Marie K. Felegi and Josh Buehring (the named Konkle plaintiffs) shall be considered part of the Post-Training Class for their post-training claims.

Finally, as a result of the filing of the Third Amended Complaint in Camp, those persons covered by the uncertified Walker class shall be included in the Camp class.

Camp is appointed as Class Representative for this class. The Plaintiffs' Steering Committee is re-appointed. Record Doc. Nos. 11, 639.

C. The Elements of the Settlement Agreement

The entire settlement consideration is $5,400,000. From this amount, plaintiffs' counsel seek attorney's fees of $1,600,000, which is less than 30% of the total, to be deducted off the top of the $5,400,000 total consideration, plus reimbursement of their actual costs out of the funds remaining after deducting the attorney's fees.

There appear to be several typographical errors in the numbers and calculations set forth on page 18 of the Final Stipulation that was filed in the record. Paragraph VII states that Class Counsel will submit an application for up to $18**9**,539.11 in actual costs. However, Paragraph VIII(A) states that $18**0**,539.11 will be dedicated to costs out of the $3,800,000 total settlement fund, leaving a balance of $3,619,4**06**.90 to be divided among the class members.

To complicate the matter further, plaintiffs' counsel seek actual costs in a third amount of $186,204.78 in their motion for attorney's fees and costs, as reflected in Exhibit A to their motion. Record Doc. No. 1796. When these discrepancies were brought to the attention of counsel during the hearing, the parties agreed to amend the Stipulation to state that plaintiffs' counsel are entitled to recover their actual costs of $186,204.78 and that Progressive will pay to plaintiffs' counsel that amount, rather than the amounts of either $180,539.11 or $189,539.11 in the original Stipulation. The change in the amount of costs will have no affect on the amounts allocated to the class members.

Of the $3,619,460.90 amount allocated to the class members, $1,831,090 will be allocated to the Training Class, $1,686,370.90 will be allocated to the Post-Training

Class and $102,000 will be allocated to the Class Representatives as an incentive payment and enhanced award for their participation in this litigation.

The Training Fund of $1,831,090 will be distributed to approximately 6,714 class members. Each plaintiff will be entitled to a distribution based on the assumption that, on average, each one worked four hours of overtime per week for six weeks during training, at an average annual salary of $26,000. The amount derived by this initial calculation will be doubled to reflect the penalty wages to which each class member would be entitled under the FLSA, should they prevail at trial.

Post-Training Class members shall be paid from the $1,686,370.90 Post-Training Fund an amount based on their actual weeks worked, within the applicable statute of limitations. This amount will be distributed to approximately 3,349 class members. Each plaintiff will be entitled to a distribution based on the assumption that, on average, each worked four hours of overtime per week for 80 weeks, at an average annual salary of $32,999. Because these claims are comparatively weak, the result of this calculation will be adjusted downward by 80% to reflect only a 20% chance of success on the merits of the post-training claims.

The Class Representatives and some other plaintiffs will receive incentive payments for their participation in this litigation, as follows: (1) $10,000 to Camp; (2)

$2,500 to any plaintiff, other than Camp, who gave a deposition; (3) $1,000 to any plaintiff, other than Camp, who assisted in the preparation of written discovery responses but did not give a deposition; and (4) $1,000 to Konkle, in addition to any payment he may receive as a result of his participation in discovery. The parties estimate these payments will total $102,000 and will be paid before the establishment of the Training and Post-Training Funds.

D. Analysis of the *Reed* Factors

Having considered all of the Reed factors, 703 F.2d at 172, in light of the circumstances of this case, as discussed below, I find that the proposed settlement is fair, reasonable and adequate to the class members.

1. *No Evidence of Fraud or Collusion*

The court may presume that a proposed settlement is fair and reasonable when it is the result of arm's length negotiations. 4 Newberg on Class Actions § 11.41 (4th ed.) (available on Westlaw).

> The initial presumption of fairness of a class settlement may be established by showing:
>
> 1. That the settlement has been arrived at by arm's-length bargaining;
> 2. That sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently;
> 3. That the proponents of the settlement are counsel experienced in similar litigation; and

> 4. That the number of objectors or interests they represent is not large when compared to the class as a whole.
> This initial presumption must then withstand the test of the plaintiffs' likelihood of success.

Id.

There is also a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary. Id. § 11.51.

In the instant case, no evidence refutes these presumptions. On the contrary, the evidence establishes that grueling settlement discussions were conducted during almost three years of litigation in this court, culminating in an extensive four-day mediation session with a former United States District Judge acting as mediator and, at the request of all counsel, several additional settlement conferences conducted by me that led to finalization of the Stipulation that was filed in the record. Thirty-five depositions were taken, voluminous discovery requests were propounded, and thousands of pages of documents were produced. Counsel for both sides are experienced in complex and class litigation, and they were thoroughly familiar with the facts and legal issues when they reached the settlement agreement. As of this date, I have received only 10 written objections to the settlement from among the thousands of class members.

The Stipulation, as amended, treats all class members uniformly. Benefits will be distributed based on objective criteria of employment status and amount of overtime worked.

The additional amounts awarded to Class Representatives Camp and Konkle and to those plaintiffs who participated directly in discovery are reasonable. These incentive payments compensate them for their additional time and efforts spent in assisting counsel to prosecute these actions, which benefitted the classes as a whole. "Federal courts consistently approve incentive awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they shoulder during litigation." Henderson, 2002 WL 31415728, at *6 (citing In re Southern Ohio Corr. Facility, 175 F.R.D. 270, 272-73 (S.D. Ohio 1997) (collecting cases)).

Accordingly, I find that the Stipulation, as amended, is the result of arm's length negotiations and that there is no evidence of fraud or collusion. I therefore presume that the proposed settlement is fair and reasonable.

2. *The Complexity, Expense and Likely Duration of the Litigation*
3. *The Stage of the Proceedings and the Amount of Discovery*

These two related factors weigh in favor of finding that the settlement is fair and reasonable. The Camp litigation was the first action filed, on August 31, 2001. A collective action in Camp was conditionally certified on November 8, 2002 and the court

ordered that notice be given to potential class members that they must opt in to the action in writing no later than 120 days later if they wanted to participate. Record Doc. No. 71.

The discovery process was painstaking, complex and contentious. The parties in Camp exchanged extensive written discovery, produced massive amounts of documents, conducted 35 depositions around the country and had numerous hearings before the court about discovery issues. The Camp Case Management Order was amended four times to attempt to contain the litigation, especially discovery, within reasonable limits. The court authorized the parties to use in Konkle the discovery materials that had been produced in Camp.

Both sides filed partially dispositive motions to narrow the issues in Camp and Konkle, some of which were granted and some of which were dismissed as moot pending the parties' settlement negotiations. Counsel vigorously engaged their opponents on the legal issues and the facts. Every motion filed in this action engendered opposition memoranda and, usually, reply memoranda and sometimes surreply memoranda, with memoranda often exceeding the court's usual limit of 25 pages. The court held numerous motion hearings and status conferences during the almost three years that this litigation has been pending in this court.

A jury trial in Camp was scheduled to begin on October 25, 2004 and was projected to last three weeks. Before that would occur, Progressive intended to file a motion to decertify the collective action, which would have required extensive briefing by both parties, with numerous exhibits presented to address the multiple legal and factual questions raised by a motion to decertify, and a lengthy hearing and ultimate opinion by the court. Progressive certainly would have filed additional summary judgment motions following a decision on decertification.

The Class Representatives, Class Counsel and Progressive participated in a four-day mediation in February and March 2004 with the Hon. Richard McQuade, Jr. as mediator. They succeeded in resolving many issues towards a settlement, and I was later able to assist them with resolving the few remaining issues.

Thus, this litigation has been complex, expensive, and time-consuming for counsel, the Class Representatives, Progressive and the court, and was scheduled to continue at least into the beginning of November 2004 for Camp and into 2005 for Konkle. These factors weigh in favor of the settlement.

4. *The Probability of Plaintiffs' Success on the Merits*

This factor militates heavily in favor of approving the settlement. The court should not engage in a trial on the merits when examining the fairness of a proposed

settlement because the very purpose of the compromise is to avoid the delay and expense of a trial. Reed, 703 F.3d at 172. However, the court must analyze the law and facts to some extent to examine the probability of plaintiffs' success on the merits.

a. The exemption for administrative employees

Section 207(a)(1) of the FLSA requires an employer to pay its employees overtime compensation for working more than 40 hours per week. 29 U.S.C. § 207(a)(1). However, there are certain exemptions to this rule, including one for "any employee employed in a bona fide executive, administrative, or professional capacity." Id. § 213(a)(1) (emphasis added).

An employee who receives a salary of more than $250 per week and whose "primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer . . . where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment" is properly classified as an administrative employee. 29 C.F.R. § 541.214(a) (as in effect before August 23, 2004).[3]

[3]The regulations governing exemptions from overtime for executive, administrative, professional, outside sales, and computer employees were significantly revised effective August 23, 2004. See 69 Fed. Reg. 22,122-01, 2004 WL 865626 (April 24, 2004) (codified at 29 C.F.R. Part 541).

Thus, an employee must meet three requirements to be deemed exempt from the FLSA overtime pay provision: "(1) the salary requirement; (2) the requirement that the employee's primary duty consists of work directly related to management policies or general business operations; and (3) the requirement that the employee's primary duty includes the exercise of discretion and independent judgment." Robinson-Smith v. Government Employees Ins. Co., 323 F. Supp. 2d 12, 18 (D.D.C. 2004).

Progressive argues that its claims representatives fall within this exemption. It is undisputed that plaintiffs meet the salary requirement. At issue are whether plaintiffs' work was directly related to management policies or general business operations and whether it included the exercise of discretion and independent judgment.

However, before addressing those criteria, the court examines the likelihood that these cases could even proceed as collective actions to recover overtime under the FLSA.

b. Continued certification is highly unlikely

The court conditionally certified Camp as a collective action pursuant to the FLSA and the two-step, conditional certification process approved by the Fifth Circuit in Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995), based on a finding at the time of certification that the putative class members were "similarly

situated." Under the two-step, conditional certification process, defendant will usually file a motion to decertify after discovery has been completed. Id. at 1214.

Progressive will file such a motion if Camp does not settle. It is extremely likely that I would grant that motion. At the conditional certification stage, the "similarly situated" standard for putative class members "is lenient, plaintiff's burden is not heavy, the evidence needed is minimal and the existence of some variations between potential claimants is not determinative of lack of similarity." Record Doc. No. 71, at p.8. I found then that "Camp has presented the bare minimum of evidence necessary to show that she is similarly situated to other potential claimants." Id. at p.10 (emphasis added).

At the decertification stage, by contrast,

> the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives–i.e. the original plaintiffs–proceed to trial on their individual claims.

Mooney, 54 F.3d at 1214.

The evidence presented in Camp to date convinces me that my original misgivings about the thinness of plaintiff's evidence that she and the class are similarly situated will be confirmed if a motion to decertify is filed. Unless some evidence about which I am

currently unaware would be submitted, I would likely grant that motion. See Moriskey v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 499 (D.N.J. 2000) (denying class certification after extensive discovery; plaintiffs and class members not similarly situated when job responsibilities differed); Ray v. Motel 6 Operating Ltd. P'shp, No. 3-95-828, 1996 WL 938231, at *4 (D. Minn. Mar. 18, 1996) (denying class certification upon review of extensive facts; plaintiffs and class members not similarly situated because of different salaries, geographic locations, and supervisors); Brooks v. Bellsouth Telecomms, Inc., 164 F.R.D. 561, 569 (N.D. Ala. 1995), aff'd, 114 F.3d 1202 (11th Cir. 1997) (denying class certification after extensive discovery; plaintiffs and class members not similarly situated when they represented a variety of pay grades); Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 946 (M.D. Fla. 1994) (same); Ulvin v. Northwestern Nat'l Life Ins. Co., 141 F.R.D. 130, 131 (D. Minn. 1991) (same).

In the absence of any certified collective action, only the individually named plaintiff, Camp herself, could proceed to trial in Camp. No collective or class action has been certified in any of the other cases consolidated with Camp.

I have already denied plaintiffs's motion to certify a class conditionally in Konkle because "[m]y own experience in the Camp case has convinced me that the two-stage conditional certification process is hugely wasteful, inefficient and ineffective." Record

Doc. No. 38, at p.4. Instead, the parties in Konkle were set to proceed under a Fed. R. Civ. P. 23 model, with discovery initially limited to class certification issues and a firm date set for plaintiffs to file a motion to certify a collective action after that discovery had been completed. Id. If the motion to certify were denied, only the 14 individually named plaintiffs would be able to proceed with that action.

All other putative class members in these cases would have to proceed with individual actions, if they chose to do so and if they could find counsel willing to accept their cases. They would face the weakness of many of their individual claims and the expense, delays and risks of litigation. Even under the ridiculous assumption of a 100% chance of success on the merits, the total damages that could be awarded to the individual plaintiffs in any of these actions in the absence of certification would be considerably less than the multi-million dollar settlement being offered here. Thus, the probable outcomes of Progressive's decertification motion in Camp and plaintiffs' certification motion in Konkle alone indicate that the settlement proposal is fair and reasonable.

Nonetheless, the court must assess the reasonable probabilities of plaintiffs' success on the merits, assuming that plaintiffs could proceed to trial with their collective actions. These probabilities differ for the Training and the Post-Training Classes.

c. The Post-Training Class likely meets both tests for the exemption

The court must determine whether the primary duties of the Post-Training Class were directly related to management policies or general business operations and whether those duties included the exercise of discretion and independent judgment.

Progressive alleges that it is in the business of selling insurance. It contends that its claims adjusting function is merely a general business operation of its primary business because most policyholders never make a claim. Plaintiffs contend that Progressive is an adjusting company and that plaintiffs are "production" workers rather than administrative employees. Progressive also argues that all post-training adjusters exercised sufficient discretion and independent judgment to qualify them as bona fide administrative employees, even if they did not always make the final decisions about the claims they handled.

It appears that the Post-Training Class members meet both of these definitions to qualify for the administrative exemption. The claims of the Post-Training Class are both weak and limited in time. The FLSA provides a two-year statute of limitations, except that a three-year statute of limitations applies to willful violations. The court has already granted Progressive's First Motion for Partial Summary Judgment and ruled that the two-

year statute of limitations applies to the Post-Training Class. Record Doc. No. 1729. This limits the number of claimants and the amount of damages that each may recover.

The parties' Stipulation, as amended, acknowledges the weakness of the Post-Training Class's claims when it provides that the award to each plaintiff in this class will be adjusted downward by 80% to reflect only about a 20% chance of success on the merits of these claims. The Stipulation, as amended, also fails to provide any liquidated damages to this class, on the assumption that plaintiffs will not be able to prove any willful violations. I agree with these assessments contained in the Stipulation, as amended.

d. Claims adjusters' duties appear to be directly related to management policies or general business operations

Claims adjusters are specifically mentioned in the Department of Labor regulations as a possible example of an exempt administrative employee, 29 C.F.R. § 541.205(c)(5) (as in effect before Aug. 23, 2004). It is highly unlikely that the court would find that plaintiffs are production workers. To the contrary, it is highly likely that the court would find that claims representatives engage in work "directly related to management policies or general business operations of the employer."

> The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as

> distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

29 C.F.R. § 541.205(a). "The administrative operations of the business include the work performed by so-called white collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." Id. § 541.205(b). "[N]on-manufacturing employees can be considered 'production' employees in those instances where their job is to generate (i.e., 'produce') the very product or service that the employer's business offers to the public." Reich v. John Alden Life Ins. Co., 126 F.3d 1, 9 (1st Cir. 1997).

The evidence in the instant cases strongly indicates that the Post-Training Class members are not production employees. They do not design and generate the insurance policies that Progressive sells. Rather, their activities service existing policies. See id. (insurance company marketing representatives are not production workers because they do not design and generate insurance policies); Robinson-Smith, 323 F. Supp. 2d at 23 ("[defendant] GEICO is in the business of producing insurance policies, not damages

estimates. . . . Estimates are therefore not the 'product' of GEICO.");[4] id. (automobile damage adjusters "are engaged in servicing the insurance policies of GEICO customers and in carrying out the policies formulated by GEICO with respect to auto damage claims").

"In the course of adjusting claims, claims representatives advise management, plan, negotiate, and represent the company. Thus, an employee who negotiates with clients and settles damage claims on behalf of an employer engages in duties consistent with the servicing of a business even though those activities can be viewed as ancillary to the provision of a good or service." Palacio v. Progressive Ins. Co., 244 F. Supp. 2d 1040, 1047 (C.D. Calif. 2002) (citation omitted).

The Palacio court held, after examining the evidence presented on cross-motions for summary judgment, that the plaintiff in that case, a Progressive claims adjuster,

> regularly and continually represented Progressive during negotiations with attorneys and claimants. Moreover, she had absolute authority to settle within her limits . . . . She also regularly advised management regarding claims handling and related matters. Taken together, these are the types of activities contemplated as servicing a business, and thus meet the "directly related" test.

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[4]Several courts, including the Robinson-Smith court, have questioned whether the "administration/production dichotomy" has continuing analytical utility in the context of modern, post-industrial service industries. Id. at n.6 (citing In re Farmers Ins. Exchg. Claims Reps.' Overtime Pay Litig., 300 F. Supp. 2d 1020, 1033 (D. Or. 2003)). The Robinson-Smith court noted that the revised 2004 Department of Labor regulations have moved away from this analysis in the context of service industries. Id. (citing 69 Fed. Reg. at 22,262-23).

> Even taking a narrow view of the administrative/production dichotomy, we still conclude that Palacio was an administrative employee. Progressive is not in the business of claims handling. Rather, it is in the business of writing and selling automobile insurance. Claims handling occurs within a functional department as a type of ancillary customer service. "The vast majority of Progressive's customers never make a claim against the policy they purchase and therefore never come into contact with any claims personnel." As a claims representative, Palacio did not produce the very goods or services that Progressive offered to the public.
>
> . . . .
>
> . . . . The evidence establishes that Palacio was "advising the management, planning, negotiating, [and] representing" Progressive throughout her employment and generally "servicing" the business.

Id. (citations and footnotes omitted); see also McAllister v. Transamerica Occidental Life Ins. Co., 325 F.3d 997, 1003 (8th Cir. 2003) (insurance claims coordinator was administrative employee exempt from FLSA overtime requirements); Munizza v. State Farm Mut., No. 95-35794, 1996 WL 711563, at *4 (9th Cir. Nov. 7, 1996) (same as to insurance claims adjuster); Jastremski v. Safeco Ins. Co., 243 F. Supp. 2d 743, 758 (N.D. Ohio 2003) (same).[5]

Much of the evidence in the instant cases is substantially similar to that in Palacio, and I find that it would very likely establish that the post-training plaintiffs were not production employees.

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[5]I do not find persuasive and reject the reasoning of the two California state court cases that interpreted similar, but not identical, state law provisions to the FLSA and found that claims representatives were non-exempt. Bell v. Farmers Ins. Exchg., 87 Cal. App. 4th 805 (2001); Guttierez v. State Farm Mut., No. BC-236552 (Los Angeles Superior Ct. Dec. 5, 2003).

e. The exercise of discretion and independent judgment

As to the exercise of discretion and independent judgment, the evidence establishes that the Post-Training Class adjusters were authorized to find coverage or to recommend the denial of coverage. They investigated liability claims and determined whether the insured was partially or completely liable, or not liable at all. They determined the existence of affirmative defenses and whether to pursue recovery from a third party through subrogation. They determined or recommended a range for settling bodily injury claims and negotiated settlements based on those ranges. They set or modified reserves. They directed Progressive's counsel at arbitrations and mediations, during discovery, and at trial. For property claims, adjusters decided whether to repair or replace parts of damaged vehicles and whether to declare a total loss. They negotiated damage settlements and contracts of repair. See deposition excerpts cited by Progressive at nn. 22-30 of its Memorandum in Support of Preliminary Approval of Settlement, Record Doc. No. 1792.

These decisions and recommendations are extremely significant to Progressive. Its claims adjusters wrote checks for claims totaling more than $18 billion between 1998 and 2002. Erroneous decisions concerning coverage, liability and affirmative defenses

expose Progressive to significant monetary risk and affect both the ability of policy holders to obtain coverage and/or the amount of their premiums.

Adjusters compare and evaluate possible courses of conduct, evaluate the facts and law underlying each claim, make decisions or recommendations that the insured was or was not negligent based on those evaluations, make decisions or recommendations concerning the monetary value of a claim, and negotiate settlements of claims. See, e.g., exhibits and deposition excerpts cited at nn. 32-36, Record Doc. No. 1792; letter from Tammy McCutchen (the "McCutchen Letter"), Administrator, United States Department of Labor, Employment Standards Administration, Wage and Hour Division, dated November 19, 2002, Defendant's Exh. 2.

The McCutchen Letter concludes that claims adjusters are properly classified as administrative exempt employees when they (a) conducted coverage and liability investigations; (b) made coverage and liability decisions based on the facts and using their own judgment; (c) evaluated bodily injury and property damage claims based on the facts; (d) set or modified reserves; (e) negotiated with claimants, attorneys, and body shops using their judgment and discretion within their settlement authority; (f) recommended settlements in excess of their authority; and (g) negotiated settlements in excess of their usual authority after obtaining additional authority. See Jastremski,

243 F. Supp. 2d at 753 ("The [McCutchen] letter is a thorough, well reasoned, and accurate interpretation of the regulations at issue in this case. The facts are nearly identical, and the opinion letter is less than three months old. I find that this letter deserves deference."); In re Farmers Ins. Exchg. Claims Representatives.' Overtime Pay Litig., 300 F. Supp. 2d at 1035 ("The 2002 DOL opinion letter is thorough, well reasoned, and, in this court's view, an accurate interpretation of the regulations at issue . . . ; thus, it is entitled to deference, at least with respect to the interpretation of the regulations themselves.").

Thus, it strongly appears that adjusters exercise "discretion and independent judgment,"[6] 29 C.F.R. § 541.214(a) (as in effect before Aug. 23, 2004), sufficient to bring them within the administrative exemption.

f. Liquidated damages

Progressive has asserted strong affirmative defenses to liability for overtime wages. Section 216(b) of the FLSA authorizes liquidated damages in an amount equal to unpaid overtime. However, an employer shall not be liable if it "pleads and proves that the act complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the

[6]One of the written objections to the proposed settlement, filed by Scot Kuwaye of Kaneohe, Hawaii, expressly concedes this point. Record Doc. No. 1826.

Administrator of the Wage and Hour Division of the Department of Labor] . . . ." 29 U.S.C. § 259. The FLSA also provides an affirmative defense to the imposition of liquidated damages when the employer can prove that it acted in good faith and with reasonable grounds for believing it was not violating the FLSA. Id. § 260.

Progressive has produced evidence that it was acting in good faith in classifying its claims representatives as exempt post-training. That evidence includes data showing that almost all property casualty insurers classified their claims adjusters as exempt, and letters and opinions from the Department of Labor from which Progressive could reasonably infer that the Department of Labor approved the exempt classification for Progressive's adjusters. See deposition of Martha Conaway at p.97 & Conaway deposition exhibit 4, which are part of Defendant's Exh. 3, in globo; letter from Maria V. Ibanez dated April 29, 1996, Defendant's Exh. 7; affidavits of Veronica Buttacavoli and Robin Kraemer, Defendant's Exhs. 8 and 9.

Thus, it appears unlikely that plaintiffs will be able to prove that Progressive willfully violated the FLSA as to the Post-Training Class. A finding of a lack of willful violation would favor defendant's good faith defense as to liquidated damages.

Accordingly, I find that plaintiffs' chances of success on the merits as to the Post-Training Class are very low.

g. The Training Class has stronger claims

The Training Class members have a stronger argument that they will succeed on the merits. Department of Labor regulations specifically provide that the administrative exemption does not apply to employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee. 29 C.F.R. § 541.210 (as in effect before Aug. 23, 2004). Progressive concedes for purposes of the settlement only that its trainees "most likely" should have been classified as exempt.

The Stipulation, as amended, reflects the strength of these claims by doubling each plaintiff's distribution, with this calculation based on his or her average weeks worked and average salary, to reflect the penalty wages to which each class member would be entitled under the FLSA, should plaintiffs prevail at trial.

On the other hand, the size of the Training Class and the time period for which its members can recover is limited by the three-year statute of limitations for willful violations and by the brief time periods of three to six weeks during which they were in training. The Konkle plaintiffs had filed a motion to apply equitable tolling to extend the recovery period back for two years before April 29, 1996, the date of a letter on which plaintiffs rely to try to establish that Progressive should have reclassified its employees

in training as non-exempt as of that date. Defendant's Exh. 7. Although that motion in Konkle was dismissed as moot pending settlement discussions, a virtually identical motion in Camp was denied, Record Doc. No. 1729, and it is extremely likely that plaintiffs' motion in Konkle would also be denied.

Progressive eliminated its exempt training positions and created a non-exempt training position, effective January 1, 2002. Absent equitable tolling, any Training Class will be comprised of those who choose to opt in to the Konkle action (which has not yet been allowed because no collective action has been certified) and who went through training between, at best, September 4, 2000 (three years before the filing date of the Konkle action)[7] and December 31, 2001 (when Progressive stopped classifying its trainees as exempt).

Nonetheless, the Stipulation, as amended, assumes the existence of a Training Class dating back to April 1996, which makes the class size vastly larger than it would

[7]Under the FLSA, the statute of limitations is not interrupted for opt-in plaintiffs until they have filed their written consents to opt in, which the court has not yet allowed because no collective action has been certified in Konkle. The Case Management Order in Konkle set a deadline of July 20, 2004 for plaintiffs to file their motion to certify a class, with an August 18, 2004 hearing date. At that time, the court would have had to address whether to apply equitable tolling at least during the pendency of the action to the limitations period of any opt-in plaintiffs, who had been prevented by the court's own action from filing their written consents.

be if the case proceeded to trial. The Stipulation, as amended, also assumes that plaintiffs in this class could recover liquidated damages[8] in addition to overtime pay.

Furthermore, defendant's evidence shows that, before January 1, 2002, adjusters generally did not work more than 40 hours per week when they were in training. Defendant's Exh. 3, Jessica Kostelac deposition at p.31; Defendant's Exhs. 15-19 (various affidavits and responses to Requests for Admissions). Plaintiffs have adduced some contrary evidence, showing that some adjusters did work more hours, particularly if study and travel time are included in the calculation.

Thus, I find that the Training Class's chances of success on the merits (assuming that a class would be certified at all) is high. I also find that the settlement proposal would compensate many more claimants over a far greater time period than would a trial on the merits.

5. *The Range of Possible Recovery*

As noted, a two-year statute of limitations applies to the claims of the Post-Training Class, pursuant to the court's order granting defendant's First Motion for Partial Summary Judgment. Record Doc. No. 1729. This limits the amount of overtime wages that these class members can recover to the two-year period before each opted in to this action. The

[8]Progressive concedes for purposes of the settlement only that the Training Class plaintiffs could prove a willful violation.

Stipulation, as amended, also reflects the near certainty that these plaintiffs could not prove defendant's bad faith or willfulness and therefore could not recover liquidated damages.

The Post-Training Class plaintiffs have no records of overtime hours worked. Progressive's own records show that the opt-in plaintiffs in Camp worked no overtime in more than 80% of the weeks they worked, that they worked between 40 and 45 hours in another 14% of the weeks worked, that they worked between 45 and 50 hours in 2.2% of all weeks, and that they worked more than 50 hours in 1.2% of all weeks. "Statistical Comparison of Average Rate of Hours Worked for the Opt-Ins vs. Controls" by Dr. Arnold Levine, dated Jan. 19, 2004, Defendant's Exh. 12. Plaintiffs would apparently attempt to rebut the written records with testimony concerning their personal recollections of overtime hours worked.

According to Progressive's calculations, there are about 967 opt-in plaintiffs in Camp and a total of about 3,000 plaintiffs (including the opt-ins) in the Post-Training Class, including the consolidated cases. If one uses the average annual salary of all the opt-ins, adds a component for gainsharing (a fringe benefit that claims adjusters receive), and pays overtime wages based on the categories in Dr. Levine's report, Progressive would owe the opt-ins a total of $2,096,433 if the class prevailed on its claims. If one

then multiplies that figure by three to account for the total of approximately 3,000 plaintiffs in the Post-Training Class, and then multiplies that product by .25 to account for only a 25% chance of success, the total is about $1,575,000.[9] However, the proposed settlement allocates a larger amount, $1,686,370.90, to the Post-Training Fund.

The Training Class has stronger claims on the merits and would probably be able to recover liquidated damages, but its recovery would be limited to the three- to six-week time periods of class members' training. The class size would be severely limited if the statute of limitations were applied without equitable tolling. However, the Stipulation, as amended, gives the Training Class the benefit of an assumption that the limitations period extends back to April 1996, which hugely increases both the number of claimants in the class and the total amount of the Training Fund.

As plaintiffs' counsel explained at the hearing, the average overtime wages for members of the Training Class would be $22.73 per week for a maximum of 6 weeks, or a total of $136.38 per class member. When doubled to account for liquidated damages and multiplied by approximately 6,714 class members, the judgment value of this class's claims would be about $1,831,310.64. Thus, the Training Fund of $1,831,090 represents full judgment value for the Training Class. At the hearing, defense counsel concurred in

[9]The Stipulation, as amended, postulates only a 20% chance of success and estimates the number of claimants as approximately 3,349.

the conclusion – though not the methodology by which the conclusion was reached – that the Training Fund represents the top level of the range of possible recovery for members of the Training Class.

I find that the range of possible recovery for both classes indicates that the amount offered in the settlement is fair and reasonable.

6. *The Opinions of the Class Counsel, Class Representatives and Absent Class Members*

Class Counsel and the Class Representatives participated in crafting the settlement and join in asking that it be approved by the court.

I have received only ten written objections to date. Record Doc. Nos. 1816, 1818, 1819, 1823, 1824, 1825, 1826, 1827, 1828, 1829. No objectors appeared in person at the fairness hearing.

Two objectors, Chris A. Schumacher and Gregory Sten, who filed objections before the originally scheduled hearing date, object that the amount of the settlement that will be distributed to the individual class members is inadequate. They assert that they worked substantial amounts of overtime, from 10 to 30 hours per week, for Progressive and that the proposed settlement amount per actual week worked is grossly inadequate. Schumacher also objects that awarding approximately 30% of the total settlement amount as attorney's fees is unfair to the class members.

Kyle Henson objects on the grounds that the lawsuit and any settlement thereof harms the insurance industry and the consumers of insurance products. He states that he always knew when he worked for Progressive that he would have to work more than 40 hours per week at times, but that he was a salaried employee and knew that he would not receive overtime pay for extra hours worked. He says that he usually was able to complete his work without working more than 40 hours per week. He states that some employees did work longer hours to complete their work but that they did not complain and understood that it was part of the job. Record Doc. No. 1819.

Seven more objectors filed written objections shortly before the rescheduled hearing date. Like Schumacher and Sten, these objectors complain that the amount to be distributed to each class member is so inadequate as to be unfair, when compared to the large amount of overtime they allegedly worked and the salary that they received. One of these objectors also objects that the $102,000 incentive payment to class representatives is excessive, especially in comparison to the small amounts that the class members will receive. Record Doc. No. 1824.

Finally, Michael R. Grey objects that he was supposed to be a class representative in the Jonas litigation that was originally filed in New York, and that he is entitled to be paid an incentive payment because he provided assistance during discovery. Record Doc.

No. 1827. I am satisfied, based on the representations of plaintiffs' counsel at the hearing and my review of the record in the Jonas matter, that although Grey may have been considered at some point as a possible class representative in that litigation, he was never named as a plaintiff or a class representative in the lawsuit that was filed in New York. He has presented no evidence that he is entitled to any incentive payment. Therefore, his objection is overruled.

All of the other objections are overruled. For the most part, these objections are general laments about the perceived unfairness of working long hours for what the objectors now deem to have been low pay. They have nothing to do with the unemotional legal factors and factual realities, divorced from sympathy or passion, that this court must consider in making its judgment. They come from only nine of the thousands of class members. Given the relevant factors discussed above, especially the very low chances of success on the merits for the Post-Training Class, I find that the amounts allocated to each class member are fair, adequate and reasonable.

III. CLASS COUNSEL'S MOTION FOR APPROVAL OF A REASONABLE ATTORNEYS' FEE AND REIMBURSEMENT FOR COSTS EXPENDED

A. Attorney's Fees

As part of its fairness determination, the court must also assess the reasonableness of the proposed attorney's fees. Strong v. BellSouth Telecomms., Inc., 137 F.3d 844,

849-50 (5th Cir. 1998). Plaintiffs' counsel seek approval of an award of attorney's fees in the total amount of $1,600,000. Record Doc. No. 1796. Although Progressive's agreement to pay this amount is separate and apart from Progressive's agreement to pay $3,800,000 into the common settlement fund, plaintiffs' counsel note that the fee award amounts to 29.62% of the total amount ($5,400,000) being paid by Progressive to settle these actions.

Plaintiffs' counsel do not ask that the court award the respective amounts of legal fees to each of the law firms involved in these cases because the firms have agreed to divide the lump sum award according to their private fee-sharing agreements. The Fifth Circuit has approved such a procedure. Longden v. Sunderman, 979 F.2d 1095, 1101 (5th Cir. 1992).

However, plaintiffs' attorneys ask the court to retain jurisdiction over the disbursement of the lump sum fees to individual counsel. They provided copies of their fee-sharing agreements to the court for in camera review. I have reviewed the fee-sharing agreements in camera, and I find that they are fair, reasonable and adequate in their allocation of the attorney's fees award and the costs in these actions, based on the actual hours worked and costs expended by each firm.

B. Standards for Awards of Attorney's Fees

"To fully discharge its duty to review and approve class action settlement agreements, a district court must assess the reasonableness of the attorneys' fees." Strong, 137 F.3d at 849. The Fifth Circuit uses the lodestar method for determining reasonable attorney's fees in class actions and FLSA actions. Id. at 850; Heidtman, 171 F.3d at 1043; Longden, 979 F.2d at 1100-01.

"Although the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method." Id. at 1101 n.9. At least seven other circuits have held that the district court has the discretion to use either the lodestar or the percentage method, Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 49 (2d Cir. 2000) (collecting cases), but the Fifth Circuit has not adopted that position and continues to approve the lodestar method only. Strong, 137 F.3d at 850.[10]

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[10]I cannot agree with the Louisiana district court cases, see, e.g., In re Harrah's Entertainment, Inc. Secs. Litig., No. 95-3925, 1998 WL 832574, at *3 (E.D. La. Nov. 25, 1998) (Clement, J.); In re Combustion, Inc., 968 F. Supp. 1116, 1135 (W.D. La. 1997) (Haik, J.), which have opined that the Fifth Circuit's case law is "at best unclear" on this issue and that the Fifth Circuit has tacitly approved the percentage method of calculating reasonable attorney's fees in a common fund settlement.

Nonetheless, if the percentage approach were to be used in the instant case, I would find that the 29.6% relationship of attorney's fees to the total settlement amount is eminently reasonable. As Judge Clement noted in In re Harrah's:

The Ninth Circuit has adopted a benchmark of twenty-five percent in common fund

Determination of reasonable attorney's fees is a two-step process that begins with determination of the lodestar amount.

> A lodestar is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work. After making this calculation, the district court may decrease or enhance the lodestar based on the relative weights of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The lodestar may not be adjusted due to a Johnson factor, however, if the creation of the lodestar award already took that factor into account. Such reconsideration is impermissible double-counting.

Heidtman v. County of El Paso, 171 F.3d 1038, 1043 (5th Cir. 1999) (citing City of Burlington v. Dague, 505 U.S. 557, 562 (1992); Shipes v. Trinity Indus., 987 F.2d 311, 319-20 (5th Cir. 1993)).

The Johnson factors are:

> cases. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993). See also [In re Catfish Antitrust Litig., 939 F. Supp. 493 (N.D. Miss. 1996)] at 501, 503 (adopting 25% benchmark). The majority of common fund fee awards fall between twenty and thirty percent. [Citations omitted]. It is not unusual, however, for district courts in the Fifth Circuit to award percentages of approximately one third. Combustion, 968 F. Supp. at 1133.

In re Harrah's, 1998 WL 832574, at *4; see also In re Prudential-Bache Energy Income P'ship Secs. Litig., No. MDL 888, 1994 WL 150742, at *1 (E.D. La. Apr. 13, 1994) (Livaudais, J.) ("Historically, fee awards in common fund cases such as this were computed based upon a percentage of the fund, typically in the 25% to 33% range. . . . The percentage fee award was intended to approximate the market--what private counsel ordinarily would charge in a contingent fee contract."). In Longden, the Fifth Circuit affirmed the district court's fee award of 27.5% of the settlement fund, which was supported by the court's analysis of the Johnson factors. Longden, 979 F.2d at 1100. Judge Clement awarded attorney's fees of 26% in In re Harrah's, 1998 WL 832574, at *7. In Combustion, 968 F. Supp. at 1136, an extraordinarily complex, multidistrict class action, Judge Haik set a maximum reserve of 36% for attorney's fees.

> (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) the award in similar cases.

Johnson, 488 F.2d at 717-19.

"[O]f the Johnson factors, the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1047 (5th Cir. 1998) (citation omitted). Three of the Johnson factors, complexity of the issues, the results obtained, and preclusion of other employment, are fully reflected and subsumed in the lodestar amount. Heidtman, 171 F.3d at 1043 (quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986); Shipes, 987 F.2d at 319-22 & n.9). After Johnson was decided, the "Supreme Court has barred any use of the sixth factor," whether the fee is fixed or contingent. Walker v. United States Dep't of Housing & Urban Dev., 99 F.3d 761, 772 (5th Cir. 1996) (citing City of Burlington, 505 U.S. at 567; Shipes, 987 F.2d at 323).

"The lodestar . . . is presumptively reasonable and should be modified only in exceptional cases." Watkins v. Fordice, 7 F.3d 453, 457 (5th Cir. 1993) (citing City of

Burlington, 505 U.S. at 562); accord Heidtman, 171 F.3d at 1043. Although the party seeking attorney's fees bears the initial burden of submitting adequate documentation of the hours reasonably expended and of the attorney's qualifications and skill, the party seeking reduction of the lodestar bears the burden of showing that a reduction is warranted. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Wegner v. Standard Ins. Co., 129 F.3d 814, 822 (5th Cir. 1997); Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 329 (5th Cir. 1995) (hereinafter "LP&L"). In the instant cases, Progressive does not seek any reduction.

C. The Hourly Rates Charged by Plaintiffs' Counsel

First, I must determine whether the hourly rates charged by plaintiffs' counsel were reasonable. Six law firms acted as the plaintiffs' Steering Committee and seven other firms acted as local counsel in the consolidated cases.

Plaintiffs' counsel seek rates of $225 per hour for the work of each partner, $140 for the work of each associate, and $60 per hour for paralegal work. They submit that these hourly rates are within the prevailing market rates within the New Orleans legal community for similar services by lawyers of reasonably comparable skills, experience and reputation.

An attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested. LP&L, 50 F.3d at 328. Based on my knowledge of the prevailing market rates in this legal community, my familiarity with the qualifications and expertise of plaintiffs' counsel, and recent awards of reasonable attorney's fees in this district, I find that the requested rates of $225 for partners and $140 for associates are reasonable. Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642, 662 (5th Cir. 2002); Henderson, 2002 WL 31415728, at *5; United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546, 569 (E.D. La. 1999) (Duval, J.), vacated on other grounds, 244 F.3d 486 (5th Cir. 2001); Yousuf v. UHS of De La Ronde, Inc., 110 F. Supp. 2d 482, 490-91 (E.D. La. 1999) (Livaudais, J.).

It is well established that fees for paralegal time are recoverable. Missouri v. Jenkins, 491 U.S. 274, 288 (1989); Volk v. Gonzalez, 262 F.3d 528, 535 (5th Cir. 2001); Walker, 99 F.3d at 773; Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd., 919 F.2d 374, 380 (5th Cir. 1990). Again, based on my experience in this legal community, I find that $60 per hour for paralegal time is reasonable.

D. The Hours Charged by Plaintiffs' Counsel

Next, I must determine the reasonable number of hours that Class Counsel expended on the litigation. As a general proposition, all time that is excessive, duplicative or inadequately documented should be excluded. Watkins, 7 F.3d at 457.

Plaintiffs' counsel have submitted the affidavits of Edward J. Castaing and Jonathan M. Herman, partners in the firm Crull, Castaing, Lilly & Herman,[11] and James M. Jacobs, a partner in the firm Murphy, Rogers & Sloss, who acted as co-lead counsel in Camp and Konkle. Castaing, Herman and Jacobs attest to the number of attorney and paralegal hours expended by their respective firms and aver that the hours were expended for the benefit of the Class, were reasonably necessary for the prosecution of this action and were neither excessive nor duplicative. Record Doc. No. 1796, Plaintiff's Exhs. B, C.

Although plaintiffs' counsel have submitted affidavits attesting only to the hours expended by these two lead firms (which total 3,999.37 partner hours, 340 associate hours and 730.70 paralegal hours), their motion asserts that the time records of all the firms who worked on these cases reflect that partners expended a total of 6,217.09 hours, associates expended a total of 1,458.65 hours and paralegals expended a total of 1,252.97 hours over the almost three-year time span of this litigation. These hours are undisputed and no

[11]Mr. Herman recently left the firm.

objections to the hours have been filed. Based on my own participation and my knowledge of the various attorneys' participation in these cases, I find that the requested hours were reasonable and necessary and neither excessive nor duplicative, given the complexity of this class litigation.

Applying the approved hourly rates to these hours expended results in the following lodestar amount.

Partners:	6, 217.09 hours	@ $225/hr.	=	$1,398,845.25
Associates:	1,458.65 hours	@ $140/hr.	=	$ 204,211.00
Paralegals:	1,252.97 hours	@ $ 60/hr.	=	$ 75,178.20
TOTAL				$1,678,234.45

This amount exceeds the requested attorney's fees of $1,600,000.

The court next applies the Johnson factors, as amended by subsequent case law, to the lodestar amount. The Johnson factors have been evaluated as follows: (1) the time and labor required have already been considered; (2) the legal issues were neither novel nor especially difficult but the procedural and factual issues were complex; (3) the skill required to perform the legal services properly has already been considered; (4) although class counsel presented no evidence on this factor, they assert that the total attorney hours expended demonstrate, and I find, that they were precluded from handling other

employment; (5) the customary fee has already been considered; (6) whether the fee is fixed or contingent is no longer a permissible factor; (7) there were no particular time limitations imposed by the client or circumstances; (8) the amount involved was extraordinary, although not necessarily for class litigation, and the results obtained were reasonably successful; (9) the experience, reputation and ability of the attorneys have already been considered; (10) the case was not undesirable; (11) the nature and length of the professional relationship with the client is not a factor; and (12) the awards in similar cases are not relevant because the lodestar amount here depends on the actual hours worked and hourly rate of pay. I find that no adjustment need be made to the lodestar.

I further find that the requested attorney's fees award of $1,600,000 is reasonable and is actually lower than the lodestar would support.

E. Costs

In their motion, plaintiffs' counsel seek to recover their actual costs of $186,204.78. They have attached to their motion copies of billing records from each law firm that represented plaintiffs, which detail the expenditures made. Record Doc. No. 1796, Plaintiff's Exhs. A-1 through A-13. The parties orally amended the Stipulation in open court during the hearing to stipulate that plaintiffs' counsel may recover $186,204.78 in costs, which Progressive will pay, and they will file a written amendment to that effect.

"[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); accord Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp., 71 F.3d 198, 205 n.5 (5th Cir. 1995). A party who obtains a favorable judgment on some of its claims may be regarded as a prevailing party, even if it has not sustained all of its claims. Id. Taxation of costs under Rule 54(d) is within the district court's discretion. Breaux v. City of Garland, 205 F.3d 150, 164 (5th Cir. 2000). Although there is no "prevailing party" when a case settles, these principles indicate that plaintiffs' counsel should recover their costs expended in reaching a successful, fair and reasonable settlement in these actions.

I find that the expenses to which counsel stipulated of $186,204.78 are reasonable and were necessarily incurred in prosecuting this litigation.

CONCLUSION

For all of the foregoing reasons, IT IS ORDERED that the Post-Training Class and the Training Class, as defined herein, are certified for settlement purposes only.

IT IS FURTHER ORDERED that all objections to the Stipulation of Class Action Settlement and Release, as amended, are OVERRULED.

IT IS FURTHER ORDERED that the Stipulation of Class Action Settlement and Release, as amended, is APPROVED. The parties agreed orally at the hearing to amend

the Stipulation to provide that no funds will be distributed to any class members or attorneys until the 30-day appeal period has run from the date of entry of this order. Accordingly, this action is hereby conditionally dismissed, without prejudice to the right, upon good cause shown within a reasonable time, to seek summary judgment enforcing the settlement, if it is not consummated. The court specifically approves the terms of the settlement agreement and incorporates those terms into the order of dismissal. The court retains jurisdiction over the parties and their settlement agreement, including the fee-sharing agreements between counsel for the class members, for purposes of enforcing that agreement, should any controversy arise about the terms of the agreement or any party's performance of its obligations under the agreement. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 378 (1994).

IT IS FURTHER ORDERED that a final order DISMISSING all claims of all plaintiffs and class members in these actions with prejudice will be issued upon the court's receipt of a motion to dismiss filed by the Class Representatives, following the mailing of the settlement payments by the Claims Administrator pursuant to the Stipulation, as amended.

IT IS FURTHER ORDERED that Class Counsel's Motion for Approval of a Reasonable Attorneys' Fee and Reimbursement for Costs Expended, Record Doc. No.

1796 in C.A. No. 01-2680, is GRANTED, as provided and clarified herein. Because plaintiffs' counsel have not yet calculated the specific amounts or agreed upon the logistical manner in which their fees and costs are to be distributed among themselves, IT IS ORDERED that Progressive shall deposit $1,600,000 in reasonable attorney's fees and $186,204.78 in costs into the registry of this court, and these funds will be distributed among plaintiffs' counsel only upon their motion and further order of the court.

New Orleans, Louisiana, this 23rd day of September, 2004.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE