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

JENNIFER PRENA, TEDRA JACKSON, STACEY CHARRAN, AND JEFFREY SPRATT, on behalf of themselves and all others similarly situated, **Plaintiffs,** **-against-** **BMO FINANCIAL CORP., AND BMO HARRIS BANK, N.A.,** **Defendants.**	**No. 14 Civ. 9175 (EEC)** **Judge Edmond E. Chang**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF SETTLEMENT, SERVICE AWARDS, AND ATTORNEYS' FEES AND COSTS

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INTRODUCTION

Following an extensive investigation, informal discovery, a motion for conditional certification, and extensive arm's-length negotiations, Plaintiffs Jennifer Prena, Tedra Jackson, Stacey Charran, and Jeffrey Spratt (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, and BMO Financial Corp. and BMO Harris Bank, N.A. (collectively, "Defendants" or "BMO"), have agreed, subject to Court approval, to resolve this wage and hour lawsuit on a collective-wide basis for significant monetary relief. The settlement satisfies the criteria for approval of a Fair Labor Standards Act ("FLSA") collective action settlement because it resolves a bona-fide dispute, was reached after contested litigation, and was the result of arm's-length settlement negotiations conducted by counsel well-versed in wage and hour law.

Accordingly, Plaintiffs respectfully request that the Court issue an order: (1) approving the $3,900,000 settlement set forth in the Joint Stipulation of Settlement and Release ("Settlement Agreement") attached as Exhibit A to the Declaration of Justin M. Swartz in Support of Plaintiffs' Motion for Approval of Settlement, Service Awards, and Attorneys' Fees and Costs ("Swartz Decl.") (attached as Exhibit A);[1][2] (2) approving the proposed Notice of Settlement and Opportunity to Join Collective Action ("Settlement Notice") (attached as Exhibit B to the Settlement Agreement) and direct its distribution; (3) approving service awards of $8,333.33 each to Named Plaintiffs Jennifer Prena, Tedra Jackson, Stacey Charran, and Jeffrey Spratt and Opt-In Plaintiffs Janeth Montenegro and Jenny Cardenas for their service to the collective; (4) approving Plaintiffs' request for one-third of the settlement for attorneys' fees and

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1 Unless otherwise indicated, all exhibits are attached to the Swartz Declaration.

2 Unless otherwise indicated, all capitalized terms have the definitions set forth in the Settlement Agreement.

an additional reimbursement of costs and expenses; (5) and incorporating the terms of the Settlement Agreement.[3]

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Allegations

Plaintiffs are former employees of BMO who worked as Service or Teller Managers ("SMs") at BMO branch locations. Plaintiffs alleged that BMO violated the Fair Labor Standards Act ("FLSA"), and applicable state wage and hour laws, by improperly classifying them as exempt from federal and state overtime requirements and failing to pay them and other SMs overtime wages. Swartz Decl. ¶ 15. BMO denies that it committed any wrongdoing or violated any federal, state or local laws pertaining to payment of wages or hours worked and vigorously disputed the claims asserted in the litigation.

II. Overview of Investigation, Litigation and Settlement Negotiations

Before the initiation of this action, Plaintiffs conducted a thorough investigation into the merits of the potential claims and defenses. *Id.* ¶ 16. Plaintiffs focused their investigation and legal research on the underlying merits of the potential class and collective action members' claims, the damages to which they were entitled, and the propriety of class and collective action certification. *Id.* ¶ 17. Plaintiffs' Counsel obtained and reviewed documents from Plaintiffs and Opt-In Plaintiffs, including job descriptions, pay records, personnel documents, and corporate documents. *Id.* ¶ 18. Plaintiffs' Counsel also conducted in-depth interviews of former SMs. *Id.* ¶ 19.

On June 5, 2014, Plaintiffs' Counsel informed Defendants by letter of the allegations that Service Managers were misclassified as exempt and their intent to initiate litigation if a pre-

[3] For the Court's convenience, a Proposed Order is attached as Exhibit A to the Settlement Agreement.

litigation settlement could not be reached. Defense counsel was retained promptly after receipt of Plaintiffs' letter and promptly engaged in cooperative, candid and good faith discussions with Plaintiffs' Counsel. Defendants' Counsel understandably wanted time to investigate Plaintiffs' allegations and make an informed assessment of the merits, with the understanding that Defendants would give serious consideration to private mediation after their counsel conducted its due diligence evaluation. Plaintiffs' Counsel agreed to give Defendants time to conduct an investigation but, to protect the rights of the putative class, proposed a tolling agreement that suspended the statute of limitations while Defendants' investigation was underway and during any future settlement discussions. In July, 2014, Defendants agreed to attempt to resolve this dispute through private mediation. A short time later the parties agreed on a mediator and scheduled a mediation for February 10, 2015.

On November 14, 2014, after an unrelated lawsuit was filed against BMO,[4] Plaintiffs filed their class and collective action complaint, alleging that BMO violated the FLSA and state laws by misclassifying them and other BMO SMs as exempt from federal and state overtime pay requirements. *See* ECF No. 1. On December 17, 2014, Plaintiffs propounded discovery requests on Defendants. Swartz Decl. ¶ 21. Defendants filed an Answer on December 30, 2014. *See* ECF No. 13. On January 12, 2015, Janeth Montenegro filed her Consent to Join form pursuant to 29 U.S.C. § 216(b) to become a party to the lawsuit. *See* ECF No. 16. On January 16, 2015, Plaintiffs filed their Motion for Court-Authorized Notice Pursuant to Section 216(b) of the FLSA

[4] On November 11, 2014, an unrelated lawsuit, *Branski v. BMO Fin. Corp.*, No. 14 Civ. 1418 (E.D. Wis.), was filed in federal court in Milwaukee, Wisconsin primarily alleging age discrimination on behalf of one individual Service Manager, but also adding allegations of misclassification of certain Service Managers who worked in BMO's Wisconsin branches. *See* Ex. E (*Branski* Complaint). Defendants informed Plaintiffs' counsel that they explained to *Branski* counsel the history of this matter, including that a mediation had been scheduled for February 10, 2015, and that they shared this information with the court in *Branski*, which agreed to defer all activity in the Wisconsin case until the mediation in this case was held.

("216(b) Motion"). *See* ECF Nos. 19-21. On January 21, 2015, the Court stayed the briefing of the 216(b) Motion in contemplation of the parties' mediation. *See* ECF No. 23. On January 26, 2015, Jenny Cardenas filed her Consent to Join form pursuant to 29 U.S.C. § 216(b) to become a party to the lawsuit. *See* ECF No. 24.

Throughout this period, the parties engaged in an informal exchange of discovery in an attempt to resolve this matter without further litigation. Swartz Decl. ¶ 27. The parties agreed to mediation with a private mediator. *Id.* ¶ 28. Thereafter, Defendants produced data to allow the parties to calculate damages, including data showing the number of potential class members in the SM job title, salaries, weeks worked, and location of employment. *Id.* ¶ 29. Plaintiffs analyzed this data and constructed a damages model. *Id.* ¶ 30. In preparation for mediation, the parties drafted mediation briefs setting forth their respective positions as to liability and damages, and exchanged those briefs before mediation so that each side could evaluate the strength of the other's claims. *Id.* ¶ 31.

On February 10, 2015, the parties attended private mediation in San Francisco, California, with David Rotman of Gregorio, Haldeman & Rotman, an experienced and well regarded employment class and collective action mediator. *Id.* ¶ 32; *see also Wietzke v. CoStar Realty Info., Inc.*, No. 09 Civ. 2743, 2011 WL 817438, at *5, *8 (S.D. Cal. Mar. 2, 2011) (approving settlement mediated by "David Rotman, Esq., a respected mediator who specializes in mediating wage and hour class action disputes"). At the mediation, the parties reached an agreement on the material terms of the settlement. Swartz Decl. ¶ 33. During the next several months, the parties finalized the terms of the settlement, which were memorialized in a formal Joint Settlement and Release ("Settlement Agreement") executed by the parties on or about April 15, 2015. *Id.* ¶ 34.

SUMMARY OF THE SETTLEMENT TERMS

I. The Settlement Fund

The Settlement Agreement establishes a maximum settlement fund of $3,900,000 to settle claims against Defendants (the "Fund"). Ex. A (Settlement Agreement) ¶¶ 1.8, 3.1. The Fund covers Eligible Settlement Class Members' awards, any Court-approved service awards to Plaintiffs and Opt-In Plaintiffs, any Court-approved attorneys' fees and costs, and the settlement claims administrator's ("Settlement Administrator's") fees and costs. *Id.*

II. Eligible Employees

Eligible Settlement Class Members are any and all current and former SMs employed by Defendants and working in a BMO branch at any time during the period from July 8, 2011, to February 10, 2015. *Id.* ¶ 1.6.

Within five days of the approval of the settlement, Defendants will provide the Settlement Administrator with the contact information for all Eligible Settlement Class Members. *Id.* ¶ 2.6. The Settlement Administrator will then mail notice of the settlement, and Settlement Checks to all Eligible Settlement Class Members within thirty-five (35) days of the Court's order granting approval of the settlement. *Id.* ¶¶ 2.8, 3.4(B). The proposed Settlement Notice will inform Eligible Settlement Class Members of the terms of the settlement, their individual estimated settlement allocations (which the Settlement Administrator will calculate based on Defendants' data), and the scope of the release. *See* Settlement Agreement Ex. B (Settlement Notice). At the end of the Acceptance Period, the Settlement Administrator shall provide copies of signed and cashed checks to Plaintiffs' Counsel and Defendants' Counsel. Defendants shall file with the Court a summary list of the Participating Settlement Class Members, as well as copies of the endorsed back of the check releases with any personal

identifying or sensitive information redacted, if any, which the Court orders to be filed. The Settlement Administrator will retain a copy of all Settlement Checks which are endorsed and cashed. Ex. A (Settlement Agreement) ¶¶ 2.2, 2.16.

III. Release

Eligible Settlement Class Members who participate in the settlement by negotiating their Settlement Checks ("Participating Settlement Class Members") will release their claims for non-payment or improper payment of overtime compensation under any federal, state, or local law or regulation or common law relating to their employment at BMO as a Service Manager or Teller Manager to April 26, 2015. *Id.* ¶ 4.1. Eligible Settlement Class Members who do not timely sign and cash a Settlement Check will not be bound by any release of claims. *Id.* ¶ 4.2.

IV. Allocation Formula

Eligible Settlement Class Members will be eligible for a settlement payment pursuant to an allocation formula based on the number of weeks they worked during the relevant period. *Id*. ¶ 3.4(C). Each Eligible Settlement Class Member, including the Named and Opt-In Plaintiffs, shall be assigned one point for each full week worked as an SM between July 8, 2011, and February 10, 2015. *Id*. The Settlement Administrator will then add all points for all Eligible Settlement Class Members together to obtain the "Denominator". *Id*. The Settlement Administrator will then divide the number of points for each Eligible Settlement Class Member by the Denominator to obtain each Eligible Settlement Class Member's "Portion of the Net Settlement Fund." *Id*. The Settlement Administrator next will multiply each Eligible Settlement Class Member's proportionate share of the Net Settlement Fund by the Net Settlement Fund to determine each Eligible Settlement Class Member's Settlement Check amount. *Id.* The Settlement Administrator will distribute a check to each Participating Settlement Class Member minus applicable employee payroll taxes and withholdings. *Id*. ¶ 3.4(D).

Any portion of the Net Settlement Fund that is unclaimed by Eligible Settlement Class Members who fail to cash their Settlement Check within 90 days after mailing will revert to Defendants. *Id*. ¶ 3.1(C). The final accounting shall occur no later than 200 days after Settlement Checks have been mailed. *Id*.

V. Service Awards

The Settlement Agreement provides that, with Court approval, the Named and Opt-in Plaintiffs will each receive a $8,333.33 service award in recognition of assistance rendered in obtaining the benefits of the settlement for the class as well as the risks they took to do so. *Id*. ¶ 3.3(A). The Named and Opt-In Plaintiffs assisted counsel in the investigation of Plaintiffs' claims, prepared declarations in support of Plaintiffs' motion for conditional certification (which were also used during the mediation), and during the mediation provided vital testimony that helped Plaintiffs' counsel achieve this settlement. Swartz Decl. ¶¶ 46-48.

VI. Settlement Claims Administration

The parties have retained Settlement Services, Inc., a wage and hour claims administrator, to serve as the Settlement Administrator. Ex. A ¶ 1.23. The Settlement Administrator's fees of a maximum of $21,400 will be paid from the Fund. Swartz Decl. ¶¶ 42-43; *see* ex. A ¶ 1.8.

VII. Attorneys' Fees and Litigation Costs

Under the Settlement Agreement, subject to Court approval, Plaintiffs' Counsel will receive $1,300,000 (one-third of the $3,900,000 settlement fund) as attorneys' fees plus reimbursement of reasonable out-of-pocket costs and expenses. Ex. A. ¶ 3.2(A).

ARGUMENT

I. A One-Step Approval Process Is Standard For FLSA Settlements.

In the Seventh Circuit, and throughout the country, a one-step approval process is the norm in FLSA settlements that do not include Rule 23 classes.5 This is because collective actions under Section 216(b) of the FLSA do not implicate the same due process concerns as Rule 23 class actions. Collective actions under Section 216(b) require workers to affirmatively opt-in to the litigation, unlike in a Federal Rule of Civil Procedure 23 class action. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 771 (7th Cir. 2013); see also *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) ("Rule 23 actions are fundamentally different from collective actions under the FLSA."). 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." *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984), abrogated on other grounds by *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). Accordingly, courts do not apply the exacting standards for approval of a class action settlement under Rule 23 to FLSA settlements. See, e.g., *Beckman v. KeyBank*, N.A., 293 F.R.D. 467, 476 (S.D.N.Y. 2013); see also *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982) (discussing due process concerns present

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5 *See, e.g.*, *Roberts v. Apple Sauce, Inc.*, No. 12 Civ. 830, 2014 WL 4804252 (N.D. Ind. Sept. 25, 2014); *Beatty v. Capital One Fin. Corp.*, No. 12 Civ. 434 (N.D. Ill. Dec. 13, 2012) (attached as Exhibit F); *Campbell v. Advantage Sales & Mktg. LLC*, No. 09 Civ. 1430, 2012 WL 1424417 (S.D. Ind. Apr. 24, 2012); *Raymer v. Mollenhauer*, No. 10 Civ. 210, 2011 WL 338825 (N.D. Ind. Jan. 31, 2011); *Perry v. Nat'l City Bank*, No. 05 Civ. 891 (S.D. Ill. Mar. 3, 2008) (attached as Exhibit G); *see also Anwar v. Transp. Sys., Inc.*, No. 13 Civ. 2666 (S.D.N.Y. Nov. 17, 2014) (attached as Exhibit H); *Wright v. Flagstar Bank FSB*, No. 13 Civ. 15069 (E.D. Mich. Sept. 19, 2014) (attached as Exhibit I); *Bozak v. Fedex Ground Package Sys., Inc.*, No. 11 Civ. 738, 2014 WL 3778211 (D. Conn. July 31, 2014); *Dixon v. Zabka*, No. 11 Civ. 982, 2013 WL 2391473 (D. Conn. May 23, 2013); *Aros v. United Rentals, Inc.*, Nos. 10 Civ. 73, *et al.*, 2012 WL 3060470 (D. Conn. July 26, 2012); *Lewis v. Wells Fargo & Co.*, No. 08 Civ. 2670 (N.D. Cal. Apr. 29, 2011) (attached as Exhibit J); *Powell v. Lakeside Behavioral Healthcare, Inc.*, No. 11 Civ. 719, 2011 WL 5855516 (M.D. Fla. Nov. 22, 2011); *Saliford v. Regions Fin. Corp.*, No. 10 Civ. 61031 (S.D. Fla. Apr. 25, 2011) (attached as Exhibit K); *McLean v. Ceturytel of Missouri, LLC*, No. 08 Civ. 865 (W.D. La. Aug. 6, 2009) (attached as Exhibit L).

in Rule 23 class action that are not present in FLSA collective actions). There is no need to require that the settlement provide for opt-outs or objections where individuals are not part of the settlement unless they decide to participate in it. See *Woods*, 686 F.2d at 580 ("The difference between a Rule 23 class action and a section 16(b) class action is . . . that in the latter the class member must opt in to be bound, while in the former he must opt out not to be bound.").

II. The Settlement Is Fair and Reasonable and Should Be Approved.

Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes. *See, e.g.*, *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982); *Fosbinder-Bittorf v. SSM Health Care of Wis., Inc.*, No. 11 Civ. 592, 2013 WL 5745102, at *1 (W.D. Wis. Oct. 23, 2013); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 994-95 (N.D. Ind. 2010); *see also Butler v. Am. Cable & Telephone, LLC*, No. 09 Civ. 5336, 2011 WL 4729789, at *8-9 (N.D. Ill. Oct. 6, 2011). If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement. *Lynn's Food Stores*, 679 F.2d at 1354; *Roberts*, 2014 WL 4804252, at *2. "It is a well settled principle that the law generally encourages settlements." *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979).

The FLSA settlement in this case easily meets the standard for approval. The settlement was the result of extensive pre-suit investigation, a motion for collective certification, and substantial arm's-length negotiations. Swartz Decl. ¶¶ 16-34. Recognizing the uncertain legal and factual issues involved, the parties reached the settlement pending before the Court after private mediation before an experienced mediator. *Id.* ¶ 32.

The settlement amount of $3,900,000 is substantial in light of the considerable risk that Plaintiffs face. First, Plaintiffs' calculations show that the average guaranteed settlement award

will be approximately $3,951.37. *Id.* ¶ 51. By Plaintiffs' estimate, this is a substantial (78%) percent of the class's lost wages. *Id.* ¶ 52; *see infra* § III(B).

Second, there was a risk that Plaintiffs would not succeed in their pending motion for conditional certification, or a motion for class certification, or maintaining a collective and class through trial. BMO would likely argue that the differences among various job positions and branches and other individualized questions precluded class and collective certification, or would warrant decertification of a collective, if certified. Although Plaintiffs disagree, defendants have prevailed on such arguments. *See, e.g.*, *Gromek v. Big Lots, Inc.*, No. 10 Civ. 4070, 2010 WL 5313792, at *5 (N.D. Ill. Dec. 17, 2010) (denying collective certification of assistant store manager claims because "significant differences are present between the job duties of individual ASMs"); *see also Beckman*, 293 F.R.D. at 480 (collecting misclassification cases where courts have decertified FLSA collectives).

Third, a trial on the merits would involve significant risks for Plaintiffs as to both liability and damages. The status of assistant managers under the FLSA is highly contextual with facts pointing in both directions. Recently, in *McCall v. First Tennessee Bank, N.A.*, the court found that a teller supervisor was exempt because of his supervision of tellers even though he spent a significant amount of time performing non-exempt teller duties. No. 13 Civ. 386, 2014 WL 2159007, at *1, *5-9 (M.D. Tenn. May 23, 2014). Although Plaintiffs believe this case is distinguishable, BMO would likely argue that SMs are similar to the teller supervisors, warranting a similar outcome.[6] While Plaintiffs believe that they could ultimately establish

[6] Other courts in the Northern District of Illinois have similarly rejected assistant manager claims. *E.g.*, *Ottaviano v. Home Depot, Inc., USA*, 701 F. Supp. 2d 1005, 1007-10 (N.D. Ill. 2010) (dismissing claims of assistant store managers and finding they were properly classified as exempt under Illinois wage and hour laws); *Jackson v. Go-Tane Servs., Inc.*, No. 99 Civ. 5686, 2001 WL 826867, at *3-4 (N.D. Ill. July 18, 2001) (granting summary judgment to employer on claims of certain assistant managers).

Defendants' liability (and prevail on class certification), this would require significant factual development.

The proposed allocation of the settlement is also reasonable. It reflects a proportion of damages owed to each Eligible Settlement Class Member based on the number of weeks he or she worked for Defendants, which is a reasonable approximation of each Eligible Settlement Class Member's damages, given the evidence that assistant managers tended to work similar hours. Ex. A (Settlement Agreement) ¶ 3.4(C); *see Summers v. UAL Corp. ESOP Committee*, No. 03 Civ. 1537, 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005) (approving allocation plan as reasonable when "settlement funds . . . will be disbursed on a pro rata basis"); *see also Hens v. Clientlogic Operating Corp.*, No. 05 Civ. 381S, 2010 WL 5490833, at *2 (W.D.N.Y. Dec. 21, 2010) (allocation formula based on plaintiffs' length of service was equitable and reasonable).

The Court should also approve the proposed Settlement Notice. *See* Settlement Agreement Ex. B (Settlement Notice). The proposed Settlement Notice sufficiently informs Eligible Settlement Class Members of the terms of the settlement, including the allocation formula, how Class Members may participate (or not participate), the estimated amount to which they are entitled, the scope of the release, and the request for attorneys' fees and costs. *Id.*; *see also Zolkos v. Scriptfleet, Inc.*, No. 12 Civ. 8230, 2014 WL 7011819, at *6 (N.D. Ill. Dec. 12, 2014) (approving class notice that, *inter alia*, described settlement terms and fee allocation); *Tobin v. Beer Capitol Distributing Inc.*, No. 12 Civ. 274, 2012 WL 5197976, at *3 (E.D. Wis. Oct. 19, 2012) (same); *see also Bozak*, 2014 WL 3778211, at *3 (approving FLSA notice providing notice of settlement terms and options facing class).

III. The Service Awards to the Named and Opt-In Plaintiffs Should Be Approved As Fair and Reasonable.

Plaintiffs request approval of a service award of $8,333.33 each to the Named and Opt-in Plaintiffs. The Service Awards that the Plaintiffs request are reasonable given the significant contributions they made to advance the prosecution and resolution of the lawsuit. Named plaintiffs in class action lawsuits play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny. "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). This is especially true in employment litigation. *See Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *7 (S.D.N.Y. June 25, 2007) ("[I]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) (internal quotation marks omitted)); *see generally* Nantiya Ruan, *Bringing Sense to Incentive Payments: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. & Emp. Pol'y J. 395 (2006).

Incentive awards serve the important purpose of compensating plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs. *See, e.g.*, *Espenscheid*, 688 F.3d at 876-77; *Cook*, 142 F.3d at 1016; *Massiah v. MetroPlus Health Plan, Inc.*, No. 11 Civ. 5669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012); *cf. Follansbee v. Discover Fin. Servs., Inc.*, No. 99 Civ. 3827, 2000 WL 804690, at *7 (N.D. Ill. June 21, 2000) (recognizing incentive awards' importance). Accordingly, incentive awards are commonly awarded to those

who serve the class's interests. *Massiah*, 2012 WL 5874655, at *8 (collecting cases); *accord Chesemore v. Alliance Holdings, Inc.*, No. 09 Civ. 413, 2014 WL 4415919, at *4 (W.D. Wis. Sept. 5, 2014); *Hawkins v. Securitas Sec. Servs. USA, Inc.*, 280 F.R.D. 388, 395 (N.D. Ill. 2011).

In examining the reasonableness of a requested service award, courts consider: (1) the actions the plaintiffs have taken to protect the interests of the class, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing the litigation. *Cook*, 142 F.3d at 1016; *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 Civ. 2898, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012). Here, Plaintiffs satisfy all three factors.

First, the Named and Opt-In Plaintiffs took substantial actions to protect the interests of potential collective action members, and those actions resulted in a substantial benefit to those potential collective action members. They participated in an extensive pre-suit investigation, provided documents crucial to establishing Plaintiffs' claims, submitted declarations in support of Plaintiffs conditional certification motion (which also were utilized extensively during the mediation), and provided important factual information during the mediation. *See* Swartz Decl. ¶ 46. Courts in this circuit and others have approved incentive awards for similar activities. *See, e.g.*, *Chesemore*, 2014 WL 4415919, at *5, *12 ($10,000 and $25,000 awards for, *inter alia*, submitting to discovery and participating in settlement discussions); *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12 Civ. 4216, 2014 WL 3778173, at *16 (S.D.N.Y. July 31, 2014) ($10,000 awards where, *inter alia*, "[p]laintiffs provided counsel with relevant documents and assisted counsel in preparing for mediation and settlement discussions"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) ($10,000 awards where, *inter alia*, class representatives participated in discovery). These actions have resulted in substantial

benefit to the class, leading to an overall gross recovery of $3,900,000, which results in an estimated average award of $3,951.37 per Eligible Settlement Class Member. Swartz Decl. ¶¶ 49, 51.

Second, Plaintiffs and Opt-In Plaintiffs undertook substantial direct and indirect risk. The Named Plaintiffs agreed to bring the action in their name, to draft and sign declarations on penalty of perjury, to be deposed, and to testify if there was a trial. Swartz Decl. ¶ 47. Opt-In Plaintiffs similarly agreed to be party plaintiffs in the case, to draft and sign declarations on penalty of perjury, to be deposed, and to testify if there was a trial. *Id.* In so doing, Plaintiffs and Opt-In Plaintiffs assumed significant risk that "should the suit fail, [they could] find [themselves] liable for the defendant's costs or even, if the suit [was] held to have been frivolous, for the defendant's attorneys' fees." *Espenscheid*, 688 F.3d at 876-77 (internal citations omitted). "The incentive reward is designed to compensate [them] for bearing these risks." *Id.*

Although the Named Plaintiffs and Opt-In Plaintiffs were no longer employed by Defendants when they joined the lawsuit, they nonetheless merit recognition for risking retaliation from future employers for the benefit of all Class Members. *See Beesley v. Int'l Paper Co.*, No. 06 Civ. 703, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (recognizing that suits against former employers also carry risks of professional and personal repercussions); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 691 (D. Md. 2013) (noting that named plaintiffs risk future employers finding out, through a simple Google search, that they filed a class action lawsuit against their prior employer); *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *14 (S.D.N.Y. Apr. 16, 2012) ("[F]ormer employees . . . fac[e] potential risks of being blacklisted as 'problem' employees."); *Guippone v. BH S & B Holdings, LLC*, No. 09 Civ. 1029, 2011 WL 5148650, at *7 (S.D.N.Y. Oct. 28, 2011) ("Today, the fact that

a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person."); *Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, No. 08 Civ. 7670, 2010 WL 532960, at *1 (S.D.N.Y. Feb. 9, 2010) ("[F]ormer employees put in jeopardy their ability to depend on the employer for references in connection with future employment.").

Third, Plaintiffs and Opt-In Plaintiffs spent a significant amount of time and effort in pursuing this litigation on behalf of the Eligible Settlement Class Members. This included the time and effort they expended in pre-litigation assistance to Plaintiffs' Counsel in investigating the claims brought, the time and effort they spent to assist in the preparation and review of the complaint, providing declarations in support of Plaintiffs' collective certification motion, helping prepare for the mediation, and answering questions during the mediation. Swartz Decl. ¶ 48; *see Kifafi v. Hilton Hotels Ret. Plan*, 999 F. Supp. 2d 88, 105 (D.D.C. 2013) (class members benefited from named plaintiff's "sustained contributions" to the litigation, which resulted in a sizable ERISA common fund); *In re Sw. Airlines Voucher Litig.*, No. 11 Civ. 8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013), *appeal dismissed* (Jan. 3, 2014) (approving service award in part because "there is a solid basis to believe that discovery," in which named plaintiffs actively participated, "improved the prospects for a favorable settlement"); *Johnson v. Midwest Logistics Sys., Ltd.*, No. 11 Civ. 1061, 2013 WL 2295880, at *5-6 (S.D. Ohio May 24, 2013) (recognizing that class members benefited from the class representative's contributions to litigation, and approving a service award of $12,500 when other class members' recovery would range from $260 to $1,000 and the gross settlement fund was $452,380); *In re Lorazepam & Clorazepate Antitrust Litig.*, Nos. MDL 1290, 99 MS 276, 99 Civ. 0790, 2003 WL 22037741, at *11 (D.D.C. June 16, 2003) (class members benefit from class representatives' filing a class

action and expending time and effort to achieve a class settlement); *Spicer*, 844 F. Supp. at 1268 (class representatives' "substantial contributions to the development of the case" benefited the class, warranting $10,000 service awards).

Finally, courts routinely approve service awards equal to or greater than the awards requested here. *See Rusin v. Chicago Tribune Co.*, No. 12 Civ. 1135 (N.D. Ill. June 26, 2013) (attached as Exhibit D) (Chang, J.) (approving $10,000 incentive award to named plaintiff).[7]

The requested Service Awards amount to approximately 1% the total recovery, which is a reasonable percentage. *See Reyes*, 2011 WL 4599822, at *9 (approving awards representing approximately 16.6% of the settlement); *Parker*, 2010 WL 532960, at *2 (finding that service awards totaling approximately 11% of the total recovery are reasonable "given the value of the representatives' participation and the likelihood that class members who submit claims will still

[7] *See also Ceka v. PBM/CMSI Inc.*, No. 12 Civ. 1711, 2014 WL 6812127, at *1 (S.D.N.Y. Dec. 2, 2014) (finding service award of $10,000 "reasonable and justified to compensate Class Representatives for the services they provided and the risks they incurred during the course of the class action litigation"); *Chesemore*, 2014 WL 4415919, at *5 (noting that courts in the Seventh Circuit routinely approve incentive awards ranging from $5,000 to $25,000); *Sukhnandan*, 2014 WL 3778173, at *16 (approving service awards of $10,000 to each of the named plaintiffs); *Swigart v. Fifth Third Bank*, No. 11 Civ. 88, 2014 WL 3447947, at *7 (S.D. Ohio July 11, 2014) ("The modest class representative award requests of $10,000 to each of the two Class Representatives have been tailored to compensate each Class Representative in proportion to his or her time and effort in prosecuting the claims asserted in this [FLSA] action."); *Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472, 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (approving service awards of $15,000 and $12,500 to class representatives and $4,000 to an opt-in plaintiff in wage and hour action); *Heekin v. Anthem, Inc.*, No. 05 Civ. 1908, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 incentive award); *Sewell*, 2012 WL 1320124, at *14-15 (approving payments of $10,000 and $15,000); *Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011) (approving awards of $15,000 and $5,000); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving awards of $15,000 and $10,000); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, No. 00 Civ. 584, 2004 WL 287902, at *3 (S.D. Ill. Jan. 22, 2004) (approving $20,000 incentive award in ERISA matter); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (finding that the mean incentive award in employment class actions is approximately $12,000).

receive significant financial awards"); *Frank*, 228 F.R.D. at 187 (approving award of approximately 8.4% of the settlement).

IV. Attorneys' Fees and Costs Should be Approved as Fair and Reasonable.

A. The Court Should Award Attorneys' Fees Based On a Percentage of Fund

The Court should award attorneys' fees as a percentage of the total fund made available to the Class. When counsel's efforts result in the creation of a common fund, counsel is "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 548 (7th Cir. 2003) (creation of a common fund "entitles [counsel] to a share of that benefit as a fee"). This is "based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691-692 (7th Cir. 2007) (quoting *Skelton v. G.M. Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)); *Kaplan v. Houlihan Smith & Co.*, No. 12 Civ. 5134, 2014 WL 2808801, at *3 (N.D. Ill. June 20, 2014); *see also Boeing*, 444 U.S. at 478.

Although there are two ways to compensate attorneys for successful prosecution of statutory claims – the lodestar method and the percentage of the fund method, *see Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565-66 (7th Cir. 1994) – the trend in this Circuit is to use the percentage of the fund method in common fund cases like this one. *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 862 (7th Cir. 2014); *Campbell*, 2012 WL 1424417, at *2 (FLSA settlement). In fact, the Seventh Circuit recently cast doubt on the lodestar method's continued relevance. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (discounting justification for attorneys' fees based on "amount of time that class counsel reported putting in

on the case," and stating "the reasonableness of a fee cannot be assessed in isolation from what it buys").[8]

It is especially appropriate to use a common fund approach to the fee award in cases based on fee shifting statutes when the "settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees . . . ." *Skelton*, 860 F.2d at 256; *accord Florin*, 34 F.3d at 564. Here, the settlement releases Plaintiffs' and class members' statutory claims to fees under the FLSA, and state wage and hour laws.[9]

There are several other reasons that courts in the Seventh Circuit favor the percentage of the fund method. First, the percentage of the fund method promotes early resolution, and removes the incentive for plaintiffs' lawyers to engage in wasteful litigation in order to increase their billable hours. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003). Where attorneys' fees are limited to a percentage of the total, "courts can expect attorneys to make cost-efficient decisions about whether certain expenses are worth the win." *Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998); *see also In re Amino Acid Lysine Antitrust Litig.*, No. 95 Civ. 7679, 1996 WL 197671, at *2 (N.D. Ill. Apr. 22, 1996) (explaining "growing recognition that in a common fund situation . . . a fee based on a percentage of recovery . . . tends to strike the best balance in favor of the clients' interests while at the same time preserving the lawyers' self-interest").

Second, the percentage method preserves judicial resources because it saves the Court from the cumbersome task of reviewing complicated and lengthy billing documents. *Florin*, 34 F.3d at 566 (noting "advantages" of percentage of the fund method's "relative simplicity of

[8] The trend in other circuits is to use the percentage of the fund method as well. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001).

[9] *See* 29 U.S.C. §216(b); 820 Ill. Comp. Stat. Ann. 105 § 12(a); Minn. Stat. Ann. § 177.27; Wis. Stat. Ann. § 109.03.

administration"); *Gaskill*, 942 F. Supp. at 386 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (fee requests "should not result in a second major litigation")). Courts in this district routinely apply the percentage method to common fund settlements and have noted the advantages of this approach. *See, e.g.*, *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1040 (N.D. Ill. 2011) (using percentage method because it did "not need to resort to a lodestar calculation, which would be costly to conduct, to reinforce the same conclusion"); *Gaskill*, 942 F. Supp. at 386 (describing advantages of percentage method, including judicial efficiency and an "efficient check on the attorney's judgment" in economic decision-making). As the Court of Appeals for the Second Circuit has stated, the "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) (citation omitted).

B. The Results and Benefits Conferred Upon The Class Justify The Fee Award.

This Settlement will provide the Class with a substantial cash payment. The Settlement Agreement provides that Defendants will pay a maximum settlement amount of $3,900,000.00 to settle all claims against them. Swartz Decl. ¶ 49. This is well within the range of reasonable recoveries for the Class. *Id.*

The settlement represents significant value given the attendant risks of litigation – even though recovery might be greater if Plaintiffs attained class certification, overcame motions to decertify any class or collective, succeeded on all claims at trial, survived any appeal, and were able to collect. *Id.* ¶ 50. By Plaintiffs' estimation, the $3,900,000 guaranteed settlement amount represents approximately 78% of the class's lost wages, based upon the estimate that each Class Member worked an average of eight overtime hours per week, which Defendants' records suggest may be considerably higher than the actual average weekly hours. *Id.* ¶ 52.

The Settlement also does not present any signs of collusion. It was vigorously negotiated with the help of a well-respected class action employment law mediator. *Id.* ¶ 53. All Class Members' awards will be calculated according to the same allocation formula. *Id.* ¶ 54. There is no "clear-sailing" provision. *Id.* ¶ 55; *cf. Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014); *Redman*, 768 F.3d at 637.

Moreover, continued litigation would pose significant risks. While Plaintiffs believe they would prevail on their claims, Defendants have asserted numerous defenses as to liability and damages. As discussed *supra* § II, if Plaintiffs continued to litigate, they would have to contend with unfavorable decisions issued by district courts in this Circuit as to both the status of assistant managers as exempt, and the feasibility of class certification.

C. Analysis Of The Market For Legal Services Supports Plaintiffs' Request.

In awarding attorneys' fees, courts ultimately "must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). District courts must "undertake an analysis of the terms to which the private plaintiffs and their attorneys would have contracted at the outset of the litigation when the risk of loss still existed." *Sutton*, 504 F.3d at 692. They must "do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, [and] information from other cases . . . ." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

(1) **Plaintiff's Counsel's Request for One-Third Of The Settlement Is The Normal Rate Of Compensation In The Northern District of Illinois Market.**

The attorneys' fees Plaintiffs' Counsel request are based on the market in the Northern District of Illinois. *Id.* at 600 (approving attorneys' fees based, *inter alia*, on "legal hurdles that

lead counsel faced in proving liability") (citing *Donovan v. Estate of Frank E. Fitzsimmons,* 778 F.2d 298, 309 (7th Cir. 1985)). Plaintiffs' Counsel are experienced and nationally recognized for their expertise in litigating complex class and collective actions, including wage and hour cases like this one, and are justified in seeking compensation in the form of one-third of any potential settlement (plus costs) for their efforts. Swartz Decl. ¶¶ 4-13; Shavitz Decl. ¶¶ 4-12.

Before initiating this litigation Plaintiffs' Counsel agreed with the Named Plaintiffs to request no more than one-third of any (at that time uncertain) future recovery. *See* Swartz Decl. ¶ 56. Thus, the Court knows what private plaintiffs "would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)," *In re Synthroid*, 264 F.3d at 718, 720, because the Named Representatives contracted for Plaintiffs' Counsel to be compensated with the amount Plaintiffs' Counsel now seek, *see In re Dairy Farmers of Am., Inc.*, __ F. Supp. 3d __, No. 09 Civ. 3690, 2015 WL 753946, at *3 (N.D. Ill. Feb. 20, 2015) (stating "presumption of market-rate reasonableness" would have attached if parties had "established[ed] a fee structure at the outset of [the] lawsuit").

It was reasonable for the Named Plaintiffs to contract for one-third of the settlement fund to be paid to Plaintiffs' Counsel. In the Northern District of Illinois, class and collective action employment lawyers routinely contract to receive one-third of any potential settlement as compensation for taking on the risk of funding a potential multi-year litigation without any assurance of recovery. *See* Declaration of Paul W. Mollica ("Mollica Decl.") ¶ 7; Declaration of Douglas M. Werman ("Werman Decl.") ¶¶ 10-11. In addition, one-third is the standard contingent percentage that employment lawyers in the Northern District of Illinois charge individual clients. Mollica Decl. ¶ 7; Werman Decl. ¶ 10. These multiple data points, confirming that plaintiffs routinely are willing to agree to a one-third contingency fee

arrangement, reinforces that Plaintiffs' Counsel are requesting the proper market rate. *See In re Synthroid*, 325 F.3d at 976.

Courts regularly agree that "a counsel fee of 33.3% of the common fund is comfortably within the range typically charged as a contingency fee by plaintiffs' lawyers in an FLSA action." *Burkholder*, 750 F. Supp. 2d at 997 (collecting cases); *see Rusin*, No. 12 Civ. 1135 (attached as Exhibit D) (Chang, J.) (approving award of one-third settlement plus costs in wage and hour litigation); *Campbell*, 2012 WL 1424417, at *2 (same). These awards of "attorneys' fees from analogous class action settlements are indicative of a rational relationship between the record in this similar case and the fees [Plaintiffs' Counsel propose should be] awarded by the [Court]." *Taubenfeld*, 415 F.3d at 600.

Plaintiffs' Counsel's requested fee is also within the market rate for common fund wage and hour actions within the Northern District of Illinois. *See id.* at 599-600 (noting class actions in the Northern District of Illinois have awarded fees of 30-39% of the settlement fund); *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming award of 38% of fund); *In re Dairy Farmers of Am., Inc.*, 2015 WL 753946, at *4 (awarding fees on one-third common fund); *Goldsmith v. Tech. Solutions Co.*, No. 92 Civ. 4374, 1995 WL 17009594, at *7-8 (N.D. Ill. Oct. 10, 1995) (same and noting that "where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); 4 Robert Newberg, *Newberg on Class Actions* § 14.6 (4th ed. 2002) ("[F]ee awards in class actions average around one-third of the recovery[.]").

(2) **The Risk Of Nonpayment Was Significant.**

Plaintiffs' Counsel's decision to charge the market rate is also reasonable in light of the significant risks of nonpayment that Plaintiffs' Counsel faced. At the outset of the litigation, Plaintiffs' Counsel took "on a significant degree of risk of nonpayment" in agreeing to represent

Plaintiffs. *Taubenfeld*, 415 F.3d at 600 (approving of district court's reliance on this factor in evaluating attorneys' fees). Plaintiffs' Counsel took this case on a contingent basis, meaning that there was a strong risk that they would not be paid. *See Sutton*, 504 F.3d at 693-94 ("We recognized [in an earlier case] that there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit."). Plaintiffs' Counsel also faced significant legal hurdles in establishing certification and proving liability. *See supra* § II. As the Seventh Circuit has noted, Plaintiffs' Counsel "could have lost everything" they invested. *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992) (Posner, J.).

D. Although Plaintiffs' Counsel's Fee Request Is Reasonably Based On The Market And Should Be Approved Without Cross-Checks, Plaintiffs' Counsel Meets Both Cross Checks That Courts Have Applied.

Plaintiffs' Counsel's fee request should be approved because it is reasonably based on the market rate. No further showing or analysis is needed. Although courts in the Seventh Circuit have on occasion employed a lodestar cross-check for the reasonableness of fees, and Judge Posner recently elucidated a further reasonableness "ratio" that should be analyzed in consumer cases where the value to the class is exceedingly low, it is not appropriate to employ either cross-check here. This is because the recovery for Class Members is substantial and the settlement does not present indicia that it was the product of collusion between the parties at the expense of Class Members.

(1) Although The Court Should Not Perform A Lodestar Cross-Check, Plaintiffs' Counsel's Lodestar Supports The Fee Request.

In the Seventh Circuit, courts are not required to perform lodestar crosschecks in common fund settlements. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("consideration of a lodestar check is not an issue of required methodology"); *In re*

Dairy Farmers of Am., Inc., 2015 WL 753946, at *7 ("For attorneys who are arguing for a percentage-of-the-fund fee award, any delineation of hours is seemingly unnecessary . . . ."). Although courts occasionally review counsel's lodestar as "a cross-check to assist in determining the reasonableness of the fee award," *Heekin*, 2012 WL 5878032, at *2, the lodestar cross-check is of limited utility because "[u]ltimately . . . the market controls," *In re Trans Union Corp. Privacy Litig.*, No. 00 Civ. 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009).

In *Redman*, the Seventh Circuit emphasized that an attorneys' fees award must be evaluated in the context of "what it buys," and not how "hard and efficiently . . . [Plaintiffs' Counsel] say they worked." 768 F.3d at 633. "[I]n determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation." *Id.* One Northern District of Illinois court recently held that the "use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 n.27 (N.D. Ill. 2011) (*quoting Will v. Gen. Dynamics Corp.*, No. 06 Civ. 698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010).

Because Plaintiffs' Counsel's substantial work to date has "bought" a significant recovery for Class Members, the Court need not analyze Plaintiffs' Counsel's lodestar.[10]

Nonetheless, were the Court to evaluate Plaintiffs' lodestar, it would highlight the reasonableness of the award. To date, Plaintiffs' Counsel have incurred $177,740 in attorneys'

[10] Further illustrating that the lodestar is an ineffective benchmark for reasonableness, recent opinions from the Northern District of Illinois have rejected the lodestar cross-check *even while finding the fees in question to be reasonable*. *See, e.g.*, *Kaplan*, 2014 WL 2808801, at *3-4 (rejecting plaintiffs' cross-check lodestar arguments as "absurd" but finding contingency rate reasonable because it was "well within the range of market prices"); *In re Dairy Farmers of Am., Inc.*, 2015 WL 753946, at *7 ("Ultimately, the Court sees no utility in considering this somewhat-arbitrary (and under-vetted) [lodestar] calculation, and thus disregards this evidence for purposes of this fee petition.").

fees and $21,682.42 in expenses. Swartz Decl. ¶¶ 58, 60; Shavitz Decl. ¶¶ 14-15. Plaintiffs' Counsel's rates are based on market rates and, therefore, reasonable. *See* Mollica Decl. ¶ 7; Werman Decl. ¶¶ 10-11. Plaintiffs' Counsel expended more than 299 hours on this case. Swartz Decl. ¶¶ 57; Shavitz Decl. ¶ 14. Should the Court look to the lodestar cross-check, these hours would establish the significant work that Plaintiffs' Counsel have invested and would confirm the reasonableness of the award. The Court should presume these hours were reasonably necessary to vigorously prosecute the case because Plaintiffs' Counsel contracted, and expected, to recover a percentage of the fund (if they recovered at all) and not their lodestar – and thus had little incentive to expend unnecessary time and effort. *See Wal-Mart Stores*, 396 F.3d at 121 (The percentage method "provides a powerful incentive for efficient prosecution and early resolution of litigation.") (citation omitted). Put another way, Plaintiffs' Counsel was not seeking to pad a bill that they never expected to come due.

The fee that Plaintiffs' Counsel request is approximately 7.3 times their lodestar amount, which is well within the range that courts accept when performing a crosscheck. Swartz Decl. ¶ 58; *see, e.g.*, *Yuzary v. HSBC Bank USA, N.A.*, No 12 Civ. 3693, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (approximately 7.6 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05 Civ. 11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approximately 8.3 multiplier); *In re Rite Aid Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approximately 6.96 multiplier); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing nationwide settlements where multiplier ranged up to 19.6).

Accordingly, Plaintiffs' Counsel request for attorneys' fees of $1,300,000 and reimbursement of actual costs of $21,682.42 is reasonable and should be approved.

(2) Although The Court Should Not Use The "*Redman* Ration Test" To Cross-Check The Settlement, Plaintiffs' Counsel's Fee Request Would Pass This Test.

In three recent cases, the Seventh Circuit was faced with three low claims-rate consumer settlements ("the Consumer Cases") that were negotiated under questionable circumstances and where only the parties and lawyers (not class members) were to benefit from the proposed settlement. *See Pearson*, 772 F.3d 778; *Redman*, 768 F.3d 622; *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). In each of the Consumer Cases, the class recovery was miniscule, the claims process was designed to discourage class participation, the claims' rate was exceedingly low, and there were other indicia that Plaintiffs' Counsel had sold-out the class to further Plaintiffs' Counsel's own pecuniary interests. As a result, based on the specific facts of two of those cases, the Seventh Circuit instructed the district courts to examine the ratio of the fee requested to the fee plus what class members received, as a cross-check, and as a deterrent to what the Seventh Circuit viewed as attorney-driven litigation (the "*Redman* Ratio test"). *See Redman*, 768 F.3d at 630; *accord Pearson*, 772 F.3d at 781. The Settlement here, however, could hardly differ more from the settlements in the Consumer Cases. As is more fully set forth below, because this is not a Rule 23 settlement, and value of this Settlement to the Class is readily apparent, no further cross-check is needed.

(i) The *Redman* Ratio Test Should Not Apply To High-Value FLSA Settlements.

At the threshold, the Consumer Cases are simply inapplicable because this is a FLSA settlement where no Class Members will release claims without affirmatively deciding to join the case. *See supra* § I (explaining that FLSA settlements do not implicate same due process concerns as Rule 23 class action settlements). If an SM does not like this settlement, he or she can simply decide not to join the case without losing his or her claims or right to sue.

For at least four additional distinct reasons, this high-value settlement is easily distinguishable from the Consumer Cases. First, through this Settlement, Plaintiffs' Counsel have provided a significant cash value to Class Members. The Settlement Agreement provides each Class Member with an individualized guaranteed minimum cash payment so long as they claim it. *See* Ex A. (Settlement Agreement). Plaintiffs' Counsel's calculations show that the average guaranteed award will be approximately $3951.37. Swartz Decl. ¶ 47. These are big checks. In sharp contrast, the settlements in the Consumer Cases brought little if any real value to their class members. *See Eubank*, 753 F.3d at 723, 725-26 (class members only received a "contingent" recovery where high value claims had to "run the gauntlet of arbitration" and others just received coupons); *Redman*, 768 F.3d at 628, 637 (class members who submitted a claim received a $10 RadioShack coupon that was "difficult[]" to value in the aggregate; value to class was "uncertain because it is not a cash settlement"); *Pearson*, 772 F.3d at 783-84 (actual recovery to the class was "7 cents apiece").

Second, the Plaintiffs' Counsel have drafted a simple notice, planned robust efforts to locate Class Members for whom the initial notices are returned undeliverable, and requested reminder notices. Swartz Decl. ¶ 37. Thus, the notice here is nothing like the notices in the Consumer Cases. In those cases, the notices were complicated and designed to *decrease* participation. *See Eubank*, 753 F.3d at 726 (notice divided into 27 sections with numerous subsections, class members had to satisfy nine separate criteria to claim benefits, and claims forms were extremely "complicated" so that defendant could reject many of them); *Redman*, 768 F.3d at 628 (of 16 million assumed class members, notice of settlement "was sent to fewer than 5 million"); *Pearson*, 772 F.3d at 782-83 (notice was structured "with an eye toward discouraging the filing of claims").

Third, because of the high Settlement Amount and because everyone will receive a check, Plaintiffs' Counsel expect a claims rate that will easily exceed those in the Consumer Cases where, due to the small value that the settlement provided to the class members and the byzantine notices and claim forms, the claims rate was very low. *See Eubank*, 753 F.3d at 726 (only 1276 claims were filed out of more than 225,000 notices sent); *Redman*, 768 F.3d at 628 ("a little more than one half of one percent of the entire class" submitted claims); *Pearson*, 772 F.3d at 782 ("one quarter of one percent" submitted claims).[11]

Moreover, Consumer Cases exhibited other suspicious circumstances simply not present in this Settlement. *See Eubank*, 753 F.3d at 724 ("[Class Counsel]'s ethical troubles should have disqualified him from serving as class counsel even if his father-in-law hadn't been in the picture [as class representative]. Another suspicious feature of the settlement . . . was [defendant's] agreeing to a $2 million advance of attorneys' fees to lead class counsel before notice of the settlement was sent to the members of the class."); *Redman*, 768 F.3d at 637 ("The existence of such [clear-sailing] clauses . . . illustrates the danger of collusion in class actions between class counsel and the defendant, to the detriment of the class members."); *id.* at 638 ("[T]he lead named plaintiff . . . is employed by a law firm for which the principal class counsel . . . once worked."); *Pearson*, 772 F.3d at 787 (implying that plaintiffs' counsel intended to "s[ell] out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers").

[11] Here, the parties have negotiated that BMO will even inform current employees that it approves of the settlement to assuage employee fears of employer retaliation and increase participation.

(ii) The Court Should Analyze The Actual Value To The Class Based On The Total Amount Available To Be Claimed.

The Consumer Cases also do not alter the decades-old Supreme Court holding that the value to the Class should be analyzed in relation to the total settlement. *See Boeing*, 444 U.S. at 48. As *Pearson* acknowledges, "[i]n regard to sizing the benefit of the settlement to the class . . . an option to file a claim creates a prospective value, even if the option is never exercised." 772 F.3d at 782. This is because "the right of class members 'to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.'" *Id.* (quoting *Boeing*, 444 U.S. at 480). Here, like in *Boeing*, Plaintiffs' Counsel have created a real benefit to all Class Members by providing them with an option to file a claim on a settlement of $3,900,000. "The class members [are] known, the benefits of the settlement ha[ve] been 'traced with some accuracy,' and costs [can] be 'shifted with some exactitude to those benefiting.'" *Pearson*, 772 F.3d at 782 (discussing and quoting *Boeing*, 444 U.S. at 480-81).

Rather than altering the Supreme Court's rule (which it could not do), the Seventh Circuit found that the actual benefit to the class was much less than the total purported settlement amount. This was because (as discussed above) the settlement amounts that were the basis of the fee awards were speculative, and the claims process was structured to minimize participation (and thus to minimize claims on the settlement). *See, e.g.*, *Pearson*, 772 F.3d at 781, 783. Thus, *Pearson* differed from *Boeing*, where class counsel created a fund, class members had an undisputed right to it, and could easily claim from it. *See Pearson*, 772 F.3d at 782. *Pearson* did not create a rule that the value to class members should only be viewed in proportion to what they actually claimed. Such a rule would run counter to Supreme Court precedent.

Here, like in *Boeing*, Plaintiffs' Counsel have provided a significant *ascertainable* $3,900,000.00 settlement fund with a straight-forward path for Class Members to easily claim what Plaintiffs' Counsel achieved for them by simply cashing a check. The reversion present in this case does not alter the value that Plaintiffs' Counsel achieved. This is because "[t]he members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery." *Boeing*, 444 U.S. at 481-82. "Any right that [Defendants] may establish to the return of money eventually unclaimed is contingent on the failure of absentee class members to exercise their present rights of possession." *Id.* at 482. Plaintiffs' Counsel created that benefit for the Class, and unlike in the Consumer Cases, there are no barriers to claiming it. Despite the potential reversion, it is proper to impose a burden on Class Members for that benefit. As the Supreme Court explained, "[a]lthough [Defendants] . . . cannot be obliged to pay fees awarded to the class lawyers, [Defendants'] latent claim against unclaimed money in the judgment fund may not defeat each class member's equitable obligation to share the expenses of litigation." *Id.*; *see also Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court issue an order: (1) approving the $3,900,000 settlement set forth in the Settlement Agreement and Release; (2) approving the proposed Settlement Notice and direct its distribution; (3) approving service awards of $8,333.33 each to the Named and Opt-In Plaintiffs for their service to the collective; (4) approving Plaintiffs' request for one-third of the settlement fund for attorneys' fees and an additional reimbursement of costs and litigation expenses; and (5) incorporating the terms of the Settlement Agreement.

Dated: April 15, 2015
New York, New York

Respectfully submitted,

/s/ Justin M. Swartz
Justin M. Swartz

OUTTEN & GOLDEN LLP
Justin M. Swartz
Christopher M. McNerney (*pro hac vice*)
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000
Facsimile: (646) 509-2060

SHAVITZ LAW GROUP, P.A.
Gregg I. Shavitz (*pro hac vice*)
Paolo Meireles (*pro hac vice*)
1515 South Federal Highway, Suite 404
Boca Raton, Florida 33432
Telephone: (561) 447-8888
Facsimile: (561) 447-8831

Attorneys for Plaintiffs and the Putative Collective

CERTIFICATION OF SERVICE

I hereby certify that on **April 15, 2015** a copy of the foregoing documents were filed electronically and service made by certified mail to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by certified mail for anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Justin M. Swartz
Justin M. Swartz