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

TOM LEWIS, MATTHEW COULTER, REBECCA GRAY, RAY PRINICIPE, JULIE KARPIK, MATTHEW BELVEAL and WAYNE DIMMOCK, on behalf of themselves and others similarly situated,	:	CIVIL ACTION
Plaintiffs,	:	NO: 2:11-cv-00058
v.	:	JUDGE MARBLEY
THE HUNTINGTON NATIONAL BANK,	:	MAGISTRATE JUDGE KEMP
Defendant.	:	

JOINT MOTION FOR APPROVAL OF SECTION 216(B) ACTION SETTLEMENT

Defendant Huntington National Bank ("HNB") and the Plaintiffs (which includes the Named Plaintiffs Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe, Julie Karpik, Matthew Belveal and Wayne Dimmock and the remaining Opt-in Plaintiffs) (collectively "the Parties") have reached a comprehensive settlement agreement (the "Agreement") in this matter. The parties now move the Court to approve the Agreement (Doc. # 137-1) which is attached as **Exhibit A** to the Parties' Memorandum in Support of this Motion. A proposed Order is attached as **Exhibit B**. For the reasons set forth in the accompanying memorandum, this motion should be **GRANTED**.

Dated: November 30, 2012 Respectfully submitted,

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EASTERN DIVISION

TOM LEWIS, MATTHEW COULTER, REBECCA GRAY, RAY PRINICIPE, JULIE KARPIK, MATTHEW BELVEAL and WAYNE DIMMOCK, on behalf of themselves and others similarly situated, Plaintiffs, v. THE HUNTINGTON NATIONAL BANK, Defendant.	:	CIVIL ACTION NO: 2:11-cv-00058 JUDGE MARBLEY MAGISTRATE JUDGE KEMP

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR APPROVAL OF SECTION 216(B) SETTLEMENT

I. INTRODUCTION

Huntington National Bank ("HNB" or "Defendant") and Plaintiffs (which includes the Named Plaintiffs Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe, Julie Karpik, Matthew Belveal and Wayne Dimmock and the remaining 110 Opt-in Plaintiffs) (collectively "the Parties") have reached a comprehensive settlement in this case. They have filed a Joint Motion for Approval of Section 216(b) Settlement. For the reasons that follow, the parties' motion should be **GRANTED.**

II. SUMMARY OF SETTLEMENT TERMS

The Parties' settlement agreement (the "Agreement") contains several salient components. Such components include in part (1) payments to members of the Plaintiffs in exchange for releases and dismissals; (2) payments to Ohio Rule 23 Class Members in exchange for releases and dismissals; and (3) payment of Plaintiffs' attorneys' fees and expenses. These

components, as well as additional terms of the settlement agreement, are discussed below. A copy of the Agreement is attached as **Exhibit A**. A proposed Order is attached as **Exhibit B**.

A. Payments to the Opt In Plaintiffs.

The Section 216(b) Plaintiffs, referred to as "Opt In Plaintiffs" in the Settlement Agreement consists of the 117 Opt-In Plaintiffs, including Named Plaintiffs, Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe, Julie Karpik, Matthew Belveal and Wayne Dimmock, who are current or former Mortgage Loan Officers ("MLOs") of HNB at its various locations nationwide (1) who worked at any time since January 18, 2008 until April 10, 2011; (2) who were compensated based on HNB's Production Commission and Incentive Compensation Plan, and/or Huntington National Bank's Production Commission and Incentive Compensation Plus Salary Plan (collectively, the "Plans"); and (3) who filed Consents to Join the above captioned lawsuit brought by Named Plaintiffs Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe, Julie Karpik, Matthew Belveal and Wayne Dimmock ("Named Plaintiffs"). The Section 216(b) Plaintiffs will be referred to as the "Opt-In Plaintiffs" in this Memorandum as they are in the Agreement. The Named Plaintiffs and the Opt-In Plaintiffs will be collectively referred to as "FLSA Class Members" in this Memorandum as they are in the Agreement.

Under the terms of the Agreement, HNB will pay an aggregate total payment of $3,100.000.00, the "Settlement Fund." As part of the Agreement, an aggregate gross amount of $1,800,000.00 of the Settlement Fund is to be paid to the FLSA Class Members. **Exhibit F** to the Agreement reflects the payments that HNB will make to each individual FLSA Class Member. Included in these payments are payments for unpaid wages and liquidated damages payments equivalent to seventy-five percent (75%) of the unpaid wage payments to each FLSA Class Member. The unpaid wage payments to the FLSA Class Members constitute wages subject to all

tax and other withholdings HNB deducts in the ordinary course of business from its payment of wages to its employees. HNB will pay the employer's portion of payroll taxes, such as FICA, FUTA, and SUTA, related to the settlement payments to FLSA Class Members with funds drawn from outside of the Section 216(b) Settlement Fund.[1]

In exchange for HNB making these payments, the FLSA Class Members agree to release HNB and its predecessors, successors, present and former affiliates, parents, subsidiaries, insurers, officers, directors, agents, MLO, members, shareholders, general partners, limited partners, owners, beneficiaries, representatives, heirs, attorneys, assigns (including without limitation, any investors, trusts, or other similar or affiliated entities) and all persons acting by, through, under or in concert with any of them, including any party that was or could have been named as a defendant in the Civil Action from claims for (1) unpaid wages, penalties, liquidated damages, costs, attorneys' fees, and any other relief under the FLSA, 29 U.S.C. § 201, *et seq*., the Ohio Minimum Fair Wage Standards Act, O.R.C. §§ 4111.01, 4111.03 and 4111.10., ("the Ohio Wage Act") and the Ohio Prompt Pay Act, O.R.C. § 4113.15 ("OPPA") (the Ohio Wage Act and the OPPA will collectively be referred to herein as "the Ohio Acts") and (2) any alleged improper deduction of wages.

B. Payment to the Ohio Rule 23 Class Members.

The remaining claims in this action brought by Named Plaintiffs Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe and Julie Karpik ("Ohio Named Plaintiffs") seek recovery of overtime pay under the Ohio Acts brought as an Ohio Rule 23 class action. On May 23, 2011,

[1] The payments to the Ohio Rule 23 Class Members are taxable in the same fashion as the Section 216(b) Settlement payments and the employer portion of payroll taxes are drawn on funds outside of the Rule 23 Settlement Fund.

this Court conditionally certified the FLSA collective action; this Court has not yet certified a Rule 23 class for purposes of the Ohio Acts.[2]

After mediation in Columbus on September 20, 2012 and notwithstanding their adversarial positions in this matter, the Named Plaintiffs, on behalf of the Opt-In Plaintiffs and HNB have, with Mediator Robert Kaiser's assistance, negotiated a settlement of this case. The terms of the proposed settlement ("the Settlement") are set forth, in their entirety, in the proposed Agreement, which is attached hereto as **Exhibit A**.[3]

The Settlement is the product of arms-length negotiations between the Parties under the mediation of a private mediator, Robert Kaiser, and is a fair, reasonable, and adequate resolution of the claims in this matter. A Settlement Team consisting of Tom Lewis, Matthew Coulter, Rebecca Gray, Ray Principe, Julie Karpik, Matthew Belveal and Wayne Dimmock represented the Opt-in Class at the Mediation and assisted Plaintiffs' Counsel in the preparation for the Mediation. The Settlement Team has since signed the Settlement Agreement.

The Parties have agreed to a two part settlement structure, in which they will seek Court approval for (1) a settlement for the FLSA Class Members wherein in exchange for individual payments from a $1,800,000.00 Section 216(b) Settlement Fund they release their FLSA and, if applicable, Ohio Acts claims; and, (2) a Rule 23 Ohio Acts class action settlement that will settle the Ohio Acts and FLSA claims of any employee of HNB who (1) worked as an MLO at any time from January 18, 2008 to April 10, 2011 in the State of Ohio and (2) was compensated based on HNB's Plans and did not timely opt-out of the Ohio Rule 23 settlement.[4] This Motion

[2] The Rule 23 Class Certification for an Ohio class of MLOs for claims pursuant to the Ohio Wage Act and the OPPA is fully briefed and pending before this Court.

[3] The September 20, 2012 mediation was successful in reaching a settlement for the Ohio Acts Rule 23 claims. A Motion to Preliminarily Approve the Rule 23 Settlement will be filed separately.

[4] The potential universe of Rule 23 members is 186; *see* **Exhibit B** of the Settlement Agreement.

seeks Court approval only of the terms of the Agreement that pertain directly to the FLSA Class Members. A separate Plaintiffs' Unopposed Motion for Preliminary Certification of an Ohio Rule 23 Class for Purposes of Settlement pertaining to the portions of the Agreement regarding the Ohio Rule 23 Class Members will be filed simultaneously.

For the following reasons, the Court should find that the Agreement as to the compromise of the FLSA Class Members' claims is fair, reasonable, and adequate and should approve the same.

III. THE AGREEMENT SHOULD BE APPROVED BY THIS COURT.

"Before approving a settlement, a district court must conclude that it is fair, reasonable and adequate." *Int'l Union, United Auto, Aerospace, and Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). This case was brought as a collective action pursuant to § 216(b) of the FLSA and an Ohio Rule 23 class action under the Ohio Acts. The collective action procedure under the FLSA differs from the class action procedure under Rule 23 of the Federal Rules of Civil Procedure, as each employee in an FLSA collective action must provide consent in writing to join the action. "The Court's role in this situation is in many ways comparable to, but in others quite distinguishable from, that of a court in a settlement of a class action brought pursuant to Fed.R.Civ.P. 23, and derives from the special character of the substantive labor rights involved." *Collins v. Sanderson Farms, Inc.*, 568 F.Supp.2d 714, 717 (E.D.La. 2008).

To protect against settlements that allow substandard wages to persist, private parties may not settle an FLSA action absent court approval or supervision by the Secretary of Labor. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-7 (1945); *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008). "The court must determine whether the settlement is a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" *Crawford v. Lexington-*

Fayette Urban County Gov't, Case No. 06-299-JBC, 2008 WL 4724499, *2 (E.D.Ky. Oct. 23, 2008) (quoting *Collins*, 568 F.Supp.2d at 718 and *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1355 (11th Cir. 1982)).[5] As previously noted, however, a collective action differs from a Rule 23 class action, as each employee in a collective action must provide consent in writing to join the action. *See Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975). Accordingly, the primary focus of a court's inquiry when reviewing a settlement of claims under the FLSA is to ensure that the settlement reflects a fair resolution of the claims, and not as Rule 23 requires, that the due process interests of absent class members be protected. *See Collins*, 568 F.Supp.2d at 721-22; *Moore v. Ackerman Inv. Co.*, Case No. C 07-3058-MWB, 2009 WL 2848858 (N.D.Iowa Sept. 1, 2009).[6]

Thus, approval of this FLSA collective action settlement does not require the two-step process of preliminary approval and notice to the class, nor the opportunity to object that is ordinarily required under Rule 23.[7] *See Moore*, 2009 WL 2848858 at *2 (unlike Rule 23 action, § 216(b) "does not expressly require a 'fairness' hearing on a proposed settlement"); *Collins*, 568 F.Supp.2d at 721-22l; 5 Moore's Federal Practice 23.04(1). Because members of an FLSA collection action must consent to join the suit and agree to be represented by the named plaintiffs and their counsel, preliminary notice of the settlement and an opportunity to object are not required. *Moore*, 2009 WL 2848858 at *1. Workers who have not joined this FLSA case are not bound by the settlement.[8] *Id.*; *see* 29 U.S.C. § 216(b).

[5] Attached as Attachment A-1.

[6] Attached as Attachment A-2.

[7] The preliminary approval, notice to the class and opportunity to object provisions are present in the Settlement Agreement but they are for the Ohio Acts Rule 23 Settlement portion of the Settlement Agreement.

[8] Since the Agreement also seeks to settle the Ohio Acts pursuant to Rule 23, the same universe of employees who received the Section 216(b) Notice in this case are now members of the Ohio Rule 23 class for settlement purposes.

A. The Agreement Is Fair And Reasonable.

Courts reviewing a proposed FLSA collective action settlement must find that the litigation involves a *bona fide* dispute and that the proposed settlement is fair and equitable to all parties concerned. *See, e.g., Lynn's Food Stores*, 679 F.2d at 1354; *Collins*, 568 F.Supp.2d at 718-19. The Sixth Circuit has identified seven factors that should aid courts in their determination of whether a class action settlement is fair and reasonable:

1) The risk of fraud or collusion;

2) The complexity, expense, and likely duration of litigation;

3) The amount of discovery engaged in by the parties;

4) The likelihood of success on the merits;

5) The opinions of class counsel and class representatives;

6) The reaction of absent class members; and

7) The public interest.

Crawford, 2008 WL 4724499 at *3 (*citing Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983))).

"The Court may choose to consider only those factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case." *Redington v. Goodyear Tire & Rubber Co.*, Case No., 5:07-cv-1999, 2008 WL 3981461, *11 (N.D.Ohio August 22, 2008) (citing *Granada*, 962 F.2d at 1205-06).[9] Because this case is a § 216(b)

They will, if the Court preliminarily approves the Ohio Rule 23 Settlement, receive notice of the Ohio Rule 23 Settlement that includes a compromise of their Ohio Wage Act and FLSA claims in exchange for a payment.

[9] Attached as Attachment A-3.

collective action rather than a Rule 23 class action, one of these factors is inapplicable, as discussed in more detail below.

1. The Absence of Fraud or Collusion in the Settlement Favors Approval.

An initial presumption exists that a settlement is fair where counsel for the parties negotiate the settlement at arm's length. *Murillo v. Texas A&M Univ. Sys.*, 921 F.Supp. 443, 445 (S.D.Tex. 1996). The settlement of this litigation was achieved through a formal mediation conducted by Robert S. Kaiser, a private mediator with extensive experience in the Sixth Circuit, including mediations of FLSA litigation.

The Parties took appropriate steps in negotiating this comprehensive settlement, which includes payment to the collective class and payment for Plaintiffs' attorneys' fees and expenses.

The Parties separately negotiated the FLSA Class Members' damages before negotiating any other items. *See* **Exhibit C**, Declaration of Robert E. DeRose, ¶ 10. Then the Parties negotiated the Ohio Rule 23 Class Members' damages. *See id.* Only after agreeing on the amount at which to settle FLSA Class Members' and the Ohio Rule 23 Class Members' damages did the parties negotiate an agreement as to the amount HNB would pay for Plaintiffs' attorneys' fees and expenses. *See id.* at ¶ 14. The three category of settlement amounts were treated separately for the entirety of the negotiations as evidenced by the Mediator's Proposal that was ultimately agreed upon by the Parties. *See* **Exhibit I** to the Settlement Agreement.

2. The Complexity, Expense, and Likely Duration of this Case, Were it not to Settle, Favors Settlement.

The complexity, expense, and likely extended duration of this case (were it not to settle at this time) are significant factors that all favor settlement. This litigation has been ongoing since January 18, 2011. To date, the Court has already ruled on one dispositive motion and it is likely that should this case not settle at this stage Plaintiffs' claims will be vigorously litigated through

another dispositive motion(s), HNB's motion for decertification, and trial. Pursuant to the Court's July 20, 2012 Order, dispositive and/or decertification motions will not be fully briefed until January 28, 2013 and a trial date has yet to be set. By way of example, in *Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346 (E.D.Mich.) (Murphy), the parties litigated similar claims for more than six years, including multiple dispositive motions and a five week jury trial.

Similarly, in this case, if the parties are not able to resolve the claims at issue, this litigation would likely continue for several years. Not only would the parties litigate their claims through summary judgment and/or trial, but the case likely would be appealed by one party (or both).

Undoubtedly, both parties will incur substantial additional legal fees and expenses if this case is not settled. For example, if this case is not resolved, Plaintiffs will likely incur addition expenses in the tens of thousands alone. *See* Exh. C at ¶ 21.

Given the complexities of the claims at issue and the expense and extended duration of continuing litigation, settlement is in the interest of both the FLSA Class Members and HNB and in the interest of judicial economy.

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

The Parties engaged in thorough discovery in this case concerning HNB's good faith defense pursuant to 29 U.S.C. § 259. Plaintiffs conducted a Rule 30(b)(6) deposition focused on twelve different topics including (1) any actions, reviews or audits by Defendant that it was in actual conformity with and in actual reliance on the Department of Labor's 2004 regulation and 2006 Opinion Letter with respect to the MLO position at HNB up to and including its decision to reclassify its MLOs as non-exempt in 2011; (2) any actions, reviews and/or audits taken by Defendant to determine whether its MLO position was in actual continued conformity with, and

that it was acting in actual reliance upon the Department of Labor's 2004 regulation and 2006 Opinion Letter with respect to the MLO position at HNB up to and including its decision to reclassify its MLOs as non-exempt in 2011; (3) the results and/or conclusion of the internal audit(s) conducted by Ms. Houck in Defendant's decision to classify the MLOs as exempt and its subsequent decision to re-classify the MLOs as non-exempt in 2011; (4) the substance of communications and/or correspondence with outside counsel regarding the internal audit as referenced in Ms. Paragraph 8 of Ms. Houck's declaration (Doc. # 36-2); (5) the substance of communications and/or correspondence regarding the internal audit referenced above; (6) the substance of communications and/or correspondence between Ms. Houck, outside counsel and others in the industry regarding the classification of Defendant's MLOs as administratively exempt as it relates to whether its MLO position was in actual conformity with, and whether it was acting in actual reliance upon, the Department of Labor's 2004 regulation and 2006 Opinion Letter up to and including its decision to reclassify its MLOs as non-exempt in 2011; (7) the substance of communications and/or correspondence between Ms. Houck, outside counsel and others in the industry regarding the classification of Defendant's MLOs as administratively exempt subsequent to the Department of Labor's March 24, 2010 Administrator's Interpretation relating to the administrative exemption as it pertains to Defendant's MLOs up to and including its decision to reclassify its MLOs as non-exempt in 2011; (8) the substance of opinions and/or communications between Ms. Houck and/or other representatives of HNB with experts and/or consultants relevant to HNB's decision to classify its MLOs as administratively exempt between January of 2008 and its decision to reclassify its MLOs as non-exempt in 2011; (9) the substance of internal communications within HNB involving Ms. Houck and/or other representatives of HNB relevant to HNB's decision to exempt its MLOs as the result of Department of Labor

regulations or Opinion Letters; (10) Any internal or outside studies or investigations of the work performed by MLOs with respect to the application and/or availability of the Department of Labor regulations or Opinion Letters; (11) Communications between Ms. Houck and/or employees of HNB and the U.S. Department of Labor and/or its state equivalent concerning HNB's decision to classify its MLOs as administratively exempt between January of 2008 and its decision to reclassify its MLO's as non-exempt in 2011; and (12) Any communications between Ms. Houck and/or employees of HNB and the American Bankers Association, the Mortgage Bankers Association, the Ohio Mortgage Bankers Association, the Columbus Mortgage Bankers Association, the law firm of Mayer, Brown, Rowe & Maw, LLP, the American Financial Services Association or any mortgage company, bank, trade association or governmental agency regarding concerning HNB's decision to classify its MLOs as administratively exempt between January of 2008 and its decision to reclassify its MLO's as non-exempt in 2011.

In addition, Plaintiffs took significant written discovery and reviewed and analyzed tens of thousands of pages of documents related to their claims.

The proposed settlement agreement reflects the discovery taken by the Parties. Additionally, the amount of damages agreed to by the Parties for each Plaintiff reflects an amount determined by Plaintiffs, with assistance of their expert, Dr. David Boyd, pursuant to the compensation data provided by HNB.[10]

4. The Uncertainty of this Litigation Favors Settlement.

Both Plaintiffs and HNB are well aware of the uncertainty associated with litigation. For instance, in *Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346 (E.D.Mich.) (Murphy), the *Quicken Loans* plaintiffs unsuccessfully tried their claims during a five week jury trial. While the Plaintiffs in this case are confident in their claims based, in part, on the differences in this

[10] HNB has not been privy to any calculations by Plaintiffs.

litigation as compared to *Quicken Loans*, including the Court's decision denying Defendant's Motion for Partial Summary Judgment (Doc. Entry No. 114), they also understand that their claims in this case may prove to be unsuccessful. Accordingly, Plaintiffs strongly prefer the certainty of the proposed settlement to the risks associated with continued litigation.

Likewise, HNB understands the risk of litigating the claims at issue. Accordingly, HNB prefers the certainty of the proposed settlement to the risks and costs associated with continued litigation.

5. The Opinions of Class Counsel and Class Representatives Favor Settlement.[11]

The lawyers of Barkan Meizlish Handelman Goodin DeRose Wentz, LLP ("Barkan Meizlish") and Oliver Law Offices have litigated numerous individual and collective and class action cases of all types and have recovered millions of dollars in these cases on behalf of workers and injured persons. *See* Exh. C at ¶ 21. *See also* **Exhibit D**, Declaration of Jami Oliver, ¶ 5. Based on this experience, they can confidently report to the Court that this prong is met. *Id.* After an intense mediation, an arm's-length settlement was reached that, in the view of Plaintiffs' counsel, affords the FLSA Class Members with significant and meaningful financial benefits. *See* Exh C. at ¶ 21 and Exh. D at ¶ 6.

Throughout the settlement process, Plaintiffs' counsel constantly conferred with the Named Plaintiffs, who was present in the room for all of the proceedings or available by telephone, answering their questions and soliciting their opinion on how to tailor the settlement. *See* Exh. C at ¶ 11; *See also* Exh. D at ¶ 7. The Named Plaintiffs have conveyed their satisfaction with the results obtained. *See* Exh. C at ¶ 12; *See also* Exh. D at ¶ 7. All in all, both

[11] The representations set forth in this subpart 5 are the representations of Plaintiffs' Counsel. Defendant, however, does not object to the representations in this subpart.

Plaintiffs' counsel and the Named Plaintiffs believe this to be a fair and reasonable outcome. *See id.* at ¶ 13; *See also*, Exh. D at ¶ 7.

6. The Reaction of Absent Class Members is Irrelevant in this Matter.

As discussed above, this case is a collective action brought pursuant to § 216(b) of the FLSA. Unlike a Rule 23 class action, there are not absent class members. All of the Opt-In Plaintiffs in this matter have joined this case pursuant to § 216(b) by filing a consent form and have agreed to be bound by the settlement reached by the Named Plaintiffs and their counsel.

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

"If the settlement reflects a reasonable compromise over issues actually disputed, such as FLSA coverage or computation of back wages, a court may approve a settlement to 'promote the policy of encouraging settlement of litigation.'" *Crawford*, 2008 WL 4724499 at *9 (*citing Lynn's Food Stores, Inc.*, 679 F.2d at 1353). In disputes over employees' FLSA rights, "[s]ettlement is the preferred means of resolving litigation." *Id.* (*citing Collins*, 568 F.Supp.2d at 720 (*citing Williams v. Nat'l Bank*, 216 U.S. 582 (1910))).

The proposed settlement of this action is clearly in the public's interest. As a general principle, it is in the public's interest for employees' wage disputes to be resolved. Should the proposed settlement be approved, this Court will ensure that the Opt-In Plaintiffs will receive the benefit of a Court-approved FLSA settlement while HNB can continue its operations without the costs and inconvenience of litigation. It is in the benefit of all employees for a federal court, such as this Court, to supervise the settlement of a wage dispute in these circumstances.

B. Plaintiffs' Proposed Attorneys' Fees and Expenses are Reasonable.[12]

As part of its fairness determination, the Court must also determine that the proposed attorneys' fees are reasonable. *See Strong v. Bellsouth Telecomms.*, 137 F.3d 844, 849-50 (5th Cir. 1998); *see also Zoll v. Eastern Allamakee Cmty School Dist.*, 588 F.2d 246, 252 (8th Cir. 1978). The party seeking attorneys' fees has the burden to prove that its request for fees is reasonable. To meet its burden, the fee petitioner must "submit evidence supporting the hours worked and rates claimed." *Consumers Produce, Inc. v. R. Family Market*, Case No. 4:08-cv-70, 2009 WL 2351642, *2 (N.D.Ohio July 28, 2009) (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983))[13].

The FLSA has a fee-shifting provision that provides that the prevailing party shall recover reasonable attorneys' fees and litigation costs. 29 U.S.C. § 216(b). Indeed, "[a]n award of attorneys' fees under the FLSA is ***mandatory***, with the amount of fees within the discretion of the court." *Cruz v. Vel-A-Da, Inc*. Case No. 3:90CV7087, 1993 WL 659253, *3 (N.D.Ohio May 14, 1993) (*citing United Slate, Tile & Composition v. G & M Roofing*, 732 F.2d 495, 501 (6th Cir.1984)).[14]

The federal courts have long recognized the profound importance of plaintiffs' right to recover attorneys' fees under the FLSA. *See, e.g., Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987) (FLSA's fee recovery provision, 29 U.S.C. § 216(b), is not collateral to the merits of an FLSA lawsuit but, rather, is an "integral part of the merits of FLSA cases and part of the relief sought therein."). There is **no** numeric relationship required between the amount of economic

12 The arguments and representations set forth in this subpart B are those of the Plaintiffs or Plaintiffs' counsel. The Defendant does not join in the specific statements in this subpart but does not object to the contention that the total amount of Plaintiffs' attorneys' fees and expenses are reasonable.

13 Attached as Attachment A-4.

14 Attached as Attachment A-5.

losses recovered and the amount of fees recoverable. Congress has determined that it is important for FLSA rights to be enforced, and that reasonable attorneys' fees must be awarded to provide for such enforcement, particularly where the victims of FLSA violations are often low-wage workers whose per-person damages may not be significant. *See, e.g., Fegley v. Higgins,* 19 F.3d 1126, 1134-43 (6th Cir. 1994) (FLSA fee award "encourages the vindication of congressionally identified policies and rights"). Thus, it is not uncommon for fee awards to exceed the amount recovered by plaintiffs in lost wages. *See City of Riverside v. Rivera,* 477 U.S. 561, 574, 578 (1986) (no rule of proportionality in cases awarding fees under § 1988, in order to ensure lawyers are available to represent persons with legitimate claims). This principle has been applied in many cases in the FLSA context. *See, e.g., Fox v. Tyson Foods, Inc.*, No. 4:99-CV-1612-VEH, Doc. 819 (N.D.Ala. Feb. 17, 2009) (in an FLSA case in which three individual donning and doffing claims were tried, the plaintiffs collectively recovered $4,937.20 in wages but were awarded $765,618.10 in attorneys' fees based the attorney's lodestar hourly rates);[15] *Hodgson v. Miller Brewing Co.,* 457 F.2d 221, 228-29 (7th Cir. 1972); *Perdomo v. Sears, Rosebuck & Co.*, Case No. 97-2822-CIV-T-17A, 1999 WL 1427752, *10 (M.D. Fla. Dec. 3, 1999);[16] *Wales v. Jack M. Berry, Inc.,* 192 F.Supp.2d 1313, 1327 (M.D.Fla. 2001); *Heder v. City of Two Rivers,* 255 F.Supp.2d 947, 955 (E.D.Wis. 2003); *Perrin v. John B. Webb & Assocs.,* Case No. 604CV399ORLKRS, 2005 WL 2465022, *4 (M.D.Fla. Oct. 6, 2005) ("in order for plaintiffs with minimal claims to obtain counsel, those counsel must be able to recover a reasonable fee for their time").[17]

[15] Attached as Attachment A-6

[16] Attached as Attachment A-7.

[17] Attached as Attachment A-8.

The relief provided to the FLSA Class Members through the Settlement Agreement goes beyond ordinary back pay. HNB has agreed to pay the MLOs who have joined this litigation pursuant to 216(b) an amount for the unpaid wages and a seventy-five (75) percent liquidation award. The Agreement provides $1,800,000.00 in total wages and liquidated damages for the 117 Named and Opt-in Plaintiffs who joined this litigation pursuant to Section 216(b). The individual payments and liquidated damages cover all weeks worked from January 18, 2008 until April 10, 2011. On April 10, 2011 HNB altered the manner in which it pays it MLOs and as such no claim is made for any time worked beyond April 10, 2011.

The individual awards are listed in **Exhibit F** of the Settlement Agreement. Of particular importance to the analysis of this settlement is that the settlement established a minimum award of $2,258.49. In addition, the median award is $6,300.21 and the average award is $15,384.61. The figures demonstrate that the settlement provided generous awards for the class members and is evidence of the fairness of this settlement.

In light of the significant recovery of unpaid overtime for the members of the collective action, the amount of Plaintiffs' attorneys' fees and expenses HNB has agreed to pay, this settlement is indeed fair and reasonable and should be approved. *See also*, *Zoll*, 88 F.2d at 252 ("the minimum award should generally be not less than the number of hours claimed times the attorney's regular hourly rate").

As previously set forth, HNB has agreed to pay $750,000.00 for Plaintiffs' attorneys' fees and expenses. The total amount of attorneys' fees and expenses incurred by Plaintiffs' counsel in this litigation as of November 16, 2012 is approximately $799,818.00 ($787,851.15 in fees and $11,966.85 in expenses). Accordingly, the total attorneys' fee agreement represents a reduction of approximately $49,818.00 of the actual lodestar fees generated in litigating Plaintiffs' claims.

As of November 16, 2012, the firms representing Plaintiffs have expended a total of approximately 2,627.16 hours pursuing this litigation, which is an effective average hourly rate of approximately $285.48 per hour based upon the attorney's fee award agreed to by the parties. *See*, **Exhibit E**, Attorney Fee and Expense Breakdown Chart.

The hourly rates charged by Plaintiffs' counsel and the amount of hours worked are reasonable based on the prevailing market rates. Plaintiffs have submitted two declarations by experienced lawyers who have testified that the rates used by Barkan Meizlish and Oliver Law Offices are reasonable in this type of litigation. *See* **Exhibit F**, Declaration of John Marshall, ¶ 5-6; *See also* **Exhibit G**, Declaration of Alexander M. Spater, ¶ 8-9. Additionally, the hourly rate structure used by Barkan Meizlish has been approved by Sixth Circuit district courts in this very type of litigation. *See Sniffen v. Spectrum Indus. Service*, Case No. 2:06-cv-622, 2007 WL 2206560 (S.D.Ohio July 30, 2007).[18] Moreover, the complexity of the procedural and factual issues of these cases, the inability of Plaintiffs' counsel to handle other matters due to the total hours consumed by these cases, and the degree of success in terms of the settlement, justify the requested fee award.

III. CONCLUSION

Because the proposed Settlement is fair, adequate and reasonable, the Court should **GRANT** the Parties' Joint Motion for Approval of Section 216(b) Settlement.

Dated: November 30, 2012 Respectfully submitted,

[18] Attached as Attachment A-9.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2012 a true and exact copy of the foregoing *Joint Motion for Approval of Section 216(b) Settlement* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Robert E. DeRose
One of the Attorneys for Plaintiffs