IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ANTHONY MORANGELLI, et al., individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **ROTO-ROOTER SERVICES COMPANY,** **Defendant.**	**1:10-CV-00876 (BMC)**

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND APPROVAL OF CLASS COUNSEL'S FEES AND COSTS

Respectfully submitted,

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PRELIMINARY STATEMENT

Subject to final Court approval, the parties have settled Plaintiffs' and class members' claims against Defendants Chemed Corporation and Roto-Rooter Services Company (collectively, "Roto-Rooter" or "Defendants")[1], for $14,274,585.00. The proposed settlement resolves all claims in this federal lawsuit ("Federal Action") and a related arbitration proceeding[2] alleging that Roto-Rooter failed to pay their commissioned service technicians correctly pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA") and sixteen state wage and hour laws. On September 17, 2013, the Court preliminarily approved the Parties' proposed settlement and authorized the issuance of Notice to Class Members. (*See* Doc. 286).

By this motion, Plaintiffs respectfully request that the Court: (i) grant final approval of the Settlement Agreement and Release ("Settlement Agreement") attached as Exhibit A to the Declaration of Michael J.D. Sweeney in Support of Plaintiffs' Motion for Final Approval of Class Settlement ("Sweeney Decl.")[3]; (ii) approve the service payments to various Plaintiffs as discussed in Argument Section III *infra*; (iii) approve an award of attorneys' fees in the amount of $3,283,154.55 (23% of the Settlement Fund), reimbursement of litigation expenses in the

[1] Chemed Corporation was an original Defendant in the action but the Court dismissed it in its February 4, 2013 Order. *Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278, 282 (E.D.N.Y. 2013) reconsideration denied in part, 10 CIV. 0876 BMC, 2013 WL 1212790 (E.D.N.Y. Mar. 25, 2013). Nevertheless, the Settlement Agreement releases claims against both Roto-Rooter and Chemed.

[2] The arbitration proceeding before the American Arbitration Association, styled, *Colquhoun, et al., v. Chemed Corporation, et al.*, AAA Case No. 11-160-001581-10 (hereinafter the "Arbitration"), was filed as a result of the Court's July 9, 2010 Order granting Defendants' motion to compel arbitration with respect to those plaintiffs who had signed Arbitration Agreement A. (*See* Docket Entry dated 7/9/2010.) After the arbitrator permitted the Arbitration to proceed under the AAA's Supplemental Class Arbitration Rules, the parties agreed to stay the proceeding pending the resolution of the federal litigation. As a result of the settlement agreement, the arbitrator has provisionally certified the arbitration classes for purposes of settlement.

[3] Unless otherwise indicated, all exhibits are attached to the Sweeney Decl.

amount of $82,672.77, and reimbursement of settlement administration costs in the amount of $50,000.00; and (iv) enter judgment dismissing the federal action with prejudice in accordance with the Settlement Agreement.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Court's Preliminary Approval Order, Notice and Claim Administration

The procedural and factual history of this litigation up to the Court's Preliminary Approval Order is detailed in the Parties' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, Approval of Plaintiffs' Proposed Notice of Settlement, and Other Relief (Doc. 285), and is not repeated here.

On September 17, 2013, the Court preliminarily approved the Parties' proposed settlement. (*See* Doc. 286.) The Court also approved the Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Notice") and authorized the mailing of the Notice to the Class Members. (*See id.*)

II. Results of Notice

On September 18, 2013, the Settlement Administrator, Simpluris, received the Court-approved Notice from Counsel. (Declaration of Mary Butler ("Butler Decl.") ¶ 3.) The Notice advised Class Members of their right to opt out of the Settlement, object to the Settlement, speak at the Final Fairness Hearing, or do nothing, and the implications of each such action. (*See* Doc. 283-1.) The Notice advised Class Members of applicable deadlines and other events, including the Final Fairness Hearing, and how Class Members could obtain additional information. (*See id.*)

On September 27, 2013, Plaintiffs' counsel provided Simpluris with a mailing list ("Class List") containing the name, last known address and phone numbers, AB number, Social Security

number, minimum settlement payment, and pertinent employment information for the Class Members. (Butler Decl. at ¶ 4.) The Class List contained data for 4,214 Class Members. (*Id.* at ¶ 5.) The mailing addresses contained in the Class List were processed and updated utilizing the National Change of Address Database ("NCOA") maintained by the U.S. Postal Service. (*Id.* at ¶ 6.) The NCOA contains changes of address filed with the U.S. Postal Service. (*Id.* at ¶ 7.) In the event that any individual had filed a U.S. Postal Service change of address request, the address listed with the NCOA was utilized in connection with the mailing of the Notices. (*Id.* at ¶ 8.) Then on October 7, 2013, after updating the mailing addresses through the NCOA, Notices were printed with the name and address of the Class Member and his or her estimated minimum payment, and were mailed via First Class Mail to 4,214 Class Members contained in the Class List. (*Id.* at ¶ 9.)

If a Class Member's Notice was returned by the USPS as undeliverable and without a forwarding address, Simpluris performed an advanced address search ("skip trace") on all of these addresses by using Accurint, a reputable research tool owned by Lexis-Nexis. (*Id.* at ¶ 10.) Simpluris used the Class Member's name, previous address, and Social Security Number to locate a current address. (*Id.* at ¶ 11.) Through the advanced address searches, Simpluris was able to locate 390 updated addresses and Simpluris promptly mailed Notices to those updated addresses. (*Id.* at ¶ 12.) Ultimately, 156 Notices were undeliverable because Simpluris was unable to locate a current address. (*Id.* at ¶ 13.) Simpluris received 77 re-mail requests for the Notices from Class Members. (*Id.* at ¶ 14.) Notices were promptly sent to those Class Members via First Class mail, fax, or email. (*Id.* at ¶ 15.)

The response to the notice has been overwhelmingly positive. More than 99.9% of the Class have remained in the settlement. (*Id.* at ¶ 17.) Only two of the 4,214 Class Members opted

out of the action. (*Id.* at ¶ 18.) Class Counsel received telephone calls from scores of Class Members and answered their questions about their claims and concerns about retaliation. (Declaration of Michael J.D. Sweeney in Support of Plaintiffs' Motion for Final Approval of Class Settlement ("Sweeney Decl.") at ¶ 5.) Class Counsel were told by many of these Class Members that they were pleased with the settlement. (*Id.* at ¶ 6.) No class members have presented objections to the settlement. (Butler Decl. at ¶ 19.)

III. Contributions of Various Plaintiffs

Various Plaintiffs were integral in initiating this class action and made significant contributions to the prosecution of the litigation, including the original Named Plaintiffs Anthony Morangelli and Frank Ercole, eighteen (18) Named Plaintiffs who were Discovery Representatives, nineteen (19) non-Named Plaintiffs who were Discovery Representatives, and six (6) Named Plaintiffs who were not Discovery Representatives (including Named Plaintiffs in the Arbitration). (Sweeney Decl. at ¶ 7.) These Plaintiffs have served the class by providing detailed factual information regarding their job duties and hours worked, assisting with the preparation of the complaint, helping to prepare and execute declarations, sitting for depositions, producing documents in response to Defendants' discovery requests, relaying information to Class Members during the pendency of this case and assuming the burden associated with assisting with litigation. (*Id.* at ¶ 9.) Although trial was unnecessary, all the Named Plaintiffs and Discovery Representatives were prepared to testify at trial. (*Id.*) In addition, the Named Plaintiffs and Discovery Representatives assumed other professional risks and burdens. Service Awards of this type are commonly awarded in complex wage and hour litigation.[4]

[4] *See Massiah v. MetroPlus Health Plan, Inc.*, No. 11–cv–05669 (BMC), 2012 WL 5874655, *2 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) ("Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the

All of the above Plaintiffs assisted Class Counsel to prepare for the mediation that took place on June 4, 2013, and which culminated in this settlement. (*Id.* at ¶ 10.) They responded to fact-intensive questions regarding their job duties and hours worked and supplied Class Counsel with information to rebut Defendants' factual arguments. (*Id.*) They developed an in-depth understanding of the case and its risks so that they could provide Class Counsel with an informed Class Member's perspective throughout the negotiation process. (*Id.*) Each thoroughly prepared for the mediation so that they could actively participate. (*Id.*) Although Original Plaintiffs Morangelli and Ercole were unable to attend due to personal circumstances, they were available by telephone throughout the mediation. (*Id.* at ¶ 11.) Without the efforts of the Original Plaintiffs, Named Plaintiffs and Discovery Representatives, this case on behalf of the Class would not have been brought, and this settlement would not have been achieved. (*Id.* at ¶ 16.)

SETTLEMENT TERMS

The terms of the Settlement Agreement, which were preliminarily approved by the Court on September 17, 2013 (see Doc. 286), are summarized in Plaintiffs' Motion for Preliminary Approval of Class Settlement, Approval of Plaintiffs' Proposed Notice of Settlement, and Other Relief (Doc. 285), and are not repeated here.[5]

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prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff."); *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819, No. 04 Civ. 2295, 2009 WL 5841128, at *4 (S.D.N.Y. July 27, 2009) (same).

[5] In the time since the Court preliminarily approved the Settlement Agreement, eight people have come forward who were mistakenly left off the class lists attached to the Settlement Agreement. Plaintiffs calculated the damages for these eight people based on the allocation formula used for the entire class as $13,726. The Parties have agreed that Defendants will pay an additional $5,574 to resolve their claims and the balance, $8,152, will be paid from the Errors and Omissions Fund. See Settlement Agreement 3.1(D).

ARGUMENT

I. Final Approval of the Settlement Agreement is Appropriate

Because this is a class action, and because it involves FLSA claims, the Court must approve the settlement. The procedure for approval includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval, including preliminary approval of any agreed settlement classes;

2. Dissemination of mailed and/or published notice of settlement to all affected class members; and

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*"), §§ 11.22, *et seq.* (4th ed. 2002). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. The Court has already preliminarily approved the proposed settlement (*see* Doc. 286) and notice of settlement has already been disseminated to all affected class members (*see* Factual and Procedural Background Section II *supra*).

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

Under Fed. R. Civ. P. 23(e), to grant final approval of a Settlement, the Court must determine whether the Proposed Settlement is "fair, reasonable and adequate." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 04 CIV. 8141 DAB, 2013 WL 1499412 (S.D.N.Y. Apr. 11, 2013) "Fairness is determined upon review of both the terms of the settlement agreement and the

negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Courts examine procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. *Massiah v. MetroPlus Health Plan, Inc.*, No. 11–cv–05669 (BMC), 2012 WL 5874655, *2 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) *citing Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal- Mart Stores*, 396 F.3d at 116 (internal quotations omitted); *Massiah*, 2012 WL 5874655 at *2 (same) (citations omitted); *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) ("When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.").

If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Massiah*, 2012 WL 5874655 at *2. *citing In re Top Tankers, Inc. Sec. Litig.*, 06 CIV. 13761 (CM), 2008 WL 2944620, at *3 (S.D.N.Y. July 31, 2008) (same); "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Massiah*, 2012 WL 5874655 at *2, *citing Clark v. Ecolab Inc* ., Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672,

2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010). "The Court gives weight to the parties' judgment that the settlement is fair and reasonable." *Massiah*, 2012 WL 5874655 at *2 (citations omitted).

The procedural and factual history of this litigation up to the Court's Preliminary Approval Order is detailed in the Parties' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, Approval of Plaintiffs' Proposed Notice of Settlement, and Other Relief (Doc. 285). It is clear from the history of this case that the parties reached this settlement only after engaging in extensive and vigorous litigation, substantial discovery (*see* Sweeney Decl. at ¶ 17), which allowed each side to assess the potential risks of continued litigation, and robust settlement negotiations, including a full-day mediation session under the direction of experienced class action mediator, Linda Singer of JAMS. (*See* Doc. 285.) In other words, the settlement was reached as a result of arm's-length negotiations between experienced, capable counsel after meaningful discovery.

II. The Settlement is Fair, Reasonable, and Adequate

In evaluating a class action settlement, courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). *Massiah*, 2012 WL 5874655 at *2. The *Grinnell* factors are (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463. Because "the standard for approval of an FLSA settlement is lower than for a

Rule 23 settlement," *Massiah*, 2012 WL 5874655 at *5, satisfaction of the *Grinnell* factor analysis will, necessarily, satisfy the standards of approval of the FLSA settlement. All of the *Grinnell* factors weigh in favor of granting final approval of the Settlement Agreement.

A. Litigation Through Trial Would be Complex, Costly, and Long (*Grinnell* Factor 1)

By reaching a favorable settlement before trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is no exception, with more than 4,200 Class Members. (Sweeney Decl. at ¶ 4.)

Although the parties have already undertaken considerable time and expense in litigating this matter (*see* Docs. 284, 285), further litigation without settlement would necessarily result in additional expense and delay (Sweeney Decl. at ¶ 18). Moreover, because the Court bifurcated the case into separate stages for liability and damages, two different trial phases would be required. (*Id.* at ¶ 20.) A trial on liability may be necessary, featuring testimony by Defendants, Plaintiffs, and numerous class members. (*Id.*) Preparing and putting on evidence on the complex factual and legal issues at such a trial would consume tremendous amounts of time and resources for both sides. (*Id.* at ¶ 21.) Additionally, the adjudication of individual non-certified claims may be needed. (*Id.* at ¶ 22.) A separate trial phase on the damages issues, even on a representative basis, would be costly and would further defer closure. (*Id.* at ¶ 23.) Any judgment would likely be appealed, thereby extending the duration of the litigation. (*Id.* at ¶ 24.) This settlement, on the other hand, makes monetary relief available to class members in a prompt and efficient manner. (*Id.* at ¶ 25.) Therefore, the first Grinnell factor weighs in favor of final approval.

B. The Reaction of the Class Has Been Positive (*Grinnell* Factor 2)

As previously stated, the response to the notice has been overwhelmingly positive. More than 99.9% of the Class have remained in the settlement. (Butler Decl. at ¶ 17.) Only two of the 4,214 Class Members opted out of the action. (*Id.* at ¶ 18.) Class Counsel received telephone calls from numerous Class Members and answered their questions about their claims and concerns about retaliation. (Sweeney Decl. at ¶ 5.) Class Counsel were told by many of these Class Members that they were pleased with the settlement. (*Id.*. at ¶ 6.) No class members have presented objections to the settlement. (Butler Decl. at ¶ 19.) "The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Wright v. Stern*, 553 F. Supp. 2d 337, 344–45 (S.D.N.Y. 2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out); *see also Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (approving settlement where only 7 of 2,025 class member submitted timely objections and only 2 requested exclusion). Thus, this factor weighs strongly in favor of approval.

C. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3)

Although preparing this case through trial would require thousands more hours of discovery work for both sides, the parties have completed enough discovery to recommend settlement. "The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Massiah*, 2012 WL 5874655 at *4 (citation omitted); see also *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a

settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176 (internal quotations omitted).

The parties' discovery here meets this standard. Class Counsel interviewed hundreds of current and former Technicians to gather information relevant to the claims in the litigation; took multiple depositions; defended depositions of 39 Plaintiffs; obtained, reviewed, and analyzed hundreds of thousands of pages of hard-copy documents and electronically-stored data including, but not limited to, time and payroll records, human resources documents and employee personnel files; engaged in numerous discovery disputes which required court intervention; responded to multiple discovery requests. (Sweeney Decl. at ¶ 17.) Discovery here was "an aggressive effort" to litigate the case. *See Massiah*, 2012 WL 5874655 at *4.

D. Plaintiffs Would Face Real Risks if the Case Proceeded (*Grinnell* Factors 4 and 5)

Although Plaintiffs believe their case is strong, it is subject to considerable risk as to liability and damages. In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian*, 80 F. Supp. 2d at 177 (internal quotations omitted). A trial on the merits would involve risks to Plaintiffs because of the fact-intensive nature of proving liability under the FLSA and fourteen separate state wage and hour laws, and in light of the defenses available to Defendants, which would pose risk as to both liability and damages. (Sweeney Decl. at ¶ 19.)

While Plaintiffs believe that they could ultimately establish Defendants' liability and damages on these claims, to do so would require significant factual development at trial. While Plaintiffs believe that their claims are meritorious and class-wide damages provable, their counsel are experienced and realistic, and understand that the resolution of liability issues, the

outcome of the trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. *See Massiah*, 2012 WL 5874655 at *4 ("Litigation inherently involves risks.") The proposed settlement alleviates this uncertainty. This factor weighs heavily in favor of final approval. *See In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969).

E. Maintaining a Class Through Trial Would Not Be Simple (*Grinnell* Factor 6)

The risk of maintaining the class status through trial is also present. While the Court has ordered that the classes should be maintained for trial for some of the Plaintiffs' claims, establishing damages at trial on a class-wide basis on such claims is a difficult endeavor that poses risks given the nature of the time and payroll records, and the inherent difficulty of using representative testimony at trial. Moreover, Defendants have already informed the Court of their intention to file an additional motion to decertify the classes based upon the Supreme Court's recent ruling regarding Rule 23 certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) and to decertify part of the Uncompensated Hours claims on additional grounds. There is a real risk that the Court could decertify the classes with respect to additional claims in light of the individualized damages calculations that Defendants allege will be necessary at trial.

Risk, expense, and delay are involved in these steps. "Settlement eliminates the risk, expense, and delay inherent in this process." *Massiah*, 2012 WL 5874655 at *5. This factor favors final approval.

F. Defendants' Ability to Withstand a Greater Judgment is Not at Issue (*Grinnell* Factor 7)

Defendants' ability to withstand a greater judgment is not currently at issue. Even if the Defendants can withstand a greater judgment, a "defendant's ability to withstand a greater

judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178 n.9). This factor does not hinder this Court from granting final approval.

G. The Settlement Fund is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

Plaintiffs' counsel has determined that this case presents risks that militate toward substantial compromise. Defendants have agreed to settle this case for a substantial amount, $14,274,585 for 4,214 Plaintiffs. (*See* Doc. 284-2 at ¶ 1.18.) The settlement amount represents a good value given the attendant risks of litigation, even though recovery could be greater if Plaintiffs succeeded on all claims at trial and survived an appeal.

"The determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.' *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) *citing In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 and *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion. "Moreover, when a 'settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing "speculative payment of a hypothetically larger amount years down the road,"' settlement is reasonable under this factor." *Massiah*, 2012 WL 5874655 at *5.

Here, each Class Member will receive payment based upon his or her relevant weeks of employment with Defendants. (*See* Doc. 284-2 at ¶ 3.5.) As explained above, the actual amount that each class member will receive reflects a careful balancing of the strengths of their

underlying claims and the risks that their claims would not ultimately prevail. Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, the settlement amount is reasonable.

Accordingly, all of the *Grinnell* factors weigh in favor of issuing final approval of the settlement. In the event that a substantial number of objectors come forward with meritorious objections, then the Court may reevaluate its determination. Because the settlement, on its face, is "fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000), the Court should grant its final approval.

III. Incentive Payments are Appropriate in this Case

Various Plaintiffs, described in Factual and Procedural Background Section III above, also seek incentive payments for their work and willingness to represent the class. *See* Exhibit H of the Settlement Agreement. No Class Member has objected to the Service Awards. (Butler Decl. at ¶ 19.) The Service Awards are consistent with the payments made to named plaintiffs and discovery representatives in this Circuit, other jurisdictions, and in other wage-and-hour cases. They are intended to compensate these Plaintiffs for their willingness to serve the Class, the services they rendered, risks they bore, and opportunities they sacrificed to ensure a favorable class settlement. Thus, the Court should find that the Service Awards are reasonable.

In light of their efforts resulting in a substantial settlement on behalf of the settlement class, the Named Plaintiffs and Discovery Representatives are entitled to a Service Award, to be distributed from the Settlement Fund. "Such service awards are common in class action cases and are important to compensate 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." *Massiah*, 2012 WL 5874655 at *8, *citing Toure v. Amerigroup Corp.*, No. 10 Civ. 5391, 2012 WL 3240461, at * 5 (E.D.N.Y. Aug. 6, 2012) (approving service awards of $10,000 and $5,000); *Sewell v. Bovis Lend Lease, Inc.*, 09 CIV. 6548 RLE, 2012 WL 1320124, at *14–15 (S.D.N.Y. Apr. 16, 2012) (finding reasonable and approving service awards of $15,000 and $10,000 in wage and hour action); *Willix*, 2011 WL 754862, at *7 (approving service awards of $30,000, $15,000, and $7,500); *Torres v. Gristede's Operating Corp.*, 04-CV-3316 PAC, 2010 WL 5507892, at *8 (S.D.N.Y. Dec. 21, 2010) *aff'd*, 519 F. App'x 1 (2d Cir. 2013) (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of $15,000 and $10,000, respectively, in wage and hour class action); *see also Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200–01 (S.D.N.Y. 1997) ("The guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claims, and, of course, the ultimate recovery.").

The incentive payments are also within the range granted in other wage-and-hour cases throughout the country. *See*, e.g., *In re Janney Montgomery Scott LLC Financial Consultant Litigation*, No. 06-3202, 2009 WL 2137224, *12 (E.D. Pa. July 16, 2009) ($20,000 incentive payments in FLSA and Pennsylvania wage and hour case); *Murillo v. Pacific Gas & Elec. Co.*, No. 2:08-1974 WBS GGH, 2010 WL 2889728, *12 (E.D. Cal. July 21, 2010) ($10,000 enhancement payment for class action under California law and the FLSA); *Wineland v. Casey's*

Gen. Stores, Inc., 267 F.R.D. 669, 678 (S.D. Iowa 2009) ($10,000 incentive award to named plaintiffs for class action under FLSA and various state wage and hour laws); *Bredbenner v. Liberty Travel, Inc.*, CIV.A. 09-905 MF, 2011 WL 1344745, at *24 (D.N.J. Apr. 8, 2011) ($10,000 service payment to named plaintiffs for class action under FLSA and various state wage and hour laws).

Here, the Named Plaintiffs and Discovery Representatives performed substantial services to and bore substantial risks for the class. Their services began with the original Named Plaintiffs' in bringing the case and the additional Named Plaintiffs' initiative in filing the state and federal claims that were eventually resolved in the Settlement and allowed more than 4,200 current and former technicians to recover unpaid wages. (Sweeney Decl. at ¶ 8.) The Named Plaintiffs and Discovery Representatives represented the class by participating in discovery, including sitting for depositions and providing numerous documents, and in settlement negotiations, working with Class Counsel in developing the case, modeling damage calculations, and ultimately concluding a successful settlement for the class. Although trial was unnecessary, all of the Named Plaintiffs and Discovery Representatives were prepared to testify during trial. (*Id.* at ¶ 9.) The Named Plaintiffs and Discovery Representatives also assumed substantial professional risks and burdens in bringing the litigation. (*Id.* at ¶ 12.) In addition, by signing the Settlement Agreement, the Named Plaintiffs executed a broader release than other Class Members. (*Id.* at ¶ 14.) The Named Plaintiffs also risked being held responsible for litigation costs should they not have been successful; another risk they bore themselves. (*Id.* at ¶ 15.) Thus, a Service Award to each of the Named Plaintiffs and Discovery Representatives is appropriate.

IV. Class Counsel is Entitled to a Reasonable Fee of 23% of the Settlement Fund and Reimbursement of Reasonable Litigation Costs

Class Counsel respectfully moves the Court for an award of attorneys' fees in the amount of 23% of the Settlement Fund, or $3,283,154.55, reimbursement of litigation expenses in the amount of $82,672.77, and reimbursement of settlement administration costs in the amount of $50,000.00. A summary of Class Counsel's fees are attached as Exhibit B to the Sweeney Declaration. During the past 46 months of litigating this class and collective action, Class Counsel's efforts have been without compensation (*id.* at ¶ 26), and their entitlement to be paid has been wholly contingent upon achieving a good result.

A. The Terms in the Named Plaintiffs' Retainers, the Opt-In Plaintiffs' Consent to Sue Forms, and the Settlement Agreement Entitle Class Counsel to Up to One-Third of the Settlement Fund

The Named Plaintiffs and opt-in Plaintiffs agreed to Class Counsel's fee of up to one-third of the common fund and reimbursement for costs, including costs of settlement administration. (*Id.* at ¶ 27.) Each of the Named Plaintiffs specifically agreed in their individually negotiated retainers, that Class Counsel would recover up to one-third of the gross settlement, or counsel's hourly rate, whichever was greater, plus litigation and settlement administration costs. (*Id.*) Similarly, the Consent to Sue forms that each of the opt-in Plaintiffs signed and submitted to the Court state "I understand that the fees retained by the attorneys will be either the amount received from the defendant or 1/3 of my gross settlement or judgment amount, whichever is greater." (*Id.*) The opt-ins also agreed in their Consent to Sue to reimburse Class Counsel for costs. (*Id.*) Moreover, the Court preliminarily approved the Settlement Agreement in this case that was agreed to by the Named Plaintiffs on behalf of the class and the Defendants. (*See* Doc. 286.) The Agreement provides that "Class Counsel will petition the Court for an award of attorneys' fees of up to one-third of the Gross Settlement Amount, and, in

addition, for reimbursement of litigation costs and expenses of up to One Hundred and Ten Thousand Dollars ($110,000.00) to be paid from the Settlement Fund. Defendants will not oppose this application." (*See* Doc. 284-2 at ¶ 3.2(A).) Further, the Agreement provides that "Class Counsel will petition the Court for an award of fees and costs associated with investing and liquidating the Settlement Fund and the Settlement Administrator's fees and costs of up to Seventy-five Thousand Dollars ($75,000.00). Defendants will not oppose this application." Finally, the Court-approved Notice that was mailed to all Class Members stated the following:

> 14. How will the lawyers be paid?
>
> The Plaintiffs have entered into a retainer agreement with Class Counsel. Under the agreement, Class Counsel has the right to ask the Court to approve up to one-third (33.33%) of the settlement amount as their attorneys' fees, however, Class Counsel will seek no more than 23% of the settlement amount. The fees will pay Class Counsel for investigating the facts, litigating the case, and negotiating the settlement. Class Counsel will also ask the Court to approve the reimbursement of their out-of-pocket costs. You may ask for a copy of the retainer agreement by calling or writing Class Counsel at the telephone number or address below.

(Doc. 283-1.) In accordance with the numerous agreed upon provisions an award of $3,283,154.55 in attorneys' fees, which is 23% of the Settlement Fund, $82,672.77 in litigation costs, and $50,000.00 in settlement administration costs is appropriate.

B. The Percentage of the Fund Method of Awarding Attorneys' Fees Is Appropriate in Common Fund Cases

In common fund situations, the attorneys whose efforts created the fund are entitled to a reasonable fee—set by the court—to be taken from the fund. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *citing Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citing cases). The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost. *Id. citing Boeing*, 444 U.S. at 478; *Mills v. Electric Auto–Lite Co.*, 396 U.S. 375, 392, 90 S. Ct. 616, 24 L.Ed.2d 593 (1970)).

What constitutes a reasonable fee is properly committed to the sound discretion of the district court, *see Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 172 (2d Cir.1998), and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding. *Goldberger*, 209 F.3d at 47.

In 1984, in *Blum v. Stenson*, the Supreme Court observed that "under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n. 16 (1984). The Second Circuit has accordingly recognized that *Blum* indicates that the percentage-of-the-fund method is a viable method for awarding reasonable attorneys' fees. *Goldberger*, 209 F.3d at 49 *citing Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999). Moreover, the trend in this Circuit is toward the percentage method, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005), *citing Visa Check III*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), which "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," *Id.*, *citing In re Lloyd's Am. Trust Fund Litig.*, 96 CIV.1262 RWS, 2002 WL 31663577, at *25 (S.D.N.Y. Nov. 26, 2002).

The percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases. *Savoie*, 166 F.3d at 460-61, *citing* Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 254–59 (1985). It has been noted that once the fee is set as a percentage of the fund, the plaintiffs' lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method. *Id.* at 461. For the same reason, the percentage-of-the-fund method also removes disincentives to prompt settlement, because plaintiffs' counsel, whose fee does not increase with delay, have no reason to drag their feet. *Id.* Finally, the lodestar method is time-

consuming and burdensome on the courts. *See In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993).

C. An Award of 23% of the Settlement Fund as Attorneys' Fees is Reasonable

District Courts should be guided by the so-called "*Goldberger* factors" in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50, *citing In re Union Carbide Corp. Consumer Products Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989). Here, all of the Goldberger factors weigh in favor of awarding Class Counsel their requested fees.

i. Class Counsel has expended extensive time and labor on this case

The procedural and factual history of this litigation up to the Court's Preliminary Approval Order is detailed in the Parties' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, Approval of Plaintiffs' Proposed Notice of Settlement, and Other Relief (Doc. 285). It is clear from the history of this case that Plaintiffs' counsel expended substantial time and labor on this case over the past almost four years, including researching the factual and legal basis for the claims, filing the complaint, filing and opposing several motions, engaging in significant discovery, and negotiating the settlement. Accordingly, this factor weighs in favor of awarding Class Counsel's requested fees.

ii. The large and complex nature of this litigation warrant the award of the attorneys' fees being requested

While hybrid FLSA and state wage-and-hour law cases are often large and complex, *see Febus v. Guardian First Funding Grp., LLC*, 870 F. Supp. 2d 337, 340 (S.D.N.Y. 2012) ("courts have recognized that FLSA cases are complex and that "[a]mong FLSA cases, the most complex

type is the 'hybrid' action brought here, where state wage and hour violations are brought as an 'opt out' class action pursuant to [Rule] 23 in the same action as the FLSA 'opt in' collective action…"), this one was extraordinarily so, consisting of several different claims litigated in a federal FLSA collective action, 14 state class actions, a FLSA arbitration and 7 state class arbitrations, covering over 4,200 technicians in 55 branches. The size and difficulty of the issues in a case are significant factors to be considered in making a fee award. *Beckman v. KeyBank, N.A.*, 85 Fed. R. Serv. 3d 593 (S.D.N.Y. 2013); *see also Jemine v. Dennis*, 901 F. Supp. 2d 365, 392 (E.D.N.Y. 2012) ("in a class action suit, as here, the large number of plaintiffs increase the complexity of the litigation").Thus, this factor favors awarding Class Counsel the requested fees.

iii. Class Counsel took on a large amount of risk in prosecuting this case

Class Counsel took on substantial risk in prosecuting this case. As was discussed in Section II.D. *supra*, this case involves incredibly complex issues of both liability and damages. Plaintiffs were far from guaranteed to prevail on all of these issues. Further, as Plaintiffs' counsel prosecuted this case on a contingency basis, advancing both fees and costs, counsel took on the risk that they would not ultimately recover anything for their time and effort. "Uncertainty that an ultimate recovery will be obtained is highly relevant in determining the reasonableness of an award." *Febus*, LLC, 870 F. Supp. 2d at 340. Accordingly, the award of fees is appropriate in a case like this one where Class Counsel's fee entitlement is entirely contingent upon success. *See Willix*, 2011 WL 754862, at *7.

iv. Class Counsel's representation has been of the highest quality

"To determine the quality of representation, courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Guzman v. Joesons Auto Parts*, CV 11-4543 ETB, 2013 WL 2898154, at *3 (E.D.N.Y. June 13, 2013)

(citations omitted). A court may take into consideration the quality of counsel's submissions to and work before the court, counsel's past experience litigating other, similar cases, and whether counsel "achieved a reasonable recovery" for plaintiff. *Id.* (citations omitted).

As discussed in Section II, Class Counsel has achieved a fair, reasonable, and adequate recovery for Plaintiffs. Further, Class Counsel's submissions to this Court have been of the highest quality, achieving a collective action class and numerous state classes, avoiding arbitration for half the class members, defending against summary judgment of Plaintiffs' claims, and preventing decertification of the classes. Class Counsel has demonstrated their knowledge of the factual and legal issues in this case in oral argument and during conferences with the Court. Finally, Class Counsel's vast experience successfully litigating similar cases has been recognized by numerous courts, including this one. *See, e.g.*, *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 119 (E.D.N.Y. 2011) (finding Getman & Sweeney to have "stellar" qualifications as class counsel in wage-and-hour class litigation); *Lewis v. Alert Ambulette Serv. Corp.*, 11-CV-442, 2012 WL 170049, *15 (E.D.N.Y. Jan. 19, 2012) ("[Getman & Sweeney] has brought to bear its considerable experience in handling class actions, and other complex litigation, particularly claims of the type asserted in the present action"); *Monserrate v. Tequipment, Inc.*, 11 CV 6090 RML, 2012 WL 5830557, *3 (E.D.N.Y. Nov. 16, 2012) ("[Pelton & Associates] was "was well-qualified to conduct [FLSA collective action] litigation."); *Brumley v. Camin Cargo Control, Inc.*, CIV.A. 08-1798 JLL, 2012 WL 1019337 (D.N.J. Mar. 26, 2012) ("Both this Court and other district courts around the country have recognized Plaintiffs' counsel's experience and skill in prosecuting wage-and-hour class litigation."); *Bredbenner v. Liberty Travel, Inc.*, Civil Action Nos. 09–905 (MF), 09–1248(MF), 09–4587(MF), 2011 WL 1344745, at *7 and *20 (D.N.J.

April 8, 2011) (finding Getman & Sweeney highly experienced and competent in wage-and-hour litigation.). Consequently, Class Counsel should be awarded the requested fees.

v. The requested fees are reasonable in relation to the settlement

Class Counsel's attorneys' fees request of 23% is more modest than decisions in this Circuit that have awarded one-third or more of the settlement fund as attorneys' fees in wage-and-hour cases. *See, e.g., Toure v. Amerigroup Corp.*, 10 CIV. 5391 RLM, 2012 WL 3240461 (E.D.N.Y. Aug. 6, 2012) (33%); *Willix,* 2011 WL 754862, at *6 (33%); *deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440(DAB), 2010 WL 3322580, *8 (S.D. N.Y. Aug. 23, 2010) (awarding class counsel one-third of settlement fund); *Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623(PAC), 04 Civ. 4488(PAC), 06 Civ. 5672(PAC), 2010 WL 1948198, *8 (S.D. N.Y. May 11, 2010) (one-third).

Similarly, Class Counsel's attorneys' fees request is more modest than decisions from across the country that have awarded one-third or more in wage-and-hour settlements. *See, e.g., Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, No. 11 Civ. 592–wmc, 2013 WL 5745102, *1 (W.D. Wis. Oct. 23, 2013) (awarding class counsel 1/3 of the settlement fund for Hybrid FLSA and Rule 23 Class Action wage and hour case); *Adeva v. Intertek USA Inc., et al.*, No. 09 Civ. 01096-SRC-MAS, Dkt. 228, pp. 1, 7 (D. N.J. Dec. 22, 2010) (awarding class 34% of the class settlement fund in a wage-and-hour case); *Rotuna v. West Customer Mgmt. Group, LLC*, 4:09 Civ. 1608, 2010 WL 2490989, *7-8 (N.D. Ohio June 15, 2010) (one-third); *Kidrick v. ABC Television Appliance Rental*, No. 97-69, 1999 WL 1027050, *4 (N.D. W.Va. May 12, 1999) (one-third). Accordingly, this factor weighs in favor of approval of the requested fees.

vi. Public policy weighs in favor of awarding attorneys' fees

In wage-and-hour class action lawsuits, public policy favors a common fund attorneys' fee award. *Willix,* 2011 WL 754862, at *6 (citation omitted). Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. *Id. citing Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. *Id.* If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk. *Id., citing Goldberger* 209 F.3d at 51 (commending the general "sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest"). Adequate compensation for attorneys who protect wage and hour rights furthers the remedial purposes of the FLSA and [state wage and hour laws]. *Id.*

Based upon the negotiated fee agreement in this case, the typical percentage of compensation in similar cases in this Circuit and nationwide, and the *Goldberger* factors, Class Counsel is entitled to a reasonable attorneys' fees award of 23% of the Settlement Fund.

D. Class Counsel is Entitled to Reimbursement of Reasonable Litigation Costs

It is well-settled in this Circuit that "attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients." *LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 763 (2d Cir. 1998). *See also Kuzma v. Internal Revenue Service*, 821 F.2d 930, 933-34 (2d Cir.1987) ("Identifiable out-of-pocket disbursements for items such as photocopying, travel, and telephone costs are generally taxable...and are often distinguished from nonrecoverable routine office overhead, which must be absorbed within the attorney's hourly rate."). Thus, courts typically allow counsel to recover their out-of-pocket expenses including filing fees, process service fees, court reporter fees, mediation fees, translator

fees, videographer fees, postage and photocopies, that are reasonable and were incidental and necessary to the representation of the Class. *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 09-CV-486 ETB, 2012 WL 5305694 (E.D.N.Y. Oct. 4, 2012).

The full set of invoices and documentation for various costs is set forth in Exhibit C to the Sweeney Declaration. Plaintiffs' counsel expended $82,672.77 in litigation costs and $50,000.00 in settlement administration costs to bring the case to conclusion. All costs expended are recoverable under the FLSA. The costs are summarized in Exhibit D to the Sweeney Declaration.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Final Approval of Class Settlement and enter the Proposed Order.

Dated: December 23, 2013

Respectfully submitted,

By: */s/ Michael J.D. Sweeney*

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