UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nathan Nerland, Daniel Williams-Goldberg and James Geckler, individually and on behalf of themselves and all others similarly situated, Plaintiffs, v. Caribou Coffee Company, Inc., Defendant.	Court File No. 05-1847 PJS/JJG **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT, EXTENSION OF CLAIM FILING DEADLINE, ENTRY OF FINAL JUDGMENT, AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SEPARATE AWARDS FOR NAMED PLAINTIFFS**

INTRODUCTION

Plaintiffs, by their counsel, respectfully submit this memorandum in support of their motion for: (i) final approval of the settlement ("Settlement")[1] reached in the captioned action, including the plan of allocation to class members, (ii) extension of the deadline for Minnesota Class Members to file claims; (iii) entry of final judgment; (iv) an award of attorneys' fees and costs and expenses; and (v) separate awards for the named plaintiffs.

[1] The Settlement is set forth in the Amended Stipulation of Settlement ("Stipulation of Settlement" or "Stip.") submitted to the Court by the parties on February 1, 2008.

BACKGROUND

A. The Litigation

In May 2005, Nathan Nerland, Daniel Williams-Goldberg, and James Geckler ("Named Plaintiffs") commenced this action, asserting claims on behalf of themselves and other former and current Caribou Coffee Store Managers ("Plaintiffs"), under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and the Minnesota Fair Labor Standards Act ("MFLSA"), Minn. Stat. § 177.21, *et seq.* Plaintiffs alleged Caribou misclassified Store Managers as "exempt" from overtime compensation requirements under federal and state law, and failed to pay Store Managers overtime compensation to which they are entitled. Defendant Caribou Coffee Company, Inc. ("Caribou") contended it properly classified Store Managers as exempt from overtime requirements under federal and state law, denied any wrongdoing or liability, and vigorously contested all claims asserted.

In September 2005, Plaintiffs moved to conditionally certify a collective action to pursue claims under the FLSA. Doc. No. 11.[2] The District Court granted the motion for conditional certification, and ordered that notice be sent to all potential claimants to afford them an opportunity to opt-in, as required by 29 U.S.C. § 216(a). Doc. No. 45. Approximately 300 former and current Store Managers opted-in to the litigation (the "FLSA Opt-In Class"). In its order, the Court noted that "[i]t appears to the Court that Plaintiffs may ultimately have a difficult time establishing that the store managers at

[2] References to "Doc. No. __" are to the District Court docket.

Caribou are improperly classified as exempt from the provisions of the Fair Labor Standards Act." *Id.* at 1.

In September 2006, after several months of investigation and discovery by the parties, Caribou brought a motion to decertify the FLSA action and a motion for summary judgment as to the Named Plaintiffs' claims and with respect to the issue of whether Caribou's alleged violation of the FLSA was willful so as to extend the statute of limitations from two years to three years from the date of a plaintiff's filing of a Consent to Join. Doc. Nos. 400 and 534, respectively. Plaintiffs contested Caribou's motion to decertify the FLSA action and its motion for summary judgment. At roughly the same time, Plaintiffs brought a motion to certify a class of Minnesota Store Managers to pursue claims under the MFLSA (the "Minnesota Class"). Doc. No. 472.

Upon referral by the District Court Judge, the Magistrate Judge issued a 43-page Report and Recommendation to deny Defendant's motion to decertify the FLSA Opt-In Class and to grant Plaintiffs' motion to certify the Minnesota Class, under Rule 23(b)(3), to pursue MFLSA claims. Doc. No. 554. The District Court adopted the Report and Recommendation on May 17, 2007. Doc. No. 571.

In addition, on April 19, 2007, the District Court granted Caribou's motion for summary judgment with respect to the issue of willfulness. Consequently, the Court dismissed the claims of Named Plaintiff Daniel Williams-Goldberg as barred by the two-year statute of limitations. The Court denied Caribou's motion for summary judgment with respect to the claims of the other two Named Plaintiffs. In its order, the Court noted that "Caribou appears to have a strong case on the

merits . . . " and that "[t]he undisputed evidence on which Caribou relies came close to persuading this Court to grant summary judgment to Caribou on the FLSA claims." Doc. No. 556 at 3, 8.

Caribou petitioned for permission to appeal, pursuant to Fed. R. Civ. P. 23(f), from the District Court's order granting Plaintiffs' motion to certify a Minnesota class to pursue state claims. Defendant also sought permission, under the collateral order and pendent appellate jurisdiction doctrines, to appeal from the District Court's order denying Caribou's motion to decertify the FLSA collective action. On July 10, 2007, the Eighth Circuit Court of Appeals denied Caribou's petition. On August 22, 2007, the Eighth Circuit denied Caribou's petition for rehearing and for rehearing en banc.

On September 22, 2007, notices were mailed to more than 500 current and former Store Managers employed by Caribou in stores located in Minnesota on or after May 25, 2003, informing them of the class action and their right to exclude themselves ("opt-out") by submitting a Request to be Excluded postmarked no later than November 21, 2007. Twenty-six potential members of the class opted-out by submitting a timely Request to be Excluded. The resulting "Minnesota Class" is comprised of 499 individuals. Affidavit of Charles N. Nauen ("Nauen Aff.") at ¶ 4.

On September 28, 2007, the District Court issued a Trial Notice and Final Pretrial Order scheduling this case for trial beginning on February 12, 2008. Doc. No. 594.

B. Mediation and Settlement

The parties met for a two-day mediation October 29-30, 2007. All three Named Plaintiffs participated in person in the mediation. The mediation was conducted by

Hunter R. Hughes III, a partner in the Atlanta law firm of Rogers & Hardin LLP. Hughes is a former Chairman of the American Employment Law Council and one of nation's leading employment class action mediators. Nauen Aff. at ¶ 5.

The October mediation did not immediately result in settlement. However, the mediation produced a "mediator's proposal" which set out key settlement terms that guided future negotiations. Nauen Aff. at ¶ 6. The parties continued to negotiate settlement, with Hughes' assistance, by telephone, correspondence, and in person over the next several weeks. *Id.* The parties reached an agreement in principle at the end of November 2007, and signed a Stipulation of Settlement on January 17, 2008. *Id.*

As reflected in the February 1, 2008, Stipulation of Settlement, Caribou, without admitting any wrongdoing, agreed to settle the claims asserted by the FSLA Opt-In Class and the Minnesota Class by paying into a Qualified Settlement Fund $2,700,000.00 (the "Settlement Fund"), to be allocated as described below. Caribou will pay into the Settlement Fund according to the following schedule:

- $1,750,000.00 on the later of the date of District Court final approval of the Stipulation of Settlement or March 15, 2008; and
- $950,000.00 on the later of December 29, 2008, or thirty (30) days after the date of final District Court approval of the Stipulation of Settlement.[3]

Stip. at ¶ 12.1.

On February 1, 2008, the Court entered an order (a) preliminarily approving the Stipulation of Settlement, (b) approving notice to the FLSA Opt-In Class and to the

[3] Caribou will pay interest on the second installment payment sum. Stip. at ¶ 12.1.

Minnesota Class, (c) appointing a settlement administrator, and (d) setting a final hearing on the proposed Stipulation of Settlement for May 28, 2008. Doc. No. 608.

C. Plan of Allocation

The Stipulation of Settlement provides that the Settlement Fund is to be allocated as follows:

(a) each member of the FLSA Opt-In Class shall receive a pro rata share of $640,000.00, based on the proportion that the total number of full and partial workweeks he or she was employed as a Store Manager between the date two years before the date his or her Consent to Join was filed with the District Court, plus any applicable tolling periods, and December 31, 2007, bears to the aggregate total number of full and partial workweeks all members of the FLSA Opt-In Class were employed as Store Managers between the date two years before the date each member's Consent to Join was filed, plus any applicable tolling periods, and December 31, 2007;

(b) each member of the FLSA Opt-In Class shall receive a pro rata share of $25,000.00, based on the proportion that the total number of full and partial workweeks he or she was employed as a Store Manager more than two years and within three years before the date his or her Consent to Join was filed with the District Court, plus any applicable tolling periods, bears to the aggregate total number of full and partial workweeks all members of the FLSA Opt-In Class were employed as Store Managers more than two years and within three years before the date each member's Consent to Join was filed, plus any applicable tolling periods;

(c) each approved claimant member of the Minnesota Class shall receive a pro rata share of $250,000.00, based on the proportion that the total number of full and partial workweeks he or she was employed as a Store Manager between May 25, 2003, and December 31, 2007, bears to the aggregate total number of full and partial workweeks all approved claimant members of the Minnesota Class were employed as Store Managers between May 25, 2003, and December 31, 2007, but only to the extent the workweeks are not included in the workweeks considered in calculating the pro rata share he or she will receive as a member of the FLSA Opt-In Class;[4]

(d) $60,000.00 shall be reserved for awards to Named Plaintiffs;

(e) $25,000.00 shall be reserved for common costs of notice and settlement administration;

(f) $450,000.00 shall be reserved for Court-approved litigation costs and expenses; and

(g) $1,250,000.00, plus interest, shall be reserved for Court-approved attorneys' fees. Stip. at ¶ 14.1.

This Plan of Allocation gives consideration to: (a) the District Court's ruling limiting the damages period to two years, as opposed to three years, and the prospect for appeal; (b) the difference between the overtime threshold under federal law (40 hours) and state law (48 hours); (c) the prohibition against double recovery under federal and

[4] Members of the FLSA Opt-In Class who are also members of the Minnesota Class may receive pro rata shares of Settlement Fund monies designated for both classes. The amount of money allocated to members of the Minnesota Class depends on the number of Minnesota Class members who submitted claims. Stip. at ¶¶ 14.2, 14.3.

state law for overlapping overtime hours; (d) differences between the opt-in nature of the FLSA Class and the opt-out nature of the Minnesota Class; (e) the resulting claims process for the Minnesota Class; (f) the time and efforts of the Named Plaintiffs in commencing and prosecuting this litigation; (g) the actual out-of-pocket costs and expenses of litigation; and (h) the time and efforts of Plaintiffs' counsel, as discussed more fully below.

This Plan of Allocation was set forth, with examples of how it would apply, in the notices that were sent to members of the FLSA Opt-In Class and Minnesota Class. *See* Declaration of Krista Kooi Tittle ("Tittle Dec."), Exs. A and B.

D. The Claims Program

On February 14, 2008, pursuant to the Court's February 1, 2008, Order and in accordance with the Stipulation of Settlement, individual notice was issued to the 303 FLSA Opt-In Class members and to the 499 Minnesota Class members via first class regular United States mail using the most current mailing address information available from Caribou's payroll records and/or Plaintiffs' counsel's records. *See* Tittle Dec. at ¶¶ 4-7.[5] Minnesota Class Members received a Claim Form in addition to the Notice. *Id.*

In addition to the initial mailing, the Claims Administrator sent Notices to 19 Class Members who called a toll free help line dedicated to assisting claimants in this litigation. Tittle Dec. at ¶ 9. The Claims Administrator also used extensive public

[5] Ms. Tittle is a Case Manager at Simpluris, Inc., the settlement administrator that was appointed, at Plaintiffs' counsel's request, by the Court's February 1, 2008, Order.

database searches to locate good addresses for 114 of the 142 initial mailings that were returned as "undeliverable" by the U.S. Postal Service. *Id.* at ¶ 8.

Minnesota Class members were required to return a completed, valid claim form to the Settlement Administrator postmarked no later than the date 60 days after the initial mailing of the notices, or April 14, 2008. The Settlement Administrator received 239 claims from Minnesota Class members. This represents 47.90% of the Minnesota Class, whose eligible weeks worked represent 49.75% of all eligible weeks worked by members of the Minnesota Class. *Id.* at ¶ 10, Ex. C.

After the Settlement is finally approved by the Court, the Settlement Administrator will send payment to eligible class members.[6]

E. Objections

Members of the FLSA Opt-In Class and the Minnesota Class were required to submit any objections to Plaintiffs' Counsel and to Caribou's Counsel no later than the date 60 days after the initial mailing of the notices, or April 14, 2008. Not a single member of the FLSA Opt-In Class or the Minnesota Class objected to the Settlement. *See* Nauen Aff. at ¶ 10; *see also* Tittle Dec. at ¶ 11.

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[6]Half of each class member's settlement payment will be reported as wages for tax purposes, each class member receiving an IRS form W-2 for this portion of the settlement payment. Caribou will provide all necessary tax withholding information to the Settlement Administrator so that appropriate calculation of withholding can be made. The second half of each class member's settlement payment will be deemed payment for liquidated damages and/or interest, and will be reported on an IRS Form 1099. Stip at ¶ 13.1.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE FINALLY APPROVED.

In preliminarily approving the Settlement, the Court ordered that the Settlement be subject to further consideration at a hearing on May 12, 2008, in part to determine whether the proposed Settlement is fair, reasonable, and adequate and should be finally approved. Doc. No. 608. Because notice to the Classes and an opportunity for objections to all elements of the Settlement have been given, the Court may now consider final settlement approval. Fed. R. Civ. P. 23(e); *White v. National Football League*, 822 F. Supp. 1389, 1406 (D. Minn. 1993), *aff'd* 41 F.3d 402 (8th Cir. 1994), *cert. denied* 515 U.S. 1137 (1995); *Holden v. Burlington Northern Inc.*, 665 F. Supp. 1398, 1402-02 (D. Minn. 1987).

A. The Law Favors Settlement.

Public policy favors the settlement of complex class actions, and such settlements carry with them a strong presumption of validity:

> In the class action context in particular, 'there is an overriding public interest in favor of settlement.' *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

Armstrong v. Bd of Sch. Dir. of City of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980) *overruled on other grounds* 134 F.3d 873 (7th Cir. 1998); *see also Little Rock Sch. District v. Pulaski County Special Sch. Dist. No. 1,* 921 F.2d 1371, 1388 (8th Cir. 1990); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993).

B. The Eighth Circuit Applies a Four Factor Test in Determining Whether to Finally Approve a Settlement

The determination of whether to approve a settlement is within the discretion of the trial court. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied* 423 U.S. 864. Such deference is granted to the trial court based on its ability to assess the settlement as a result of its exposure to the litigants and their strategies, positions, and the strength of their respective cases. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999).

In determining whether to approve a proposed settlement, a court must determine whether the settlement is fair, reasonable, and adequate. *Grunin,* 513 F.2d at 123. However, the Eighth Circuit has cautioned that the role of the trial court in determining whether to approve a settlement and the proper analysis to be undertaken in such a determination is limited:

> Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

Little Rock Sch. Dist., 921 F.2d at 1388 (quoting *Armstrong*, 616 F.2d at 315).

The Eighth Circuit applies a four-factor test to determine whether a class action settlement should be approved: (1) the merits of the plaintiff's case as compared to the terms of the settlement; (2) the financial condition of the defendant; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *In re Wireless Telephone Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005),

cert. denied 546 U.S. 822. Each of these four factors supports approval of this Settlement.

C. The Settlement Meets All Factors to Be Considered in Finally Approving a Settlement.

1. Plaintiffs faced significant risk in establishing liability and damages.

The first and most important factor in the Eighth Circuit's test is the comparison between the strength of the plaintiffs' case and the relief obtained through settlement. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988).

Plaintiffs' counsel and the Named Plaintiffs carefully assessed the probability of ultimate success on the merits versus the risks of establishing liability and damages. Although Plaintiffs' case is meritorious, it faces significant hurdles, including: (1) significant, generally unfavorable, precedent in this district and circuit, *see, e.g., Murray v. Stuckey's Inc.*, 50 F.3d 564 (8th Cir. 1995), *cert. denied* 516 U.S. 863; *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir. 1991), *cert. denied* 502 U.S. 1073 (1992); *Smith v. Heartland Automotive Services, Inc.*, 418 F. Supp. 2d 1129 (D. Minn. 2006); (2) this Court's ruling granting summary judgment with respect to the issue of willfulness, which reduced the damages period from three years to two years; (3) the potential applicability of the fluctuating work-week rule, which would further limit damages; (4) the difficulty of proving, based on Plaintiffs' recollections, the number of overtime hours actually worked, especially in light of contrary Point-Of-Sale ("POS") data; and (5) the Court's express reservations regarding the merits of Plaintiffs' claims. Nauen Aff. at ¶ 8.

In light of these significant legal and factual issues, a settlement with a sure recovery for all Plaintiffs is prudent.

2. Caribou's financial condition made its ability to pay a judgment questionable.

The second settlement approval factor – the defendant's overall financial condition and ability to pay – also favors settlement.

In considering settlement, the Named Plaintiffs and Plaintiffs' counsel weighed significant concerns about Caribou's falling stock value and its ability to pay a judgment in the future, after trial and appeals. Nauen Aff. at ¶ 9. Caribou stock was first publicly traded on September 29, 2005, not long after this lawsuit was commenced; it opened the market at $15.50 per share.[7] At the recent close of market on April 25, 2008, Caribou stock was trading at $2.64 per share.[8]

In light of these concerns, settlement sooner rather than judgment later is prudent. Significantly, the Settlement provides that all payments of pro rata shares of the Settlement Fund to members of the FLSA Opt-In Class and the Minnesota Class will be made out of Caribou's first installment payment into the Settlement Fund, thereby reducing the risks relating to Caribou's ability to pay in the future. *See* Stip. at ¶ 14.2.

3. Continued litigation would be long, complex and expensive.

The expense and potential duration of litigation also should be considered in evaluating the reasonableness of a settlement. *See DeBoer v. Mellon Mort. Co.*, 64 F.3d

[7] *See* http://findarticles.com/p/articles/mi_m3190/is_41_39/ai_n15693294?tag=rel.res1.

[8] *See* http://finance.google.com/finance?client=ob&q=NASDAQ:CBOU.

1171, 1178 (8th Cir. 1995) ("'the very purpose of compromise is to avoid the delay and expense of ... a trial.'") (quoting *Grunin*, 513 F.2d at 124).

In considering settlement, Plaintiffs' counsel and the Named Plaintiffs considered the costs of trial and the costs of appeal. The trial likely would have been bifurcated into a liability phase, involving extensive fact and expert testimony, followed by a damages phase that might have involved multiple proceedings. These trial proceedings likely would have been followed by one or more appeals. To continue litigating would have been an extremely expensive and time consuming proposition that would have delayed recovery, if any, for many months or, possibly, years. Nauen Aff. at ¶ 9.

Plaintiffs' counsel and the Named Plaintiffs also considered the fact that many Plaintiffs are persons of modest means who would benefit from a certain and relatively immediate recovery. In light of all of these factors, a settlement with a certain outcome is prudent. *Id.*

4. No one objected to the settlement.

The lack of objections to a settlement weighs heavily in support of approval. *Petrovic*, 200 F.3d at 1152 (approving settlement over the objections of 4% of class members).

In this case, the 802 members of the FLSA Opt-In Class and Minnesota Class were mailed notice of the Settlement and its terms.[9] Not a single person objected. *See*

[9] Of the 802 mailings to Class Members, only 32 ultimately were undeliverable by the U.S. Postal Service. *See* Tittle Dec. ¶ 8.

Nauen Aff. ¶ 10; Tittle Dec. ¶ 11. This fact speaks volumes to the adequacy and fairness of all aspects of the Settlement.

D. The Claims Filing Deadline Should be Extended by Three Weeks.

Five claims were received bearing postmarks after the April 14, 2008 deadline. Tittle Dec. ¶ 10. In the interest of being as inclusive as possible, Plaintiffs' counsel now ask that the Court extend the deadline for filing claims by approximately 3 weeks, from postmarked on or before April 14, 2008, to postmarked on or before May 12, 2008, the date scheduled for the hearing on final approval of the Settlement. The very small number of claims that were mailed late were in all other respects valid and complete, did not cause any undue delay or extraordinary work for the Settlement Administrator to review, and the requested extension ensures that no claim will be rejected simply because it was mailed a few days after the filing deadline.

In sum, the Settlement is fair, reasonable, adequate, and in the best interests of Plaintiffs. Therefore, the Court should grant final approval of the Settlement and the plan of allocation, extend the claims filing deadline to May 12, 2008, and order entry of final judgment dismissing this action with prejudice.

II. THE REQUESTED AWARD OF FEES AND EXPENSES IS REASONABLE AND WARRANTED AND SHOULD BE APPROVED.

When fee-shifting statutes such as the FLSA are involved,[10] parties may negotiate settlements that encompass a defendant's total liability for damages, attorney fees, and

[10] The FLSA provides that the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of action." 29 U.S.C. § 216(b).

costs. *See Evans v. Jeff D.*, 475 U.S. 717, 733-34, 738 n.30 (1986); *see also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 107 (9th Cir. 1997) ("parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees."); *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1427-28 (D. Minn. 1987); 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 15:32 (4th ed. 2002). In this case, the parties negotiated a settlement which, at Caribou's insistence, caps Caribou's total obligation for settlement payments to Plaintiffs, costs of notice and settlement administration, court-approved separate awards to Named Plaintiffs, court-approved litigation costs and expenses, and court-approved attorney fees. *See* Stip. at ¶¶ 12.1, 13.2, 14.1.

All three Named Plaintiffs participated, in person, in the two-day mediation and participated in subsequent discussions that resulted in the final settlement and proposed allocation of the Settlement Fund. Nauen Aff. ¶¶ 5, 7. The proposed allocation specifically includes $1,250,000 (plus interest) for attorney fees, $450,000 for litigation costs and expenses, and $60,000 for separate awards to Named Plaintiffs. Stip. at ¶ 14.1.

Notices to the FLSA Opt-In Class and Minnesota Class, sent pursuant to the Court's preliminary approval order (Doc. No. 608), fully described the settlement terms and proposed allocation of the Settlement Fund, including proposed settlement payments to class members, separate awards to Named Plaintiffs, attorney fees and costs. *See* Stip., Ex. 5 at 5-7 & Ex. 6 at 5-7. In addition, the Notices specifically stated that Plaintiffs' counsel would file an application for an award of $1,250,000 (plus interest) for attorney fees, $450,000 for litigation costs and expenses, and separate awards of $20,000 for each

of the three Named Plaintiffs in addition to any pro rata shares of the Settlement Fund to which they may be entitled. *See id.*, Ex. 5 at 8, Ex. 6 at 9. The Notices also informed members of the classes of their rights to object, and described the procedure for asserting any such objections. *Id.*, Ex. 5 at 9, Ex. 6 at 11. Not a single member of either the FLSA Opt-In Class or the Minnesota Class objected. Nauen Aff. ¶ 10; Tittle Dec. ¶ 11.

As contemplated by the Stipulation of Settlement, as stated in the Notices, and without objection by class members, Plaintiffs now seek the Court's approval of awards of $20,000 for each of the three Named Plaintiffs, $446,968.14 for reimbursement of litigation costs and expenses, and $1,250,000 (plus interest earned by the Settlement Fund) for attorney fees. As discussed below, the amount requested for attorney fees reflects a significant discount of fees actually incurred.

A. An Award of Fees and Costs is Mandatory.

As a threshold matter, an award of fees and costs to prevailing plaintiffs under the FLSA is mandatory. *See* 29 U.S.C. § 216(b) (the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of action,").[11] *See also Singer v. Waco*, 324 F.3d 813, 829 n.10 (5th Cir. 2003) (§ 216(b) "requires" a fee award), *cert. denied* 540 U.S. 1177 (2004); *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) (a fee award is

[11] Fee awards also are mandatory under the MFLSA. *See* Minn. Stat. § 177.27, subd. 10 ("the court shall order an employer who is found to have committed a violation of sections 177.21 to 177.44 to pay to the employee or employees reasonable costs, disbursements, witness fees, and attorney fees."). All arguments made here in support of an award of fees and costs under the FLSA also support an award of fees and costs under the MFLSA.

"mandatory"), *cert. denied* 513 U.S. 875 (1994); *Falica v. Advanced Tenant Servs,, Inc.*, 384 F. Supp.2d 75, 77 (D.D.C. 2005) ("The award of counsel fees to an employee's attorney in FLSA cases is mandatory and unconditional."); *Lawson v. Lapeka, Inc.* 1991 WL 49775, *4 (D. Kan. March 19, 1991) (mandatory); *Fields v. Luther*, 1988 WL 121791, * 1 (D. Md. July 12, 1988) (mandatory).[12]

Plaintiffs in this case are prevailing parties as a result of the settlement of this litigation. *Cf. Fish v. St. Cloud State Univ.*, 295 F.3d 849, 851 (8th Cir. 2002) ("Plaintiffs who obtain relief through settlement are considered prevailing parties" under Title VII); *Wray v. Clarke*, 151 F.3d 807, 809 (8th Cir. 1998) ("prevailing parties" includes civil rights complainants who prevail through settlement in lieu of litigation); *see also Am. Disability Assoc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002) (plaintiffs are prevailing parties because the court's approval of settlement and retention of jurisdiction to enforce settlement are judicially-sanctioned changes in the legal relationship between the parties). Therefore, Plaintiffs are entitled to fees and costs.

B. The "Lodestar" Method is Used to Determine Attorney Fees in FLSA Cases.

Although the award of attorney fees and costs under the FLSA is mandatory, the amount of the award is within the court's discretion. *Fegley*, 19 F.3d at 1134. To determine "reasonable" awards in FLSA cases, the courts use the "lodestar" method. *Heidtman v. El Paso County*, 171 F.3d 1038, 1043 (5th Cir. 1999); *see, e.g., West v.*

[12] The purpose of mandatory fee awards under the FLSA is to help ensure that plaintiffs with wage and hour grievances have "effective access to the judicial process[.]" *Fegley*, 19 F.3d at 1134 (internal citation omitted).

Border Foods, Inc., 2007 WL 1725760, **2-4 (D. Minn. June 8, 2007) (applying lodestar method in FLSA case); *Milner v. Farmers Ins. Exchange*, 725 N.W.2d 138, 145-47 (Minn. Ct. App. 2006) (applying lodestar method in FLSA case).

The lodestar method involves calculating the number of hours reasonably expended on litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "There is a 'strong presumption' that the lodestar figure represents the reasonable fee to be awarded." *Hixon v. City of Golden Valley*, 2007 WL 4373111, *2 (D. Minn. Dec. 13, 2007), *quoting City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). Nevertheless, adjustments to the lodestar sum "may be made as necessary in the particular case." *Blum v. Stenson*, 465 U.S. 886, 888 (1984).[13]

1. Hours reasonably expended.

Counsel must use "billing judgment" by making good-faith efforts to exclude from a fee request hours that are "excessive, redundant, or otherwise unnecessary[.]" *Hensley*, 461 U.S. at 434.

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[13] A variety of factors may be considered in making adjustments to the lodestar figure, including: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases; (13) the significance of the legal issue on which the plaintiff prevailed; and (14) the public purpose served. *Flowers v. City of Minneapolis*, 2008 WL 927940, *2 (D. Minn. April 7, 2008). However, it is not necessary for the Court to explicitly examine all of these factors in determining reasonable attorney fees. *Id.*, *citing Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997 (8th Cir. 1999).

Plaintiffs' counsel have made good-faith efforts to use good billing judgment in their fee request by taking several steps to exclude any hours that might be excessive, redundant, or otherwise unnecessary. First, Plaintiffs' counsel have cut *all* time of attorneys and other timekeepers who worked fewer than 300 hours on this case, eliminating more than 1,400 total hours. Nauen Aff. ¶ 13; Affidavit of Jon Tostrud ("Tostrud Aff.") Aff. ¶ 4. *Cf. Hixon*, 2007 WL 4373111 at *3 (reducing hours by a percentage, instead of line-by-line, to account for redundancies and vagueness). Second, Plaintiffs' counsel have cut *all* time after February 2008 (approximately 75 hours), including time spent responding to class members' inquiries, time spent on settlement administration, and time spent preparing for final settlement approval and on this application for fees and costs. Nauen Aff. ¶ 13; Tostrud Aff. ¶ 4.[14] Third, Plaintiffs' counsel have reviewed each remaining time entry and have cut hours that might be construed to be excessive, redundant, or otherwise unnecessary. Nauen Aff. ¶ 13; Tostrud Aff. ¶ 4.

Even after eliminating all of the hours described above, Plaintiffs' counsel and non-lawyer billing staff have worked 9,481.81 hours litigating and settling this case for Plaintiffs' benefit. *See* Nauen Aff. ¶ 13; Tostrud Aff. ¶ 4. Further, Plaintiffs' counsel

[14] Post-judgment hours, including time spent preparing a fee application, are recoverable and may be included in the lodestar calculation. *See Hixon*, 2007 WL 4373111 at *4.

will continue to expend time implementing the Settlement and in connection with distribution of the Settlement Fund.[15]

2. Reasonable hourly rates.

The hourly rates of Plaintiffs' counsel and each non-lawyer billing staff member for whom time is submitted are set out in the exhibits to the affidavits in support of this fee application. The hourly rates for the attorneys for whom time is submitted, i.e., only those who spent more than 300 hours working on this case, range from $400 to $595, and the hourly rate for non-lawyer billing staff range from $130 to $200. Nauen Aff., Ex. 1; Tostrud Aff., Ex. 1. These hourly rates have been accepted and approved in other contingent litigation and are comparable to rates charged by class action counsel in similar cases in Minnesota. Nauen Aff. ¶ 12; Tostrud Aff. ¶ 3. *See also Milner*, 2005 WL 5621615 (pinpoint citation not available) (approving $590 and $450 hourly rates in FLSA case); *West*, 2007 WL 1725760 at *2 (approving $550 and $400 hourly rates in FLSA case); *cf. Hixon*, 2007 WL 4373111 at *3 (approving $400 hourly rate in § 1983 case).

3. Plaintiffs' counsel's lodestar.

Multiplying the hours that all attorneys and non-lawyer billing staff have worked on this case (and which remain after the exercise of billing judgment described above) by

[15] Plaintiffs' counsel will provide detailed time records for *in camera* review upon the Court's request. However, because Plaintiffs' counsel are requesting a fee award that is much less than the lodestar, and because the Court has been intimately involved in this case and is well aware of the litigation efforts involved, Plaintiffs' counsel have not provided detailed time and expense records at this time.

their respective hourly rates yields a lodestar figure of $3,768,875.70. *See* Nauen Aff. at ¶ 13; Tostrud Aff. at ¶ 4. This lodestar figure is entitled to a strong presumption of reasonableness. *See Hixon*, 2007 WL 4373111, *2.

C. No Downward Adjustment is Warranted.

Plaintiffs' request for $1,250,000 (plus interest) to compensate their attorneys for more than 9,000 hours and nearly three years of hard-fought litigation and settlement efforts satisfies any conceivable standard of reasonableness. The amount requested is significantly lower than Plaintiffs' counsel's lodestar. In effect, the request incorporates any reasonable reduction in the number of lodestar hours and/or hourly rates that the Court might be inclined to consider. Further, as discussed below, numerous other factors weigh against any additional downward adjustment and, under different circumstances, would weigh in favor of enhancement.

1. Results obtained.

Lodestar may be adjusted based on "results obtained." *Hensley*, 461 U.S. at 434. However, because mandatory fee awards in FLSA cases are intended to "encourage[] the vindication of congressionally identified policies and rights[,]" courts "should not place an undue emphasis on the amount of the plaintiff's recovery[.]" *Fegley*, 19 F.3d at 1134-35 (internal citation omitted). In fact, courts frequently grant and uphold "substantial awards of attorney's fees even though a plaintiff recovered only nominal damages." *Id.* at 1135 (internal citation omitted); *see also Singer*, 324 F.3d at 829-30 (limited monetary success does not require a reduction in lodestar); *cf. Fields*, 1988 WL 121791 at *3 (proportionality between the amount recovered and the amount of attorney's fees

awarded is not required); *accord Milner*, 725 N.W.2d at 145-47 (awarding $1,258,178.80 in attorney fees where plaintiffs obtained injunctive relief but $0 damages).[16]

This litigation will result in the creation of a $2,700,000 Settlement Fund. From this Settlement Fund, 303 FLSA Opt-In Class members and the 239 Minnesota Class members who submitted claims will receive checks totaling $915,000, a significant portion of the damages Plaintiffs might have recovered if successful at trial and on appeal. In addition, the Settlement Fund will pay all costs of settlement administration, costs and expenses of litigation, and attorney fees.

This result is substantial, especially in light of Caribou's vigorous defense; generally unfavorable precedent in this district and circuit; the Court's ruling limiting the damages period; the potential applicability of the fluctuating work-week rule to further limit damages; the difficulty of proving, based on Plaintiffs' recollections, the number of overtime hours worked in light of contrary POS data; the Magistrate Judge's and District Judge's expressed reservations about the merits of the claims; the risks of trial; and the further risks of appeal. Nauen Aff. at ¶¶ 8-9.

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[16] In *Milner*, the district court awarded attorney fees totaling $1,887,268.32, representing 90% of lodestar plus a 1.5 multiplier. *See Milner v. Farmers Ins. Exchange*, 2005 WL 5621615 (Minn. Dist. Ct. Sept. 14, 2005) (Trial Order) (pinpoint citations not available), *vacated in part*, 2005 WL 5621616 (Minn. Dist. Ct. Nov. 23, 2005) (Trial Order). The court of appeals remanded with instructions to enter an order awarding 90% of lodestar without a multiplier, or a total of $1,258,178.80. *Milner*, 725 N.W.2d at 147; *Milner*, 2005 WL 561615.

This result also is substantial in light of Caribou's falling stock value and reasonable concerns about Caribou's ability to pay a judgment in the future, as described above.

2. Time and labor required.

This litigation began nearly three years ago. As noted above, Plaintiffs' counsel and staff have worked in excess of 9,000 hours to bring this lawsuit to a successful conclusion against considerable odds and formidable opponents.

The 609 entries on the Court's docket only partially reflect the time and labor required to reach this point. Plaintiffs' counsel and staff undertook hundreds of other tasks including, among others, propounding and responding to written discovery; reviewing more than 1 million pages of documents; producing approximately 20,000 pages of documents; taking and defending 17 depositions; interviewing witnesses; counseling clients; researching; analyzing; strategizing; writing; arguing; and negotiating. *See* Nauen Aff. at ¶ 2. All of these tasks were performed at a high level, without compensation and with the risk of no compensation.

3. Novelty and difficulty of issues.

This is not a run-of-the-mill FLSA case. It presented difficult and complex issues of law and fact that required sophisticated analysis, briefing, and argument, as reflected in the record.

Because caselaw in this district and circuit generally favors defendants with respect to the issues in this case, great effort was required to develop strong, supported and persuasive arguments, particularly in connection with Plaintiffs' successful

opposition to Caribou's decertification motion. Plaintiffs in at least one other case have relied heavily on the resulting decision in their own successful opposition to a motion for decertification. *See Pendlebury v. Starbucks Coffee Co.*, 518 F. Supp.2d 1345, 1352 n.10 (S.D. Fla. 2007) (noting plaintiffs' heavy reliance on the *Caribou* decision, and finding this Court's reasoning persuasive).

4. Skill required to perform legal services properly.

The difficulty of the issues in this case, as well as the generally unfavorable precedent in this district and circuit, required high-level research, analysis, deposition practice, writing, and oral advocacy to present effective and persuasive arguments to the Court. The skill, resolve, and tenacity displayed by Plaintiffs' counsel were particularly important in light of the fact that Caribou was represented by skilled and experienced attorneys from one of Minnesota's largest and most prominent law firms.

5. Preclusion of other employment.

The prosecution of this action consumed the attention and time of Plaintiffs' counsel, sometimes totally, to the exclusion of other matters. Plaintiffs' counsel have active legal practices and other endeavors they could have and would have pursued but for their commitment to this litigation. Nauen Aff. at ¶ 17; Tostrud Aff. at ¶ 3.

6. Customary fee.

As noted above, the hourly rates charged by Plaintiffs' counsel and staff are comparable to rates charged by class action counsel in similar cases in this district and have been accepted and approved in other contingent litigation. Nauen Aff. ¶ 12; Tostrud Aff. ¶ 3.

7. Whether the fee is fixed or contingent.

The fee in this case is contingent. Many of the Plaintiffs are of modest means and would not have been able to obtain counsel to pursue their claims on a fixed-fee basis. Because the fee is contingent, Plaintiffs' counsel bore the time costs and out-of-pocket costs of litigation for nearly three years without any compensation and with the risk of no compensation.

8. Time limitations imposed by clients or circumstances.

No particular time limitations were imposed by Plaintiffs or circumstances.

9. Experience, reputation, and ability of attorneys.

Plaintiffs' counsel are experienced, successful lawyers whose reputations for quality are among the highest. Brief biographies of Plaintiffs' counsel are attached to the affidavits submitted in support of this fee application. *See* Nauen Aff. Ex. 3; Tostrud Aff. Ex. 3.

10. Undesirability of the case.

The undesirability of this case is reflected by the fact that none of the other numerous local and national law firms that regularly file FLSA actions intervened or filed separate actions on behalf of any plaintiffs. This lack of interest is understandable given the significant legal and practical hurdles this case presented.

11. Nature and length of professional relationship with clients.

There was no pre-existing relationship between Plaintiffs' counsel and their clients in this case. However, Plaintiffs' counsel developed a strong working relationship with their clients, in particular with the Named Plaintiffs, who actively participated by

communicating with other Plaintiffs, suggesting areas and avenues of discovery, educating Plaintiffs' counsel regarding Caribou practices and procedures, attending hearings, participating in the mediation, and crafting the settlement and proposed plan of allocation. Nauen Aff. at ¶¶ 5, 7-9.

12. Awards in similar cases.

Perhaps the most comparable case is Milner, supra, which involved similar exemption misclassification issues. As noted above, in *Milner*, plaintiffs obtained injunctive relief but $0 damages. Plaintiffs' counsel ultimately were awarded $1,258,178.80 in attorney's fees. *See Milner*, 725 N.W.2d at 147; *Milner*, 2005 WL 561615 (pinpoint citations unavailable).

13. Significance of the legal issues on which Plaintiffs prevailed.

As noted above, Plaintiffs' success in opposing Caribou's motion for class decertification is a model for other misclassified retail store managers and already has had an impact beyond this case. *See Pendlebury*, 518 F. Supp.2d at 1352 n.10.

14. Public purpose served.

Plaintiffs' success serves the purpose of the FLSA by vindicating rights the FLSA was enacted to protect. It serves notice to employers that there is a cost for paying lip-service to their FLSA exemption classification obligations, and that employers make blanket exemption classifications at their own risk. It also provides persuasive authority to counter caselaw in this district and circuit that is generally unfavorable to plaintiffs.

15. No objections.

It bears repeating that explicit and clear notice of the fact and amount of this request for attorney fees was provided to 303 members of the FLSA Opt-In Class and to 499 members of the Minnesota and not a single person objected.

In sum, an award of attorney fees in this case is mandatory. The amount requested, $1,250,000 plus interest earned by Settlement Fund, is reasonable in light of Plaintiffs' counsel's lodestar, which far exceeds the request. *See* Nauen Aff. at ¶ 13; Tostrud Aff. at ¶ 4. Further, no downward adjustment is warranted in light of the results obtained, the benefits to Plaintiffs, and all of the other pertinent factors that bear on such an award.

Therefore, Plaintiffs and Plaintiffs' counsel request an award of attorney fees in the amount of $1,250,000, plus all interest earned by the Settlement Fund.

D. Plaintiffs' Counsel are Entitled to Reimbursement of Costs and Expenses.

As noted above, the award of costs, as well as fees, is mandatory under the FLSA. *See* 29 U.S.C. § 216(b); *West*, 2007 WL 1725760 at *4 ("The Court shall also award reasonable costs to the prevailing party.").[17]

Plaintiffs' counsel have advanced litigation costs and expenses that normally would be charged to clients. Nauen. Aff. at ¶¶ 14-16; Tostrud Aff. at ¶ 7. These costs and expenses are summarized in Nauen Aff. Ex. 2 and Tostrud Aff. Ex. 2. All of these

[17] In this context, "costs" includes all costs and expenses that firms in the area normally charge to their clients, including expert fees. *See Lawson*, 1991 WL 49775 at *2-3.

costs and expenses were reasonably and necessarily incurred in the course of this litigation. Nauen Aff. at ¶ 15; Tostrud Aff. at ¶ 7.

Notably, Plaintiffs' counsel's actual costs and expenses total $446,968.14, which is less than the amount identified in the Notices. The Notices stated that Plaintiffs' counsel would request $450,000 for costs and expenses; no one objected.

Therefore, Plaintiffs and Plaintiffs' counsel request an award of costs and expenses to Plaintiffs' counsel in the amount of $446,968.14.

E. The Three Named Plaintiffs are Entitled to Separate Awards for their Efforts in this Litigation.

Courts may make separate awards to class representatives in recognition of their risks, time expended, and benefits to the class. *See In re US Bancorp Litig.*, 291 F.3d 1035, 1037 (8th Cir. 2002), *cert. denied* 537 U.S. 823 (2002); *White*, 822 F. Supp. at 1406.

The role of the Named Plaintiffs in this litigation was crucial. Each sacrificed his time to prosecute this lawsuit on behalf of his fellow current and former Store Managers. Each reviewed and approved the Complaint. Each met, conferred and corresponded with Plaintiffs' counsel. Each responded to written discovery, and produced records and documents. Each was deposed. Each participated, in person, in the mediation that set this settlement into motion. And all three were actively involved in subsequent discussions that shaped and finalized the settlement and proposed plan of allocation. Nauen Aff. at ¶¶ 5, 7-9.

The Notices informed class members that Plaintiffs' counsel would ask the Court to make separate awards of $20,000 to each of the three Named Plaintiffs in addition to any pro rata shares of the Settlement Fund to which they may be entitled. Again, no one objected. Nauen Aff. at ¶ 10.

Therefore, Plaintiffs and Plaintiffs' counsel request separate awards of $20,000 to each of Nathan Nerland, Daniel Williams-Goldberg, and James Geckler, in addition to any pro rata shares of the Settlement Fund to which they may be entitled.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter an order (i) finally approving the Settlement reached in the captioned action, including the plan of allocation to class members, (ii) extending the deadline for filing claims from April 14, 2008 to May 12, 2008; (iii) entering final judgment dismissing this action with prejudice; (vi) awarding Plaintiffs' counsel attorney fees in the amount of $1,250,000.00, plus interest earned by the Settlement Fund, and $446,968.14 for reimbursement of costs and expenses; and (v) granting separate awards in the amount of $20,000.00 to each of the Named Plaintiffs, in addition to any pro rata share of the Settlement Fund to which they may be entitled.

Dated: April 28, 2008

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