IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JESSICA WILLIAMS, SHERYL FRITZ AND JAMIE TERRY, Individually and on behalf of all other similarly situated Corizon Correctional Nurses,	)	Case No.: 6:19-cv-03365-SRB
Plaintiffs,	)	
v.	)	
CORIZON HEALTH, INC., and CORIZON, LLC	)	
Defendants.	)	

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY SETTLEMENT APPROVAL AND APPROVAL OF ATTORNEYS' FEES AND COSTS

Respectfully submitted,

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The parties have reached an agreement to settle this case. The Settlement is fair, reasonable and beneficial to the FLSA plaintiffs and Missouri state law Class Members, and should be readily approved. The Settlement creates a Gross Settlement Fund of $550,000 covering approximately 949 FLSA plaintiffs who have already joined the case, and a Missouri class of approximately 1,628 Class Members. The Settlement addresses the alleged unpaid time that non-exempt correctional nurses spent performing activities after entering a correctional institution, but prior to clocking in, as well as activities performed after clocking out, but prior to exiting the correctional institution.

Each FLSA plaintiff and Missouri state law Class Member will be sent notice that identifies his or her specific estimated gross recovery (free and clear of fees and costs). Missouri state law Class Members who are not FLSA plaintiffs will have the right to exclude themselves from the case. All Missouri state law Class Members who are not also FLSA plaintiffs, and who do not exclude themselves, will have the right to object to the Settlement. Anyone who already joined the case will not be required to file a claim. The Settlement is non-reversionary and the full $550,000.00 will be paid out regardless of the level of participation.

I. Procedural History and Settlement Overview.

Named Plaintiffs Sheryl Fritz, Jessica Williams, and Jamie Terry ("Plaintiffs") brought this lawsuit on October 15, 2019. Plaintiffs sought relief on behalf of a nationwide collective for unpaid wages pursuant to the Fair Labor Standards Act ("FLSA"), and on behalf of a Missouri class for unpaid wages under Missouri common law. Defendants moved to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) for lack of personal jurisdiction and for failure to state a claim. (Docs. 7 & 8). The Court denied Defendants' Motion. (Doc. 25).

After some threshold discovery, on July 14, 2020, the parties mediated the case with the Honorable Ray Price, Jr., but the mediation failed. On August 31, 2020, Plaintiffs moved to

conditionally certify the nationwide FLSA collective action. (Doc. 58). After full briefing, and a stipulation of the parties, the Court conditionally certified the nationwide FLSA collective action with respect to correctional nurses who worked more than 40 hours in a workweek at Corizon's facilities and performed pre- and post-shift activity for which they were not paid because their time clock was not near (*i.e.*, within 25 feet) of the facility's entrance/exit. (Doc. 89). Pursuant to the Court's conditional certification order, notice and an opportunity to opt-in was sent pursuant to 29 U.S.C. § 216(b), and a total of 949 individuals eventually opted into the case.

The parties exchanged voluminous documents, payroll, timekeeping data, financial data, ESI, employment dates and duties, compensation data, login data, weeks worked, and hourly pay of the FLSA plaintiffs and Missouri state law Class Members. They also conducted depositions of Defendants' witnesses, FLSA plaintiffs, Missouri state law Class Members, and Missouri Department of Corrections witnesses. Plaintiffs moved for Rule 23 Class Certification of their unjust enrichment claim under Missouri law (Doc. 209), which Defendants opposed (Doc. 218). After full briefing and a hearing, the Court certified the Rule 23 Class. (Doc. 231). Notice was sent to the Missouri state law Class Members, and the notice period closed on or around May 6, 2021.

On February 8, 2022, the parties mediated the case again with the assistance of David Vogel, a well-recognized labor and employment law mediator, but did not resolve the case. The parties continued to have arms-length negotiations and, on or about February 18, 2022, they reached a settlement. On March 8, 2022, the parties finalized a written Settlement Agreement.

The Plaintiffs and Class Counsel believe the claims asserted have merit and that the evidence developed to date supports the claims. Plaintiffs and counsel, however, also recognize the myriad risks and delay of further proceedings in a complex case like this, and believe that the Settlement confers substantial benefits upon the Class Members. Defendants deny Plaintiffs'

claims in their entirety and deny any wrongdoing, but wish to avoid the uncertainty and risk attendant with further litigation.

The main terms of the agreement are as follows:

- The Settlement creates a Gross Settlement Fund of $550,000.00 to resolve the claims of the FLSA Class and the Missouri Rule 23 Class.
- Within three days of the Court preliminarily approving the Settlement, Corizon will fund the total settlement amount of $550,000.00 in escrow.
- The Settlement calls for different notices. One notice will inform the Missouri state law Class Members who have not already opted into the case of their eligibility to participate in the Settlement by submitting a Claim Form and opt out of the Settlement, as well as their anticipated approximate gross settlement allocation. Existing FLSA plaintiffs will receive notice, including their individual settlement amount, but will not be required to submit a Claim Form to participate in the Settlement or given an opportunity to opt out.
- The settlement funds will be distributed based on a proportionate share of the settlement fund taking into account individuals' payroll and time records and a uniform assumed number of unpaid pre- and post-shift minutes worked per shift.
- Settlement amounts allocated to Missouri state law Class Members who do not submit a claim will be redistributed to those participating in the Settlement; none of the settlement funds will revert to Corizon.
- The FLSA plaintiffs will release all federal and state Wage and Hour Claims. The Missouri state law Class members will release all Missouri state Wage and Hour Claims. The release is limited by the facts alleged in this lawsuit.
- The Settlement will be administered by a third-party administrator, to be selected by mutual consent of the parties. Reasonable fees and expenses of the Settlement Administrator shall be deducted from the Gross Settlement Fund.
- Plaintiff's counsel seeks attorneys' fees in the amount of one-third of the Gross Settlement Fund ($183,333.33).
- Plaintiffs' counsel also seek costs to date of approximately $54,455.53.
- The individual Named Plaintiffs and specific FLSA plaintiffs who sat for a deposition shall receive, in recognition of their service contributions, service awards paid from the Gross Settlement Fund in the following amounts: Named Plaintiffs, Jessica Williams, Sheryl Fritz, and Jamie Terry, $5,000 each; and for the two FLSA plaintiffs who sat for a deposition, Hannah Dossey and Sharon Patterson, $1,000 each.
- A final fairness hearing allowing Missouri state law Class Members to present any objections will be held on a date scheduled by the court approximately 94 days after preliminary approval of the Settlement.

The Settlement Agreement is attached as Exhibit 1.

II. Question Presented

Should the Court grant Plaintiffs' motion to approve the Settlement of this case when the settlement is fair, reasonable and provides an immediate, significant benefit to the Class Members, and ends contested litigation?

III. Argument

A. Approval of the Rule 23 Class Settlement.

Rule 23(e) sets out a two-part process for Rule 23 settlements.[1] This case is at the first stage of the settlement process, often called "preliminary approval," where the Court decides if it is likely to approve the settlement such that notice of the settlement should be sent to the class.

At this first step of the process, the parties request that the Court grant "preliminary approval" of the Rule 23 settlement and order that notice should be sent to the class.

i. The Proposed Settlement Enjoys an Initial Presumption of Fairness.

"The law strongly favors settlements. Courts should hospitably receive them." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990) (noting it is especially true in "a protracted, highly divisive, even bitter litigation"); *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."). This preference is particularly strong "in class actions and other complex cases where substantial judicial resources

[1] Approval of a Rule 23 class settlement involves a two-step process. Manual for Complex Litigation, § 21.632 (4th ed. 2004); 4 Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.25, at 38-39 (4th ed. 2002); *see also Schoenbaum v. E.I. Dupont De Nemours & Co.*, 4:05-CV-01108, 2009 WL 4782082, at *2 (E.D. Mo. Dec. 8, 2009) ("As a practical matter, evaluation of a settlement usually proceeds in two stages; before scheduling the fairness hearing, the court makes preliminary determinations with respect to the fairness of the settlement terms, approves the means of notice to class members, and sets the date for that final hearing.") (*citing* Manual § 21.632 and *Liles v. Del Campo*, 350 F.3d 742, 745 (8th Cir. 2003)). During the first step, counsel submits the proposed terms of settlement and the Court makes a preliminary fairness evaluation. If the Court is likely to approve the settlement, it should grant preliminary approval and direct that notice under Rule 23(e) be given to class members of a formal fairness hearing, at which objections may be heard (the second step). *See* Manual § 21.633; Rule 23(E)(1).

can be conserved by avoiding formal litigation." *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

Courts adhere to "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 Newberg on Class Actions§ 11.41; *see also Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) ("A settlement agreement is 'presumptively valid.'") (quoting *In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013)). After the parties' arm's length negotiations, "it is not for the Court to substitute its judgment as to a proper settlement for that of such competent counsel." *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 173-74 (S.D.N.Y. 2000) (quoting *In re Warner Comm. Sec. Lit.*, 618 F. Supp. 735, 746 (S.D.N.Y. 1985)); *Sanderson v. Unilever Supply Chain, Inc.*, 10-CV-00775-FJG, 2011 WL 5822413, at *3 (W.D. Mo. Nov. 16, 2011) (crediting the judgment of class counsel experienced in FLSA cases that settlement was fair, reasonable, and adequate); *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413, 2008 WL 5458986, at *8 (S.D. Cal. Dec. 10, 2008) (noting "it is the considered judgment of experienced counsel that this settlement is a fair, reasonable, and adequate settlement of the litigation, which should be given great weight.").

ii. The Rule 23(e) Factors Favor Approval of the Settlement.

When evaluating the fairness of the settlement, the Rule 23(e)(2) factors are:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

According to the Advisory Committee notes: "The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." 2018 Advisory Committee Notes.[2] As a result, this motion will follow the factors outlined in Rule 23(e), but will then address miscellaneous factors previously analyzed by this, and other, courts. Under any standard, however, the Settlement is fair, reasonable, and adequate.

1. The class representatives and Class Counsel have adequately represented the class.

Since the case was filed in 2019, the class representatives and Class Counsel have adequately represented the class. First, Class Counsel are highly experienced in the area of wage and hour and class action litigation. They have tried wage and hour class actions to verdict and prosecuted and settled numerous others. Moreover, they have diligently prosecuted this case for over two years, handling, among other things, motions to dismiss, conditional certification motions, discovery disputes, class certification, and depositions. Class Counsel also reviewed numerous documents, worked with damages experts, communicated with hundreds of Class Members regarding the strengths and weaknesses of the case, and participated in mediation. Similarly, the class representatives have done everything asked of them, and more, including

[2] When considering the fairness of both Rule 23 and FLSA class settlements, courts have considered the following factors: "(1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense, and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiffs; (5) the opinions of class counsel and class members after receiving notice of the settlement whether expressed directly or through failure to object [final approval stage]; and (6) the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery." *Sanderson*, 2011 WL 5822413, at *3.

sitting for contentious depositions, providing written discovery to Corizon, and participating in mediation and settlement.

2. The proposal was negotiated at arm's length.

The Settlement was fairly and honestly negotiated. "The fairness of the negotiating process is to be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may have marred the negotiations themselves.'" *Ashley v. Reg'l Transp. Dist*., Civil No. 05-cdv-01567-WYD-BNB, 2008 U.S. Dist. LEXIS 13069, at *15 (D. Colo. Feb. 11, 2008) (unpublished) (quoting *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983)). The Settlement was honestly and fairly negotiated by competent counsel and involved the assistance of a well-respected mediator. "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." *Marcus v. Kansas*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002).

This case was highly contested. Defendants disagreed with Plaintiffs' legal and factual positions at every step. Defendants contested personal jurisdiction, the merits of the case, and Rule 23 certification. Moreover, the first mediation with Ray Price failed near the beginning of the case, and the parties failed again at another mediation with David Vogel. It took significant negotiations and discussions between the parties to reach an agreement. Under these circumstances it cannot be questioned that the deal was reached at arm's length.

3. The relief provided for the class is adequate taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing Class Member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment.

This Settlement provides significant relief to Class Members that compensates them fairly for their alleged unpaid time in light of the risks and delay at issue.

a. The costs, risks, and delay of trial and appeal.

The parties naturally dispute the strength of the Plaintiffs' case, and the Settlement reflects the parties' compromise of their assessments of the worst-case, and best-case, scenarios, and weighing the likelihood of various potential outcomes. Plaintiffs' best-case scenario is a denial of FLSA decertification, surviving summary judgment recovery on the merits, prevailing on the merits, and upholding the award on appeal. Plaintiffs' worst-case scenario is that the conditionally certified FLSA collective is decertified, the Rule 23 class is decertified, summary judgment is granted to Defendants, and/or Plaintiffs lose at trial or on appeal. Even if this case were to proceed to trial, and Plaintiffs prevailed on the question of liability, substantial questions may remain as to the measure of damages and the entitlement of each FLSA plaintiff and Missouri state law Class Member to recover. Although Plaintiffs believe strongly in the merits of their claims, the great number of uncertainties in ultimately prevailing and calculating class damages makes it difficult to predict how the Court/jury would make an assessment and award.

This case is complex and carries significant risks for the parties as to both legal and factual issues, and litigating the case to trial would consume great time and expense. The remaining discovery, summary judgment and decertification briefing, damages calculations, trial and appeal would consume significantly more time and resources. The parties would likely have brought at least a dozen witnesses from several states for several days of preparation and testimony, at great expense to the parties and inconvenience to the witnesses. Moreover, the parties would bring expensive expert witnesses to trial. And, regardless of the outcome, a lengthy appeal would be likely.

On the other hand, the Settlement ensures proportional recovery based on specific timekeeping and payroll data. In light of the many uncertainties still pending in the litigation, this

equitable and certain recovery is highly favorable, and weighs in favor of approving the proposed Settlement. The Settlement brings substantial, and certain, monetary value to Settlement Class Members now, rather than uncertain value to an unknown number of people at an uncertain time after protracted litigation involving complex and changing law.

b. The effectiveness of any proposed method of distributing relief to the class, including the method of processing Class Member claims.

The Settlement calls for different notices, depending on the FLSA plaintiffs' and Missouri state law Class Members' status. One notice will be sent to FLSA plaintiffs who have already opted into the case and are not part of the Rule 23 Class, (attached as Exhibit A to the Settlement Agreement), another will be sent to all FLSA plaintiffs who are also members of the Missouri state law class (attached as Exhibit B to the Settlement Agreement), and another to Missouri state law Class Members who have not opted into the case as FLSA plaintiffs (attached as Exhibit C to the Settlement Agreement). The notices include all of the information required by Rule 23 and are consistent with settlement notices previously approved by this Court. Indeed, the notices go above and beyond those requirements and specifically inform FLSA plaintiffs and Missouri state law Class Members of their individual, estimated gross settlement amount free and clear of fees and costs.

Further, the parties have agreed, in addition to the mailing of notice, the notice will be e-mailed to Settlement Class Members for whom a personal e-mail exists. The claims process is easy to use as well. Individuals wanting to participate may either mail a completed claim form, or simply visit the claims administrator's website to electronically submit a claim. The notice is easy to read and provides all necessary information.

c. The terms of any proposed award of attorney's fees, including timing of payment.

The Settlement calls for a payment of attorneys' fees constituting one-third of the Gross Settlement Fund, or $183,333.33, plus costs in the amount of approximately $54,455.53.[3] As supported by a Lodestar method of calculating fees, Class Counsel have spent significantly more time working on the case than will be recovered. *See* Dirks and Burger Declarations, attached as Exhibit 2. The attorneys' fee award is scheduled to be distributed to Class Counsel within three days after the effective date of the Final Judgment and Order Approving Settlement becomes final– *i.e.*, only after all payments to FLSA plaintiffs and Missouri state law Class Members have been determined, and any objections have been heard.

The Supreme Court has expressed a preference that the parties agree to the amount of the fee: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Here, the parties have done so. When a settlement yields a common fund for class members, fees must be paid from the recovery. *Boeing Co. v. VanGemert*, 444 U.S. 472, 481, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well-established."' *In re Xcel Energy, Inc. Sec. Derivative & ERISA Litig.,* 364 F.Supp.2d 980, 991 (D. Minn. 2005). Indeed, courts in this Circuit routinely approve, and apply, the "percentage-of-the-fund" approach in awarding attorneys' fees in common fund cases. *See, e.g., Johnston v. Comerica Mortg. Corp,* 83 F.3d 241, 245-7 (8th Cir. 1996) (approving percentage method as one method of awarding fees); *Petrovic v. AMOCO Oil Co.,* 200 F.3d 1140, 1157 (8th Cir. 1999); *In re U.S. Bancorp Litig.,* 291 F.3d 1035, 1038 (8th

[3] Before the period for objecting to the Settlement closes, the Missouri state law Class Members will receive notice of Plaintiffs' Motion for Fees. The proposed notices indicate Plaintiffs have requested this amount of attorney fees, and provides an opportunity to review the Motion for Fees so they may understand the basis for the fee request.

Cir. 2002); *In re Xcel Energy,* 364 F. Supp. 2d at 993.

As courts, including the Eighth Circuit, have routinely recognized, using a percentage of the fund approach most closely aligns the interests of the lawyers with the class, since the more that is recovered for the class, the more the attorneys stand to be paid. *See Johnston v. Comerica Mortgage Co.*, 83 F. 3d 241, 244 (8th Cir. 1996) (noting that the percent of benefit approach has been recommended in common fund situations); *see also Stoneridge Inv. Partners LLC v. Charter Communs., Inc. (In re Charter Communs., Inc.)*, 2005 U.S. Dist. LEXIS 14772, 40-42 (E.D. Mo. 2005). Moreover, in class actions, other Circuits express "a preference for the percentage of the fund method". *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3rd Cir. 1998) ("[t]he percentage-of-recovery method is generally favored in cases involving a common fund"); *Swedish Hospital Corp v. Shalala,* 1 F.3d 1261, 1269, 1272 (D.C. Cir. 1993) ("concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fee award in common fund cases" and that "a percentage of the fund approach more accurately reflects the economics of litigation practice … and most closely approximates the manner in which attorneys are compensated in the marketplace for these types of cases.").

Indeed, courts routinely "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007); *In re Synthroid Marketing Litigation*, 264 F.3d 712, 717-18 (7th Cir. 2001) (*Synthroid I*) (reversing district court's award for failure to apply "market-based approach" to approving attorney's fees). "The object in awarding a reasonable attorney's fee is to give the lawyer what he would have gotten in the way of a fee in arm's length

negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible." *Id*. (*citation omitted*).

Synthroid sets forth a framework for assessing attorneys' fees in common fund cases, observing that the court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *Synthroid I*, 264 F.3d at 718. To conduct this evaluation, the court must look to "actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Williams v. Rohm and Hass Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) (*citation omitted*). When "the prevailing method of compensating lawyers for similar services is the contingent-fee, then the contingent fee is the 'market' rate." *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986); *see also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) ("[I]t is commonplace to award the lawyers for the class a percentage of the fund in recognition of the fact that most suits for damages in this country are handled in the plaintiff's side on a contingent fee basis."). When plaintiffs have agreed to a contingent fee of one-third of the net recovery, these agreements "define the market." *City of Greenville v. Syngenta Crop Protection, Inc*., 904 F. Supp. 2d 902, 908 (S.D. Ill. 2012). Here, the market rate is not an item of mere conjecture – *i.e.*, Class Counsel entered into a contingency agreement with the Named Plaintiffs and class representatives for, at a minimum, one-third of the recovery plus costs.

Courts in the Eighth Circuit and Missouri "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in class actions." *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) (*quoting In re U.S. Bancorp Litig.,* 291 F.3d 1035, 1038 (8th Cir.2002) (affirming fee award representing 36% of the settlement fund as reasonable)); *In re Xcel,* 364 F.Supp.2d at 998 (collecting cases demonstrating that district courts

routinely approve fee awards between 25% and 36%); *Husein v. Bravo Brio Restaurant Group*, No. 16-cv-00435-DW, Doc. 48 (W.D. Mo. December 13, 2017) (approving one-third of the maximum settlement fund as attorneys' fee in an FLSA class action) (Whipple, J.); *Hernandez v. Texas Capital Bank*, No. 07-0726-ODS, Doc. 107 (W.D. Mo. July 14, 2009) (same) (Smith, J.); *Busler v. Enersys Energy Products Inc.*, No. 09-0159, Docs. 111, 120 (W.D. Mo.) (same) (Gaitain, J.); *Osby v. Citigroup, Inc.*, No. 5:07-06085-NKL, Doc. 128 (W.D. Mo. June 22, 2009) (same) (Laughrey, J.); *Brown v. Time Warner Cable, Inc.*, No. 13-0353-CV-W-BP (W.D. Mo. March 3, 2014) (same) (Phillips, J.); *In re U.S. Bancorp Litigation*, 291 F.3d at 1038 (affirming award of 36% of common fund, plus expenses); *Hamilton, et al. v. ATX Services Inc.*, No. 08-0030-SOW (W.D. Mo. May 6, 2008) (ordering, under seal, approval of attorneys' fees and expenses at 34%); *Burks v. Bi-State Development Agency*, No. 4:09CV1302 (MLM) (E.D. Mo. Jan. 31, 2011) (Doc. 91, p. 3, ¶ 8 & Doc. 102, p. 4, ¶ 9) (approving 33-1/3% attorney's fee award in call center wage and hour claim); *Wolfert v. UnitedHealth Group, Inc.*, No. 4:08CV1643 (TIA) (E.D. Mo. Oct. Aug. 21, 2009) (Doc. 37, p. 2 & Doc. 38, p. 4, ¶ 9) (approving attorney fee award of 33% of the maximum gross settlement amount in call center overtime claim); *Morak, et al. v. CitiMortgage, Inc.*, No. 07-1535 (E.D. Mo. Sep. 26, 2008) (order under seal approving attorneys' fees and expenses at 33%); *Staton v. Cavo Communications, Inc.*, No. 08-0273 (E.D. Mo. Jan. 14, 2009) (order under seal approving attorneys' fees and expenses at 33%); *Edney, et. al. v. The Golf Stop*, No. 11-00185-CV-W-DW (W.D. Mo, Nov. 11, 2011) (Whipple, J.) (approving a fee award of 33% of the settlement fund); *Michaels v. Diodes Fabtech*, No. 4:12-cv-01082-GAF (W.D. Mo., January 14, 2013) (Fenner, J.) (same); *See also Robinson v. Flowers Foods, Inc.,* No. 16-02669-JWL (D. Kan. May 31, 2018) (awarding one-third of common fund in FLSA settlement for pre-and post-shift changing time) (Lungstrum, J.); *Wass v. NPC International, Inc.,* No. 02254-JWL, Doc. 359

(D. Kan. June 27, 2012) (Lungstrum, J.) (approving one-third of the common fund in FLSA case); *Perry v. National City Bank*, Order Approving Settlement, Attorneys' Fees and Service Awards, Case No. 3:05-CV-00891-DRH-PMF (S.D. Ill. March 3, 2008) (approving requests for attorneys' fees and costs in the amount of thirty-three percent (33%) of the Settlement Fund in FLSA case).

Class Counsel took this case on a contingency basis, with the real possibility of an unsuccessful outcome and no fee of any kind. When Plaintiffs filed their Complaint in 2019, it was with no indication a settlement would be reached or litigation would be successful. For more than two years, Class Counsel has continued litigating this case, and fronting all litigation expenses. To be sure, Class Counsel is taking a loss with the requested fee because their lodestar is more than five times greater than the fee sought.

For out-of-pocket expenses, Class Counsel is also seeking approval of approximately $54,455.53. These expenses were all necessary in the pursuit of this litigation and the results obtained. (*See* Itemization of Expenses, attached as Exhibit 3. These expenses include filing costs, the costs of taking depositions, expert costs, and the cost of two mediations. These costs were reasonable and necessary. It is appropriate and customary in class litigation for class counsel to be reimbursed for out-of-pocket litigation expenses from a common settlement fund. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) ("It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class."). *See also* 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS, § 6:24 (8th ed. 2011) (noting "class counsel also is entitled to reimbursement from the class recovery (without interest) for the costs and reasonable out-of-pocket expenses incurred in prosecuting the litigation"). Reimbursable expenses include costs incurred for legal research, photocopying, document production, deposition transcripts, travel, meals, lodging, postage, and expert witness

services. *Hale v. Wal-Mart Stores, Inc.*, Nos. 01CV218710, 02CV227674, 2009 WL 2206963, ¶ 6 (Mo. Cir. Ct. Jackson Cty. May 15, 2009) (Midkiff, J.).

This Settlement provides participating Settlement Class Members with a significant payment, even after accounting for the requested attorneys' fees, reimbursement of out-of-pocket expenses, and the cost of the settlement administrator.

d. Any agreement required to be identified under Rule 23(e)(3).

No such agreement exists.

4. The proposal equitably distributes settlement funds.

The Settlement treats FLSA plaintiffs and Missouri state law Class Members fairly and equitably. No members of the FLSA class or the Rule 23 Class are treated more advantageously than another within their class. Indeed, the Settlement payment formula takes into account each FLSA plaintiff's and Missouri state law Class Member's shifts, weeks worked, and individual pay records within the applicable statute of limitations. Thus, the more shifts worked, the more he or she will receive. But no one will receive special treatment, except those deservingly receiving "Service Awards."

5. The experience and views of counsel.

A court evaluating a proposed settlement "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 arm's length negotiations between experienced, capable counsel after meaningful discovery." *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) (quoting Fed. Judicial Ctr., Manual for Complex Litig. § 30.42 at 240 (3d. ed.1997)). Although the Court is not bound by counsel's opinion, their opinion nonetheless carries weight in assessing a settlement, 2011 WL 5822413, at *3–4 (crediting experienced class counsel's belief that the settlement was fair,

reasonable, and adequate). Here, the class had the benefit of attorneys who are highly experienced in complex wage and hour litigation and familiar with the facts and law in the case, and who have negotiated many such class and collective action settlements. In Class Counsel's view, the Settlement provides substantial benefits to the class, especially when one considers, among other things, the attendant expense, risks, difficulties, delays, and uncertainties of litigation, trial, and post-trial proceedings.

iii. Class Certification for Settlement Purposes is Appropriate.

The second part of Rule 23(e)(1) requires the Court to determine that it is likely to certify the class for settlement purposes. The Advisory Committee comment states:

> One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement.

Here, the Court has already conditionally certified the case as a nationwide FLSA collective and certified the Rule 23 Class regarding the state law claims. The proposed Settlement does not call for any change in the classes certified, or of the claims, defenses, or issues regarding which certification was granted. Therefore, class certification for settlement purposes is appropriate.

iv. The Requested Service Awards are Reasonable.

Plaintiffs seek a service award payment for the Named Plaintiffs and two FLSA plaintiffs who provided deposition testimony. The requested service awards are as follows: Named Plaintiffs

Jessica Williams, Sheryl Fritz, and Jamie Terry ($5,000 each), and FLSA plaintiffs Hannah Dossey and Sharon Patterson, who sat for depositions ($1,000 each). These service awards are sought in recognition of their efforts to pursue the claims raised in this litigation on behalf of others, including providing factual information and otherwise assisting Class Counsel with the prosecution of the litigation

Additionally, the Named Plaintiffs took a risk by not only initiating the litigation, but by putting their names on it. By lending their names to employment litigation, they have risked reputation damage to current and future employers. They will forever be subject to background checks on employment applications, and there is risk that, if another, potential employer learns of their previous litigation, it may be less likely to hire them.[4] In light of the small percentage of the Settlement the service awards represent, the service awards should be approved.

Courts recognize that the risk, time, and dedication that an individual devotes to a lawsuit that inures to the common benefit of others warrants a service award above-and-beyond what other settling plaintiffs receive. *See Husein v. Bravo Brio Restaurant Group*, No. 16-cv-00435-DW, Doc. 48 (W.D. Mo. December 13, 2017) (approving service award to two named plaintiffs and early opt in of $17,500 each)*; Hermsen v. City of Kansas City,* No. 11-cv-753-BP, ECF Doc. 115 (W.D. Mo. Sept. 22, 2014) (approving service award to named plaintiff in the amount of $42,282.12, representing 3% of the common fund); *Tussey v. ABB, Inc.*, No. 06-04305-CV-C-NKL, 2012 WL 5386033 (W.D. Mo. Nov. 2, 2012) (approving $25,000 service awards for three class representatives); *Wolfert v. UnitedHealth Group, Inc.,* No. 4:08CV01643(TIA), at *4 (E.D. Mo. Aug. 21, 2009) (approving incentive award of $30,000); *Matheson v. T-Bone Rest.*, LLC,

[4] *Bellinghausen v. Tractor Supply Co.,* 306 F.R.D. 245, 266–67 (N.D. Cal. 2015) ("Incentive awards are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit against their former employers.").

2011 WL 6268216, at *9 (S.D.N.Y. Dec. 13, 2011) (approving $45,000 service award to named plaintiff in tip pool/OT case settlement after two-and-a-half years of litigation); *Mentor v. Imperial Parking Sys., Inc.*, 2010 WL 5129068, at *5 (S.D.N.Y. Dec. 15, 2010) (approving $40,000 service award to named plaintiff in FLSA settlement after five years of litigation); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving $30,000 service award to named plaintiff in FLSA settlement after three years of litigation).

Given the importance of the assistance provided by the proposed service award recipients, the requested service awards are reasonable.

IV. Approval of the FLSA Collective Action Settlement.

The standard for court approval is straightforward under the FLSA: a district court should approve a fair and reasonable settlement if it was reached as a result of contested litigation to resolve a *bona fide* dispute under the FLSA. *Garcia v. Triumph Foods*, Case No. 11-6046-CV-SJ-ODS (W.D. Mo. July 12, 2012) (citing *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-54 (11th Cir. 1982)). First, the court must be satisfied that the settlement was the product of "contested litigation." *Id.* (citing *Lynn's Food Stores, Inc.*, 679 F.2d at 1353). Second, the court must inquire as to whether the settlement involves a fair and reasonable resolution of a *bona fide* dispute between the parties under the FLSA. *Id.* Typically, as *indicia* of fairness courts rely on the adversarial nature of a litigated FLSA case resulting in an arm's length settlement. *Id*. If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement in order to promote the policy of encouraging settlement of litigation. *Id.* Plaintiffs respectfully submit this Court should conclude the parties' Settlement is a reasonable resolution of a *bona fide* dispute in contested litigation.

This Settlement was the product of arm's length negotiations by experienced counsel after

over two years of litigation and provides meaningful, significant, monetary relief to all party Plaintiffs. It also eliminates the very real and inherent risks both sides would bear if this complex litigation continued to resolution on the merits. Under these circumstances, a presumption of fairness should attach to the proposed Settlement. *See Lynn's Food Stores*, 679 F.2d at 1354 (courts rely on the adversarial nature of a litigated FLSA case resulting in settlement as indicia of fairness). *See also In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("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") (citations omitted).

The litigation was contested and settled after two mediations and significant post-mediation negotiations. Serious questions of fact and law existed that placed the ultimate outcome of the litigation in doubt. Defendants dispute that the activities performed by Settlement Class Members was compensable under the law. Defendants contend the FLSA plaintiffs and Missouri state law Class Members were compensated for all hours worked. The parties were only able to reach an accord after years of discovery, depositions, data analysis, and the mediation process.

The Settlement offers a significant payment to the FLSA plaintiffs and the Missouri state law Class Members, who will receive meaningful payments after costs and attorneys' fees are deducted from the Gross Settlement Fund. Further, if the Settlement is not approved, any recovery through litigation may not occur until after years of litigation and appeals. Or, such recovery may not occur at all after trial and appeal. For these reasons, settlement approval now should be highly favored. *See, e.g., In re BankAmerica*, 210 F.R.D. at 701 ("As courts have recognized, when considering settlement agreements they should consider the vagaries of litigation and compare the

significance of immediate recovery by way of the compromise to the mere probability of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in the hand instead of a prospective flock in the bush."); *see also Lynn's Food Stores*, 679 F.2d at 1354 (concluding public policy encourages settlement of FLSA litigation); *Little Rock School District v. Pulaski Cnty. Special School District No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.").

CONCLUSION

The Settlement presented is an immediate, real, substantial, and fair settlement. Plaintiffs, therefore, respectfully request that the Court approve the Settlement as provided in Exhibit 1, in whole and without delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record, and via electronic mail to:

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