UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEFFREY ROBBINS, ASHLEY HARDY, VERONIQUE HEPLER, and CHRISTINA LE, individually and on behalf of themselves and all others similarly situated, and DOMONIQUE MARCEAU individually, Plaintiffs, v. ABERCROMBIE & FITCH CO., ABERCROMBIE & FITCH STORES, INC., and J.M. HOLLISTER, LLC d/b/a HOLLISTER COMPANY Defendants.	Civil Action No. 15-cv-6187-FPG-JWF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL, APPROVAL OF PROPOSED NOTICE OF SETTLEMENT, AND TO AMEND THE COMPLAINT FOR SETTLEMENT PURPOSES

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INTRODUCTION

Subject to Court approval, Plaintiffs Ashley Hardy, Veronique Hepler, Christina Le, Dominique Marceau, Agnieszka Pustelnik, Jeffrey Robbins, Clinton Thompson, and Cassandra Wat (together, "Plaintiffs" or "Representative Plaintiffs") and Defendants Abercrombie & Fitch Co., Abercrombie & Fitch Stores, Inc., and J.M. Hollister, LLC (together, "Defendants" and together with Plaintiffs, the "Parties") have settled this wage and hour class action for significant monetary relief of Five Million Two Hundred Fifty Thousand Dollars ($5,250,000.00). This proposed settlement would resolve this action and three other related Fair Labor Standards Act ("FLSA") lawsuits filed in the Eastern District of New York including one in which the Second Circuit reversed the District Court's dismissal of the action. The parties in each of these actions believe that having all four actions concluded with a single settlement serves the interests of all Plaintiffs and the members of all of the classes that have been asserted in the actions. The claims in all the cases are the same – namely, that Defendants failed to properly apply the "half time" or "fluctuating workweek" provisions contained in 29 C.F.R. § 114 when they paid half time overtime pay to assistant managers and other employees at their stores and, because they failed to pay the half-time correctly, they should have paid full time and a half overtime. Effectively, this presented a fairly novel legal issue implicating the interpretation of the FLSA's requirements under 29 C.F.R. § 114. This case was chosen to be the settlement case inasmuch as it was, at the time the Settlement was reached, the most active of the four cases.

The proposed settlement satisfies all of the criteria for preliminary approval under federal law. Accordingly, Plaintiffs respectfully request that the Court (1) grant preliminary approval of the Settlement Agreement, attached as Exhibit 1 to the Declaration of Seth R. Lesser ("Lesser

Decl.")[1]; (2) conditionally certify the proposed Settlement Class under Federal Rule of Civil Procedure 23(b)(3) for settlement purposes; (3) appoint Klafter Olsen & Lesser LLP ("KOL"), the Shavitz Law Group, P.A. ("SLG"), Kellogg, Huber, Hansen, Todd, Evans & Figel ("Kellogg"), and the Block O'Toole & Murphy LLP ("Block O'Toole") as Class Counsel; (4) approve the proposed Notice of Class Action Settlement ("Class Notice") (attached as Exhibit C to the Lesser Decl.) and direct its distribution; and (5) allow Plaintiffs to file a Second Amended Complaint with Defendants' written consent. Defendants do not oppose this motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Plaintiffs and Settlement Class Members are current and former employees of Defendants who have worked as Managers-in-Training, Assistant Managers, Stock Managers, Overnight Managers, and Loss Prevention Agents (collectively referred to herein as "AMs"), in New York, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Ohio, and Washington. Plaintiffs alleged that Defendants violated the FLSA and, concomitantly, the wage and hour laws of New York, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Ohio, and Washington by not paying overtime to AMs at rates that were a full time and one-half of their regular rates of pay. Lesser Decl. ¶ 3; Proposed Second Amended Complaint (attached as Exhibit A to Lesser Decl.). Plaintiffs claim that Defendants' common fluctuating workweek pay practice – through which Defendants paid AMs overtime at approximately one-half of their regular rate of pay – violated the FLSA and the state laws, entitling them and the Settlement Class Members to, among other things, unpaid overtime wages, liquidated damages, and attorneys' fees and costs. Lesser Decl. ¶ 4; Proposed Second Amended Complaint (attached as Exhibit A to Lesser Decl.).

[1] Unless otherwise indicated, all exhibits are attached to the Lesser Declaration. Also unless otherwise indicated, all capitalized terms have the definitions set forth in the Settlement Agreement.

B. Overview of Investigation

Before the initiation of this action, Plaintiffs conducted a thorough investigation into the merits of the potential claims and defenses. Lesser Decl. ¶ 5. Plaintiffs focused their investigation and legal research on the underlying merits of Class Members' claims under 29 C.F.R. § 114, the damages to which they were entitled, and the propriety of Rule 23 class and FLSA collective action certification. *Id.* Plaintiffs' Counsel conducted interviewed Plaintiffs to determine the hours that they worked, the wages they were paid, the Defendants' compensation practices, the nature of their duties and responsibilities, and other information relevant to their claims. Lesser Decl. ¶ 6. Plaintiffs also reviewed the United States Department of Labor's Final Rule issued in April 2011 (as well as the preliminary rule announcement that proceeded it), case law, and federal regulations that addressed the half time method of overtime compensation. Plaintiffs allege that Defendants did not pay Plaintiffs a fixed salary as required by law and therefore owe them and the Class Members damages. *Id.* 29 C.F.R. 778.114.

Plaintiffs' Counsel also obtained and reviewed documents from Plaintiffs related to their employment with Defendants, including pay records, offer letters, company policies and procedures and other related documents. *Id.* Plaintiffs conducted background research on Defendants, including reviewing SEC filings and other public documents. Lesser Decl. ¶ 7.

C. Litigation

1. The Hepler Litigation No. 13-cv-2815 (E.D.N.Y.)

On May 10, 2013, Plaintiff Hepler filed a class and collective action complaint against Defendants Abercrombie & Fitch Co. and Abercrombie & Fitch Stores, Inc. in the United States District Court for the Eastern District of New York on behalf of herself and others similarly situated alleging that Defendants violated the FLSA and the New York Labor Law ("NYLL"), by not paying overtime at time and one-half to AMs who worked in Abercrombie stores. The

complaint sought recovery of overtime wages, attorneys' fees and costs, interest, and liquidated damages. Lesser Decl. ¶ 9. The Defendants answered on June 7, 2013, and moved to transfer venue to the Southern District of Ohio on August 9, 2013. Lesser Decl. ¶ 10. The Court denied the Defendants' motion on January 9, 2014. Lesser Decl. ¶ 10.

At the end of February 2014, Defendants served Rule 68 offers of judgment on Plaintiffs Hepler and Marceau (as well as individuals who had opted into the case). Lesser Decl. ¶ 11. After Hepler and Marceau refused to accept the offers of judgment (which they asserted were insufficient, among other things, to resolve their state law claims), the parties went into discovery, much of which was disputed as Defendants asserted the case had been rendered moot by the offers of judgment. Plaintiffs moved for FLSA conditional certification and Defendants moved to dismiss Hepler's and Marceau's cases as moot for lack of subject matter jurisdiction. Lesser Decl. ¶ 11. In addition, and among other things, in opposing FLSA notice and conditional certification, Defendants asserted that no overtime at all was owed because the work AMs had done was not managerial in nature, and, accordingly, AMs had been entitled to no overtime at all and hence had no claim for overtime. Defendants also asserted that any damages were limited to only a few specific weeks worked each year under 29 C.F.R. § 114. On October 3, 2014, the court granted Defendants' motion to dismiss of the case as moot based upon the offers of judgment, did not reach conditional certification, declined to exercise supplemental jurisdiction over Hepler and Marceau's NYLL claims and did not reach any of the other issues presented by the lawsuit. Lesser Decl. ¶ 12.

Plaintiffs appealed the mootness dismissal to the Second Circuit in October 2014. After briefing and argument, the Court of Appeals vacated the district court's order and remanded the case to the district court on July 13, 2015. Lesser Decl. ¶ 13. As described below, on April 3,

2015 and while the appeal was pending, Plaintiffs Hepler, Robbins and Marceau filed this action, asserting their FLSA claims on individual and collective bases and that of the New York class for the parallel New York Labor Law claims. Lesser Decl. ¶ 14; *see infra* at 18-21 (discussing *Robbins* matter). Accordingly, Plaintiffs Hepler and Marceau are named Plaintiffs in both the *Hepler* and the present action, a result of their having to refile their individual state claims before the period of time to refile provided for in 29 U.S.C. § 216(b) expired.

2. The Wat Litigation No. 14-cv-5361 (E.D.N.Y)

On September 12, 2014, Plaintiff Cassandra Wat filed a class and collective action complaint against Defendants Abercrombie & Fitch Stores, Inc. and J.M. Hollister LLC in the United States District Court for the Eastern District of New York on behalf of herself and others similarly situated alleging that Defendants violated the FLSA and the NYLL, by not paying overtime at time and one-half to Hollister AMs (a subsidiary of Abercrombie & Fitch Stores, Inc.). Lesser Decl. ¶ 15. Defendants answered on December 5, 2014. Lesser Decl. ¶ 16. The parties conducted written discovery and had many conferrals with Defendants' counsel about discovery issues, potential damages, and the merits of the claims. Lesser Decl. ¶ 17.

3. The Robbins Litigation No. 15–cv-6187 (W.D.N.Y.)

As noted above, Plaintiffs Jeffrey Robbins, Veronique Hepler, and Dominique Marceau filed the instant class and collective action complaint against Defendants Abercrombie & Fitch Co. and Abercrombie & Fitch Stores, Inc. to preserve the NYLL statute of limitations for the New York putative class members, and to allow the FLSA and NYLL claims to proceed for Plaintiffs and other AMs. Defendants answered on April 24, 2015. Lesser Decl. ¶ 18.

On June 21, 2015, Plaintiffs amended their complaint to add Plaintiffs Christina Le and Ashley Hardy, to add Defendant J.M. Hollister LLC, to assert Rule 23 class claims on behalf of

New Jersey and Maryland AMs, and to expand the FLSA allegations to include AMs at all of Defendants' brands. Lesser Decl. ¶ 20. On July 2, 2015, Plaintiffs filed a motion for conditional certification and notice pursuant to 29 U.S.C. § 216(b) requesting that this Court permit Plaintiffs to send a notice of this lawsuit and provide an opportunity for AMs to join the FLSA collective action. Lesser Decl. ¶ 21. After being advised of the mediation, the Court extended Defendants' response to Plaintiffs' motion to September 17, 2015 but the parties agreed to settle this matter before Defendants' response was due. Lesser Decl. ¶ 21.

4. The Pang Litigation No. 15-cv-1148 (E.D.N.Y.)

On March 5, 2015, Plaintiffs Cindy Pang, Clinton Thompson, and Agnieska Pustelnik filed a class and collective action complaint against Defendants Abercrombie & Fitch Stores, Inc. and J.M. Hollister LLC in the United States District Court for the Eastern District of New York on behalf of themselves and others similarly situated alleging that Defendants violated the FLSA and the NYLL, by not paying overtime at time and one-half to Abercrombie and Hollister AMs. Lesser Decl. ¶ 22. Defendants answered on April 17, 2015. Lesser Decl. ¶ 22. Given the overlap of the *Pang* claims and those in *Hepler, Robbins*, and *Wat*, no formal discovery occurred in *Pang*. Lesser Decl. ¶ 23.

D. Settlement Negotiations

During the first two weeks of March 2015, the Parties discussed the benefits of going to mediation and the sharing of damages data to facilitate settlement discussions. Lesser Decl. ¶ 24. At least in some measure, Plaintiffs believe it far to say that Defendants agreed to discuss resolution of the claims because of the fact that the most active attorneys in these cases were also attorneys who had shown their capabilities in another FLSA case then-pending in Ohio federal

court and as a result of Plaintiffs' counsel reputation as exceedingly experienced lawyers in prosecution of FLSA wage and hour overtime actions. *See also* page 7, below.

The Parties then engaged in informal discovery to allow the Parties to more fully assess the claims and to calculate damages in advance of mediation. Lesser Decl. ¶ 25. Defendants provided information concerning their fluctuating workweek pay practice including, among other things, the fact that they ended the practice in September 2014, the total overtime wages paid to Plaintiffs and the Settlement Class, and information concerning Defendants' affirmative defenses such as their defense that they acted in good faith and had their pay practice previously found to be valid by other courts. This exchange of information was in addition to the discovery obtained through litigation. Lesser Decl. ¶ 26. Plaintiffs and Defendants analyzed the damages data and constructed damages models. The parties also had numerous telephone calls addressing the claims and potential damages. Plaintiffs researched how to measure damages in cases involving fluctuating workweek payment practices and prepared a damages model. Lesser Decl. ¶ 27.

On July 31, 2015, the Parties attended a full-day mediation session in Columbus, Ohio with Hunter Hughes, Esq., a well-known and experienced mediator in wage and hour litigation. After a full day of extensive negotiations facilitated by the mediator, the Parties agreed in principal to resolve the *Hepler*, *Pang*, *Robbins*, and *Wat* matters for $5.25 million. Lesser Decl. ¶ 28. Over the next month and one-half, the Parties continued to negotiate the actual terms of the Settlement Agreement and all accompanying documents including how to procedurally resolve all four pending cases if the settlement is approved by this Court. Lesser Decl. ¶ 29.

In that regard, the Parties have determined that they will file Stipulations and Proposed Orders in the *Pang* and *Wat* actions, which will request that the Court transfer these actions to the Western District of New York to be consolidated with the *Robbins* action for settlement purposes. Ex. 1

(Settlement Agreement) at ¶ 37. Those Stipulations and Proposed Orders were filed on September 29, 2015 (*Wat* case) and on October 6, 2015 (*Pang* case). The Parties will also request that the Court overseeing the *Hepler* action stay that action (where, as noted Plaintiffs Hepler and Marceau are the only named Plaintiffs, as they are also named Plaintiffs here) pending approval of the Settlement by this Court. *Id.*

Plaintiffs are pleased to present this Settlement Agreement to the Court for preliminary approval, which, we submit is an excellent result. *See* pages 8-12, below.

II. SUMMARY OF THE SETTLEMENT TERMS

A. The Settlement Fund

The Settlement Agreement creates a common fund of Five Million Two Hundred Fifty Thousand Dollars ($5,250,000.00) to settle the claims asserted in proposed Second Amended Complaint, which includes all claims asserted in the four actions against the Defendants (the "Fund"). Lesser Decl. ¶ 30; Ex. 1 (Settlement Agreement) ¶¶ 40-41. The Fund covers payment of all Settlement Class Members' awards, enhancement payments to the Representative Plaintiffs, attorneys' fees and costs, settlement administrator's fees and costs, employee and employer side payroll taxes. Lesser Decl. ¶ 31; Ex. 1 (Settlement Agreement) ¶¶ 42-43.

B. Eligible Employees

Settlement Class Members who are entitled to receive payments from the Fund include:

> (i) all persons employed for one or more weeks as an AM in New York from May 10, 2007 to September 30, 2014; (ii) all persons employed in the AM position in Connecticut from May 7, 2012 to September 30, 2014; (iii) all persons employed in the AM position in Illinois from May 7, 2012 to September 30, 2014; (iv) all persons employed in the AM position in Maryland from May 7, 2012 to September 30, 2014; (v) all persons employed in the AM position in Massachusetts from May 7, 2012 to September 30, 2014; (vi) all persons employed in the AM position in New Jersey from May 7, 2012 to September 30, 2014; (vii) all persons employed in the AM position in Ohio from May 7, 2012 to

> September 30, 2014; and (viii) all persons employed in the AM position in Washington from May 7, 2012 to September 30, 2014.

Ex. 1 (Settlement Agreement) at ¶ 21. Eligible Settlement Class Members are those Settlement Class Members who do not exercise their right to opt-out of the action.

C. Releases

The Settlement Agreement provides that all Settlement Class Members who do not timely opt out of the settlement by requesting exclusion from the action will release their state wage and hour law claims. Ex. 1 (Settlement Agreement) ¶¶ 21, 56(c)(iv). Settlement Class Members will release their FLSA claims only if they sign and negotiate their settlement checks. Ex. 1 (Settlement Agreement) ¶ 47(d).

D. Allocation Formula

Eligible Settlement Class Members will be paid pursuant to an allocation formula based on the number of overtime hours worked by each Eligible Settlement Class Member during the applicable State class period, as shown in Defendants' time records. Ex. 1 (Settlement Agreement) ¶ 47(a). Each Settlement Class Member's Award will be calculated by multiplying the fraction x/y by the Net Funds Available for Settlement, where "x" equals the "Overtime Hours Worked" attributed to each Settlement Class Member based on Defendants' time records, and "y" equals the Settlement Class Total Overtime Hours Worked. *Id*. The Claims Administrator will determine the "Settlement Class Total Overtime Hours Worked" by determining the Overtime Hours Worked for each Settlement Class Member and then aggregating the Overtime Hours Worked for all Settlement Class Members to reach the Settlement Class Total Overtime Hours Worked. *Id*.

Any unnegotiated settlement checks sent to Eligible Settlement Class Members shall be void after 120 days. Ex. 1 (Settlement Agreement) ¶ 47(e). For any checks not cashed within

sixty (60) days from the date of their issuance, the Claims Administrator shall make reasonable efforts to contact the Eligible Settlement Class Members to whom the checks were issued to facilitate their cashing or to issue replacement checks. *Id*. The amounts of any checks or reissue checks not cashed after 120 days after their issues shall revert to Defendants. *Id*.

E. Attorneys' Fees and Litigation Costs

Plaintiffs' Counsel will apply for up to one-third of the Fund as attorneys' fees, an amount that is typical for wage and hour common fund settlements both within this Circuit and within this Court.[2] Ex. 1 (Settlement Agreement) ¶ 43(b). Additionally, Plaintiffs' Counsel will seek reimbursement for their reasonable litigation costs and expenses from the Fund not to exceed $52,500.00, as well as to have Claims Administrator Costs not to exceed $39,850.00 approved. *Id*., *id.* at ¶ 43(c). Pursuant to Federal Rule of Civil Procedure 23(h) and 54(d)(2),

[2] 33% or one third fees were awarded in all of the following wage and hour settlements: *Ferreira v. Model's Sporting Goods, Inc.*, 11 Civ. 2395, Memorandum and Order (March 12, 2015); *Flores v. Anjost Corp.,* 11 Civ. 1531, 2014 U.S. Dist. LEXIS 11026, at *24-26 (S.D.N.Y. Jan. 29, 2014); *Guaman v. Ajna-Bar NYC,* 12 Civ. 2987, 2013 U.S. Dist. LEXIS 16206, at *17-18 (S.D.N.Y. Feb. 5, 2013); *Capsolas v. Pasta Res. Inc.*, 2012 U.S. Dist. LEXIS 144651 (S.D.N.Y. Oct. 5, 2012); *Spicer v. Pier Sixty LLC*, 2012 U.S. Dist. LEXIS 137409 (S.D.N.Y. Sept. 14, 2012); *Alli v. Boston Mkt. Corp.,* 10-cv-0004, Order (D. Conn. Apr. 12, 2012); *deMunecas v. Bold Food, LLC*, 2010 U.S. Dist. LEXIS 87644, at *19 (S.D.N.Y. Aug. 23, 2010); *Gilliam,* 2008 U.S. Dist. LEXIS 23016, at *15; *Clark v. Ecolab*, 2009 U.S. Dist. LEXIS 76613, at * 27 (S.D.N.Y. May 11, 2010); *Duchene v. Michael Cetta, Inc.*, 2009 U.S. Dist. LEXIS 85955, at *8 (S.D.N.Y. Sept. 10, 2009); *Faican v. Rapid Park Holding Corp.*, 2010 U.S. Dist. LEXIS 64382, at *6 (E.D.N.Y. June 29, 2010) ; *McMahon,* 2010 U.S. Dist. LEXIS 18913, at *18; *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 U.S. Dist. LEXIS 27899, at *16 (S.D.N.Y. Mar. 31, 2009); *Parker,* 2010 U.S. Dist. LEXIS 12762, at *7; *Prasker v. Asia Five Eight LLC*, 2010 U.S. Dist. LEXIS 1445, at *17 (S.D.N.Y. Jan. 4, 2010). *See also, e.g.*, *Stefaniak v. HSBC Bank USA, N.A*., 2008 U.S. Dist. LEXIS 53872, at *9-10 (W.D.N.Y. June 28, 2008) (awarding 33% of $2.9 million fund in FLSA and NYLL case); *Davis v. J.P. Morgan Chase & Co*., 827 F. Supp. 2d 172, 182-187 (W.D.N.Y. 2011) (approving 33 1/3% fee request); *Knapp v. Badger Techs., Inc*., 2015 U.S. Dist. LEXIS 77186, at *14-15 (W.D.N.Y.) (citing numerous authorities recognizing that "one-third [of the settlement fund] is consistent with the norms of class litigation in this circuit"); *see also*, *e.g.*, *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (Plaintiffs' counsel's request for one-third of the fund was "consistent with the norms of class litigation in this circuit.") (quotation omitted); *Palacio v. E*TRADE Fin. Corp.*, 2012 U.S. Dist. LEXIS 88019, at *17 (S.D.N.Y. Mar. 12, 2012) ("Class Counsel's request for one-third of the fund is reasonable and consistent with the norms of class litigation in this circuit.) (quotation omitted).

Plaintiffs' Counsel will move for approval of their fees and costs and also for the Representative Plaintiffs' enhancement awards at the time they move for final approval of the settlement.

F. Enhancement Payments

In addition to their individualized awards under the allocation formula, the Representative Plaintiffs will apply for enhancement payments in the amount of $7,000 each in recognition of the services they rendered on behalf of the Settlement Class Members (including, among other things, providing documents, with respect to some, sitting for deposition, providing information to Class Counsel, and remaining actively involved in the litigation on behalf of the Settlement Class) and for the risks they undertook in bringing their actions. Lesser Decl. ¶ 8; Ex. 1 (Settlement Agreement) ¶ 43(a); *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 244 (2d Cir. 2011) (recognizing risks that FLSA plaintiffs face including "retaliation or of being 'blackballed' in [their] industry"). Plaintiffs will move for Court approval of these enhancement payments simultaneously with the motion for final Settlement approval.

G. Settlement Claims Administrator

The Parties have jointly selected Settlement Services, Inc. to serve as the Claims Administrator. Lesser Decl. ¶ 32; Ex. 1 (Settlement Agreement) ¶ 2. The Claims Administrator's fees, which have been negotiated to an estimated $39,850.00, will be paid from the Fund. Ex. 1 (Settlement Agreement) ¶¶ 7, 43(c). At the time of final approval, Plaintiffs will seek approval of the Claims Administrator's costs.

H. Additional Provisions

The Class Notice will specifically inform each Settlement Class Member of the amount that would receive upon approval of the Settlement, assuming approval of the sought fees, costs and incentive awards. Ex. C (Class Notice) at ¶ 5. The Class Notice will explain the Settled

Claims and the release. Ex. C (Class Notice) at ¶¶ 11-12. Settlement Class Members who wish to exclude themselves from the action by submitting a request for exclusion in accordance with the terms of the Settlement Agreement and as set forth on the Notice of Proposed Class Action Settlement. Ex. 1 (Settlement Agreement) ¶ 56(c)(iv); Ex. C (Class Notice) at p. 1 & ¶¶ 16-17. Only Eligible Settlement Class Members may object to the terms of the settlement agreement in accordance with the terms of the Settlement Agreement and as set forth on the Notice of Proposed Class Action Settlement. Ex. 1 (Settlement Agreement) ¶ 56(c)(ii-iii); Ex. C (Class Notice) at p. 2 & ¶¶ 18-19.

III. CLASS ACTION SETTLEMENT PROCEDURE

The well-defined class action settlement procedure includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval;

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

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which the Court will consider the fairness, adequacy, and reasonableness of the settlement.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*"), §§ 11.22, *et seq.* (4th ed. 2002). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. With this motion, Plaintiffs request that the Court take the first two steps – granting preliminary approval of the Settlement, conditionally certifying the settlement class, approving Plaintiffs' proposed Class Notice, and authorizing Plaintiffs to send it.

The Parties respectfully submit the following proposed schedule for final resolution of this matter for the Court's consideration and approval:

1. The Class Notice will be mailed to Class Members within 30 days after the Court grants Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. Ex. 1 (Settlement Agreement) ¶ 56(c)(ii); Ex. B (Implementation Schedule).

2. Class Members will have 60 days after the date the Settlement Notices are mailed to opt out of the settlement or object to it. Ex. 1 (Settlement Agreement) ¶ 56(c)(v); Ex. B (Implementation Schedule).

3. A final Settlement Fairness Hearing will be held as soon as is convenient for the Court after expiration of the ninety-day period for notice of appropriate State officials as required by 28 U.S.C. § 1715(a)(2), (d). The required notice will be provided by Defendants within ten (10) days of today. Ex. 1 (Settlement Agreement) ¶ 56(a).

4. Plaintiffs will file a Motion for Final Approval of Settlement no later than 14 days before the Settlement Fairness Hearing. Ex. B (Implementation Schedule).

5. At or after the Settlement Fairness Hearing, the Court will consider final approval of the Settlement and Plaintiffs' motion for an award of attorneys' fees, expenses and enhancement awards. If the Court grants Plaintiffs' Motion for Final Approval of the Settlement, the Court will issue a Final Approval Order and Final Judgment. If no party appeals the Court's Final Approval Order and Final Judgment, the "Effective Date" of the settlement will be the day after the deadline for filing any such appear. Ex. 1 (Settlement Agreement) ¶ 9.

6. If an individual or party appeals the Court's Final Approval Order and Final Judgment, the "Effective Date" of Settlement shall be the day after the final resolution of the appeal (including any requests for rehearing and/or petitions for writ of certiorari) and/or the expiration of any time period for any further appeal or judicial review, resulting in final judicial approval of the Agreement. Ex. 1 (Settlement Agreement) ¶ 9.

7. Defendants will wire Five Million Two Hundred Fifty Thousand Dollars ($5,250,000.00) to the Claims Administrator seven days after the Effective Date. Ex. 1 (Settlement Agreement) ¶ 41.

8. The Claims Administrator will disburse settlement checks to the Eligible Settlement Class Members, as well as Enhancement Awards to the Representative Plaintiffs and Class Counsel's attorneys' fees and costs, as awarded by the Court, 21 days after the Effective Date. Ex. B (Implementation Schedule).

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotation marks and citation omitted); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *see also Newberg* § 11.41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

The approval of a class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1998). "The court must give proper deference to the private consensual decision of the parties in exercising its discretion." *Chambery v. Tuxedo Junction, Inc.*, 10 F. Supp. 3d 415, 419 (W.D.N.Y. 2014). "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 . . . ." *Clark v. Ecolab Inc*., 2010 U.S. Dist. LEXIS 47036, at *18 (S.D.N.Y. May 11, 2010) (quotation omitted).

"Preliminary approval is the fist step in the class action settlement process." *Chambery*, 10 F. Supp. 3d 415, 418 (W.D.N.Y. 2014). "It allows notice to issue to the class and for class members to object or opt-out of the settlement." *Id*. Preliminary approval requires only an initial evaluation of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Davis*, 775 F. Supp. 2d at 607. To grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *Newberg* § 11.25 (noting that "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and

appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members) (quoting *Manual for Complex Litigation* (3d ed.) § 30.41); *Davis*, 775 F. Supp. 2d at 607 (preliminary approval of a class action settlement only requires "probable cause to submit the proposal to class members and hold a full-scale hearing as to its fairness.") (quotation omitted).

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted). This is particularly true when (as here) a private mediator helped resolve the dispute. *Chambery v. Tuxedo Junction, Inc.*, 2014 U.S. Dist. LEXIS 101939, at *15 (W.D.N.Y. July 25, 2014) (involvement of an experienced mediator is "a strong indicator of procedural fairness") (quotation omitted).

"A proposed settlement of a class action should therefore be preliminarily approved where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *Davis*, 775 F. Supp. 2d at 607 (quotation omitted; citing numerous authorities). If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007); *accord Chambery*, 10 F. Supp. 3d at 419 (same). "After the notice period, the

Court will be able to evaluate the settlement with the benefit of the class members' input." *Chambery*, 10 F. Supp. 3d at 419.

A. The Settlement Is Fair, Reasonable, and Adequate.

In evaluating a class action settlement, courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Although the Court's task on a motion for preliminary approval is merely to perform an "initial evaluation," *Newberg* § 11.25, to determine whether the settlement falls within the range of possible final approval, or "the range of reasonableness." *Id*. at § 11.26.

The *Grinnell* factors are (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

In the case at bar, an examination of each of the factors to be examined at this stage demonstrates that there is a strong basis to preliminarily conclude that the proposed settlement is fair, reasonable, and adequate to the members of the class.

First, with respect to complexity, expense, and duration of litigation, it is clear that the prosecution of this case would be lengthy and expensive. If this Settlement is not approved, the Parties face an extended and costly battle, first regarding the FLSA notice and conditional certification and then, no less, so as to any state law Rule 23 class certification and then

summary judgment as to the scope and interpretation of the 29 C.F.R. § 114 fluctuating work week provisions and also as to whether Defendants' acted willfully or in good faith. Novel issues of interpreting Section 114 are presented (such as the liability question itself and whether damages would be for the entirety of the working period of the employees or only the weeks in which Defendants paid the allegedly improper holiday pay bonuses) or as to Defendants' defense that Settlement Class Members are exempt from receiving overtime under federal and state law. Appeals could be taken as to such determinations (and this litigation already has had one trip to the Second Circuit) and even getting to trial could take a year or two. Further, Plaintiffs' Counsel have tried to a FLSA verdict a collective action and the time and expense was considerable. *See Chambery*, 2014 U.S. Dist. LEXIS 101939, at *15 (approving class action settlement agreement in wage and hour case involving federal and state claims and finding that "a trial in this matter would likely be lengthy, costly, and complicated."). The Settlement, on the other hand, makes monetary relief available to the Settlement Class Members in a prompt and efficient manner. This factor weighs in favor of preliminary approval.

Second, with respect to the reaction of the class to the settlement, the Court will only be able to evaluate this factor after the notice period.

Third, with respect to the stage of proceedings and the amount of discovery completed, Plaintiffs' Counsel conducted a sufficient investigation as to the merits of the claims asserted, as well as the potential recoverable damages, to allow them to assess the fairness of the Settlement. *See* Lesser Decl. at ¶¶ 14-16. "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [, but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176 (internal quotations omitted). The Parties' discovery here meets this standard inasmuch as they

investigated the claims from the outset, and were able to argue matters as to the nature of the case in the competing papers on conditional certification in the *Hepler* matter. In fact, the Parties submitted substantial statements to the mediator setting forth facts and legal analysis relevant to the claims and argued to each other numerous points as to the strengths and weaknesses of each's position on those claims. The forthright nature of the mediation process and the back-and-forth between the sides, as well as the views of an extremely respected and experienced mediator as to those strengths and weaknesses, focused the Parties on the legal and factual issues presented by the case, and this Settlement will resolve the legal risks associated with those claims, which the Plaintiffs fully appreciate at this point in the litigation. *See* Lesser Decl. at ¶¶ 24-25. Further, to allow the Parties to perform damages calculations in preparation for that mediation, the Parties exchanged informal discovery, including data showing the number of Class Members in the Settlement Class and payroll data. Plaintiffs had all the data necessary to compute total damages with precision. Therefore, this factor favors preliminary approval. *Chambery*, 2014 U.S. Dist. LEXIS 101939, at *17 (finding that the exchange of "a significant amount of data including time and payroll records" supported final approval of wage and hour class and collective settlement); *Frank*, 228 F.R.D. at 185 (approving settlement of case "in the relatively early stages of discovery" where parties had exchanged information regarding identities of potential class members, the hours they worked, and the relevant rates of pay); *Odom v. Hazen Transp., Inc*., 275 F.R.D. 400, 411 (W.D.N.Y. 2011) (same); *see Wal-Mart Stores, Inc.*, 396 F.3d at 121 (encouraging "early resolution of [class action] litigation").

Fourth, as to liability and damages risk, although Plaintiffs believe their case is strong, it is subject to risk. "'In considering the risks of establishing liability and damages, and of maintain the class action through the trial, it is important to keep in mind that this Court's role is

not to decide the merits of the case or resolve unsettled legal questions." *Chambery*, 2014 U.S. Dist. LEXIS 101939, at *17 (quotation omitted); *Carson v. Am Brands, Inc.*, 450 U.S. 79, 88 (1981) (the court is not required to "decide the merits of the case or resolve unsettled legal questions."). "Instead, 'the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Chambery*, 2014 U.S. Dist. LEXIS 101939, at *17 (quoting *Davis*, 827 F. Supp. 2d at 177-78); *accord Odom*, 275 F.R.D. at 411 (same).

Here, there is risk as to both liability and damages. Plaintiffs would have to overcome Defendants' defenses that their fluctuating workweek practice complied with the law and, even if it did not, Plaintiffs and Class Members were subject to exemptions under applicable federal and state laws and therefore not entitled to receive any overtime. So far as Plaintiffs can tell, no court has addressed Defendants' exemption defense in this context. If Plaintiffs proceeded through litigation and the Court upheld the defense, then Plaintiffs would receive no recovery.

Regarding damages, even if Plaintiffs prevailed on liability, Defendants have claimed that they did not willfully violate the FLSA and acted in good faith and relied upon prior courts' decisions finding that their fluctuating workweek practice complied with the law. If the Court or jury agreed with Defendants' willfulness position or good faith defense, then there would be a two year statute of limitations and Plaintiffs would not be entitled to liquidated (i.e., double actual) damages. 29 U.S.C. §§ 255, 260. In addition, Defendants argued (with supporting case law) that, even if Plaintiffs won the liability issue, damages would be limited to the specific weeks in which the alleged violations occurred (i.e., the holiday weeks). If the Court accepted Defendants' argument about damages, the damages would have been approximately 80%. In short, risk existed here as to both liability and damages.

Fifth, the risk of obtaining class certification and maintaining it through trial is also present. The Court has not certified the FLSA collective or Rule 23 state class yet, and the Parties anticipate that such a determination would be reached only after further discovery (for the Rule 23 classes) and intense briefing. In opposing class certification, Defendants would likely argue that the differences among various job positions and stores and other individualized questions preclude collective and class certification. Although Plaintiffs disagree with these arguments, other defendants have prevailed on arguments like these. *See, e.g.*, *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011) (affirming decertification, citing "variations in job duties that appear to be a product of employees working at different facilities, under different managers, and with different customer bases"); *Myers v Hertz Corp.*, 624 F.3d 537, 549-51 (2d Cir. 2010) (affirming denial of class certification in misclassification case based on evidence that class members' duties varied by location). Risk, expense, and delay permeate such processes. Settlement eliminates this risk, expense, and delay.

In addition, the Court has not yet granted permission for Plaintiffs to proceed on their FLSA claims on a collective basis pursuant to 29 U.S.C. § 216(b). If the Court did authorize FLSA notice, Defendants would likely challenge that determination at a later date, after the close of discovery. Settlement eliminates the risk and delay inherent in this process.

Sixth, while it is not clear whether Defendants could withstand a greater judgment, their ability to do so, "standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178 n.9). Thus, this factor is neutral and does not preclude the Court from granting preliminary approval.

Finally, as to the last two *Grinnell* factors, defendants have agreed to settle this case for a substantial amount, $5,250,000. The settlement amount represents substantial value given the attendant risks of litigation, even though recovery could be greater if Plaintiffs attained class and collective certification, overcame motions to decertify any class or collective, succeeded on all claims at trial, and survived an appeal. If Plaintiffs proceeded through litigation and won every issue (*i.e.*, obtaining Rule 23 class certification, FLSA collective action certification, liquidated damages, a willfulness finding and a three-year FLSA statute of limitations, and a trial and/or summary judgment victory, and defeating decertification and all appeals), the parties' estimation of damages would have been approximately $8.1 million. Lesser Dec. ¶ 34. Defendants counter that any recover could well have been lower – they assert no overtime is owed because AMs are exempt from receiving overtime under the FLSA and state laws; they argue that, if the exemption defense does not apply, that damages can only be assessed in weeks in which the fixed salary requirement of 29 C.F.R. § 778.114 was violated (i.e., the weeks in which there was holiday pay for work performed). Certainly a $5.25 million settlement is fair and reasonable and properly accounts for the risk, expense, delay, and uncertainty of continued litigation.

The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. "It

is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also Cagan v. Anchor Sav. Bank FSB*, 1990 U.S. Dist. LEXIS 11450, at *34-35 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million").

Here, each Eligible Settlement Class Member will receive a payment based upon the number of overtime hours they worked in proportion to the number of overtime hours worked by all Eligible Class Members during the Settlement Class period. Weighing the benefits of the settlement against the available evidence and the risks associated with proceeding in the litigation, the settlement amount is reasonable.

* * *

The *Grinnell* factors will weigh in favor of final approval and, certainly, they appear to weigh in favor of preliminary approval. Because the settlement, on its face, seems to be "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000)), preliminary approval is warranted.

V. CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

For settlement purposes, Plaintiffs request that the Court certify the Settlement Class under Fed. R. Civ. P. 23(e) for purposes of effectuating the settlement. As shown below, the Settlement Class meets all of the requirements for, and Defendants do not oppose, provisional certification for settlement purposes only. Lesser Decl. ¶ 2; Ex. 1 (Settlement Agreement) ¶ 38; *see Newberg* § 11.27 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a

class action for the purpose of settlement only."); *accord Chambery*, 10 F. Supp. 3d at 420 (provisionally certifying Rule 23 classes for settlement purposes).

Provisional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all Settlement Class Members of the terms of the proposed Settlement Agreement, and setting the final approval hearing. *See Davis*, 775 F. Supp. 2d at 609-10 (noting practical purposes of provisionally certifying settlement class).

Under Rule 23(a), a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that:

> questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Id. at (b)(3). In the Second Circuit, "[i]n deciding [Rule 23] certification, courts must take a liberal rather than restrictive approach in determining whether the plaintiff satisfies these requirements and may exercise broad discretion in weighing the propriety of a putative class." *Chambery*, 10 F. Supp. 3d at 420 (quotation omitted); *Davis*, 775 F. Supp. 2d at 608 (same).

A. Numerosity

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiffs easily satisfy this requirement because there are approximately 4,329 Settlement Class Members. Lesser Decl. ¶ 30.

B. Commonality

The proposed Settlement Class also satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Although the claims need not be identical, they must share common questions of fact or law. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (there must be a common contention "that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."); *Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983). The proper question is whether "the disputed issue of law or fact occupies essentially the same degree of centrality to the named plaintiffs' claims as to that of the other members of the proposed class." *Chambery*, 10 F. Supp. 3d at 420 (quotation omitted).

This case presents the archetype of a common issue: namely, whether Defendant's method of paying half time/FWW overtime complied with 29 C.F.R. § 114. Plaintiffs and Settlement Class Members all possess that overriding claim. They also share other common issues, too, including (a) whether Defendants acted willfully or in reckless disregard of the law; (b) whether Defendants' would have an exemption defense; and (c) whether Defendants can

establish a good faith affirmative defense. *See Chambery*, 10 F. Supp. 3d at 420-21; *Davis*, 775 F. Supp. 2d at 608-09; *Jacob v. Duane Reade, Inc*., 602 Fed. Appx. 3, 6-7 (2d Cir. 2015).

C. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the class. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank*, 228 F.R.D. at 182. Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (internal quotations omitted). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendants direct "the same unlawful conduct" at the named plaintiff and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). Courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, 2007 U.S. Dist. LEXIS 2914, at *15 (S.D.N.Y. Jan. 12, 2007) (quotation omitted).

Here, typicality exists for the same reason as does commonality: the claims of the Settlement Class as to the legality of Defendants' overtime payments (as well as the ancillary willfulness and good faith issues) are the same for all Settlement Class Members, including the Representative Plaintiffs themselves. *Chambery*, 10 F. Supp. 2d at 421 (typicality satisfied where "Plaintiffs' claims for unpaid wages arise from the same factual and legal circumstances that form the basis of the class members' claims."); *Morris*, 859 F. Supp. 2d at 616 (same).

D. Adequacy of the Representative Plaintiffs[3]

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement exists to ensure that "(1) the representative plaintiff's attorneys [are] qualified, experienced, and generally able to conduct the litigation, and (2) the plaintiff's interests [are] not antagonistic to those of the remainder of the class." *Chambery*, 10 F. Supp. 3d at 421 (quotation omitted). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, 2007 U.S. Dist. LEXIS 38701, at *19 (E.D.N.Y. May 29, 2007) (quotation omitted). Representative Plaintiffs meet the adequacy requirement because there is no evidence that they have interests that are antagonistic to or at odds with those of Settlement Class Members. *See Capsolas v. Pasta Res. Inc.*, 2012 U.S. Dist. LEXIS 65408, at *9 (S.D.N.Y. May 9, 2012) (adequacy met where there was no evidence that named plaintiffs' and class members' interests were at odds).

Plaintiffs' Counsel also meet the adequacy requirement of Rule 23(a)(4). Plaintiffs' Counsel have substantial experience prosecuting and settling employment class actions, including wage and hour class actions, and are well-versed in wage and hour law and class action law. Exs. 2 and 3 (Plaintiffs' Counsel's firm resumes).

[3] Originally, as part of the Settlement Agreement. Plaintiff Cindy Pang was to be a Representative Plaintiff but, by agreement and as a result of other claims she wishes to assert relative to her employment, she no longer wishes to continue as a possible Representative Plaintiff for this Settlement and the attached proposed Preliminary Approval Order so reflects this.

E. Certification Is Proper Under Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). That Plaintiffs easily meet the Rule 23(a) criteria is a strong indicator that Rule 23(b)(3) is satisfied. *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality").

1. Common Questions Predominate

To establish predominance, Plaintiffs must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Marriott v. Cnty. of Montgomery*, 227 F.R.D. 159, 173 (N.D.N.Y. 2005) (quoting *In re Visa Check/MasterMoney Antitrust Litig*, 280 F.3d 124, 139 (2d Cir. 2001)). Simply because a defense "'may arise and [] affect different class members differently does not compel a finding that individual issues predominate over common ones.'" *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 339 (S.D.N.Y. 2004) (quoting *In re Visa Check/MasterMoney*, 280 F.3d at 138). Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502

(S.D.N.Y. 2005); *Moore*, 306 F.3d at 1252-53. The predominance requirement is "more demanding than the Rule 23(a) commonality inquiry and is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Frank*, 228 F.R.D. at 183 (quoting *Amchem*, 521 U.S. at 623).

Here, Plaintiffs' and Settlement Class Members' common factual allegations and common legal theory – that Defendants violated wage and hour laws by failing to pay overtime at time and one-half of regular rates of pay – predominates over any factual or legal variations among Settlement Class Members. *Chambery*, 10 F. Supp. 3d at 421 (predominance satisfied where a common issue as to the legality of a common pay practice existed). This is particularly true where, as here, a determination that Defendants' half-time overtime practice violated the law would result in a liability victory for all Settlement Class Members. *See Davis*, 775 F. Supp. 2d at 609; *see also In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("[W]e hold that a court may employ [Rule 23(c)(4)] to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.").

2. A Class Action Is a Superior Mechanism

The second part of the Rule 23(b)(3) analysis is a comparison examining whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: the class members' interests in individually controlling the prosecution or defense of separate actions; whether individual class

members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[4]

Plaintiffs and Settlement Class Members have limited financial resources with which to prosecute individual actions, and Plaintiffs are unaware of any individual lawsuits filed by Settlement Class Members arising from the same allegations. Concentrating the litigation in this Court is desirable because some of the allegedly wrongful conduct occurred within its jurisdiction and employing the class device here will not only achieve economies of scale for putative Settlement Class Members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings and prevent inconsistent adjudications of similar issues and claims. *See Davis*, 775 F. Supp. 2d at 608-09; *Chambery*, 10 F. Supp. 3d at 421-22.

VI. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

KOL, SLG, Kellogg, and Block O'Toole should be appointed as Class Counsel. Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law; and"

[4] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial"); *Frank*, 228 F.R.D. at 183 ("The court need not consider the [manageability] factor, however, when the class is being certified solely for the purpose of settlement."). Moreover, denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. 69, 199 (E.D.N.Y. 2008) (quoting *In re Visa Check/MasterMoney*, 280 F.3d at 140).

(4) "the resources that counsel will commit to representing the class". Fed. R. Civ. P. 23(g)(1)(A).

The Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). KOL, SLG, Kellogg, and Block O'Toole meet these criteria. As set forth in the Lesser Declaration, KOL, SLG, Kellogg, and Block O'Toole have done substantial work identifying, investigating, prosecuting, and settling Plaintiffs' and Settlement Class Members' claims. *See* pages 28-29, above; Lesser Decl. ¶¶ 6-7. Additionally, these firms have substantial experience prosecuting and settling employment class actions, including wage and hour class actions, and are well-versed in wage and hour law and in class action law and are well-qualified to represent the interests of the class. Lesser Decl. ¶¶ 37-38; Exs. 2 and 3 (Plaintiffs' Counsel's firm resumes). Accordingly, the Court should appoint KOL, SLG, Kellogg, and Block O'Toole as Class Counsel.

VII. THE NOTICE PLAN AND AWARD DISTRIBUTION PROCESS ARE APPROPRIATE

The content of the proposed Class Notice, which is attached to the Lesser Declaration as Exhibit C, fully complies with due process and Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

The proposed Class Notice satisfies these requirements. Additionally, it is written using simple language and describes the terms of the settlement and the approximate amount of the settlement award to be paid to each Eligible Settlement Class member, informs the class about the application for attorneys' fees and expenses, explains the release and how to object or opt-out, and provides specific information regarding the date, time, and place of the final approval hearing. Courts have approved class notices even when they provided only general information about a settlement. *See Wal-Mart Stores, Inc.*, 396 F.3d at 113-14. The detailed information in the Proposed Class Notice far exceeds this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B). *Chambery*, 10 F. Supp. 3d at 422 (approving class notice that "describe[d] the terms of the settlement, inform[ed] the class about the allocation of attorneys' fees, provide[d] specific information regarding the date, time, and place of the final fairness hearing, and [was] reasonably calculated to provide actual notice to the class members.").

The Settlement Agreement provides that the proposed Class Notice will be mailed by the Claims Administrator to the last known address of each Settlement Class Member within 30 days of preliminary approval. Ex. 1 (Settlement Agreement) ¶ 56(c)(ii). The Claims Administrator will take reasonable steps to obtain the correct addresses of any Settlement Class Member whose notice is returned as undeliverable and will attempt re-mailing. Ex. 1 (Settlement Agreement) ¶ 56(c)(ii). As discussed above, the proposed Class Notice contains information about how to exclude oneself or object to the settlement. Settlement Class Members will have 60 days from the date of mailing to submit opt-out requests or to comment on or object to the settlement. Ex. 1 (Settlement Agreement) ¶ 56(c)(v). No Settlement Class Member will be required to complete a claim form to participate in the settlement. Ex. 1 (Settlement Agreement) ¶ 56(e). The Claims

Administrator will mail Eligible Settlement Class Members their payments 21 days after the Effective Date. Ex. 1 (Settlement Agreement) ¶ 56(c)(v); Ex. B (Implementation Schedule).

VIII. PLAINTIFFS SEEK TO AMEND THE COMPLAINT FOR SETTLEMENT PURPOSES

For settlement purposes, Plaintiffs move to amend the complaint to add Rule 23 class claims under Connecticut, Illinois, Massachusetts, Ohio, and Washington state laws. Defendants do not oppose this motion for settlement purposes. "Leave to amend is to be freely given when justice requires." *Freidus v. Barclays Bank PLC*, 734 F. 3d 132, 140 (2d Cir. 2013). The federal rules expressly provide that a party may amend its pleading "with the opposing party's written consent. . . ." Fed. R. Civ. P. 15(a)(2). Defendants have entered into this Settlement Agreement which expressly provides that "[u]pon execution of this Agreement, Class Counsel shall file in the Class Action the Second Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(2) and with Defendants' written consent." Ex. 1 (Settlement Agreement) ¶ 35. Because the purpose of the Second Amended Complaint is to adequately protect the interests of class members from Connecticut, Illinois, Massachusetts, Ohio, and Washington and Defendants' consent to the amendment, the Court should permit the filing of the Second Amended Complaint. *Chambery*, 10 F. Supp. 3d at 418 (granting motion to file amended complaint to add claims for violations of wage and hour laws in selected states).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of Settlement and enter the Proposed Preliminary Approval Order attached as Exhibit D to the Lesser Declaration.

Dated: October 13, 2015
Rye Brook, New York

Respectfully submitted,

By:_____

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