IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

GALE CARTER, *et al.* Plaintiff, v. PASCHALL TRUCK LINES, INC., *et al.* Defendants.	No. 5:18-CV-41

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF COLLECTIVE SETTLEMENT

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I. INTRODUCTION

The instant matter is a Fair Labor Standards Act ("FLSA") collective action of over-the-road truck drivers who allege Defendant was obligated but failed to pay them the federal minimum wage by misclassifying them as independent contractors and failing to pay sufficient compensation to pay the minimum wage for all compensable hours. Following six and a half years of litigation, subject to this Court's preliminary and final approval, the Parties have reached a settlement in this matter.

This settlement came after the Parties had engaged in substantial discovery and motion practice. The proposed settlement provides that Defendants will pay $1,175,000 to settle the claims asserted by the Named Plaintiff and Opt-In Plaintiffs ("Collective Members").

This action was originally filed by Named Plaintiffs Gale Carter and Forbes Hays[1] on October 12, 2017 in the Eastern District of Pennsylvania, and was transferred to this Court in February 2018, bringing the FLSA claims at issue here as well as putative class claims asserting violations of the Federal Forced Labor Statute ("FFLS") and the Truth-in-Leasing Act ("TILA"). On April 10, 2019, Judge Thomas Russell conditionally certified the FLSA minimum wage claims as a collective action under the FLSA. Approximately 1,000 individuals opted-in by filing consent forms to join the FLSA collective action.

On October 12, 2019, the Court stayed the matter pending mediation, which took place but was unsuccessful on August 5, 2020, after which the Court lifted the stay, and the Parties engaged in discovery and motion practice regarding Rule 23 class certification and summary judgment of the FFLS and TILA claims. On December 12, 2020, the case was reassigned to this Court. On January 23, 2023, the Court granted Defendant summary judgment as to the Federal Forced Labor

[1] Forbes Hays later withdrew from the case.

Statute and as to all but one segment of Named Plaintiff's Truth-in-Leasing Act claims, while also denying Plaintiff's motion for Rule 23 certification of the surviving TILA claim.

The Parties continued to engage in settlement discussions while taking discovery as to the collectively certified FLSA claim, and ultimately, reached a settlement in principle on April 1, 2024. The Parties have now finalized that settlement, and seek the Court's approval of same.

The Parties have engaged in significant, time-consuming, and costly litigation prior to settlement, including significant discovery and significant motion practice. Together, this discovery and the significant adversarial motion practice ultimately culminated in the proposed settlement. Counsel for the Parties and the Parties themselves have carefully evaluated the risks, time, and costs associated with continuing this litigation. The settlement proposal fairly accounts for the risks of trial, and the delay and risk of an inevitable appeal, and the possibility that even a verdict in Plaintiffs' favor may only result in a partial recovery of the total amount being sought.

The settlement agreement provides that Defendants will fund a Settlement Fund of $1,175,000 to settle this action. There is no "claims made" mechanism or similar procedure which will be required for collective members to receive payment; rather, every collective member who does not opt-out will be issued a check from the Settlement Fund. There is also no reversion. The Collective Administrator will make every reasonable effort to ensure every check is cashed; what remains will be donated to the St. Christopher's Fund, a 501(c)(3) charity which provides money to financially distressed commercial truck drivers.[2]

Every FLSA class member who does not opt out of the settlement will be releasing all wage and hour claims, TILA, FFLS, and unjust enrichment claims they have against Defendants stemming from the work performed for Defendant as an independent contractor through the end

[2] Neither Plaintiffs nor their Counsel have any affiliation with the St. Christopher's Fund. More information regarding the Fund can be found at: http://truckersfund.org.

of the Collective Period, *i.e.*, from October 12, 2014, through March 14, 2024, when the proposed settlement was reached.

Accordingly, for the reasons set forth in more detail below, Plaintiffs make this unopposed motion: (1) for preliminary approval of the settlement, and (2) to approve the Notice of the Proposed Settlement to Collective Members.

II. PROPOSED SETTLEMENT TERMS

The Parties have agreed to the following proposed settlement terms:

A. Settlement Fund

Pursuant to the Settlement Agreement, Defendant will deposit $1,175,000 into a Settlement Fund to resolve the claims of the members of the FLSA collective (to be finally certified for purposes of settlement only) asserted in this action. *See* Proposed Settlement Agreement, *attached hereto as* Exhibit 1, at § III(1). The Gross Settlement Amount covers payments to (1) the Opt-In Plaintiffs; (2) Court-approved Service Awards; (3) Court-approved attorneys' fees and costs, and (5) the Settlement Administrator's fees. Ex. 1 § III.

Collective Members will be paid a flat amount plus a *pro* rata portion of the portion of the Net Settlement Fund pursuant to an allocation formula based on the number of workweeks he or she worked for Defendant as an independent contractor commercial truck driver during the period from October 12, 2014 through March 12, 2024. Ex. 1, § III(4).

B. Notice and Payment Process

To effectuate the settlement, within 14 days after the Court's preliminary approval of the Settlement Agreement, PTL will provide the Settlement Administrator and Plaintiffs' Counsel an electronic file listing the necessary information to identify, send notice, and pay each individual who is entitled to a settlement payment. Ex. 1, § VII(2). Within 14 days thereafter, notices of the settlement and fairness hearing will be mailed to each Collective Member. Ex. 1, § VII(3). The

proposed form of Notice is attached hereto as Exhibit 2. The Notice will provide the number of workweeks for which the Collective Member's settlement payment will be based. Ex. 2, § 3. The Notice will also explain that the Collective Member may dispute the number of workweeks attributed to the Collective Members, object to the settlement, or opt out of the settlement by writing to the Settlement Administrator within 45 days of the date the Notice is distributed. Ex. 2, §§ 6, 8. Following the close of the opt-out and objection period, Plaintiffs will file a motion for final settlement approval and will respond to any objections raised by Collective Members. Ex. 1, § IX.

After the Court grants final approval and the Settlement Agreement becomes effective, the Settlement Administrator will distribute payment to the collective members consistent with the allocation formulas provided in the Settlement Agreement. Ex. 1, § IX(3). Any remaining uncashed funds will be donated to the *cy pres* recipient, the St. Christopher's Truckers' Fund. *Id.*

C. Releases

Collective Members will release all claims that were or are asserted in this action. Ex. 1, § V(1). Specifically, the participating Collective Members will release Defendant from wage and hour claims for failure to pay the minimum wage, violations of the federal Forced Labor Statute, 18 U.S.C. § 1589, violations of the Truth-In-Leasing Act and its regulations, 49 U.S.C. §14704, et seq., or unjust enrichment under the common law of any state related to any work performed while under contract with Defendant. Ex. 1, §§ V(1), I(28). The release period extends from October 12, 2014, through March 14, 2024. *Id.*

D. Attorney's Fees and Costs and Service Awards

In recognition of his service to the class, the Settlement Agreement provides that Plaintiff Gale Carter may seek a service award of $10,000. Ex. 1, § III(2). The Settlement Agreement

further provides that four Opt-In Plaintiffs who provided deposition testimony may seek a service award of $500 each. *Id.*

The Settlement Agreement further provides that Plaintiffs' Counsel will seek no more than 1/3 of the Gross Settlement Amount as attorneys' fees, as well as their reasonable out-of-pocket costs and expenses. Ex. 1, § IV(1). Plaintiffs' Counsel will file a motion for approval of its fees and costs in conjunction with the motion for Final Approval of the Settlement. *Id.*

E. Settlement Administrator

The Parties recommend the Court appoint Simpluris as the Settlement Administrator, with the cost of administration paid from the Gross Settlement Fund. Ex. 1, § 2. Simpluris has estimated its cost to administer this settlement to be less than $8,000. Even if the costs exceed Simpluris' estimate, the Parties do not expect the costs of administration to exceed $15,000.

III. LEGAL ARGUMENT

A. Preliminary Approval is Appropriate

The law favors compromise and settlement of collective and class action suits. *UAW v. General Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (noting "the federal policy favoring settlement of class actions") (hereinafter *UAW*); *Griffin v. Flagstar Bancorp, Inc.*, 2013 U.S. Dist. LEXIS 173702, at *6 (E.D. Mich. Dec. 12, 2013) ("The Sixth Circuit and courts in this district have recognized that the law favors the settlement of class action lawsuits."); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1008 (S.D. Ohio 2001) ("Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement.").

Preliminary approval, which is what Plaintiffs seek here, is the first step in the settlement process. *Daoust v. Maru Rest., LLC, No. 17-cv-13879,* 2019 U.S. Dist. LEXIS 26587, at *2 (E.D.

Mich. Feb. 20, 2019).[3] It simply allows notice to issue to the Collective and for Collective Members to object to or opt-out of the settlement. *Id.* After the notice period, the Court will be able to evaluate the settlement with the benefit of the Collective Members' input. *Id.*

This settlement meets the standards for preliminary approval. The settlement was reached after significant litigation, which included extensive written discovery, investigation, collective certification motion practice, depositions, and Plaintiff's counsel's review and deconstruction of hundreds of thousands of electronic datapoints found in GPS data, hours of service logs, and PTL's compensation records. Accordingly, the settlement is the result of the Parties and their counsel fully evaluating the risks, expense, and delay of continued litigation and the benefits of settlement. All the Parties' counsel have significant experience litigating wage and hour collective and class actions and have conducted extensive discovery and litigated several significant motions in this case. As a result, they fully understand the claims and defenses in the Litigation and can value them accordingly. Plaintiffs' Counsel and the Named Plaintiffs believe that this is a fair, reasonable, and adequate settlement for the Collective Members. Moreover, all of the Collective Members will have the opportunity the settlement for themselves once formal notice of same has been sent to the class members. Accordingly, the Court should "apply an initial presumption of fairness" to the settlement and grant preliminary approval of same. Newberg on Class Actions § 11.41

B. <u>The Court Should Preliminarily Approve the Proposed Settlement.</u>

[3] Although this Court has held the FLSA does not require judicial approval before a plaintiff dismisses a case under Fed. R. Civ. P. 41, *Askew v. Inter-Cont'l Hotels Corp.*, 620 F. Supp. 3d 635 (W.D. Ky. 2022), this Court has also noted that "'[t]he Sixth Circuit has yet to rule definitively on the question' whether the FLSA *requires* court approval of settlement agreements." *Love v. Gannett Co. Inc.*, No. 3:19-CV-296-BJB-RSE, 2021 WL 4352800, at *1 (W.D. Ky. Sept. 24, 2021) (Beaton, J.) (citation omitted). Accordingly, when the parties ask the Court to approve a settlement of an FLSA case, the Court has followed the general practice in this district concerning review and approval of FLSA settlements. *Id.* (reviewing and approving FLSA settlement upon request by the parties).

A court reviewing a settlement of FLSA claims must conclude that it is a "fair and reasonable resolution of a *bona fide* dispute over FLSA provisions." *Thompson v. Seagle Pizza, Inc.*, Civil Action No. 3:20-cv-16-DJH-RSE, 2022 U.S. Dist. LEXIS 81666, at *11 (W.D. Ky. May 4, 2022); *Burnham v. Papa John's Paducah, LLC*, No. 5:18-CV-112-TBR, 2020 U.S. Dist. LEXIS 75220, at *3 (W.D. Ky. Apr. 29, 2020); *Crawford v. Lexington-Fayette Urban Cty. Gov't*, No. 06-299-JBC, 2008 U.S. Dist. LEXIS 90070, at *11 (E.D. Ky. Oct. 23, 2008).

Courts also look to the factors used to evaluate Rule 23 settlements in assessing whether to approve a FLSA settlement. *See Lott v. Louisville Metro Gov't*, No. 3:19-CV-271-RGJ, 2023 U.S. Dist. LEXIS 45228, at *3 (W.D. Ky. Mar. 17, 2023); *Crawford v. Lexington-Fayette Urb. Cty. Gov't*, No. CIV. A. 06-299-JBC, 2008 WL 4724499, at *3 (E.D. Ky. Oct. 23, 2008) ("The need for the court to ensure that any settlement of a collective action treats the plaintiffs fairly is similar to the need for a court to determine that any class-action settlement is "fair, reasonable, and adequate.'") This settlement, borne of six and one-half years of active litigation, meets those tests.

The Sixth Circuit has identified seven factors that guide the inquiry undertaken by the district court in assessing whether a proposed settlement is fair, reasonable, and adequate:

> (1) the risk of fraud or collusion [i.e. whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining]; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Doe v. Deja Vu Servs., 925 F.3d 886, 894-95 (6th Cir. 2019); *Moulton v. United States Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009); *UAW v. GMC*, 497 F.3d 615, 631 (6th Cir. 2007).

Here, because all the *UAW* factors are satisfied, and because the settlement is a fair, reasonable, and adequate resolution of a *bona fide* dispute under FLSA, the Court should preliminarily approve the settlement. *See Doe*, 925 F.3d at 859-99.

a. <u>There Is No Collusion or Fraud Involved in the Proposed Settlement and the Settlement Was Negotiated at Arm's Length</u>

There exists a presumption that no fraud or collusion occurred between counsel in the absence of any evidence to the contrary. *Lott,* 2023 U.S. Dist. LEXIS 45228 at *9); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 531 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011). Further, "[t]he participation of an independent mediator in the settlement negotiations virtually assures that the negotiations were conducted at arm's length and without collusion between the parties." *Hainey v. Parrot*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007).

In reviewing settlement agreements to determine fairness, courts must recognize the strong presumption" in favor of finding that a settlement is fair and reasonable and must remain aware that a settlement is a compromise, "a yielding of the highest hopes in exchange for certainty and resolution." *Collins et al. v. Sanderson Farms, Inc., et al.*, 568 F.Supp.2d 714 (E.D. La. July 9, 2008) (citing *Camp v. Progressive Corp.*, 2004 WL 2149079 (E.D. La. Sept. 23, 2004); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d. Cir. 1995).

Here, the Parties have been represented by experienced and capable counsel and fiercely litigated this matter for more than six years. The Parties filed discovery-related motions, including motions to compel, and other motions during the litigation. Similarly, Plaintiffs' motions for class certification and collective certification were both strongly opposed. Hundreds of thousands of pages of documents and millions of data-points were exchanged, allowing the parties to assess and argue the strengths and weaknesses of their respective positions, as well as perform settlement calculations. Additionally, while the Parties did not reach a settlement after the mediation before Hunter Hughes, an experienced class action mediator, that mediation plus the extensive litigation

which continued thereafter is strong evidence there is no collusion or fraud involved in proposed settlement, the settlement was negotiated at arm's length, and the Court should preliminarily approve the settlement. *See, e.g., Thacker,* 695 F. Supp. 2d at 531 (finding no risk of fraud or collusion after significant adversarial litigation and extended arms-length settlement negotiations).

b. Settlement is Appropriate because Continued Litigation Through Trial and Appeal Would be Complex, Costly, and Protracted, and the Likelihood of Success on the Merits is Far from Guaranteed (Factors 2 and 4)

Of the *UAW* factors, "[t]he most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *Doe,* 925 F.3d at 895. In assessing this factor, courts must closely analyze "whether the claims that the unnamed class members are giving up are worth the benefits they may receive." *Id.* However, in evaluating settlements, courts are not required "to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id.* at 895-896.

Here, approval of the settlement is appropriate because (1) the risk of success on the merits is significant; and (2) the settlement provides a reasonable and appropriate percentage of the total recoverable damages which have been calculated by the Plaintiffs and by Defendant. First, Plaintiffs calculated the damages for the collective based on documents and electronic records of Defendant which showed each load delivered by each collective member, the amount of money each collective member received each week as payment for his or her work, as well as the miles driven, and the days spent over-the-road.

Plaintiffs assumed that their maximum damages for unpaid wages would treat 16 hours per day as compensable hours worked for every day the collective member spent over-the-road delivering freight for Defendant, pursuant to 29 C.F.R. § 785.22. Accordingly, under Plaintiffs'

damages model, the total amount of minimum wage damages each collective member was owed for each week spent over-the-road equaled:

$$Damages = \left((Days\ Worked) \times 16\ hours\ \times \frac{\$7.25}{hr} \right) - (Net\ Weekly\ Amount\ Paid)$$

The FLSA has a default two-year statute-of-limitations, but allows for a three-year accrual period if the cause of action arises from a willful violation. 29 U.S.C § 255(a). Given the above, Plaintiff's calculated that the minimum wage damages recoverable by the collective if only a two-year statute of limitation applied was approximately $300,000, while damages for the third year were calculated at approximately $1,000,000. Plaintiffs also calculated that each month of equitable tolling granted by the Court would result in approximately an additional $100,000 in damages. Each of these figures was potentially subject to an equal amount of liquidated damages. 29 U.S.C. § 216(b).

Accordingly, Plaintiffs calculated their potential recovery as being from $300,000 (two-year period, no liquidated damages), to $2,600,000 (three-year period with liquidated damages), with an additional amount of $100,000-$200,000 for every month of equitable tolling granted by the Court. Moreover, to the extent that the Court found that minimum wage damages were owed but disagreed that the proper measure of hours worked was 16 hours per day, Plaintiffs' damages would likely have been even lower.

Accordingly, the amount recovered—$1,175,000—reflects nearly four times the amount of Plaintiff's lower estimate for a recovery, approximately half the recovery they would have received if a three-year statute of limitations and liquidated damages were awarded, and a fifth of the amount recoverable if, in addition to the preceding amounts, Plaintiffs were also able to receive 18 months of equitable tolling **and** liquidated damages on that amount that fell within the tolling period. And it is worth emphasizing that even if Plaintiffs were successful in demonstrating that

Defendant had misclassified them as independent contractors and failed to pay minimum wage for every workweek worked, Defendant still intended to contest that 29 C.F.R. § 785.22 applied and was the proper way to measure compensable hours worked, which, if accepted, would likely have resulted in an even lower amount of recoverable damages.

Accordingly, the amount of the settlement is well-within the range of possible and reasonable recoveries. *See, e.g., Doe*, 925 F.3d at 896-897; *Heimbach v. Amazon.com, Inc. (In re Amazon.com Inc., Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.)*, No. 3:14-md-2504, 2024 U.S. Dist. LEXIS 93752, at *22 (W.D. Ky. Apr. 2, 2024); *Thompson*, 2022 U.S. Dist. LEXIS 81666 at *22. This settlement, like any settlement, does not provide Plaintiffs the equivalent of the best day in Court. On the other hand, the amount offered in settlement—$1,175,000—is significantly higher than Plaintiff's "worst" day in Court.

The Parties have been hotly litigating this hybrid class and collective action since 2017, and continuing it would be long, arduous, risky, and complex. While much of the written discovery had been completed at the time of settlement, the Parties were in the middle of a dispute regarding the scope of the remaining discovery, which, regardless of the resolution of that dispute, would likely result in at least an additional two dozen depositions and additional written discovery from Opt-In Plaintiffs. *See* ECF Doc. No. 272, 273, 279, 286. Expert discovery remained in its earliest stages. The discovery and the attending motion work would take many months to complete. The Parties would file dispositive and decertification motions after discovery was completed. A complex trial involving testimony from dozens of witnesses would proceed only after those motions were resolved. Were the Parties to proceed to trial on their claims, final resolution would likely take years due to the contested legal claims and the inevitable appeals which would follow.

There are also many significant risks to the Collective to litigating to a final judgment. Defendants have aggressively challenged Plaintiffs' legal and factual claims, many of which are the subject of unsettled law. If not for settlement, Defendants would surely seek to decertify the collective. If they were successful, continued litigation would require hundreds of individual claims to be litigated. For many of these low-wage Drivers, individual litigation is not a reasonable option as their work is not conducive to attending trial and depositions based on a potential—but not guaranteed—financial recovery. The settlement will pay drivers now, rather than require drivers to wait for and risk their recovery on the outcome of dispositive motions, a jury trial, and an (almost certain) appeal.

Accordingly, considering the Parties' relative positions, the legal issues which remained to be resolved, and the time which it would take to resolve this matter through final appeals, the benefits of a settlement outweighed the risks of proceeding to trial. *See, e.g., In re Amazon.com*, No. 3:14-md-2504, 2024 U.S. Dist. LEXIS 93752, at *22; *Lott*, 2023 U.S. Dist. LEXIS 45228 at *11; *Thompson*, 2022 U.S. Dist. LEXIS 81666 at *22. As such, the Settlement Agreement should be approved.

c. The Parties are at an Advanced State of the Proceedings and Have Completed a Significant Amount of Discovery (Factor 3)

The Litigation is at an advanced stage, with the FLSA collective action conditionally certified, and the Parties having engaged in significant discovery and motion practice over the last six and a half years. The Parties have propounded and responded to substantial written discovery resulting in Defendant's production of extensive documentary and electronic discovery including tens of thousands of pages of relevant documents and millions of data points. Plaintiffs have also spent a significant amount of time analyzing Defendants' data to build a damages model and calculate damages for the class.

The discovery process remained contentious, with the Parties briefing several discovery issues in motions before the Court, which remained before the Court at the time the settlement was reached. *See* ECF Doc. No. 272, 273, 279, 286. Those discovery motions, including the scope of remaining opt-in discovery and the Parties respective duties to respond to extensive contention interrogatories at this stage of the litigation, were also useful in framing the evidentiary issues for both sides.

Given the advanced stage of the Litigation, as well as the significant discovery and motion practice that had already taken place prior to the second mediation, the Parties are in a strong position to assess the strengths and weaknesses of the various claims and the risks of trial. Accordingly, this factor also supports approving the settlement.

d. Plaintiffs' Counsel, Who Have Adequately Represented the Collective, and Defendants' Counsel Believe the Settlement is Fair, Reasonable, and Adequate (Factor 5)

The judgment of Plaintiffs' Counsel that the settlement is in the best interest of the Collective "is entitled to significant weight and supports the fairness of the class settlement." *IUE-CWA v. GMC*, 238 F.R.D. 583, 597 (E.D. Mich. 2006); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 525 (E.D. Mich. 2003) ("[I]n approving a proposed settlement, the court also considers the opinion of experienced counsel as to the merits of the settlement.").

Here, the Parties are represented by experienced counsel with a significant specialization in the litigation of class and collective actions within the trucking industry. The settlement was reached during arm's length negotiations following years of contentious litigation. Plaintiffs are represented by counsel who are well informed and practiced in collective and class wage and hour litigation, and are realistic and knowledgeable of the risks of litigation and benefits of the settlement.

Plaintiffs' counsel has substantial experience litigating complex wage and hour actions, including class actions and certified collective actions with tens of thousands of class members. Swartz Swidler is trial counsel in a number of pending wage and hour collective and class actions and has been trial counsel in dozens of wage and hour collective and class actions that have resolved with court approval. *See, e.g., Salinas v. U.S. Express Enterprises, Inc.*, 2018 WL 1477127, at *6 (E.D. Tenn. Mar. 8, 2018), *report and recommendation adopted*, 2018 WL 1475610 (E.D. Tenn. Mar. 26, 2018) ("Plaintiffs are represented by Swartz Swidler, who are well-informed and practiced in collective wage and hour litigation, and are realistic and knowledgeable of the risks and benefits of the settlement. Plaintiff's counsel has substantial experience litigating complex wage and hour actions, including class actions and certified collective actions with tens of thousands of class members."); *Campbell v. C.R. Eng., Inc.*, No. 2:13-cv-00262, 2015 U.S. Dist. LEXIS 134235, at *18 (D. Utah Sep. 30, 2015); *see also Katz v. DNC Servs. Corp.*, No. 16-5800, 2024 U.S. Dist. LEXIS 20629, at *39 (E.D. Pa. Feb. 5, 2024) (noting Swartz Swidler's substantial experience litigating class action wage-and-hour cases).

Plaintiffs' Counsel and Named Plaintiff have reviewed the terms of the settlement and believe that the settlement is fair and reasonable and is in the best interest of the Settlement Collective Members. Their opinion that the settlement is fair is entitled to deference and further weighs in favor of approval.

e. Reaction of the Collective (Factor 6)

As notice of the settlement has not yet issued, an assessment of the Collective's reaction is premature. However, the Named Plaintiff believes the settlement is fair, and Plaintiffs' Counsel is not aware of any objections by Collective Members.

f. The Settlement is Consistent with Public Policy (Factor 7).

Like other jurisdictions, the Sixth Circuit recognizes a strong public policy in favor of settlements. *Rusiecki v. City of Marquette.*, 64 Fed. Appx. 936, 936 (6th Cir. 2003); *Borror Prop. Mgmt., LLC v. Oro Karric N., LLC*, 979 F.3d 491, 496 (6th Cir. 2020), *citing Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("Public policy strongly favors settlement of disputes without litigation."); Margaret M. Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36 (1996) (noting that settlement "decreases the expense and risk of litigation for parties" and "enables courts to conserve scarce judicial resources and to reduce their backlog"). The settlement here is consistent with that policy because it resolves a pending case on behalf of a collective of approximately 1,000 individuals and avoids a jury trial and likely appeals that would affect these collective members. Because the settlement represents a fair settlement of a *bona fide* dispute, public policy weighs heavily in favor of approval.

g. <u>The Proposed Settlement Resolves *Bona Fide* Disputes.</u>

Courts may approve an FLSA settlement where such an agreement represents the "resolution of a bona fide dispute over FLSA provisions." *Thompson v. United Stone, LLC, et al.*, 2015 WL 867988, at *1 (E.D. Tenn. March 2, 2015) (quoting *Lynn's Food Store, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982)); *Salinas v. U.S. Xpress Enterprises, Inc.*, No. 113CV00245TRMSKL, 2018 WL 1477127, at *3 (E.D. Tenn. Mar. 8, 2018), *report and recommendation adopted*, No. 1:13-CV-245, 2018 WL 1475610 (E.D. Tenn. Mar. 26, 2018).

Here, Plaintiffs contend that they were misclassified as independent contractors and that, because they were in fact employees, Defendants were required to pay them the minimum wage for every hour worked. Thus, this matter seeks restitution for minimum wage violations (i.e. payment for the difference between what Defendants paid Plaintiffs and $7.25 per hour). The Parties dispute whether Plaintiffs were employees. Plaintiffs allege that Defendants exercised a level of control over Drivers' work that made them employees under the FLSA, while Defendants

claim that Drivers exercised the type of independence that made them independent contractors. The law in this area remains unsettled. *Compare Craig v. FedEx Ground Package Sys. (In re FedEx Ground Package Sys.)*, 792 F.3d 818, 821 (7th Cir. 2015) (FedEx truck delivery drivers were misclassified and were legally employees); *with Merrill v. Pathway Leasing LLC*, No. 16-CV-02242-KLM, 2021 WL 3076848, at *12 (D. Colo. July 21, 2021) (finding Lease Purchase drivers to be independent contractors). If Plaintiffs lost on this issue, they would recover no FLSA damages at all.

Even if the Plaintiffs were successful in establishing that Drivers were employees, the Parties dispute what constitutes work time under the FLSA. What constitutes work is critical to FLSA damages liability—the more hours that constitute work, the greater the minimum damages. That law is in flux. For example, the law regarding the compensability of sleeper berth time for over-the-road drivers such as the drivers in this case remains subject to uncertainty and risk to both sides. *See Sanders v. W. Express, Inc.*, No. 1:20-CV-03137-SAB, 2021 WL 2772801, at *7 (E.D. Wash. Feb. 11, 2021) (summarizing cases that have come to different conclusions). Indeed, in *Petrone v. Werner Enterprises*, the *same* court – without appellate review – reached inconsistent results, demonstrating that there is a *bona fide* dispute under the FLSA whether such time is compensable. *Compare Werner I*, 121 F.Supp.3d 860 (D. Neb. 2015) (Strom, J.) (entering summary judgment for plaintiffs and finding that trucking companies must pay over-the-road drivers for sleeper berth time in excess of 8 hours per day) with *Werner II*, 2017 WL 510884 (D. Neb. Feb. 2, 2017) (Smith Camp, J.) (vacating summary judgment award and holding that whether sleeper berth time is compensable must be determined by jury).

Other issues in dispute include whether Defendants acted willfully and therefore should be subject to a third year of FLSA liability, 29 U.S.C. § 216(b), whether Defendants can show that

they acted in good faith and should be relieved of liquidated damages, 29 U.S.C. § 259, and whether any Plaintiffs are entitled to equitable tolling.

Defendants aggressively challenged Plaintiffs' positions on all these issues, and none were resolved. The settlement accordingly eliminates the risk that the Collective Members would recover nothing at all if Plaintiffs were unable to establish their claims.

h. The Release of Claims by Plaintiffs who fail to cash their checks, and the distribution of any remaining funds to a *cy pres* charity is reasonable and appropriate.

The proposed settlement provides that funds from uncashed checks shall be donated to the St. Christopher's Fund. Ex. 1, § IX(3). The settlement provides that Plaintiffs who do not cash their checks will still be bound to the release. *Id.* Courts routinely approve settlements in which the release attaches to individuals who fail to receive or cash their checks. *See, e.g., Valencia v. Greater Omaha Packing*, No. 8:08CV161, 2014 WL 284461, at *3 (D. Neb. Jan. 23, 2014) (releasing claims of all class members but allowing a cy pres recipient to receive uncashed funds); *Rosales v. El Rancho Farms*, No. 1:12-CV-01934- AWI, 2015 WL 4460918, at *6 (E.D. Cal. July 21, 2015) ("[P]arties should have a plan for distributing unclaimed funds because many class action settlements result in unclaimed funds" and approving wage and hour settlement where only 15% filed claims but all class members released claims)

Moreover, if this case were tried and a judgment was entered – in which case all class members would be barred from bringing these claims again as a consequence of res judicata – some class members would not cash their check, and cy pres distribution of those uncashed funds would still be appropriate. *See Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306, 1307 (9th Cir.1990).

Here, the charity recipient—St. Christopher's Fund—is an appropriate *cy pres* recipient as that charity assists commercial truck drivers during times of crisis, and the Collective is composed

of commercial truck drivers. *See* https://truckersfund.org/faq/. Accordingly, the release of claims and donation of uncashed funds to a charity supporting commercial truck drivers is appropriate and supports preliminarily approving the settlement.

i. The Terms of Plaintiffs' Counsel's Proposed Attorneys' Fees are Fair

The Settlement Agreement allows for Plaintiffs' Counsel to apply to the Court for an award of attorneys' fees of thirty-three percent of $1,175,000. Ex. 1, § IV(1). "Fee awards of thirty-three percent are frequently approved in complex wage-and-hour cases." *Heimbach v. Amazon.com, Inc. (In re Amazon.com, Inc.)*, No. 3:14-md-2504, 2024 U.S. Dist. LEXIS 120951, at *29 (W.D. Ky. July 10, 2024); *Jones v. H&J Rests.*, No. 5:19-CV-105-TBR, 2020 U.S. Dist. LEXIS 219071, at *17 (W.D. Ky. Nov. 20, 2020); *Ware v. CKF Enters., Inc.*, Civil Action No. 5: 19-183-DCR, 2020 U.S. Dist. LEXIS 82879, at *44-45 (E.D. Ky. May 12, 2020) (collecting cases where a third was found to be an appropriate fee).

Plaintiffs' Counsel will make a motion for attorneys' fees at the final approval stage in which Plaintiffs' Counsel will set forth in detail the reasons why their fee request should be granted. The Court will also have the benefit of considering any objections to the requested fees that may be filed. Accordingly, the Court should grant preliminary approval of the Settlement Agreement and permit the Notice to disclose that Plaintiffs' Counsel will seek one-third of the settlement fund as attorneys' fees. *See Wilson v. Anthem Health Plans of Kentucky, Inc.*, No. 3:14-CV-743, 2019 WL 6898662, at *5 (W.D. Ky. Dec. 18, 2019) (preliminarily approving attorneys' fees of 38% of the settlement fund pending more detailed information provided at final fairness hearing).

For the same reason, Plaintiffs' Counsel's reimbursement of their out-of-pocket litigation expenses from the settlement fund is reasonable. "Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs

in the prosecution of claims and in obtaining settlement[.]" *Stephens v. ADS All. Data Sys., Inc.*, No. 2:20-cv-2152, 2024 U.S. Dist. LEXIS 38280, at *20 (S.D. Ohio Mar. 5, 2024).

The types of expenses for which Plaintiffs' Counsel seeks reimbursement—photocopying, postage, travel, lodging, filing fees and electronic service expenses, long distance telephone, telecopier, computer database research, depositions expenses, and expert fees and expenses—are reimbursable as "are the type typically billed by attorneys to paying clients." *Gokare v. Fed. Express Corp.*, No. 2:11-CV-2131-JTF-CGC, 2013 WL 12094887, at *9 (W.D. Tenn. Nov. 22, 2013) *citing In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 382 (S.D. Ohio 2006).

j. <u>The Requested Service Payments are Reasonable.</u>

The Settlement Agreement also allows the Named Plaintiff to seek the Court award him a $10,000 service fee award for his services to the Collective, and $500 service fee awards for the four Opt-In Plaintiffs who participated in discovery and sat for depositions. Ex. 1, § III(2).

Courts "recognize and grant incentive awards [as] efficacious ways of encouraging member[s] of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Andrews v. State Auto Mut. Ins. Co.*, No. 2:21-CV-5867, 2023 U.S. Dist. LEXIS 191571, at *22 (S.D. Ohio Oct. 25, 2023). *Swigart v. Fifth Third Bank*, No. 1-11-cv-88, 2014 U.S. Dist. LEXIS 94450, 2014 WL 3447947, at *7 (S.D. Ohio July 11, 2014) (approving service payments of $10,000 each to the two class representatives); *see also Newberg on Class Actions* § 11,38, at 11-80 (citing empirical study from 2006 that found average award per class representative to be $16,000). The amounts requested, totaling no more than $12,000, are in line with the amounts customarily paid to individuals who assist in bringing class and collective actions.

C. The Proposed Settlement Notice and Notice Process and the Proposed Method of Distributing Settlement Funds to the Collective Are Effective and Satisfy Due

Process.

"Before ratifying a proposed settlement agreement, a district court also must direct notice in a reasonable manner to all class members who would be bound by the settlement. The notice should be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *UAW*, 497 F.3d at 629.

In order to meet this requirement, the Parties have agreed upon a form and content of the Settlement Notice that informs the Settlement Collective Members of the terms of the settlement and detailed information about the claims being released, of their ability to opt out of the settlement, and of their ability to object to the settlement and/or participate in a final fairness hearing, attached hereto as Exhibit 2.

Settlement Notices will be customized to include each individual Settlement Collective Member's expected recovery so that they can evaluate their own part of the settlement. Ex. 2, § 3. It also sets forth Plaintiffs' Counsel's requested fees and expense reimbursements, as well as the requested Service Payments for the Named Plaintiffs and Original Discovery Representatives. Ex. 2, p. i, § 3. In addition, the Settlement Notice provides information about the date for the final fairness hearing, the Settlement Collective Members' right to dispute workweeks, opt out, or object to the settlement (and deadlines and procedures for disputing workweeks, opting out, or objecting), and the procedure to receive additional information. Ex. 2, p. i, §§ 6-8

Further, the Settlement Notice provides the Collective Members with the contact information for Plaintiffs' Counsel. Ex. 2, § 10. The Parties have agreed that the Settlement Notice, attached as Exhibit 2, meets the requirements for a collective settlement. *O'Bryant v. ABC Phones of N. Carolina, Inc.*, No. 19-CV-02378-SHM-TMP, 2020 WL 7634780, at *11 (W.D. Tenn. Dec.

22, 2020) ("Courts often rely on agreement between the parties on language for notice and consent forms to serve as a check against improper forms"); *citing Morales v. Rite Rug Co.*, No. 3:16-cv-00072, 2017 WL 6945344, at *6 (M.D. Tenn. Jan. 23, 2017) and *Loveland-Bowe v. Nat'l Healthcare Corp.*, No. 3-15-1084, 2016 WL 1625820, at *2 (M.D. Tenn. Apr. 25, 2016). Accordingly, Plaintiffs request the Court approve the form of Notice as well.

D. The Court Should Appoint Simpluris as the Settlement Administrator and Preliminarily Approve the Settlement Administrator its Costs and Fees.

Finally, Plaintiffs request the Court approve Simpluris as a Settlement Administrator. Simpluris has significant experience in administrating and distributing class and collective settlements, including wage and hour settlements. *See* https://www.simpluris.com/representative-cases/ (last visited July 29, 2024). The settlement administration will be relatively complex, given Settlement Collective Members reside in states throughout the United States, and the Settlement Administrator in this matter will issue the Settlement Notice and, later, payments to the Settlement Collective Members, many of whom will require updated address information through skip tracing. Ex 1, § VII(1), VII(3), IX(3). The Settlement Administrator also must participate in the tracking of opt-outs and objections, Ex. 1, § VII(4)-(5). Simpluris is well qualified to perform these and other duties set forth in the Settlement Agreement.

Simpluris has provided an initial estimate of the administration of this matter as being approximately $8000. The Parties further expect that even if Simpluris exceeds this estimate, the costs of administration will be less than $15,000. This amount is also highly reasonable for the administration of a settlement of this size with this many Collective members. Thus, Plaintiffs respectfully request the Court appoint Simpluris as the Settlement Administrator and approve it being paid its costs and fees from the Settlement Fund pursuant to the Settlement Agreement.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion: (1) for preliminary approval of the Settlement Agreement; (2) to approve as to form and content the proposed Settlement Notice; (3) to approve Simpluris as the Settlement Administrator; (4) to direct Defendant to provide a final collective list according to the settlement within 14 days; (5) order the Settlement Administrator to effectuate the Notice within 14 days of receipt of the final collective list provided by Defendant; and (6) to schedule a final fairness for a date and time approximately 100 days following the Court granting Preliminary approval, or as soon thereafter as the Parties may be heard. A proposed form of order is attached.

Respectfully submitted,

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