IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

JOSEPH SANNUTTI and JOHN HOLAHAN and BRADLEY GALE and MICHAEL LANGE and ANDREW DESARNO and KATHERINE JABLONSKI and GISELLE VARGAS and NELSON RAMIREZ and TIMOTHY QUICK and MALCOME LAPONE and KEITH LOCASCIO and MATTHEW COLOMBO and KRISTINE KAVANAUGH and DAVID BUBAR Plaintiffs, v. W.B. MASON CO., INC. and LEO MEEHAN, *individually* and CHRIS MEEHAN, *individually* And ROGER AHFELD, *individually* Defendants.	Civil Action No.: 21-10955 (FLW)(DEA)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs Michael Lange ("Lange") and Andrew DeSarno ("DeSarno") (each a "Named Plaintiff"), individually and on behalf of three proposed classes comprising a total of approximately 273 employees ("Class Members"), in conjunction with Plaintiffs Joseph Sannutti ("Sannutti"), John Holahan ("Holahan"), Bradley Gale ("Gale"), Timothy Quick ("Quick"), Malcolm Lapone (alternatively referred to in company records by his former name, Malcolm Scott Bertram, Jr., and referred to herein as "Lapone"), Matthew Colombo ("Colombo"), Keith Locascio ("Locascio"), Kristine Kavanaugh ("Kavanaugh"), David Bubar ("Bubar"), Katharine Jablonski ("Jablonski"), Giselle Vargas ("Vargas) and Nelson Ramirez ("Ramirez") (who collectively with Lange and DeSarno are "Plaintiffs"), allege Defendant W.B. Mason Co., Inc. ("WB Mason") and the individual Defendants (collectively referred to as the "Individual Defendants," and together with WB Mason, the "Defendants") wrongfully withheld earned but unpaid commissions and other amounts from them and other commissioned sales representatives in violation of federal and certain states' law. This Motion represents a global settlement and consolidation of several cases previously pending in this Court, the United States District Courts for the Eastern District of Pennsylvania and Eastern District of New York, as well as the Supreme Court of New York, asserting similar causes of action.

This Court should grant preliminary approval of the Parties' proposed Settlement Agreement. It is fair, reasonable, and adequate under applicable legal standards and provides reasonable monetary relief to the putative Class Members. The Parties ask the Court to: (1) approve preliminarily the proposed Global Class Action Settlement Agreement ("Settlement Agreement"),

attached as Exhibit A; (2) approve the proposed Notice of Proposed Settlement of Class Action Lawsuit ("Class Notice") for all Settlement Classes, attached to the Settlement Agreement as Exhibit 1; (3) authorize mailing of the Class Notice in the manner set forth in the Settlement Agreement; (4) schedule a final approval hearing 100 to 125 days after the date of preliminary approval; and, (5) enter the [Proposed] Order Certifying Classes for Settlement Purposes Only, Granting Preliminary Approval of Class Action Settlement ("Preliminary Approval Order"), attached as Exhibit B.

FACTUAL AND PROCEDURAL BACKGROUND

I. PROCEDURAL HISTORY AND SUMMARY OF PLAINTIFFS' SETTLED CLAIMS

Plaintiffs Lange and DeSarno filed a putative class action against Defendants on April 2, 2021 in the Superior Court of Middlesex Law Division, which Defendants removed to this Court (the "New Jersey Action"). [Dkt. 1]. They alleged Defendants breached an alleged written contract, committed common law fraud, were unjustly enriched, and wrongfully withheld earned but unpaid commissions and other amounts from commissioned sales representatives, sometime referred to as Account Executives ("AEs")[1], in violation of New Jersey common law and the New Jersey Wage Payment Law ("NJWPL").

On April 8, 2021, Plaintiffs Quick, Lapone, Colombo, and Locascio filed a similar putative class action against Defendants in the Supreme Court of New York (the "New York State Action"). The New York State Action initially asserted claims on behalf of a putative class of New York-based WB Mason AEs alleging Defendants breached the same duties as outlined in the New Jersey

[1] For purposes of this lawsuit, AEs mean only *commissioned* sales representatives/Account Executives.

and Pennsylvania actions in violation of New York common law and the New York Labor Law ("NYLL").[2] A few weeks later, on April 28, 2021, Plaintiffs Sannutti, Holahan, and Gale filed a putative class action against Defendants on behalf all current and former Pennsylvania-based AEs in the Philadelphia County Court of Common Pleas, which Defendants timely removed to the United States District Court for the Eastern District of Pennsylvania (the "Pennsylvania Action"). The Pennsylvania Action asserts the same underlying factual allegations and claims Defendants violated Pennsylvania common law and the Pennsylvania Wage Payment Collection Law ("PWPCL"). On June 3, 2022, Plaintiffs Jablonski, Vargas and Ramirez filed a putative class action against WB Mason in the United States District Court for the Eastern District of New York (the "New York Federal Action"). The New York Federal Action asserts claims against Defendants on behalf of a putative class of current and former New York-based WB Mason AEs asserting the aforementioned allegations violate New York common law and the NYLL.

Although Plaintiffs sought to bring their claims on behalf of themselves and similarly situated AEs as class actions under Federal Rule of Civil Procedure ("Rule") 23, they have not filed any motions for certification in the New Jersey Action, New York Federal (or State) Action, or Pennsylvania Action (collectively the "Actions"). To avoid the expense and burden of further litigation, the Parties have agreed, after arm's-length negotiations, to reach a global resolution of all Actions, including any and all wage and/or commission-related claims, state or federal, that were or could have been asserted by anyone who held an AE position and performed services for

[2] On June 8, 2022, the Supreme Court of New York (Hagler, J.) endorsed the decision of Plaintiffs Quick, Lapone, Colombo and Locascio to dismiss voluntarily the New York State Action's class action allegations in favor of permitting Quick, Lapone, Colombo and Locascio to pursue their claims individually.

WB Mason in the States of New Jersey, New York, and/or Pennsylvania at any point from the operative statute of limitations commencement date through the date of final approval of this class action settlement.

II. SETTLEMENT NEGOTIATIONS

On March 29-30, 2022, the Parties participated in a two-day mediation with The Honorable Joel Schneider, U.S. M.J. (Ret.). On May 20, 2022, the Parties participated in a partial day of mediation (a third continued date of mediation). Judge Schneider is a prominent and well-respected former federal judge and now mediator in wage and hour and employment-related class and collective litigation at Montgomery McCracken Walker & Rhoads LLP. Although the Parties did not reach an agreement at the mediation, they continued to engage in arms-length negotiations which, on August 31, 2022, resulted in the Parties reaching a global agreement to resolve all pending disputes between them. The settlement reached is within a range that was discussed at length before Judge Schneider, but the Parties required additional information before they were able to bridge the proverbial gap. The settlement reached provides for substantial monetary relief for approximately 273 Class Members, including Plaintiffs. The terms of the settlement are contained in the Settlement Agreement. There are no undisclosed side agreements between the Parties to this Agreement.

Defendants denied, and continue to deny, any liability, wrongdoing, or legal violations of any kind related to the claims and contentions asserted by Plaintiffs. Rather, Defendants maintain WB Mason paid and notified all AEs of its commission plans and any changes thereto in accordance with legal requirements, and that no wages or penalties of any kind are owed to them.

Defendants also have disputed and continue to dispute that a class action is appropriate. Nevertheless, Defendants agreed to settle the claims asserted in this lawsuit on the terms and conditions set forth in the Settlement Agreement to avoid the burden and expense of continued litigation.

III. THE SETTLEMENT TERMS

A. Eligible Settlement Class Members

There are three Settlement Classes, defined as follows:

New Jersey Settlement Class: All individuals who worked for WB Mason as a commissioned sales representative/Account Executive primarily based or working in New Jersey at any point from April 2, 2015 through the date Class Notice is distributed and who have not previously released and/or adjudicated any of the Released Claims.

New York Settlement Class: All individuals who worked for WB Mason as a commissioned sales representative/Account Executive primarily based or working in New York at any point from April 8, 2015 through the date Class Notice is distributed and who have not previously released and/or adjudicated any of the Released Claims.

Pennsylvania Settlement Class: All individuals who worked for WB Mason as a commissioned sales representative/Account Executive primarily based or working in Pennsylvania at any point from April 28, 2017 through the date Class Notice is distributed and who have not previously released and/or adjudicated any of the Released Claims.

Collectively, the New Jersey, New York, and Pennsylvania Settlement Classes comprise the Global Rule 23 Settlement Class.

B. Maximum Settlement Amount Allocation

To avoid the time and expense of continued litigation and the risks and delays inherent in that process, the Parties have agreed to a Maximum Settlement Amount ($5,650,000.00) as set forth in the attached Settlement Agreement. (Ex. A, Settlement Agreement, § 4). The Maximum Settlement Amount includes: (1) the Rule 23 Settlement Class Maximum Settlement Amount

($4,150,000.00), which includes Service Awards ($40,000.00) and employee and employer-side payroll taxes; and (2) Attorneys' Fees and Litigation Costs in connection with Class Counsel's representation of Plaintiffs and the putative class members, including all fees and costs that may arise in the future in connection with the Settlement Agreement, such as, for example, fees and costs associated with Class Counsel seeking Court approval of the Settlement Agreement and managing the notice process and all Settlement Administration Costs incurred by the Settlement Administrator[3] ($1,500,000.00). Any settlement funds not claimed by Settlement Class Members remain the property of WB Mason and will not be transferred to the Qualified Settlement Fund.

C. Service Awards

As outlined below, Class Counsel seeks an award of service payments to Plaintiffs Kavanaugh, Locascio, Holahan, Sannutti, DeSarno, Gale, and Quick, all to be paid from the Rule 23 Settlement Class Maximum Settlement Amount. Defendants do not oppose Class Counsel's request for the following service payments: (i) $15,000.00 to Plaintiff DeSarno; (ii) $7,500.00 to Plaintiff Holahan; (iii) $5,000,00 to Plaintiff Locascio; (iv) $4,000.00 to Plaintiff Kavanaugh; (v) $2,500.00 each to Plaintiffs Gale and Lange; (vi) $2,000.00 to Plaintiff Quick; and (vii) $1,500.00 to Plaintiff Sannutti. (*Id.*, at § 3.4).

D. Settlement Administrator

The Parties agreed to retain Analytics, LLC as the Settlement Administrator. (Ex. A, Settlement Agreement, § 1.22). The Settlement Administrator's Costs of Settlement will be paid

[3] All defined terms, unless otherwise defined herein, shall have the meaning set forth in the Settlement Agreement attached hereto as Exhibit A.

from the Attorneys' Fees and Litigation Costs as set forth above.

E. Attorneys' Fees and Litigation Costs

As outlined below and pursuant to Rules 23(h) and 54(d)(2), Class Counsel seeks an award of Attorneys' Fees and Litigation Costs in the sum of One Million Five Hundred Thousand Dollars and Zero Cents ($1,500,000.00), which Defendants do not oppose. (*Id.*, at § 4.2). The Parties agree this sum is fair and reasonable in light of all the facts and circumstances, including the past and anticipated future time spent by Class Counsel, their hourly rates, the risks undertaken, and the results achieved.

F. Rule 23 Settlement Class Allocation

The Rule 23 Settlement Class Maximum Settlement Amount is Four Million One Hundred and Fifty Thousand U.S. Dollars and Zero Cents ($4,150,000.00), less any amounts payable as employee and employer-side payroll taxes and any amounts approved by the Court and paid to Plaintiffs as Service Awards. (*Id.*, at § 4.6(a)).

Each Rule 23 Settlement Class Member is entitled to receive a settlement payment equal to the aggregate total of the following amounts: (1) to the extent WB Mason issued any payroll checks in 2021 to Class Members for alleged amounts owed but not paid, such Class Member shall receive an additional amount based on the applicable state wage law in the state in which the Class Member worked; (b) the remainder of the Rule 23 Settlement Class Maximum Settlement Amount shall be allocated to each Class Member based upon their respective earnings during the number of weeks worked within the statutory look-back period in their respective State(s). (*Id.*, at § 1.24).

G. Class Notice and Releases

The Class Notice thoroughly outlines the terms of Settlement and instructs recipients how to participate in the Rule 23 Settlement. The Settlement Agreement provides that, upon entry of an order approving the Settlement by the Court, the Settlement Class Members will release all legally waivable wage and hour claims of any kind against Defendants, regardless of whether they choose to participate in the Rule 23 Settlement. (*Id.*, at § 5.3).

IV. CLASS ACTION SETTLEMENT PROCEDURE

The well-established class action settlement procedure includes the following three steps:

1. Preliminary approval of the proposed settlement following submission of a written motion for preliminary approval;
2. Dissemination of mailed and/or published notice of settlement to all putative class members; and
3. A final settlement approval hearing, at which time class members may be heard regarding the settlement, and at which time arguments concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (*"Newberg"*), § 11.22 *et seq.* (4th ed. 2002). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as guardian of class interests. By this Motion, the Parties ask the Court to take the first step of this process and grant preliminary approval of the Settlement Agreement, approve the proposed Class Notice, and order its distribution by the Settlement Administrator. The Parties ask the Court to issue a Preliminary Approval Order, which includes the following schedule:

1. Within seven (7) calendar days after the Court grants Preliminary Approval of the Parties' proposed settlement, WB Mason will provide the Settlement Administrator with a list, in electronic form, of the names, last known addresses, dates of

employment, and compensation information, of all Settlement Class Members. (Ex. A, Settlement Agreement, § 8.1).

2. Within twenty-eight (28) calendar days after the Court grants Preliminary Approval of the Parties' proposed Settlement, the Settlement Administrator will compile and mail and e-mail the Class Notice to members of the Settlement Classes. The Class Notice will set forth a summarized version of the formula by which each Class Member's settlement amount is calculated, the Rule 23 Settlement Class Members' dates of employment, instructions for participating in the settlement, including a Claim Form, and instructions for objecting to the settlement. (*Id.*, at § 8.2(a)). The Settlement Administrator shall send the Class Notice by First Class U.S. Mail to each member of the Settlement Classes at such individuals' last known address as provided by WB Mason. (*Id.*, at § 8.2(b)). For any Settlement Class Member whose initial Class Notice is returned to the Settlement Administrator as undeliverable, the Settlement Administrator shall conduct reasonable address verification efforts, to include email searches, consistent with the customary practices in the settlement administration industry and, within thirty (30) calendar days of the initial mailing, shall re-send Class Notice to any Settlement Class Member whose initial Class Notice was returned as undeliverable. (*Id.*, at § 8.2(c)). No later than twenty-one (21) days before the conclusion of the Notice Period, the Settlement Administrator will mail a reminder Class Notice to those individuals who have not yet opted-in to the settlement. (*Id.*, at § 8.2(d)).

3. Rule 23 Settlement Class Members must provide a complete, valid and timely Claim Form confirming their intent to participate. Those who do not want to participate may timely submit a valid opt-out letter to the Settlement Administrator. To be deemed timely, an opt-out letter or objection must be postmarked during the Notice Period and received by the Settlement Administrator no later than five (5) days after the close of the Notice Period. (*Id.*, at § 8.5).

4. Within twenty-one (21) days after the close of the Notice Period, the Parties will file a joint motion seeking a Final Approval Order. (*Id.*, at § 9.1).

5. A Final Approval Hearing on the fairness and adequacy of the proposed settlement, Class Counsel's Attorneys' Fees and Litigation Costs, and settlement administration expenses will be held after the Court preliminarily approves the settlement, on a date subject to the Court's determination, approximately 125 days after the date of preliminary approval. (*Id.*, at § 1.14).

6. After the Final Approval Hearing, if the Court grants the Parties' joint motion for final approval of the settlement, the Court will issue a Final Approval Order. The

"Settlement Effective Date" will be the Date after which the Final Approval Order will be final and no longer subject to appeal. (*Id.*, at § 1.23).

7. Within ten (10) business days of the Settlement Effective Date, WB Mason will ensure the availability of funds in the QSF of the amount of money necessary to satisfy all awarded Attorneys' Fees and Litigation Costs, as well as the Settlement Payments of all Participating Rule 23 Class Members, including employer-side payroll taxes and any court-approved Service Payments to Plaintiffs. The Settlement Administrator will administer any funds transferred into the QSF. (*Id.*, at § 10).
8. The Settlement Administrator shall mail each Settlement Class Member his or her Settlement Payment within thirty (30) days of the Settlement Effective Date. (*Id.*, at § 11.1).

ARGUMENT IN SUPPORT OF APPROVAL

I. LEGAL STANDARDS

The dismissal or compromise of any certified class action requires court approval. Fed. R. Civ. P. 23(e). The approval of any proposed class action settlement is typically exercised in a two-step process consisting of "preliminary" and "final" approval. Manual for Complex Litigation § 30.41 (3d ed. 2000). Although the legal standards for preliminary and final approval overlap, preliminary approval and notice to the class require only a threshold finding that the Court will likely be able to: (1) certify the class(es) for purposes of judgment on the settlement; and (2) approve the settlement as fair, reasonable, and adequate after notice to the class. Fed. R. Civ. P. 23(e)(1)(B).

"If the proposed settlement 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, then the court should direct that notice be given to the Class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement." *Gaskin*

v. Pennsylvania, 389 F. Supp. 2d 628, 630 (E.D. Pa. 2005); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995).

The Third Circuit has stressed that the most relevant consideration is whether the proposed settlement is within a "range of reasonableness" considering all costs and risks of continued litigation; in other words, the test is whether the proposed settlement is fair and reasonable under the circumstances. *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 322 (3d Cir. 1998).

Here, it is undisputed the Settlement Agreement resolves a bona fide dispute and contains no provisions that would be contrary to the purposes of the wage and hour statutes at issue or frustrate their implementation. Indeed, the Settlement furthers the purposes of the statutes by providing Plaintiffs with a substantial recovery for their alleged unpaid wages and other violations. Because the Settlement facilitates these statutory goals and is a fair and reasonable resolution of a bona fide dispute, the Court should approve it as reasonable.

II. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS PURSUANT TO RULE 23.

A. Preliminary Approval is Appropriate.

The parties have satisfied all of Rule 23's requirements, and preliminary approval is appropriate. Preliminary approval of a proposed class action settlement is left to the trial court's sound discretion. *Caddick v. Tasty Baking Co.*, No. 2:19-cv-02106-JDW, 2021 WL 1374607, at *7 (E.D. Pa. April 12, 2021). "The fair, reasonable and adequate standard is lowered, and the court is required to determine whether the proposed settlement discloses grounds to doubt its fairness or

other obvious deficiencies. *Id.* (citing *In re Nat.'l Football League Players' Concussion Inj. Litig.*, 961 F. Supp. 2d 708, 714). Nevertheless, "[p]reliminary approval is not simply a judicial 'rubber stamp' of the parties' agreement." *Id.* Rather, it is "based on an examination of whether the proposed settlement is 'likely' to be approved under Rule 23(e)(2)." *Wood v. Saroj & Manju Invs. Philadelphia LLC*, No. CV 19-2820-KSM, 2020 WL 7711409, at *10 (E.D. Pa. Dec. 28, 2020) (citing Fed. R. Civ. P. 23(e)(1)(B)(i) and additional citations omitted).

Here, the Parties have agreed to Rule 23 certification for settlement purposes and request the Court certify the Settlement Classes for settlement purposes only. When presented with a request to approve a proposed class settlement preliminarily, a court's evaluation may be more relaxed than when considering entry of a final order binding all class members to the settlement's terms. Nevertheless, the court must still determine whether the proposed Settlement Classes satisfy the requirements of Rule 23. As set forth below, preliminary approval is appropriate and Plaintiffs request, with Defendants' consent, the Court grant the relief requested.

B. The Proposed Settlement Classes Satisfy the Requirements of Rule 23(a).

1. Rule 23 (a)(1): The proposed class is so numerous that joinder is impracticable.

Although Fed. R. Civ. P. 23(a)(1) provides no firm number of putative class members that must exist to satisfy the Rule's numerosity requirement, courts typically hold it is satisfied where there are more than 40 putative class members. *See, e.g. In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016), *as amended* (Sept. 29, 2016). Here, each of the three proposed State law classes contain at least 40 putative members. Thus, numerosity is satisfied.

2. Rule 23 (a)(2): There are questions of law and fact common to the class.

The second consideration, pursuant to Rule 23(a)(2), requires there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. 338, 349-50 (2011). This commonality inquiry focuses on the defendant's conduct. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"). "Commonality exists when proposed class members challenge the same conduct of the defendants." *Schwartz v. Dana Corp./Par. Civ.*, 196 F.R.D. 275, 279 (E.D. Pa. 2000).

At least three common issue exists in this case that support certification for settlement purposes, because Defendant allegedly subjected all proposed Class Members to the same pay practices they claim deprived them of earned commissions: (1) whether Defendants manipulated data and information for the purpose of depriving Class Members of earned but unpaid commissions; (2) whether WB Mason provided proper and/or timely notice to Class Members regarding changes to their commission structures and plans; and (3) whether WB Mason in fact improperly withheld any earned wages allegedly owed. *See Bredbenner v. Liberty Travel, Inc.*, No. CIV. A. 09-1248 MF, 2011 WL 1344745, at *6 (D.N.J. Apr. 8, 2011) (stating "the commonality requirement is easily met in most cases because all that is required is one common issue" and finding commonality existed where all class member claims would turn on whether method of calculating overtime was compatible with applicable state wage and hour laws). Therefore, Plaintiffs satisfy the commonality requirement for the Settlement Classes.

3. Rule 23 (a)(3): The claims and defenses of Plaintiffs are typical of the claims or defenses of the class.

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23. Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiffs as representatives of the class. *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *In re Nat.'l Football League Players' Concussion Inj. Litig.*, 821 F.3d 410, 428 (3d Cir. 2016), *as amended* (May 2, 2016).

Here, Plaintiffs' claims are typical of the claims of other Settlement Class Members because they arise from the same course of action of Defendants. Namely, Plaintiffs, like all other Class Members, were employed by WB Mason as AEs and claim Defendants improperly withheld commissions and did not provide adequate notice regarding changes in their commission plans. As a result, Plaintiffs and the Settlement Class Members base their respective claims on the same legal theories, i.e., that Defendants allegedly improperly withheld commissions, did not give adequate or timely notice under applicable law of changes to Class Members' commission plans, and engaged in conduct aimed at depriving all Class Members of commissions rightfully earned and owed. Thus, Plaintiffs' claims are typical of those of the Settlement Class Members.

4. Rule 23 (a)(4): The class representatives will fairly and adequately protect the interests of the class.

The final Rule 23(a) requirement requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. "The adequacy requirement encompasses two distinct inquires designed to protect the interests of absentee class members: whether the named plaintiffs' interests are sufficiently aligned with the absentees,' and the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. June 26, 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). "A class representative must represent a class capably and diligently. *In re Nat'l Football League Players' Concussion Inj. Litig.*, 821 F.3d at 430. "A minimal degree of knowledge about the litigation is adequate." *Id.* (finding class representatives provided adequate representation where they followed the litigation, approved the filing of a complaint, and approved final settlement).

The proposed class representatives, DeSarno, Lange, Kavanaugh, Locascio, Quick, Holahan, Gale, and Sannutti, all worked as AEs during part of the class period, and they base their claims on the same allegedly unlawful conduct pertaining to their commissions that the Settlement Class claims to have experienced. They have also shown their commitment to prosecuting this litigation by assisting Class Counsel in preparing the Complaint(s) and actively participating in discovery and mediations. Discussed *infra*. The Class Representatives also have provided invaluable information and documents and have thoroughly assisted Class Counsel in understanding Plaintiffs' claims and Defendants' defenses. (*Id.*). Furthermore, the class

representatives do not have any interests antagonistic to the class; rather, they have the same interests and claim to have incurred damages similar to Settlement Class Members. *Bredbenner v. Liberty Travel, Inc.*, No. CIV.A. 09-1248 MF, 2011 WL 1344745, at *8 (D.N.J. Apr. 8, 2011) (finding no antagonistic interest where plaintiff alleged same violation and remedy as rest of class).

Likewise, Class Counsel have fairly and adequately protected the interests of the class. Class Counsel are experienced wage and hour lawyers and have successfully acted as representative counsel in numerous wage and hour class and collective actions, as well as other complex class actions, in federal and state courts throughout the United States. (*See* Ex C and D)).

Courts deem plaintiffs' counsel adequate representatives if they possess adequate experience, vigorously prosecuted the action, and demonstrate they have acted at arm's length from defendant(s). *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. at 344 (citation omitted). *In re Nat'l Football League Players' Concussion Inj. Litig.*, 821 F.3d at 429. Pursuant to Rule 23(g), courts must also consider: (i) the work counsel has done in identifying and investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g).

Here, Class Counsel are seasoned wage and hour class action litigators. They have invested considerable time and resources in reviewing and analyzing payroll data and other confidential documents provided by Defendants before the settlement was reached. (Ex. E). Indeed, this exchange of information, the use of a well-respected mediator, and Plaintiffs' independent

investigation, as well as arm's-length negotiations with Defendants, demonstrate Class Counsel's pursuit of the interests of the class, and the fact that they have not colluded with Defendants before agreeing to a settlement. *See Bernhard v. TD Bank, N.A.*, No. 1:08-CV-04392, 2009 WL 3233541, at *1-2 (D.N.J. Oct. 5, 2009); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (stating "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). In short, the class representatives and Class Counsel have demonstrated they "are fully capable of litigating this case." *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 218 (M.D. Pa. 2012). Accordingly, the adequacy requirement of Rule 23(a)(4) is satisfied.

C. The Proposed Settlement Meets the Requirements of Rule 23(b)(3).

1. Questions of law and fact common to class members predominate over any questions affecting only individual class members.

In addition to satisfying the requirements of Rule 23(a), the parties must also demonstrate the proposed settlement satisfies Rule 23(b)(3). Rule 23(b)(3) requires a court to find "questions of law or fact common to 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." Fed. R. Civ. P. 23(b)(3). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 594 (1997). Notably, the Third Circuit has remarked it is "more inclined to find the predominance test met in the settlement context." *In re Nat'l Football League Players' Concussion Inj. Litig.*, 821 F.3d at 434 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273,

304 n.29 (3d Cir. 2011) (en banc)).

Here, certification of the proposed Settlement Classes is appropriate. There are numerous common questions of law and fact that predominate over any questions that may affect individual Class Members. As noted above, Defendants vigorously asserts that WB Mason's commission plan(s) and notices regarding same are complaint with all laws. The question of the legality of Defendants' conduct in administering WB Mason's commission plans and of the right of Plaintiffs to any unpaid commissions, for provisional certification purposes, may be determined for the entire class in a single adjudication, without considering individualized issues. Accordingly, the proposed Settlement Classes satisfy the predominance prong of Rule 23(b)(3) warranting their provisional certification.

2. A class action is superior to other available methods for fairly and efficiently adjudicating this action.

Rule 23(b)(3) lists four factors the Court should consider in determining whether a class action is superior to other methods of adjudicating this litigation: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23 (b)(3)(A)-(D).

Here, an assessment of the Rule 23(b)(3) "superiority" factors shows a class action is the preferred procedure in this case. The superiority requirement is satisfied when "a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as

to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 304 (N.D. Ill. 2010) (quoting *Amchem*, 521 U.S. at 615). "[A]s courts presiding over other wage and hour cases of this type have observed, 'there is little incentive for Plaintiffs to bring their claims individually because the amount of recovery, if any, would be very small. Class actions are particularly appropriate in such cases.'" *Wintjen v. Denny's, Inc.*, No. 2:19-CV-00069-CCW, 2021 WL 5370047, *15 (quoting *Koenig v. Granite City Food & Brewery, Ltd.*, No. 2:16-CV- 01396, 2017 WL 2061408, *5 (W.D. Pa. May 11, 2017)).

The Settlement Agreement provides Settlement Class Members with the ability to obtain prompt, predictable, and certain relief, and it contains well-defined administrative procedures to ensure due process. This includes the right of dissatisfied Settlement Class Members to object. Judicial economy and efficiency, as well as consistency of judgments, will also be served through preliminarily certifying the Settlement Classes for settlement purposes. The settlement relieves the court and the Parties of the substantial judicial burdens that will result from forced repeated adjudication of the same issues in multiple individualized trials across various courts. In short, permitting this case to go forward as a single class action, consolidated from four class actions, is much more efficient. Rule 23(a), Rule 23(b)(3) and 29 USC § 216(b) are all satisfied.

Thus, Rule 23 certification and final certification under FLSA of the Settlement Class for purposes of settlement is appropriate.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Criteria for establishing fairness, reasonableness, and adequacy.

To determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit apply a nine-factor test first enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), and reaffirmed in *In re Nat'l Football League Players' Concussion Inj. Litig.*, 821 F.3d at 437. These factors include the: (i) complexity, expense, and likely duration of the litigation; (ii) reaction of the class to the settlement; (iii) stage of the proceedings and the amount of discovery completed; (iv) risks of establishing liability; (v) risks of establishing damages (vi) risks of maintaining the class action through the trial; (vii) ability of the defendants to withstand a greater judgment; (viii) range of reasonableness of the settlement fund in light of the best possible recovery; and (ix) range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Girsh*, 521 F.2d at 156-57. At the preliminary approval stage, a court need not address every factor, as "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008). In *In re Nat'l Football League Players' Concussion Inj. Litig.*, the Third Circuit noted that in reviewing a proposed settlement, a court should also – to the extent applicable – consider "several permissive and non-exhaustive factors" in evaluating a proposed class settlement. *In re Nat'l Football League Players' Concussion Inj. Litig.*, 821 F.3d at 437.

B. The Complexity, Expense, Stage of Proceedings, and Likely Duration of the Litigation Support Settlement.

Beyond doubt, both sides have vigorously litigated and contested this case. Significant work has been done, including but not limited to multiple depositions, the production of more than

100,000 pages of documents (inclusive of spreadsheets), multiple rounds of written discovery, over two full days of mediation before an experienced wage and hour mediator, motion practice, and court hearings. The settlement, although not easily reached, was unquestionably the product of fair and arms-length negotiations. The Parties were only able to agree on a settlement after two-plus days of mediation followed by weeks of extensive arms-length negotiations and continued discovery. These discussions could only occur because of counsels' thorough investigation, discovery, analysis and zealous negotiations on behalf of their clients.

Indeed, it took the parties nearly two years to reach an agreement that benefits all class members. As part of the mediation, Defendants produced additional payroll data and other financial information which allowed Plaintiffs to develop a comprehensive picture of the damages at issue, as well as Defendants' defenses to same. *See* E; *see also, e.g.*, *Bernhard v. TD Bank, N.A.*, No. 1:08-CV-04392, 2009 WL 3233541, at *1-2 (D.N.J. Oct. 5, 2009); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). Before and after the aforesaid mediation(s), the Parties exchanged comprehensive email communications, commission formulas, spreadsheets on calculations, six years of presentations to employees, raw data, sales and cost data, information on coupon and shipping deductions, water deposit recoupment, and many other types of information underlying claims and defenses in the case.

If this Court does not approve this settlement, the parties will necessarily have to engage in more extensive discovery and preliminary and final class certification briefing, additional fact

and expert discovery depending on the outcome of class certification, summary judgment motions, and, eventually, trial. For these reasons, this factor also weighs in favor of settlement approval.

C. The Positive Reaction of the Class Supports Settlement.

Because the Parties have not yet sent the Class Notice, it is premature to assess fully the factors regarding support of the settlement by Class Members. Nevertheless, Plaintiffs support the Settlement, as does Class Counsel and counsel for Defendants. At this preliminary stage, Class Counsel is not aware of any opposition to the settlement. (Ex. E). In the unlikely event a substantial number of objectors come forward with meritorious objections, the Court may reevaluate its determination at the Final Approval Hearing. Plaintiff's counsel represents that the 14 named class Plaintiffs believe the recovery in this case: (a) is very good; (b) reflective of their actual claimed losses; and (c) they all were very appreciative and happy with the final resolution.

D. The Attendant Risks of Establishing Liability and Damages and Maintaining the Case Through Trial Supports Settlement.

Further supporting preliminary settlement approval is that the benefits of settlement outweigh the attendant risks of carrying this case through trial. In this regard, courts "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Ikon Off. Sols., Inc. Sec. Litig.*, 209 F.R.D. 94, 105 (E.D. Pa. 2002) (quoting *In re Prudential Ins. Co., Am. Sales Practice Litig. Agent Actions,* 148 F.3d at 319). "The existence of obstacles, if any, to a plaintiff's success at trial weighs in favor of settlement." *Harshbarger v. Penn Mut. Life Ins. Co.*, No. 12-CV-6172, 2017 WL 6525782, at *7 (E.D. Pa. Dec. 20, 2017). The risks associated with class certification increase the risk of maintaining the proposed classes, and therefore supports

settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding settlement appropriate because there was "appreciable risk to the class members' potential for recovery").

The outcome of this litigation is far from certain. Defendants maintain they did not engage in any impermissible conduct, and certainly not in any fraudulent scheme. Defendants remain confident they properly paid AEs all amounts due and owing them under the terms of the operative commission plan(s) and WB Mason policies, and properly notified all AEs regarding any changes to commission terms or plans. As the litigation to date has proven, further litigation and trial in this case will be very costly, complex, and long, especially because certification is a hotly contested issue in this litigation, including whether each Plaintiff was subjected to the same policies and treatment as other Plaintiffs in different States. Further litigation will certainly require additional depositions, more class and collective certification briefing, including decertification motions, potential motions to compel and the Parties' anticipated cross-motions for summary judgment. It would prolong the risk, time, and expense associated with a complex trial. Any judgment would likely be appealed, further extending the litigation. These costs of further litigation are considerable in terms of both time and money, but the costs will not reduce the risks that litigation holds for the Settlement Class. The Settlement Class could lose at any turn. The proposed settlement, on the other hand, provides immediate monetary relief for the Settlement Class, and certainty for all parties involved.

By reaching a favorable settlement before full discovery practice, certification proceedings, dispositive motions, and/or trial, Plaintiffs seek to avoid significant expense and delay, and instead

ensure recovery for the Settlement Class. Although Class Counsel believes Plaintiffs' case is strong, the case remains subject to considerable risks and costs if not settled, which will be in addition to the significant costs already expended in litigating this action to this point. (Ex. E). Although not providing the maximum possible value that conceivably might be awarded later at trial, assuming Plaintiffs achieved Rule 23 class certification and overcame Defendants' anticipated summary judgment motion on liability, the settlement provides substantial monetary benefits now, without the time, difficulties, expense, and uncertainty of further litigation and without the years of delay any appeal might cause. Weighing the benefits of the Settlement against the risks associated with proceeding in the litigation, this factor favors settlement.

E. The Range of Reasonableness of the Settlement Fund In Light of the Best Possible Recovery and Attendant Risks of Litigation Support Settlement.

The Maximum Settlement Amount ($5,650,000.00), as reflected in the Settlement Agreement (Ex. A), represents significant value for the Class Members — an average of approximately $15,201.47 each, net of anticipated Attorneys' Fees and Litigation Costs, in addition to Service Payments. There are 273 putative class plaintiffs in total. This is particularly true given the attendant risks of litigating the merits of the case through the completion of discovery, Rule 23 and FLSA certification, summary judgment proceedings, trial, and any appeals of decisions on those matters. Measuring the reasonableness of the settlement fund is an "inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d at 806. Each named and putative

plaintiff is receiving a set allocation based upon their exact months of work (within the statute of limitations in each state) and their specific alleged losses. Here, the proposed Settlement confers a substantial benefit on the Settlement Class Members. Consequently, preliminary approval is warranted.

F. The Permissive Factors Also Support Settlement.

The permissive factors outlined in *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions* also favor settlement. 148 F.3d 283, 317 (3d Cir. 1998). In that case, the Third Circuit held that since *Girsh* was decided in 1975, there has been a "a sea-change in the nature of class actions," and therefore "it may be useful to expand the traditional *Girsh* factors to include, when appropriate, these factors among others:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. at 323.

Here, the permissive *Prudential* factors also weigh in favor of settlement. All Class Members have the right to opt-out of this Settlement. (*See* Ex. A, § 8.5). Those that do not opt out, and instead opt in, will receive a proportionate share of the settlement without having participated in any meaningful way. The opt-in procedure is straightforward, fair, and reasonable. By

submitting a Claim Form, a Class Member will consent to participate in the Action and receive a proportionate share of the settlement. The settlement does not unduly grant preferential treatment to anyone. To the extent some Plaintiffs can seek reasonable service payments that recognize their efforts in prosecuting and resolving this litigation and the risks associated with bringing this action, the Court must approve those payments.

The settlement represents a fair and reasonable amount to resolve all disputes at issue, including no less than four separate actions spread across three different states. Again, each Plaintiff and Class Member that participates is set to receive an average award of $15,201.47. This is particularly fair and reasonable considering the time and expense that will be involved to carry this matter through to trial, including Plaintiffs' and future opt-in plaintiffs' depositions. Finally, the provision regarding attorneys' fees is reasonable. The Parties refer the Court to Section V herein, which includes Class Counsel's request for fees and support of same. Defendants do not object to the amounts sought. Thus, the permissive factors also weigh in favor of settlement.

IV. THE CLASS NOTICE PLAN AND AWARD DISTRIBUTION PROCESS ARE APPROPRIATE.

The content of the proposed Class Notice, attached to the Settlement Agreement as Exhibit 1, fully complies with due process and Rule 23. Under Rule 23(c)(2)(B), notice must provide:

> the best notice that is 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). "Notice by mail provides such 'individual notice to all members' in accordance with Rule 23(c)(2), and where the names and addresses of the class members are easily ascertainable, individual notice through the mail is 'clearly the 'best notice practical.'" *Fein v. Ditech Fin., LLC*, No. 5:16-cv-00660, 2017 WL 4284116, at *6 (E.D. Pa. Sep. 26, 2017) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974)).

The Settlement Agreement provides the Settlement Administrator will mail Class Notice to the last known address of each Settlement Class Member within twenty-eight (28) days of the Court's entry of Preliminary Approval. (Ex. A, Settlement Agreement, § 8.2(a)). The Settlement Administrator must take reasonable steps to obtain the correct addresses of any Settlement Class Member whose Class Notice is returned as undeliverable and must attempt to resend it. (*Id.*, § 8.2(c)). The proposed Class Notice contains information about how to participate in the Settlement, opt out of the Settlement, or object to the Settlement. (*Id.* at Ex. 1 thereto). The Settlement Administrator will also send a reminder notice within 21 days of the conclusion of the Notice Period via mail. (*Id.* at § 8.2(d)). The Class Notice further explains that, after the Settlement Agreement receives final approval and after any appeals, Settlement Class Members who do not timely opt-out will release their Wage Claims. (*Id.*, Ex. 1).

V. PRELIMINARY APPROVAL OF CLASS COUNSEL'S FEES AND COSTS IS APPROPRIATE.[4]

Plaintiffs' lead counsel in three class actions (now consolidated before this Court) are Ari Karpf and Christine Burke. As aforesaid, there are three separate class actions (collectively, "the actions") filed in April of 2021 (in NY, PA, and NJ). The Parties litigated the actions for almost 2 years. The work in these cases was extensive and laborious.

(1) The claims in this case are unique and Plaintiffs' Firm spent in excess of 800 hours litigating in three states (now consolidated for global settlement approval in New Jersey).

Unlike a more typical overtime (i.e. non-payment for meal breaks) case or a pattern wage violation (i.e. rounding of hours or pre-shift work) situation (where ease of proof and standard documents are commonplace), Plaintiffs allege improper adjustments to their commissions structure were made at various times in the year (among other concerns) that reduced their overall commission payments. These theories required Class Counsel to: (a) review thousands of spreadsheets based upon commission calculations; (b) recalculate commission structures evaluating Defendants' formulae; (c) obtain raw data including coupon applications, water deposit repayments to employees, bad-debt write off information, and many other costs or deductions; (d) obtain images of Defendants' mobile sales ordering platform and on-line sales platform to determine profit and loss margins for each commission sale; and (e) review management emails, communications to and from employees in three states, and documents disseminated to employees

[4] Class Counsel has exclusively drafted this section. Although Defendants do not oppose Class Counsels' petition for fees as a whole as part of the settlement, Defendants take no position on specific assertions herein and leave Plaintiffs to their own representations in this Section.

about or concerning commissions plans, amendments, and presentations of adjustments to commission structures.

In total, inclusive of spreadsheets, raw data, payroll information, and discovery in whole, Plaintiffs' counsel reviewed more than 100,000 documents provided on a rolling basis as the actions progressed. In addition to this heavy labor, the Parties agree there is a dearth of case law on many of the legal issues asserted in the varied actions across these three States.

In total, Class Counsel spent approximately 800 hours litigating these cases in three States. To provide this Court with ***some examples*** of the labor and intensity involving unusual case theories:

- Ari Karpf, the managing partner of Karpf, Karpf & Cerutti, PC ("KKC") (Exhibit C), spent more than 70 hours learning the claims and evaluating case theories before initiating litigation. He interviewed over 15 putative plaintiffs in attempting to understand Defendants' nationwide payroll and commission(s) system (through examples, documents, and explanations).

- Ari Karpf spent more than 50 hours drafting, researching, and finalizing complaints and associated pleadings to be filed in three States (inclusive of an edit process with plaintiffs).

- Amy Karpf, a co-managing partner (and certified public accountant – "CPA") (Exhibit F), spent more than 100 hours reviewing, analyzing, and recreating formula calculations based upon commission payments, raw data, and in accordance with designee deposition testimony. She further helped forensically calculate damages claimed for litigation and mediations.

- Partners of KKC, including Julia Clark, Ari Karpf, and Christine Burke collectively spent well in excess of 550 hours:

    a. Reviewing documents, spreadsheets, electronic images, and other discovery;

    b. Researching nationwide case law and engaging in continual calculations;

c. Taking depositions;

d. Talking with more than 30 witnesses around the United States (inclusive of interviewing employees from states other than in the actions filed);

e. Participating in motion practice, telephone and in-person hearings, and multi day and continued mediations; and

f. Communicating with witnesses, putative plaintiffs, and the named plaintiffs on a continual basis.

- KKC (non-lawyer) staff spent well over 100 hours in handling organization, notices, document and discovery matters, exhibits, inputting of data for Plaintiffs' counsel to create their own spreadsheets, and other coordination with Plaintiffs' counsel.

See Exhibit E.

The case pursued by Plaintiffs' counsel was challenging from the outset and contained many litigation theories about and concerning commissions that: (a) were unique and not the basis of prior court opinions in any state or nationally; and (b) were a substantial risk to the law firm of KKC in that the firm's work and expenses could go uncompensated. ***In total, KKC partners spent approximately 800 hours of attorney time and closer to 900 hours of law firm time if including paralegal work.*** *See* "Exhibit E" (Declaration of summary of hours worked by members of firm).

(2) A contingency fee model is preferred by the Third Circuit in class actions, and Class Counsels' fee percentage of the common fund in this case is *far lower* than the majority of class settlements approved (and lower than the contingency fee agreements entered with named plaintiffs).

Class Counsels' fee application herein is reasonable. It reflects no more than 26% of the entire recovery to the class(es). This application is particularly reasonable considering all class plaintiffs executed a written representation agreement individually authorizing: (a) a class action; and (b) a contingency-fee percentage to KKC in the amount of 35% of any recovery. Class Counsel

reduced its authorized percentage of the entire recovery to ensure class members were made as whole as possible.

Without consideration of legal fees, the class shall receive and be eligible for $4,150,000.00. The sum of $1,500,000.00 (referred to as Counsels' Fees) is allocated towards legal fees and costs. The sum of $1,500,000.00 (in attorney's fees and costs) is only approximately 26% of the entire settlement recovery. KKC is absorbing an estimated $60,000.00 in costs associated with litigation costs, mediation fees, and payment towards the third-party administrator to process the settlement (per the terms of settlement). No costs of litigation, mediation or case administration have been passed on to the class members. As a result, the net recovery of actual counsel fees to KKC will be (closer to and) approximately $1,440,000.00 (roughly 25% of the overall settlement).

Separately and importantly, the first-class action (in New Jersey) was initiated on April 2, 2021 (asserting improper deductions and retroactive changes to commissions structures). By that date and within the weeks that followed, Defendants issued letters and checks to the putative plaintiffs totaling in excess of $400,000.00 based upon commission adjustments from payroll of prior years. Although Defendants had begun making such payment adjustments before April 2, 2021 (the date of the first-class action filing), Plaintiffs would argue (irrespective of Defendants' position) that Plaintiffs were the "catalyst" for such retroactive payments after several years of non-payment.[5] If inclusion of this additional (catalyst) compensation were included, the actual recovery of legal fees to Class Counsel would approximate 23% of Plaintiffs' entire class recovery.

[5] Under the catalyst theory, a litigant can qualify as a "prevailing party" entitled to an award of attorney's fees under a fee-shifting statute if the lawsuit "achieves the desired result because [it] brought about a voluntary change in the defendant's conduct." In the absence of a judgment or enforceable consent decree, the catalyst theory entitles a plaintiff

Courts must perform a "thorough judicial review of fee applications . . . in all class action settlements." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 819 (3d Cir. 1995). In assessing attorneys' fees, courts may use the percentage-of-recovery method. The percentage-of-recovery method "applies a certain percentage to the settlement fund." *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir. 2009) (citations and quotations omitted). When evaluating fees in a case where the attorneys' "efforts create, discover, increase, or preserve a fund to which others also have a claim ... the percentage-of-recovery method is generally favored." *Id.* (citation omitted); *see also In re Auto. Refinishing Paint Antitrust Litig*., 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *3 (E.D. Pa. 2008) ("In this Circuit, the percentage of recovery method is 'generally favored' in cases involving a common settlement fund[.]")(quoting *In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 732 (3d Cir. 2001)); *Maddy v. Gen. Elec. Co*., 2017 U.S. Dist. LEXIS 98802 (D.N.J. 2017) ("percentage-of-recovery method is the prevailing methodology in the Third Circuit for wage-and-hour cases")(citations omitted).

It is critical to emphasize that the 23-26% attorney fee allocation to Class Counsel of the common / class fund (as a result of a reduction from its authorized fee agreement) is far less than commonly and routinely awarded in this Circuit. In *Kapolka v. Anchor Drilling Fluids USA, LLC*, 2019 U.S. Dist. LEXIS 182359 (W.D. Pa. 2019), the court explained: In class settlements up to

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to an award of attorney's fees if it "can demonstrate: (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law." *Obchinetz v. Maple Shade Twp*., 2015 N.J. Super. Unpub. LEXIS 1524 (N.J. App. Div. 2015); see also Jones v. Hayman, 418 N.J. Super. 291, 305 (N.J. App. Div. 2011)(same); *Underwood Properties, LLC v. City of Hackensack*, 470 N.J. Super. 202, 216 (N.J. App. Div. 2022).

"$6.5 million," [d]istrict courts within the Third Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses, in settlements of this size."

Class Counsel, in a very sizeable, reasonable, and hard-fought recovery, are receiving no more than 26% of the value of the common fund and have not – contrary to typical and standard practice(s) – layered in an additional recovery of substantial costs from the common fund. Courts in this Circuit commonly permit class counsel to receive up to 33.3 - 40% of common funds in class-action settlements. *See e.g. Gasper v. Collective*, 2020 U.S. Dist. LEXIS 182617, *15 (E.D. Pa. 2020) (awarding 40% contingency fee in class action); *Alvarez v. BI Inc.*, 2020 U.S. Dist. LEXIS 60656, *19 (E.D. Pa. 2020) (approving 40% fee award of common fund to class counsel in wage and hour litigation); *Maddy v. Gen. Elec. Co.*, 2017 U.S. Dist. LEXIS 98802, *26 (D.N.J. 2017) (awarding 33.3% of fund to plaintiffs' counsel, plus costs); *Lupian v. Joseph Cory Holdings*, 2019 U.S. Dist. LEXIS 121778 (D.N.J. 2019) (approving 33.3% of class fund for attorney's fees explaining "such percentage awards are consistent with fees in this District in contingency cases."); *Wallace v. Powell*, 288 F.R.D. 347, 375, 2012 U.S. Dist. LEXIS 179002 (M.D. Pa. 2012) (approving class settlement and stating attorneys routinely negotiate fee agreements for between thirty percent (30%) and forty percent (40%) of the recovery."). (Emphasis added). Hence, the fee sought by Class Counsel is far lower than typical of plaintiffs' counsel in this Circuit.

(3) A Lodestar crosscheck of work and hours of counsel shows the contingency fee to be very reasonable and in line with Third Circuit jurisprudence.

The Third Circuit has "suggested that district courts cross-check the percentage award at which they arrive against the 'lodestar' award method." *Gunter v. Ridgewood Energy Corp.*, 223

F.3d 190, 195 n.1 (3d Cir. 2000). A lodestar award "is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys" *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 216 (E.D. Pa. 2011) (internal quotation omitted).

Courts reviewing attorney fee allocations in class actions do not pour over itemizations of billing records, do not need to do any analysis concerning them, nor require any records. It is completely unnecessary because, in a Lodestar crosscheck, courts only want to verify that the Lodestar calculation, if multiplied by 2 or 4 times, equates to the approximate contingency fee.

As the Court in *Wood v. AmeriHealth Caritas Servs., LLC*, 2020 U.S. Dist. LEXIS 60787, *27-28 (E.D. Pa. 2020) explained: "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Id*, citing, *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 302 (3d Cir. 2005). (Emphasis added); *see also Kirsch v. Delta Dental*, 534 Fed. Appx. 113, 117, 2013 U.S. App. LEXIS 15949, *9 (3d Cir. 2013) (stating lodestar crosscheck is an “abridged” review relying on counsel’s representations alone, not an accounting review of actual time and itemized billing records); *In re Mercedes-Benz Emissions Litigation*, 2021 U.S. Dist. LEXIS 256167, *49 (D.N.J. 2021) (noting courts rely upon summaries of total time expended by plaintiffs’ counsel and do not review actual invoicing or billing records in evaluating class-action settlements).

By way of summary, Class Counsel's partners spent approximately 800 hours litigating the three class actions in three different states over the course of almost two years. Partners Karpf and Burke would (if there was a post-resolution fee application) seek billing rates of $475.00 - $525.00 per hour. See "Exhibit G" (declarations demonstrating the reasonableness of such billing rates). The lodestar at such a billing rate would be at least $415,000.00 (and closer to $425,000.00 if including paralegal billing, which is permissible in fee petitions). The contingency fee received by KKC is approximately 3.4 times the lodestar.

Class Counsel's requested fees are exactly in line with (and lower than many holdings in the) Third Circuit as to expectations for contingency fees in class actions. *See e.g. Keller v. TD Bank, N.A.*, 2014 U.S. Dist. LEXIS 155889, *43 (E.D. Pa. 2014) (approving $1,200,000 in a contingency class fee where lawyers lodestar totaled approximately $368,601.50, explaining: "The lodestar cross-check results in a multiplier of slightly above 3, which is within the range of one to four that is frequently awarded in common fund cases in the Third Circuit.); *see also Wood v. AmeriHealth Caritas Servs., LLC*, 2020 U.S. Dist. LEXIS 60787, *28-29 (E.D. Pa. 2020) ("The Third Circuit has recognized that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied," citing, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998)); *Arrington v. Optimum Healthcare IT, LLC*, 2018 U.S. Dist. LEXIS 186192 (E.D. Pa. 2018) (approving lodestar multiplier of 5.3 in a wage and hour case even though "lodestar multiplier is certainly on the higher end of the range of reasonable multipliers"); *Demaria v. Horizon Healthcare Servs.*, 2016 U.S. Dist. LEXIS 143941, *12 (D.N.J. 2016) (citing numerous cases explaining courts in Third Circuit deem

fee requests with lodestar multipliers of four to five times reasonable, explaining some courts in this Circuit have approved multipliers "at least as high as 6.96.").

Class Counsel has expended at least 800 hours of attorney time. These cases were litigated in Philadelphia, New York City, and in New Jersey (before this Court). Amy Karpf, Ari Karpf, and Burke are partners managing different aspects of KKC, who would have sought billing rates of $475 - $525. A loadstar multiplier of approximately 3x is unquestionably reasonable and in accordance with Third Circuit guidance.

(4) Third Circuit 10-Factor Analysis

In addition to a lodestar crosscheck, the Third Circuit has held that district courts "must consider" ten factors "[i]n determining what constitutes a reasonable percentage fee award[.]" *In re Diet Drugs*, 582 F.3d at 541. The factors are:

(1) the size of the fund created and the number of beneficiaries;

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;

(3) the skill and efficiency of the attorneys involved;

(4) the complexity and duration of the litigation;

(5) the risk of nonpayment;

(6) the amount of time devoted to the case by plaintiffs' counsel;

(7) the awards in similar cases;

(8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations;

(9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and

(10) any innovative terms of settlement.

Id. (citing *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 n.1 (3d Cir. 2000), and *In re Prudential Ins. Co. Am. Sales Practice Litig. Against Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998)). These factors "need not be applied in a formulaic way" and "in certain cases, one factor may outweigh the rest.'" *Kapolka v. Anchor Drilling Fluids USA, LLC*, 2019 U.S. Dist. LEXIS 182359, (W.D. Pa. 2019), citing *In re AT & T Corp.*, 455 F.3d at 166 (3d Cir. 2006) (emphasis added).

(1) Size of Fund created and number of beneficiaries – This factor favors approval. There are 273 putative plaintiffs. The average award is $15,201.47 (excluding prior retroactive payments Defendants made at the outset of litigation outside the litigation settlement). *See, e.g., Wood v. AmeriHealth Caritas Servs., LLC, 2020 U.S. Dist. LEXIS 60787, *25* (E.D. Pa. 2020) (explaining sum of $7,870.75 per plaintiff confers "substantial benefit" in "$4,250,000 gross settlement" involving alleged wage violations).

(2) Absence of substantial objections – This factor favors approval. To date, there have been no objections to the proposed settlement. There is an unusually high number of named plaintiffs (14 in total). They each executed settlement agreements expressing appreciation, satisfaction, and fairness. Plaintiffs' counsel has conferred with many putative plaintiffs (not named in the case) and there have been no objection(s) to resolution.

(3) Skill and efficiency of attorneys involved – This factor favors approval. Karpf and Burke are very reputable trial attorneys who are sophisticated in class, collective, and individual actions (in all areas of employment law, inclusive of wage litigation). They have litigated well over 2,000 federal employment cases in multiple states, are frequent authors and lecturers, and are skilled advocates. *See* Declarations of Karpf and Burke, attached as C and D respectively.

(4) Complexity of litigation and duration – This factor favors approval. There were at least three separate class actions filed in New York, New Jersey, and Pennsylvania (ultimately and recently consolidated for purposes of resolution in this Court by agreement). Each state has different laws, different procedures, and different potential liabilities. Moreover, as repeatedly outlined *supra*, the claims are unique, complex, and adamantly disputed. By way of example only:

	CLAIM(S)	DEFENSE(S)
1	Alleged improper deductions from payroll for certain donations to third parties. Plaintiffs claimed, even if consenting to donations, they were not permissible deductions under applicable wage laws.	Plaintiffs requested and consented to the donations. They were pre-commission earnings not subject to applicable wage laws because commissions must be earned post-calculation before wage laws apply (and hence, the deductions were not governed by wage law deduction rules).
2	Alleged improper changes to commission percentages after work was already performed by Plaintiffs in 1-3 adjustments per year by Defendants. Plaintiffs claimed written notice was required and other forms of notice before a commission adjustment could be made.	The commission plan was discretionary, and Plaintiffs had adequate notice based upon sales meetings and company-wide presentations of such (anticipated) changes to commissions. Additionally, such changes were visible from commission statements - such that additional notice was not legally required.
3	Costs were at times increased of products being sold (without notice) decreasing commissions, resulting in wage violations.	An employer can increase the costs of its products anytime, as inflation occurs, without notice in a discretionary commission plan.
4	In 2019, certain errors were made during a 5-month timeframe with calculations of commissions based upon a new accelerator formula used by Defendants.	Defendants carefully rolled out all programs properly and with adequate notice and explanation. There was a dispute as to formula miscalculations, as Defendants believe their rollout was proper.
5	In 2020, certain products were recharacterized as "PPE" for sale during the pandemic and should have been subjected to a higher commission rate because they were similar to other products already sold by commissioned salespeople.	Defendants were not liable to pay any additional commissions, as the new product category of PPE and new commission rate was premised upon new items from different manufacturers. Defendants disputed that most products were previously available pre-COVID.
6	Bad debt, design time, and other specified deductions for certain periods of time were improper under applicable wage law(s) - and not subject to employee notice requirements.	Plaintiffs each received commissions statements outlining any changes Defendants made, and receipt of the commission statements was sufficient legal notice of changes.
7	Water deposits were not being fully recouped or recounted within certain commission statements as credits, resulting in lower commission payments.	Plaintiffs received all commissions due, and Defendants properly accounted for all water deposit credits. Plaintiffs were able to verify such information in WB Mason's sales system.

The above doesn't fully comprise all of Plaintiffs' claims, nor all of Defendants' defenses. These examples, however, provide this Court with a clear understanding of how nuanced and unique the claims were in these lawsuits. Every assertion was hotly disputed as to liability, claimed damages, and appropriateness as a class action. Defendants repeatedly asserted they would attempt to decertify or challenge numerous claims as appropriate for class action litigation.

(5) Risk of non-payment – This factor weighs in favor of approval. Class Counsel pursued this case on a 100% contingency fee, advancing all costs (and working for nearly two years on cases in three states). *See e.g. Wood v. AmeriHealth Caritas Servs., LLC*, 2020 U.S. Dist. LEXIS 60787 (E.D. Pa. 2020) (stating any case pursued on contingency basis includes risk of non-payment making this factor weigh in favor of approval).

(6) Amount of time dedicated by Plaintiffs' Counsel – This factor weighs in favor of approval. Plaintiffs' counsel spent approximately 800 hours litigating cases in three states, exclusive of administrative firm assistance from paralegals. This is a substantial commitment in a contingency case, where the loadstar multiplier is in line with Third Circuit expectations justifying the contingency fee herein.

(7) Awards in similar cases – This factor weighs in favor of approval. Class Counsel will receive no more than 25% of the common fund recovery. This is less than the 35% authorized in representation agreements with named Plaintiffs. Additionally, the vast majority of courts in this Circuit "routinely" approve fees to class counsel in the range of 33.3% to 40% of the common fund). The fee award to Plaintiffs' counsel herein is fair, reasonable, similar - - and lower than typically awarded (justifying approval).

(8) Value of benefits attributable to class counsel – This factor weighs in favor of approval. The benefits of a class recovery are attributable to class counsel when they obtain sufficient information and advance a class recovery through litigation such that they serve as a catalyst for the resultant settlement. *See, e.g., Wood v. AmeriHealth Caritas Servs., LLC*, 2020 U.S. Dist. LEXIS 60787 (E.D. Pa. 2020). Class Counsel spent approximately 800 hours litigating these cases in three states, reviewing over 100,000 documents, attending hearings before numerous judges, engaging in extensive discovery and motion practice, and took depositions including the highest-level management overseeing commissions, formula application, and cost deductions. Class Counsel also attribute the result solely to their firm being willing to litigate unique legal theories in a case that no prior law firm (of many consulted by Plaintiffs) accepted. Moreover, Plaintiffs did not have the benefit of any agency assistance or other law firms (KCC managed the case alone).

(9) Percentage Fee & Negotiations – This factor weighs in favor of approval. As aforesaid: (1) Plaintiffs' counsel is charging an approximate 25% contingency fee of the fund; (2) the 25% fee is less than authorized in representation agreements; (3) a loadstar cross-check demonstrates the proposed fee award is reasonable per the analysis *supra*; and (4) there was an arm's length negotiation. *See, e.g., Wood v. AmeriHealth Caritas Servs., LLC*, 2020 U.S. Dist. LEXIS 60787 (E.D. Pa. 2020) (stating where mediator is used and settlement thereafter occurs, it is presumably arm's length settlement without concerns of collusion). In this case, the Parties participated in two days of mediation on 3/30/22, 3/31/22 and a partial day of mediation on 5/20/22 (all with former Magistrate Judge Joel Schneider, ret.). The parties used the next several months to engage in ongoing discovery and continued litigation, until ultimately compromising within the range of settlement discussed with Judge Schneider.

(10) Innovative Terms of Settlement – This factor weighs in favor of settlement. The Parties have reached a resolution that is substantial to each individual plaintiff, contains normal and standard terms of class resolution, and Plaintiffs did not agree to anything that would be atypical or innovative. The settlement sets forth a very fair settlement, anticipates standard notice timeframes, and payments and correspondence with the class shall be administered by a reputable third-party administrator.

Lastly, courts place value on the sophistication, resources, and expertise of Defendants' counsel in determining overall settlement results achieved by plaintiff's counsel. *See e.g. Maddy v. Gen. Elec. Co.*, 2017 U.S. Dist. LEXIS 98802, *22 (D.N.J. 2017) (where defense firm was Littler Mendelson, a nationwide defense firm focusing in employment litigation, this is demonstrative of a very favorable (multi-million dollar) result by Plaintiffs' counsel). In the instant case, two major international law firms represented Defendants conterminously: (1) Jackson Lewis; and (2) Nixon Peabody. Jackson Lewis is comparable in size and sophistication to that of Littler Mendelson. And Nixon Peabody, separately, is a Global 100 law firm operating in numerous continents. Suffice it to say, the opposition to Plaintiffs' allegations legally, factually, and through hearings or mediation was immense.

For these reasons, Class Counsel submits that approval of the requested contingency fee is appropriate.

VI. THE SERVICE PAYMENTS ARE APPROPRIATE.

"[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. *Hegab v. Family Dollar Stores, Inc*., 2015 U.S. Dist. LEXIS 28570, * 39 (D.N.J. 2015). Incentives can particularly be warranted when named plaintiffs risk their reputation "with their current employer." *Alvarez v. BI Inc*., 2020 U.S. Dist. LEXIS 60656 (E.D. Pa. 2020).

In an overall class settlement of $5,650,000.00, an allocation of $40,000.00 in class incentives or enhancements is very low. Class Counsel seeks an award of service payments to Plaintiffs Kavanaugh, Locascio, Holahan, Sannutti, DeSarno, Gale, and Quick, all to be paid from the Rule 23 Settlement Class Maximum Settlement Amount. Defendants do not oppose Class Counsel's request for the following service payments: (i) $15,000.00 to Plaintiff DeSarno; (ii) $7,500.00 to Plaintiff Holahan; (iii) $5,000,00 to Plaintiff Locascio; (iv) $4,000.00 to Plaintiff Kavanaugh; (v) $2,500.00 each to Plaintiffs Gale and Lange; (vi) $2,000.00 to Plaintiff Quick; and (vii) $1,500.00 to Plaintiff Sannutti.

These requested service awards are relatively modest. Service awards of $15,000.00 or more are not uncommon for substantial assistance during class litigation. *See e.g. Shiptoski v. SMG GRP, LLC*, 2020 U.S. Dist. Lexis 8864, * 2 (M.D. Pa. 2020) (approving $15,000 service payment to named plaintiff in $772,000 settlement for 189 class members); *see also Alvarez v. BI Inc*., 2020 U.S. Dist. LEXIS 60656, *18 (E.D. Pa. 2020) ("a service payment of $15,000 is in line with what

the courts in this Circuit have approved" in settlements concerning wage and hour litigation and approving same where class settlement was $800,000.00 in total with 103 plaintiffs); *Lupian v. Joseph Cory Holdings*, 2019 U.S. Dist. LEXIS 121778, *9 (D.N.J. 2019) (approving class settlement in the amount of $2,675,000 and explaining $15,000.00 incentives for named plaintiffs is not atypical).

The largest incentive payment, $15,000.00, is to DeSarno. He spent in excess of 50 hours (by estimation) throughout the litigation assisting KKC. DeSarno was instrumental to Class Counsel understanding the case pre-litigation (and even accepting the lawsuit(s) at all). He assisted with review of the draft class-action lawsuits and editing process, continually coordinated and explained aspects of the pay and commission system with counsel. He also provided Class Counsel with images, documents, and other information to justify class allegations (before and during litigation), and he provided remote support and examples during designee deposition testimony. Additionally, DeSarno provided insight on spreadsheets, formulas, and discovery provided by Defendants to counter assertions, explain mobile ordering systems, and other sales platforms. He was – without doubt – a primary reasons the class resolution was successful. In addition to routine telephone calls, he exchanged 169 emails with information, calculations, and other data with KKC. This is separate and apart from discovery assistance. As aforesaid, DeSarno undertook such involvement as a current employee.

The eight (8) total named Plaintiffs receiving service awards were the go-to group of individuals whom Plaintiffs' counsel posed questions, reviewed discovery responses, and provided ongoing insight, information, and discovery assistance. Holahan was instrumental in providing

ongoing consulting (in a somewhat lesser DeSarno role). He dedicated substantial time to providing documents, information, and help in evaluating legal theories. He became more actively involved with assisting the litigation as a current employee post-filing.

The remaining six named Plaintiffs (other than DeSarno and Holahan) provided substantial assistance in the same manner. Holahan, Sanutti, and Gale participated in an in-person discovery hearing in Pennsylvania before Judge Kenney (in the Eastern District of Pennsylvania). The six individuals in total provided substantial written discovery in the cases, were continually available and assisted with review of submissions by Defendants, evaluated ongoing calculations, and were used on a consulting basis for nearly two years (also helping with witness coordination).

The proposed service awards are in accordance with the approximate amounts of time the specified Plaintiffs expended in contrast to one another. But collectively, they assisted with facilitating a resolution in this case in a very impactful and direct way. Jurisprudence adequately supports awards in the amounts requested for providing such assistance and benefits, as they benefited the class as a whole.

VII. THE SETTLEMENT STRUCTURE IS APPROPRIATE.

The Settlement Agreement proposes resolving the Rule 23 Settlement Class claims via a claims-made process, with any unclaimed Rule 23 Settlement Class funds remaining the property of WB Mason. This settlement structure is appropriate here. Courts often grant preliminary approval of settlement agreements, including funds distributed on a "claims-made" basis. *See Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825 (7th Cir. 2018) (approving claims-made settlement agreement). This is due, in part, to the fact that absent

agreement to a claims-made process, no settlement was likely to occur considering Defendants' position that most putative class members had no interest in pursuing the litigation. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *see also Schilling v. PGA Inc.*, No. 16-CV-202-WMC, 2020 WL 7865885, at *FN 2 (W.D. Wis. Jan. 14, 2020) (approving claims-made settlement where class was certified and numerous class members had opted out, and the parties had engaged in mediation with reputable mediator); *Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 9664959, at *7 (C.D. Cal. Aug. 4, 2015) (granting final approval in FLSA wage and hour collective action of claims-made structure because plaintiffs likely would not have been able to negotiate agreed upon settlement amount in any other form and parties sent reminder post cards to putative class members who had not responded to class notice after one month).

Here, any Rule 23 Settlement Funds not claimed by Class Members remain the property of WB Mason. The Attorneys Fees and Litigation Costs remain the same irrespective of the amount of the Rule 23 Settlement Fund claimed by Settlement Class Members. It is important to note, however, that the funds allocated for Attorneys' Fees and Litigation Costs are specific to Class Counsel's requested lodestar and do not increase, decrease or otherwise bear on the amount being paid to Class Members. The Settlement Class Members who choose to submit a Claim Form and participate in the Settlement will receive their allocated settlement amount without qualification. *See Trout v. Meggitt-USA Servs., Inc.*, No. 2:16-CV-07520-ODW(AJW), 2018 WL 1870388, at *6 (C.D. Cal. Apr. 17, 2018) (approving FLSA claims-made settlement structure where the settlement would pay each employee for the full amount of overtime worked plus an equal amount

in liquidated damages); *Nur v. Tatitlek Support Servs., Inc.*, No. 15-CV-00094 SVW (JPRx), 2016 WL 3039573, at *3 (C.D. Cal. Apr. 25, 2016) (noting claims-made settlements in wage and hour cases are "routinely approved by the Ninth Circuit and California Courts").

As a result, preliminary approval of the claims-made structure is appropriate here based on the relief being awarded to Class Members, the significant discovery to date, the little to no interest in participation by absent class members, and the time and cost expended by Class Counsel in regard to same.

CONCLUSION

For the reasons set forth above, the Parties ask the Court to grant their Joint Motion for Preliminary Approval of Class Action Settlement and enter the Proposed Order, attached as Exhibit B.

Dated: January 25, 2023

SANUTTI, ET. Al.
PLAINTIFFS

By: */s/ Ari. R. Karpf*

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CERTIFICATE OF SERVICE

I, Christine E. Burke, certify that, on January 25, 2023, the foregoing **Memorandum in Support of Joint Motion for Preliminary Approval of Class and Collective Action Settlement** was served on all counsel of record via the Court's ECF system.

/s/ Christine E. Burke

Christine E. Burke, Esq.