UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIM PAYTON-FERNANDEZ, LAVERN COLEMAN, and DARNIEL WILLIAMS, Individually and on Behalf of All Other Persons Similarly Situated,	:	Case No.: 1:22-cv-00608-NLH-AMD
Plaintiffs,	:	
-against-	:	
BURLINGTON STORES, INC., BURLINGTON COAT FACTORY WAREHOUSE CORPORATION, BURLINGTON COAT FACTORY INVESTMENTS HOLDINGS, INC., and BURLINGTON COAT FACTORY HOLDINGS, INC.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR APPROVAL OF COLLECTIVE ACTION SETTLEMENT AGREEMENT AND RELEASE

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Plaintiffs Kim Payton-Fernandez, Lavern Coleman, and Darniel Williams (together, "Plaintiffs") submit this memorandum in support of their Unopposed Motion for Approval of Collective Action Settlement Agreement and Release with regard to the parties' proposed settlement of this Fair Labor Standards Act ("FLSA") collective action lawsuit. The proposed Settlement would provide for the sum of $11,000,000 to be paid by Defendants to resolve all the overtime claims of 1,715 present and former Burlington Store assistant store managers ("ASMs"), who, as alleged in the Amended Complaint in this action, claim that they were misclassified as exempt employees and therefore wrongly not paid overtime. Plaintiffs submit that this Settlement represents an excellent result for these Burlington employees, particularly because this case was filed in February of this year and because the average gross settlement of $6,414 is an extremely good result for a FLSA/state law misclassification case. *See* pages 14-20, below. Obtaining a class or collective settlement so expeditiously is most unusual. In fact, it stands in contrast to the prior case in whose wake this case has followed, *Goodman v. Burlington Coat Factory Warehouse Corporation*, et al., Case No. 11-cv-4395 (D.N.J.) ("Goodman"), which is discussed below and which asserted the same claims on behalf of Burlington ASMs and took nine years of litigation before a settlement was reached and then approved by Judge Schneider on December 15,

2020.[1] Further, the result here was obtained in the face of an arbitration agreement which had a class/collective action ban that Burlington had moved to enforce.

Plaintiffs respectfully request the Court grant their unopposed motion for Settlement approval as it complies with the criteria applicable to the settlement of claims under the FLSA.

I. BACKGROUND

Defendants (collectively referred to herein as "Burlington") operate a nationwide off-price retail chain in 45 states across the United States and Puerto Rico. As part of its operations, Burlington employs Assistant Store Managers ("ASMs") and, until the spring of 2021, classified them as exempt under the FLSA and state labor laws and therefore did not pay them for overtime hours worked above 40 in a workweek. *See* Declaration of Michael A. Galpern ("Galpern Dec."), filed concurrently herewith, at ¶ 2. Plaintiffs allege that they and Burlington's other ASMs were misclassified as exempt under the FLSA prior to the spring of 2021. *Id.*

[1] The *Goodman* settlement also resolved *Kawa, et al. v. Burlington Stores, Inc., et al.,* Case No. 14-cv-2787 (D.N.J.) ("*Kawa*"), as discussed below. For convenience, the joint *Goodman/Kawa* settlement will be referred to simply as *Goodman* unless the context requires otherwise. As well, throughout this memorandum, defined terms from the Settlement Agreement (Galpern Dec. Ex. A) will be used.#

A. The Prior Goodman Case and The Background to This Action

This case followed upon the *Goodman/Kawa* actions whose joint settlement was reached after nine years of litigation and after the Honorable Joseph Rodriguez and the Honorable Joel Schneider spent numerous hours each presiding over the related cases. Galpern Dec. ¶ 3. *Goodman* had been commenced in 2011 and extensively litigated: from the certification of the collective action in November 2012; to 580 additional ASMs joining the collective following notice; through extensive discovery, including expert discovery[2]; to Plaintiffs' motion to exclude Defendant's expert pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (2000) (Dkt 338) ("*Daubert* Motion"), which was extensively briefed and on which the Court held four days of hearings; to cross-motions for final certification and decertification, that addressed, at length, what Burlington ASMs did (or did not do) on the job, and which were extensively briefed and also argued at hearings before the Court. *Id.*

Following the hearings and argument, in decisions issued on September 16, 2019, and November 20, 2019, the Court, per Judge Rodriguez, granted in part and

[2] The *Goodman* merits discovery included 28 opt-in depositions across the country, seven depositions of Burlington corporate witnesses, and multiple sets of written discovery that resulted in over a half million pages of documents produced by Burlington that were reviewed by Plaintiffs' counsel. The expert side of *Goodman* entailed detailed expert reports on the issues relevant to whether Burlington improperly classified ASMs as exempt under the FLSA, which were followed by expert depositions. Galpern Dec. ¶ 5.

denied in part Plaintiff's *Daubert* motion, granted Plaintiff's motion for final certification of the collective, and denied Burlington's motion to decertify. *See Goodman v. Burlington Coat Factory*, No. 11-cv-4395, 2019 U.S. Dist. LEXIS 161162 (D.N.J. Sept. 20, 2019) (*Daubert*); *Goodman v. Burlington Coat Factory*, No. 11-cv-4395, 2019 U.S. Dist. LEXIS 223588 (D.N.J. Nov. 20, 2019) (final certification and decertification). Galpern Dec. ¶ 4. To all intents and purposes, *Goodman* was ready to proceed to pre-trial planning and a trial on whether the work that ASMs did constituted exempt or non-exempt employment. *Id.*

With the advent of the COVID pandemic in the spring of 2020, the Parties, under the urging of Magistrate Judge Schneider, agreed to mediate the *Goodman/Kawa* cases. Using the same nationally prominent mediator who mediated this case, David Geronemus of JAMS, a $19.6 million settlement was reached and approved by Judge Schneider (by consent) on December 15, 2020. Galpern Dec. ¶ 6. For the reasons set out for the Court in connection with that resolution, Plaintiffs' counsel believes that the *Goodman* settlement represented an exceedingly successful result. And, as noted, it was fully litigated and ready for a collective trial as to whether Burlington's ASMs were similarly situated, which itself is a rarity in FLSA misclassification cases.[3]

[3] In fact, the undersigned counsel are aware of less than ten FLSA misclassification collectives that have been tried in the United States during the past 15 years. One of the most significant was the one tried by the undersigned in 2009 before (then)

Importantly, however, the *Goodman/Kawa* settlement only encompassed 1,648 Burlington ASMs who either i) had opted into the *Goodman* case, or ii) (in *Kawa*) were residents of New York, California, and Illinois. Galpern Dec. ¶ 7. The notice in *Goodman* was sent to the putative collective in 2013, over seven years before the case eventually settled, so nobody hired into the assistant manager position post-2013 received a notice to opt into that case. *Goodman* pertained to FLSA claims; it was settled together with *Kawa*, which asserted Rule 23 class claims on behalf of individuals in New York, California, and Illinois under those state's wage and hour laws. *Id.*; *Kawa, et al.*, v. Burlington Stores, Inc., et al., 14-cv-02787-JHR-JS (D.N.J. 2020).

Magistrate Judge Patti Shwartz, *Stillman v. Staples*, 07-cv-849 (D.N.J.) ("*Staples*"). That was tried on behalf of a collective of 342 Staples assistant store managers, and which, even pursuant to an expedited schedule, occurred nearly two years after the filing of the case, consumed six weeks of time, cost hundreds of thousands of dollars and presented innumerable contested issues of law and fact. Plaintiffs prevailed on the jury verdict, and ultimately, the case resulted in an omnibus nationwide Staples assistant store manager settlement totaling $42 million, *In re Staples Wage & Hour Litigation*, MDL No. 2025 (D.N.J.) (final approval obtained November 3, 2011). Over time, as many FLSA misclassification collective action cases have been lost as they have been won. *Compare, e.g., Stillman, supra* (collective action plaintiffs' verdict) *with Perkins v. Southern New England Telephone Co Inc.* No. 3:07-967, Dkt No. 578 (D. Conn. Oct. 24, 2011) (collective action defendant's verdict); *Henry v. Quicken Loans, Inc.,* Case No. 2:04-cv-40346-SJM-MJH (E.D. Mich. 17, 2011) (collective action defendant's verdict); *Bell v. Citizens Fin. Group*, 2:10-cv-00320 (W.D. Pa.) (same); *see also Weiss v. Mercedes- Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1301 (D.N.J.), *aff'd*, 66 F.3d 314 (3d Cir. 1995) ("the risks surrounding a trial on the merits are always considerable").#

Also importantly, after *Goodman* was commenced, in 2014, Burlington initiated a dispute resolution program called "STEPS" ("Steps To Effective Problem Solving") which required arbitration for disputed employee claims and which also had a class/collective action waiver. Galpern Dec. ¶ 8. Burlington was unable to invoke STEPS in *Goodman* because of the older timing of the claims in the case, but did so in this case. While Plaintiffs believed that under New Jersey caselaw they had significant arguments to challenge the validity of STEPS,[4] this arbitration provision, which also had a class/collective action waiver can (and routinely does) constitute a death knell for class or collective lawsuits. STEPS, therefore, presented a substantial hurdle to this case. *Id.*

B. The Present Case

For those that opted into the prior *Goodman* case or who were members of the State law classes in the *Kawa* case, the release date was August 20, 2020. Galpern Dec. ¶ 9. Nevertheless, as of that date, Burlington continued to classify ASMs as exempt and continued not to pay them overtime until February 28, 2021,

[4] Particularly, under *Leodori v. Cigna Corp.*, 175 N.J. 293 (N.J. 2003), Plaintiffs would have argued in response to Burlington's motion to compel Plaintiff to arbitrate that Burlington had only obtained an acknowledgment of receipt of the STEPS materials and therefore it did not obtain clear consent to arbitrate disputes, as required by New Jersey law. Burlington would have challenged this position, but even if Plaintiff prevailed under *Leodori*, the vast majority of the ASMs who worked in other States might not have been able to invoke New Jersey law, but rather been subject to the arbitration law of the State in which they worked. The arbitration challenge issues were therefore, fairly stated, substantial.

when it reclassified the ASM position to be an hourly position with overtime. *Id.* As a result, a great many ASMs never had claims released because they had neither joined the *Goodman* collective action nor worked in the three *Kawa* states. *Id.*

Accordingly, in late 2021, the original named Plaintiff, Ms. Payton-Fernandez, reached out to counsel because she believed she possessed meritorious misclassification claims for the period prior to February 28, 2021, and, after further investigation and research, this case was commenced on February 4, 2022. Galpern Dec. ¶ 10. Two other ASMs, Opt-in Plaintiffs Lavern Coleman and Darniel Williams, soon joined the case. *Id.* ECF Docket No. 11. Part of the preparation for the filing of this case also involved reaching out to former clients from *Goodman*, researching and preparing the complaint and also a motion for FLSA notice and conditional certification. *Id.* Two months after the case was filed, on April 8, 2022, Plaintiff filed such a notice and conditional certification motion seeking a nationwide FLSA Burlington ASM collective that would extend through the date that Burlington had reclassified ASMs as non-exempt and that would either include employment three years prior to the filing of the lawsuit or August 20, 2020, depending on whether the ASM was part of the *Goodman/Kawa* settlement or not. *Id.* ECF Docket No. 12. That same day, Burlington filed a motion to compel Ms. Payton-Fernandez to arbitrate her claims. *Id.*; ECF Docket No. 10.

While the parties were respectively preparing to respond to the two motions, Burlington approached Plaintiff's counsel to discuss a potential mediation. Galpern Dec. ¶ 11. Both sides were well aware of the issues presented; both sides fulsomely knew the *Goodman* record and the rulings in that case; and both sides were aware of how the company had reclassified the position. *Id.* That Plaintiffs were prepared to litigate doggedly on all the issues presented, including, as noted, the validity of the STEPS arbitration provision and Burlington's invocation of it. *Id.* Burlington's position was also clear that, throughout the relevant time period, the ASM position was properly classified as exempt from overtime. *Id.* To Plaintiffs and their counsel, the opportunity to obtain an expeditious resolution for Plaintiffs and other Burlington ASMs – particularly compared to the nine years of *Goodman* litigation – made the prospect of mediation worthwhile. *Id.*

The parties agreed, as noted, to use the same mediator as they used in 2020, David Geronemus. Galpern Dec. ¶ 12. In preparation, Burlington provided more detail about what it might claim in this case about why its arbitration program and its collective action bar was enforceable, and its basis for claiming that the ASM position was properly classified as exempt during the relevant time period. *Id.* In advance of the mediation, it also provided week-by-week payroll information for all members of the putative FLSA collective. *Id.* Plaintiffs' counsel asked multiple questions of Burlington to develop a damages/exposure model against

which the mediation could take place. Both sides exchanged mediation statements and the mediation took place over Zoom on July 12, 2022. *Id.* After a full day of extensive back-and-forth, that evening an agreement in principle was reached and committed to writing in a term sheet. *Id.* Further negotiation led to the full Settlement Agreement (Exhibit A to Galpern Dec.).

The proposed Settlement is an $11 million resolution. Galpern Dec. ¶ 13. The $11 million will provide for payments to the proposed Potential Collective Members, as well as cover the incentive awards and attorneys' fees and costs that are herein requested for approval. It also will provide for a "PAGA" payment to the California Labor and Workforce Development Agency ("LWDA"),[5] and cover the costs of the settlement administrator. *Id.* In contrast to some class action settlements, rather than having the submission of claim forms, it provides for direct and immediate delivery of checks. *Id.* The checks will contain and constitute FLSA and related state law releases that are only effective if the Potential Collective Member cashes or deposits the check. *Id.* The Maximum Settlement Amount is all-in, with the exception that Burlington will be responsible for the

[5] PAGA stands for California's "Private Attorneys General Act", a civil penalties provision under Cal. Lab. Code §2698 *et seq*. The Settlement allocates $15,000 ("PAGA Payment") to resolve PAGA claims, of which 75% ($11,250) will be allocated to the LWDA and 25% ($3,750) to the Potential Collective Members who worked as ASMs in California during the relevant time period are referred to as the "PAGA Members." Galpern Dec. ¶ 13

employer share of payroll taxes attributable to wages on 50% of Settlement Payments cashed or deposited. *Id.* In addition, pursuant to common FLSA practice, the value of any uncashed checks will revert to Burlington because, otherwise, Burlington will not (unlike a Rule 23 class action) get a release of the FLSA claims.[6] *Id.*

There are also the following Settlement terms:

1. 50 percent of the Settlement Payments shall be allocated as wages and 50 percent shall be allocated as liquidated damages and all other non-wage income in light of the claims asserted. It is intended that the amount treated as wages shall be subject to regular withholding and deductions for which, at the appropriate time, an IRS Form W-2 shall issue. For that amount treated as liquidated damages and all other non-wage income, there shall be no withholding or deductions, and, at the appropriate time, an IRS Form 1099 shall issue.

2. In return for the consideration provided under the Settlement, and by choosing to cash the Settlement checks, the Participating Collective Members, including their heirs, agents, representatives, successors, assigns and estates shall release, any and all wage and hour claims, rights, and causes of action, whether known or unknown, under any federal, state, or local wage and hour law, including but not limited to the Fair Labor Standards Act, including without limitation statutory, constitutional, contractual, and common law claims for wages, damages, penalties, attorneys' fees, restitution, or equitable relief to the extent relating to or deriving from a wage and hour claim (including claims for overtime wages or any other wages) relating to their Burlington

[6] In the *Staples* settlement (*see* note 3, above), an objection to this procedure was obtained. However, the Court, per Judge Shwartz, held that such a return of monies for FLSA claims was, indeed, proper for the very reason that a defendant otherwise does not obtain a release and rejected the objection. *See George v Staples, Inc.*, No. 08-cv-5746-KSH-PS, DEs 122, 128, 137 at 6 n.7 (D.N.J.).

employment.

3. Subject to Court approval, Plaintiffs' Counsel can request up to 30% of the Maximum Settlement Amount as fees and reasonable actual costs.

4. Subject to Court approval, service awards ("Separate Awards") of up to $10,000 each for a total of $30,000 shall be paid from the Maximum Settlement Amount to named Plaintiffs Kim Payton-Fernandez, Lavern Coleman, and Darnel Williams.

Galpern Dec. ¶ 14.

If approved, the Settlement will proceed by sending each potential ASM who could join the collective – the "Potential Collective Members" – a Notice and an accompanying check in the amount of their share, on which will be a consent to join and a release, informing them of the Settlement and how they could cash or deposit the check and thereby join and settle any of their claims. This efficient approach of direct pay for FLSA-only settlements has become commonplace, if not the norm, because a FLSA collective action is an opt-in group action. Unlike in a Rule 23 class action settlement, there is no release of claims in an FLSA collective action settlement unless the individual decides to join the case and receive their share; thus meaning there are no due process issues implicated.[7] A choice not to

[7] *See, e.g., Campbell v City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018) (leading recent decision discussion addressing the difference in the nature of FLSA collective actions and Rule 23 class actions and how the former is "a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases"); *see also, e.g.*, *O'Connor v. Oakhurst Dairy*, 2015 U.S. Dist. LEXIS 67029, at *10 (D. Me. May 22, 2015) ("The due process

negotiate the check simply means the person has decided to retain their claims and can assert them separately (or not) as they may wish. The form of the Notice informs Potential Collective Members of the claims in the case and their Settlement Check amount, as well as how they can contact Plaintiffs' counsel for more information, is attached as Exhibit 2 to the Settlement Agreement (Galpern Dec. Ex. A).

Plaintiffs' counsel submit that this result is a decidedly excellent one for the Potential Collective Members. Settlement was reached five months following the complaint's filing. Payment will be well less than a year following the filing. This result was obtained in the face of an arbitration and class and collective action waiver defense. The $11 million means a gross recovery of $6,414 per Potential Collective Member, a result exceeding most FLSA misclassification cases, in fact one on par with that obtained in the Staples case ($5,952) (*See* note 3, above) where Plaintiffs had already obtained a jury verdict in their favor. *See also* page 18, below (addressing other comparative settlements). This Settlement, therefore, readily meets the requirements for approval of a FLSA settlement, as is next addressed.

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safeguards built into Rule 23 class actions are not necessary in the FLSA collective action context.").

II. ARGUMENT

In order to ensure enforceability, a Court must approve the terms settling an FLSA claim. *McGee v. Ann's Choice, Inc.*, 2014 U.S. Dist. LEXIS 75840, *4-5 (E.D. Pa. June 4, 2014) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982)). The standard for approval is straightforward: a court must determine that the settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions," and if a settlement reflects "a reasonable compromise," then the court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." *Lynn's Food Stores, Inc. v. United States.*, 679 F.2d 1350, 1352-54 (11th Cir. 1982) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945)); *see also Clarke v. Flik Int' Corp.*, 2020 U.S. Dist. LEXIS 26306, *5 (D.N.J. Feb. 14, 2020) ("[a]lthough the Third Circuit has not adopted a standard for evaluating the settlement of a FLSA action, district courts in this Circuit have followed the guidance set forth by the Eleventh Circuit in *Lynn's Food Stores*…."). Accordingly, an FLSA settlement will be approved if it: (1) resolves a bona fide dispute under the FLSA; (2) is fair and reasonable for the employee(s); and (3) furthers the FLSA's implementation in the workplace. *Id.* 2020 U.S. Dist. LEXIS at *5-7; *see also Gabrielyan v. S.O. Rose Apartments LLC*, 2015 U.S. Dist. LEXIS 135615 (D.N.J. Oct. 5, 2015).[8]

[8] It is often recognized that "[e]valuation of an FLSA settlement is less rigorous

In analyzing these requirements, "a court must be mindful of the strong public policy in favor of settlements." *Farris v. JC Penney Co., Inc.*, 176 F.3d 706, 711 (3d Cir. 1999); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-595 (3d Cir. 2010). Indeed, where a settlement to a bona fide dispute was reached with competent counsel, the settlement they reach will, almost by definition, be reasonable." *Kapolka v. Anchor Drilling Fluids USA*, 2019 U.S. Dist. LEXIS 182359 (W.D. Pa. 2019) (citation omitted).

A. Approval of the Settlement is Warranted

The proposed Settlement should be approved because, as discussed below, all of the relevant approval criteria are satisfied:

1. The settlement resolves a bona fide FLSA dispute

In determining whether the settlement resolves a bona fide dispute, the Court must be assured that the settlement "reflect[s] a reasonable compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer's overreaching," and the bona fide dispute must be determined to be one over "factual issues" not "legal issues such as the statute's coverage or applicability." *Brumley v. Camin Cargo Control, Inc.*, 2012 U.S. Dist. LEXIS

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than the court's evaluation of a class action settlement because, under the FLSA, parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date." *Romero v. La Revise Assocs., LLC*, 58 F. Supp. 3d 411, 421 (S.D.N.Y. 2014).

40599 at *6 (D.N.J. Mar. 26, 2012) (*quoting Lynn's Food*); *Davis v. Essex Cnty*, 2015 U.S. Dist. LEXIS 161285, *5-6 (D.N.J. December 1, 2015); *Dominguez v. Galaxy Recycling, Inc.*, 2017 U.S. Dist. LEXIS 88855, *16-17 (D.N.J. June 9, 2017). Here, there can be no question that the present Settlement would resolve a bona fide dispute over issues such as (1) what ASMs did on a daily basis; (2) what constituted their "primary duty"; (3) the legal implications to be drawn from those facts; (4) what would constitute the proper standards for determining willfulness and good faith; (5) how damages would be determined, and (6), as a threshold matter, the validity of Burlington's assertion of its arbitration program and class and collective action waiver provisions. In fact, the core factual issues as to what Burlington ASMs did on the job occupied seven years of this Court's prior time and the same claims present here were proceeding towards trial on the merits when *Goodman* settled and Judge Rodriguez found the parties' dispute was bona fide. Unambiguously, a bona fide dispute under the FLSA exists here, which this Settlement would resolve.

2. The Settlement is "Fair and Reasonable"

While it is often recognized that "there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion" (*Frank v. Eastman Kodak Co.*, 228 F.R.D.

174, 186 (W.D.N.Y. 2005)) – most certainly this Settlement represents a fair and reasonable (if not excellent) result, one reached through arms' length negotiation, over contested issues, and with assistance from a third party mediator.

First, as discussed, with the history in *Goodman*, there can be no question that counsel had an adequate appreciation of the merits of this case when negotiating. And as noted, informed and competent counsel's judgment is accorded significant weight and deference in approving FLSA settlements.

Second, the Settlement is fair and reasonable in light of the considerable risk posed to recovery. As discussed, this case presented a threshold arbitration/collective and class action waiver and multiple issues of fact and law concerning the primary responsibilities of the collective which posed significant risks and challenges in any continuing litigation; as many FLSA collective misclassification case have been won as have been lost at trial. It can fairly be stated that a managerial misclassification case, such as this, presents a large number of "contingencies" that could have "impact[ed] Plaintiffs' possible recovery" including, for instance, "…the method of calculating damages, proving willfulness in order to extend the statute of limitations by one year in order to obtain an additional year of damages under FLSA, and showing lack of good faith in order to get liquidated damages." *Roberts v. TJX Corp.*, 2016 U.S. Dist. LEXIS 136987, at *27-28 (D. Mass. Sept. 30, 2016) (approving class settlement in similar retail chain

misclassification case). Or, as Judge John Jones III said in approving another substantial FLSA retail chain store mid-level manager misclassification settlement, "[i]t is undisputed that copious risks abound with respect to maintaining this action and establishing liability." *Craig v. Rite Aid Corp.*, No. 4:08-cv-2317, 2013 U.S. Dist. LEXIS 2658, at *38 (M.D. Pa. Jan. 7, 2013).[9]

Third, the result here is also excellent in light of the range of damages that could be obtained. The possible recovery here primarily presents a disputed issue of law that is unsettled in this Circuit as to how damages are calculated in misclassification cases: are they determined at a "Fluctuating Work Week" ("FWW") or half time for work over 40 hours damage rate, as has been accepted by all the federal Courts of Appeals that have addressed the issue[10] (as have courts within this Circuit, including this Court in its most recent decision on point[11]) or are they determined at a "regular" rate analysis which provides for half time up to

[9] Note should also be made of the possibility of post-trial decertification, which has even occurred in FLSA misclassification cases, most notably in *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567 (E.D. La. 2008) (decertifying retail store manager collective action after trial).

[10] *See Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351 (4th Cir. 2011) (applying half-time rate); *Urnikis-Negro v. Am. Family Prosperity Servs.*, 616 F.3d 665 (7th Cir. 2010) (same); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (same); *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999) (same).

[11] *See DePalma v. The Scotts Company LLC*, No. 13-7740 (KM) (JAD), 2019 U.S. Dist. LEXIS 97036 (D.N.J. June 10, 2019).

expected hours to be worked and then time and a half beyond that, as was utilized by Judge Schwartz in the Stillman v. Staples, Inc. case, supra. Using the week-by-week payroll data supplied by Burlington, Plaintiffs' counsel has determined that at either a half-time rate or at a "regular" rate analysis, the maximum recovery for the overtime alleged in the Amended Complaint would have been either $9.62 million (FWW) or $16.8 million (regular rate), respectively, on an unliquidated basis. Galpern Dec. ¶ 15. Thus, even assuming Plaintiffs prevailed on the threshold arbitration issue, an $11 million recovery against a range from a likely $9.62 to $16.8 million (or even twice those numbers assuming Plaintiffs could prove that Burlington had willfully violated the FLSA to obtain liquidated damages), represents a recovery of from 114% to 65.4%, (or even 57% to 37.7%, liquidated) – most certainly a fair and reasonable result, particularly given the risks presented by the case, at trial, post-trial and the time attendant upon getting any result. *See also Craig*, 2013 U.S. Dist. LEXIS 2658 at *38-39 (method of damage calculations was crucial unresolved issue that weighed in favor of wage and hour misclassification class settlement approval); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 462 (D.N.J. 2008) (that parties "insisted on vastly different methodologies for determining damages" favored settlement).

Fourth, when viewed comparatively with other FLSA misclassification case settlements, the gross recovery here, is commensurate with, or even better than,

other mid-manager misclassification settlements. Although every case is different, in the undersigned counsel's other, most recent settlement for retail chain store mid-manager misclassification claims the gross recovery will be $5,433 (*Outlaw v. Red Robin International, Inc.*, Civ. 18-cv-4357 (E.D.N.Y.; preliminary approval recommended July 19, 2022), while the undersigned counsel's last three settlements in this Circuit of retail chain store mid-manager misclassification claims had gross recoveries of $9,038 per person (*Fischer v. Kmart Corp.*, No. 13-cv-4116 (D.N.J.) (final approval granted Nov. 2, 2016)), $11,838 (*McKee v. PetSmart, Inc.*, 1:12-cv-01117-SLR-SRF (D. Del.) (final approval granted July 27, 2015)), and $2,001 per person (*Hegab v. Family Dollar Stores, Inc.*, No. 11-cv-1206-CCC-JAD (final approval granted March 9, 2015)). In *Goodman*, the gross settlement recovery was $12,003, admittedly a higher per person amount than here, but one that also resulted from the fact that many of the *Goodman* collective members had many more workweeks since the claims covered eight years of work, whereas no claim here reached back longer than three years; for half of the three-year period here no claim existed at all since the company had reclassified its ASMs; and for those Collective Members who were part of the *Burlington/Kawa* settlement, no claim reached back before August 20, 2020. In addition, Burlington has an arbitration defense. *See also*, *e.g.*, *Nash v. CVS Caremark Corp.*, 1:09-cv-00079 (D.R.I.) (final approval order dated Apr. 9, 2012)

(where average gross ASM class member recovery was $1,760, court termed the result "magnificent."). Other comparable assistant manager cases involving similar "big box" retailers have often had substantially smaller recoveries, including, for instance, $1,771 in *Jenkins v. Sports Authority*, No. 09-cv-224 (E.D.N.Y.) (final approval obtained September 30, 2011); $3,264 in *Caissie v. BJ's Wholesale Club*, No. 08-cv-30220 (D. Mass.) (final approval obtained June 24, 2010); and $1,161 in *Ferreira v. Modell's Sporting Goods, Inc.*, No. 11-cv-2395 (S.D.N.Y.) (final approved obtained March, 12, 2015). In short, this Settlement is reasonable when compared to others, if not exceedingly good.

For these reasons, the Settlement here is most certainly "fair and reasonable." This Settlement means that Potential Collective Members can obtain a substantial recovery now, without waiting, and without having to run the risks of not being able to proceed either in Court or on a collective basis.

Altogether, Plaintiffs' counsel's thorough assessment of the risks is that this is a "fair and reasonable" result. Galpern Dec. ¶ 16.

3. The Settlement "Furthers the FLSA's implementation"

Finally, the Settlement furthers the FLSA's purpose and implementation by providing relief to a large number of employees who might have had misclassification claims and, as discussed, the Settlement conforms to the FLSA's opt-in structure. Typically, indicia of a settlement that runs counter to the FLSA's

purpose of protecting workers "include restrictive confidentiality clauses and overly broad release provisions." *Clarke*, 2020 U.S. Dist. LEXIS 26306 at *11; *see also Brumley*, 2012 US Dist. LEXIS 40599 at *2 (noting that settlements that place "constraints on employees beyond their full compensation under the FLSA" such as barring FLSA plaintiffs from informing fellow employees of the result obtained diminish the benefit to the plaintiffs and frustrate the FLSA's purpose); *Mabry v. Hildebrandt*, 2015 U.S. Dist. LEXIS 112137, *2-3 (E.D. Pa. Aug. 24, 2015) (rejecting confidentiality provision in a settlement of FLSA claims as "unnecessarily restrictive" and counter to the FLSA's purpose of correcting imbalances of power and information between employers and their employees).

Here, the Settlement Agreement does not contain any such restrictive confidentiality provision on the Plaintiffs nor the Potential Collective Members. There is a standard and reasonable non-disparagement clause, and the only confidentiality limitation applies to Plaintiffs' counsel and is consistent with permissible ethical rules (and is typical for FLSA settlements). In turn, the releases here are, for the Potential Collective Members, properly tailored to wage and hour claims and while the release applicable to three named Plaintiffs is a general one, that is proper (and commonplace in employment cases) inasmuch as they are seeking a service award for having stepped forward in this lawsuit.

* * *

Plaintiffs respectfully submit that the Settlement here meets the criteria for FLSA collective settlement approval.

B. The Court Should Approve the 30% Expense and Fee Request

In the Settlement Agreement, Plaintiffs' counsel agreed to limit their expense and fee request to 30% of the Settlement value. With expenses of $18,443.21 (Galpern Dec. ¶ 17), this means that Plaintiffs' counsel are seeking approval of a fee request of $3,281,556.88, or 29.8%, which represents approximately a ten percent discount from the one-third retainer agreements to which each of the Named Plaintiffs signed with Plaintiffs' counsel and a diminution from the usual one-third (or more) *plus* expenses that are usually awarded in FLSA settlement, *see Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, 2016 U.S. Dist. LEXIS 126893, at * 8-9 (N.D. Ill. Sept. 16, 2016) (approving 1/3rd fee request in FLSA opt-in settlement) and noting:

> In awarding attorneys' fees, courts ultimately "must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). District courts must "undertake an analysis of the terms to which the private plaintiffs and their attorneys would have contracted at the outset of the litigation when the risk of loss still existed." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007). They must "do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, [and] information from other cases . . . ." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005)).

Numerous courts within the Third Circuit and this District have awarded fees equal to or exceeding 33 1/3% in wage and hour class and collective actions. *See, e.g., Goodman*, 11-cv-04395-JHS-JS (D.N.J. June 10, 2020) (one third plus expenses); *Lucia v. McClain & Co.*, Civil Action No. 11-cv-930 (CCC-MF), 2015 U.S. Dist. LEXIS 164584 (D.N.J. Dec. 8, 2015) (42%); *Lovett v. Connect Am.com*, No. 14-2596, 2015 U.S. Dist. LEXIS 121838, at *14-15 (E.D. Pa. Sep. 11, 2015) (38.26%); *Rouse v. Comcast Corp.*, No. 14-1115, 2015 U.S. Dist. LEXIS 49347, at *29 (E.D. Pa. Apr. 14, 2015) (35%); *Creed v. Benco Dental Supply Co.*, No. 3:12-CV-01571, 2013 U.S. Dist. LEXIS 132911, at *17 (M.D. Pa. Sep. 17, 2013) (33 1/3%).[12]

These courts invoke the "percentage-of-recovery" method in determining attorneys' fee awards in common fund cases because it "directly aligns the interests of the class and its counsel" and because it incentivizes attorneys to create the largest common fund out of which payments to the class can be made. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (leading decision; internal citations omitted); *see also In re Rite Aid Corp. Sec. Litig.*, 396

[12] District courts in this Circuit are afforded discretion in approving settlement awards and fees. *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) (fee award left to "sound discretion" of district court); *Smith v. Daimlerchrysler Servs. N. Am., LLC*, 2005 U.S. Dist. LEXIS 25116, *3-4 (D.N.J. Oct. 19, 2005) (setting the amount of attorneys' fees and expenses "is within the discretion of the district court.").

F.3d 294, 300 (3d Cir. 2005) (approving percentage of the fund approach); *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001) (same).[13] And to the extent they are applicable, the fee request here accords with the *Gunter* factors that the Third Circuit uses in evaluating class action settlements. *See, e.g., Rite Aid*, 396 F.3d at 301 (*citing Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000))[14] Thus, the fund created is substantial, $11 million, and offers a recovery to 1,715 Potential Collective Members (*Gunter* factor 1). As discussed, the average award made available to the Potential Collective Members is $6,414, an amount well within the range of recoveries in other, similar cases (*Gunter* factor 7), and an amount that is being made available particularly quickly – within less than a year after case initiation. Plaintiffs' counsel are exceedingly experienced in similar class and collective actions and have a nationwide

[13] Indeed, in what is perhaps the most serious contemporary consideration of current fee jurisprudence – the American Law Institute's *Principles of Aggregate Litigation* – it is stated that "the percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement." American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.13(b), (c) at 248-49 (2010).

[14] The only *Gunter* factor that is inapplicable here is the second factor – the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel – because, as discussed this not a Rule 23 class settlement but a FLSA collective opt-in settlement. Potential Collective Members will either join the case or not and, in doing so, accept (or not) the Settlement, including the fee and expense request.

reputation for prosecuting wage and hour misclassification lawsuits, including, as discussed, even trying in this Court the leading FLSA trial within the Third Circuit, *Stillman v. Staples*, as well as having obtained many hundreds of millions of dollars in recoveries for managerial misclassification claims for tens of thousands of other clients. *See* Galpern Dec. ¶ 18 and Galpern Dec. Exs. C (Klafter Lesser firm resume) and D (Javerbaum firm resume). Without belaboring Class Counsel's qualifications and experience at length, the "the skill and efficiency of the attorneys involved" criteria (*Gunter* factor 3) is met. Further, the risk of nonpayment (*Gunter* factor 5) was significant. Plaintiffs' Counsel undertook this action entirely on a contingent fee basis, assuming a substantial risk that they might not be compensated at all for their efforts, particularly since, as discussed, as many FLSA misclassification cases are lost at trial as are won and, in this instance, this case was commenced in the face of a known arbitration protocol. Galpern Dec. ¶ 19. "Courts recognize the risk of non-payment as a factor in considering an award of attorneys' fees." *In re Datatec Sys. Sec. Litig.*, No. 04-CV-525 (GEB) 2007 U.S. Dist. LEXIS 87428, at *20 (D.N.J. Nov. 28, 2007).

Lastly, with regard to the hours spent in getting to this Settlement, from inception through the date of this filing (Gunter factor 6) and lodestar cross-check, Plaintiffs' counsel have put in 615.3 hours of work and have a combined lodestar of $431,689. Galpern Dec. ¶ 20. There is also still significant work to be done that

will be necessary to effectuate the administration of the Settlement and advise Potential Collective Members regarding their Settlement payments, which is estimated to be 150 hours and will consist of such things as addressing questions and concerns from Participating Collective Members as they will report lost checks and request new ones, raise questions about tax consequences, and generally call for advice. Galpern Dec. ¶ 20. *Cf. Beckman v. KeyBank*, N.A., 293 F.R.D. 467 at 482 (S.D.N.Y. 2013) ("Class Counsel is often called upon to perform work after the final approval hearing, including answering class member questions, answering questions from the claims administrator, and negotiating and sometimes litigating disagreements with defendants about administering the settlement and distributing the fund."). Conservatively assuming that the majority of this time will be paralegal time with some associate time included, it would reasonably be anticipated to add another $60,000 in lodestar (Galpern Dec. ¶ 20), which should properly be considered; indeed, "[e]xcluding such time . . . would misapply the lodestar methodology and needlessly penalize class counsel." *In re Equifax Inc. Customer Data Security Breach Litig.*, No. 1:17-md-2800-TWT, 2020 U.S. Dist. LEXIS 7841, at *264 (N.D. Ga. Jan. 13, 2020), *aff'd in relevant part and reversed in part on other grounds*, *Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247 (11th Cir. 2021) (affirming fee award).[15]

[15] *See also, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and*

When included, the time spent and likely to be spent has a lodestar of $491,689. Galpern Dec. ¶ 20.

On the face, the amount of work that was done and that shall be required hereafter (relevant for the "complexity and duration of the litigation" *Gunter* factor 4), is not extraordinary but two additional points are particularly noteworthy. First, while this case itself was quickly resolved, there is no dispute that its resolution was driven by the fact that *Goodman* had consumed many years of advanced and thorough litigation. To all intents and purposes this case was a final continuation and coda to that action, successfully resolving the claims that were not, as discussed, settled in that case, and while Plaintiffs' counsel had their fee approved

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Prods. Liab. Litig., 746 Fed. Appx. 655, 659 (9th Cir. 2018) ("[t]he district court did not err in including projected time in its lodestar cross-check; the court reasonably concluded that class counsel would, among other things, defend against appeals and assist in implementing the settlement"); *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 281 F. Supp. 3d 833, 856 (N.D. Cal. 2017) (including, over defendants' objection, "125 anticipated future hours" to be spent on "communicating with the settlement administrator and responding to inquiries from class members" in the lodestar calculation); *Corzine v. Whirlpool Corp.*, Case No. 15-cv-05764-BLF, 2019 U.S. Dist. LEXIS 223341, at *31-32 (N.D. Cal. Dec. 31, 2019) (including "an estimate of 250 hours for future work to complete Settlement's claims process through 2026" in the lodestar calculation); *In re Equifax Inc. Customer Data Security Breach Litig.*, No. 1:17-md-2800-TWT, 2020 U.S. Dist. LEXIS 7841, at *242-43 (N.D. Ga. Jan. 13, 2020) (including in the lodestar calculation, over a class member's objection, class counsel's estimate of an anticipated 10,000 hours to be spent in the future to implement and administer a class action settlement); *Hausfeld v. Cohen Milstein Sellers & Toll, PLLC*, Civil Action No. 06-cv-826, 2009 U.S. Dist. LEXIS 130241, at *59 (E.D. Penn. Nov. 30, 2009) (holding that "[w]here attorneys provide additional services post-settlement . . . courts should award fees for those services").

there, the lodestar multiplier (computed as part of the lodestar check in awarding the one third fee request) was just 1.55 – which for nine years of work essentially meant, given the lost time value, that Plaintiffs' counsel essentially only broke even on their time. Galpern Dec. ¶ 21. The multiplier in this case, including the extra time still to be spent, is 6.67, a multiplier which is certainly not unreasonable where, as here, "class counsel undertook significant risk to achieve a substantial settlement amount, and [they] should not be penalized for settling the case early in the litigation." *Arrington v. Optimum Healthcare IT, LLC*, No. 17-3950, 2018 U.S. Dist. LEXIS 186192, *30 (E.D. Pa. Oct. 31, 2018) (awarding 5.3 multiplier); *see also, e.g., Steiner v. American Broad Co., Inc.*, 248 Fed. App'x 780, 783 (9th Cir. 2007) (multiplier of 6.85 "well within the range of multipliers that courts have allowed" when used as a cross-check for a fee based on percentage of the fund); *In re Rite Aid Corp. Secs. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (concluding that, under the cross-check approach, a lodestar multiplier in the range of 4.5 to 8.5 was "unquestionably reasonable"). As another Court wrote in approving a one third of the fund fee in a wage and hour case which, like this one, settled quickly upon filing (indeed, the case settled for $4.9 million within one month of having been filed):

> Here, the lodestar [multiplier] sought by Class Counsel, approximately 6.3 times, falls within the range granted by courts and equals the one-third percentage being sought. While this multiplier is near the higher end of the range of multipliers that courts have allowed, this should not result in

> penalizing plaintiffs' counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial.

Beckman v. KeyBank, N.A., 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (citing numerous other cases); *accord Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 U.S. Dist. LEXIS 144327, at *29 (S.D.N.Y. Oct. 2, 2013) (same language made in approving 7.6 multiplier in wage and hour case).[16]

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[16] This Court has likewise recently recognized:

> The requested fee award results in applying a multiplier of 5.67, within the range of multipliers typically awarded in the Third Circuit. Courts in this Circuit and elsewhere have approved large multipliers, when appropriate, in a range exceeding 10. *See, e.g., In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327* (Bankr. D. Md. 2000) (40% award for $71 million fund awarded, resulting in cross-check multiplier of 19.6); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926 at *39-40, 60 (E.D. Pa. May 20, 2005) (multiplier of 15.6 and fee of 20% of $100M settlement where "no prior government investigation" or finding of civil or criminal liability existed); *New England Carpenters*, 2009 WL 2408560, at *2 (approving multiplier of 8.3 and 20% fee); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d at 736 n.44 (award of 25% of the $193 million fund, which amounted to $48 million and represented a multiplier of 4.5-8.5, which court described as “handsome but unquestionably reasonable”); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587 (25% of $126,800,000 fund awarded; multiplier of 6.96); *Weiss*, 899 F. Supp. at 1304 (fee resulted in multiplier of 9.3 times hourly rate).

In re Mercedes-Benz Emissions Litigation, No. 2:16-cv-881 (KM)(ESK), 2021 U.S. Dist. LEXIS 256167, at *51 (D.N.J. Aug. 2, 2021). In addition to the immediately just cited cases, other decisions, including wage and hour settlements have approved essentially as higher (or higher) multipliers to that requested here. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (listing nationwide class action settlements where multipliers ranged up to 8.5 times); *Ramirez v. Lovin’ Oven Catering Suffolk, Inc.*, No. 11 Civ. 520, 2012 U.S.

But we would further submit that it would be appropriate to consider a portion of the *Goodman* time inasmuch as Plaintiffs' counsel's litigation of the *Goodman* case enabled Plaintiffs' counsel here to reach this Settlement at an early stage in the case. Considering only one-third of those hours and lodestar (which totaled approximately 7,000 hours for a lodestar of $4.211 million, *see* Galpern Dec. ¶ 21), Plaintiffs' combined lodestar would be $1.835 million and the total net lodestar multiplier here would then be 1.79, which is exceptionally reasonable – even assuming a lodestar cross-check was appropriate in a collective action settlement of this sort where each possible participating Potential Collective Member has the individual choice to accept the Settlement (or not) – in effect

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Dist. LEXIS 25060 (S.D.N.Y. Feb. 24, 2012) (6.8 multiplier in FLSA wage and hour case); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier in FLSA wage and hour case and noting, "had this case not settled, class counsel's hours, and hence the lodestar figure, would almost certainly have been greater, although it is by no means certain that the class's recovery would also have been larger-indeed, given the vagaries of litigation and trial, it might have been lower. That, too, then, tends to show that the multiplier here is not so high as to raise any red flags over the size of the fee request."); *Perez v. Rash Curtis & Assocs.*, No. 4:16-cv-03396-YGR, 2020 U.S. Dist. LEXIS 68161, at *62 (N.D. Cal. Apr. 17, 2020) (approving multiplier of up to 18.15); *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-11148-PBS, 2009 U.S. Dist. LEXIS 68419, at *10 (D. Mass. Aug. 3, 2009) (8.3 multiplier); *In re RJR Nabisco Sec. Litig.,* MDL No. 818 (MBM), 1992 U.S. Dist. LEXIS 12702, at *16 (S.D.N.Y. Aug. 24, 1992) (multiplier of 6); *Muchnick v. First Fed. Sav. & Loan Assoc.,* Civ. A. No. 86-1104, 1986 U.S. Dist. LEXIS 19798 (E.D. Pa. Sept. 30, 1986) (multiplier of 8); *Cosgrove v. Sullivan,* 759 F. Supp. 166 (S.D.N.Y. 1991) (multiplier of 8.75).

replicating the market for individual retainers which, in this case were, as noted 33%.[17] *Id.*

Second, and perhaps even more importantly, while the time expended by counsel in this case was less than what other cases might entail, Plaintiffs' counsel submit that they did the right thing by their clients by agreeing forthrightly to mediate when Burlington approached them in April. At that point, Plaintiffs' counsel faced an alternative: they could either do the right thing by Potential Collective Members and agree then to mediate, or to commence the discovery they had prepared and challenge Burlington's arbitration protocols. The latter effort certainly could not have been faulted as unnecessary and it would have, at a minimum, provided time and lodestar that would unquestionably have been recouped at a premium in a delayed mediation. Galpern Dec. ¶ 22.

Instead, agreeing to mediate this case and see how much they could obtain for their clients when Burlington first came forward and made it clear it was willing to talk, counsel aligned their interests with their clients – and then obtained

[17] In *Jackson v. Wells Fargo Bank, N.A.,* 136 F. Supp. 3d 687 (W.D. Pa. 2015), the Court reached this same conclusion: because of counsels' work advancing discovery and pressing litigation in a prior, related suit, the parties were able to reach early resolution in the latter case. The Court recognized, as is the case here, that early resolution would have been unlikely, if not impossible, but for the earlier efforts and work of counsel in the related case, and considered that time in approving fee award. *Id.* at 714.

an excellent result for the clients. We believe it fair to say that having obtained a substantial Settlement, particularly when facing the Burlington arbitration provision, indicates an exceedingly high level of representation that this Court, in its discretion, should not "penalize[] for settling the case early in the litigation." *Arrington,* 2018 U.S. Dist. LEXIS 186192 at *30; *accord Beckman, supra* (quoted at pages 28-29, above).[18] And, of course, each Potential Collective Member has the right to decide if a 30% fee/expense, as provided in the Settlement Agreement – one slightly below the usual 1/3rd plus expenses market rate for employment representation – is reasonable in accepting the Settlement (or not).

C. The Separate Service Awards Should Be Approved.

The Settlement Agreement also provides that the named Plaintiffs will seek, and Burlington will not oppose, Service Awards for the three Named Plaintiffs in the amount of $10,000.00 each. The Named Plaintiffs provided valuable information about their experiences working for Burlington, and made themselves available for consultation as the case was filed and proceeded. Galpern Dec. ¶ 24.

[18] The Klafter Lesser firm has been in this situation before where an FLSA misclassification defendant, there BJ's Wholesale Club, wished to settle the case expeditiously and early, and the firm agreed to do so, notwithstanding the risk the court might cut its fee request because the case settled so quickly and without substantial time expenditure. The Court did, however, award the full fee request (27% there) which represented a 10x multiplier. *Caissie v. BJ's Wholesale Club,* No. 08-cv-30220 (D. Mass.) (final approval obtained June 24, 2010, for $9.15 settlement, including 27% fee request).

Among the valuable information they provided was information relevant to challenge Burlington's contention that its ASM position had changed since the period at issue in the prior cases. *Id.* As a result of their willingness to bring these actions and step forward 1,715 ASMs stand able to get their claims paid. Service awards are particularly appropriate in wage and hour cases inasmuch as each Named Plaintiff here faced the risk of retaliation from within the retail industry—or at least the fear of such risk—by putting their name out there as Named Plaintiffs. *Id.* As the Second Circuit explained in *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 244 (2d Cir. 2011), "an employee fearful of retaliation or of being 'blackballed' in his or her industry may choose not to assert his or her FLSA rights."[19] This Court recently reaffirmed the propriety of incentive/service awards. *Somogyi v. Freedom Mortg. Corp.*, 2020 U.S. Dist. LEXIS 194035 at *26-27 (D.N.J. Oct. 20, 2020) (citing cases).

The amount of the Service Awards is reasonable inasmuch as the law recognizes that it is appropriate to make modest awards in the range of $10,000 to $20,000 in recognition of the services that named plaintiffs perform. *See*, *e.g.*,

[19] To be clear, Class Counsel do not intend to suggest—in any way—that Burlington here would engage in any retaliation. There has been no indication that it has retaliated or will retaliate because of this case. The point is that it is the *fear* of such retaliation that can cause employees to be unwilling and wary of suing the past or present employer by stepping forward as a named plaintiff in a class or collective action.

Rivet v. Office Depot, Inc., No. 12-cv-2992, Final Order & Judgment (D.N.J. Dec. 21, 2017) (FLSA case: $10,000 to each of five named plaintiffs); *In re Ins. Brokerage Antitrust Litig.*, Nos. 04-5184 (GEB), 05-1079 (GEB), 2007 U.S. Dist. LEXIS 74711, at *60-61 (D.N.J. Oct. 5, 2007) ($10,000 incentive award to each plaintiff, resulting in total payment of $250,000); *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 347 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581, 588 (3d Cir. 1999) ($5,000 to $20,000 and enhancement awards); *Godshall v. Franklin Mint Co.*, No. 01-CV-6539, 2004 U.S. Dist. LEXIS 23976, at *19-20 (E.D. Pa. Dec. 1, 2004) ($20,000 enhancement award to each named plaintiff).

The amounts requested here are also reasonable and are not out of proportion to the overall Settlement or the average gross payout per Potential Collective Member, which makes them appropriate. *See Cook v. Niedert*, 148 F.3d 1004, 1015 (7th Cir. 1998). Plaintiffs' Counsel respectfully requests that the requested Separate Service Awards be approved.

D. The Settlement Administrator's Costs Should Be Approved.

Finally, the Court should also approve the payment of up to $32,699, the amount of JND's capped proposal, to JND for the costs of Settlement Administration, including the printing of the Notice and checks, mailing to Potential Collective Members and dealing with replacement checks and remailings. *See* Galpern Decl. ¶ 25. Not only is JND a most experienced administrator, and in

fact handled, without any problems, the *Goodman* settlement, but in the experience and opinion of Plaintiffs' counsel, this amount is reasonable and typical of the costs for handling a FLSA settlement of this size. *Id.*

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Unopposed Motion for Approval of Collective Action Settlement Agreement and Release and enter the accompanying proposed Order on Approval of Collective Action Settlement and Judgment and the relief set forth therein.

Dated: September 21, 2022
Rye Brook, New York

Respectfully submitted,

By: /s/ Seth R. Lesser

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