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

FRED SPEER, et al., on behalf of a class of all others similarly situated,	)	
Plaintiffs,	)	**CASE NO: 4:14-cv-00204-FJG**
v.	)	
CERNER CORPORATION,	)	
Defendant.	)	

PLAINTIFFS' UNOPPOSED MOTION FOR FINAL SETTLEMENT APPROVAL AND SUGGESTIONS IN SUPPORT

Years of arduous litigation finally culminate in the parties' Settlement Agreement (Exhibit 1), which provides substantial relief to FLSA Opt-in Plaintiffs and participating Rule 23 Class Members. This Court reviewed the Settlement terms and initially concluded that the parties' Settlement "falls well within the range of reasonableness." (Order Preliminarily Approving Settlement Agreement, Doc. 259, at 1-2). Nothing has happened to alter this finding. Indeed, the parties' Settlement Agreement provides *nearly full recovery* for Plaintiffs' FLSA and Rule 23 Late Overtime Claims; Miscalculated Overtime Claims; and Fluctuating Work Week claims based upon failure to pay a fixed salary to recipients of ON3, NDF, and ARM and failure to include those pay types into regular rate calculations. This result exceeds the "fair, reasonable, and adequate" standard for final settlement approval—it is exceptional. This Court's final settlement approval order will allow FLSA Opt-in Plaintiffs and participating Rule 23 Class Members to reap these substantial, long-awaited benefits. [1]

[1]Consistent with all the settlement approval briefing in this case, to date, Plaintiffs use initial caps to reflect terms defined in the parties' Settlement Agreement (Exh. 1).

Following the notice and claims administration process, 1,119 Rule 23 Class Members and 339 FLSA Opt-in Plaintiffs elected to participate and claimed 61.02% of the $4,500,000 Settlement Total Available to Class. This is a remarkably high take rate. Moreover, not one Class Member objected to this Settlement, and only 1 opted out (e.g. .03% of the Class). Upon final approval, these settlement proceeds will flow to participating Class Members and FLSA Opt-in Plaintiffs without any reduction for attorneys' fees, costs or settlement administration expenses. This is money the Class would never have received but for this lawsuit, to compensate for claims that are largely time barred if not resolved with this litigation. This Settlement provides exceptional relief now, without the additional risk and expense of continued litigation, trial, and appeal. Accordingly, for all the reasons set forth in this and prior briefing, Plaintiffs respectfully request this Court grant final settlement approval and allow participating Rule 23 Class Members and FLSA Opt-in Plaintiffs to recover their hard-earned wages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. SUMMARY OF THE CASE AND SETTLEMENT.

By now, this Court is very familiar with the protracted procedural history and the claims asserted in this FLSA collective action and Rule 23 class case. A detailed case summary is set forth in the parties' Suggestions in Support of Joint Motion for Preliminary Approval of Class Settlement. (Doc. 258, at 1-5).

Under the terms of the parties' executed Settlement Agreement, Cerner agreed to offer significant benefits to a class of approximately 359 FLSA Opt-in Plaintiffs and 3,178 Rule 23 Class Members. (Settlement Agreement, Exh. 1, at 2-3; ¶ 2). To settle the wage-and-hour claims of the FLSA Opt-in Plaintiffs and the Rule 23 Class Members, Cerner agreed to create a settlement fund equal to four million, five hundred thousand dollars ($4,500,000.00) ("Settlement Total Available to Class"), plus Approved Attorneys' Fees and Costs of up to two million dollars ($2,000,000.00), for a total not to exceed six million, five hundred thousand dollars ($6,500,000) ("Qualified Settlement Fund"). *Id.* at ¶¶ 2, 5, 10. In addition, Cerner will directly pay Settlement Administrator fees and expenses. *Id.* at ¶ 7.

Upon final settlement approval, each Rule 23 Class Member submitting a valid claim form and each FLSA Opt-in Plaintiff shall receive their Eligible Settlement Amount determined by the equitable formula set forth in Paragraph 3 of the Settlement Agreement. *Id.* at ¶ 3. Rule 23 Class Members who did not previously opt in to the FLSA collective action must return a claim form consenting to release both their state and federal claims. *Id.* at ¶ 8(c)(ii); 29 U.S.C. 216(b) (FLSA's procedural opt-in requirement). Conversely, FLSA Opt-in Plaintiffs are not required to return a claim form because they previously consented to join the FLSA collective classes and to compromise their federal claims; however, those individuals may still exclude themselves in order to retain their claims. (Exh. 1, at ¶ 8(c)(iv)). With this Settlement, the

parties negotiated compensation for both federal FLSA claims and MMWL claims in exchange for a release of both federal and Missouri state claims. (Declaration of Tracey F. George ("George Decl."), attached as Exhibit 2, at ¶ 4). This is the only feasible means of resolving this case because Plaintiffs' Missouri overtime claims are based upon the same allegations as the FLSA claims, and applying the relevant statutes of limitations, the available damages under the MMWL wholly subsume those available to Plaintiffs under the FLSA. Accordingly, with this Settlement, Rule 23 Class Members who participate and receive compensation for their Missouri state law claims will be simultaneously compensated for their federal FLSA claims. *Id.* at ¶ 5.[2]

The Settlement provides the Rule 23 Class and FLSA Opt-in Plaintiffs with nearly all of the relief sought in the Complaint, including relief for both the FLSA and Missouri state law claims, without the delay and expenses of trial and post-trial proceedings. (George Decl., Exh. 1, at ¶ 6). Class Counsel utilized a damages model, prepared with the assistance of a PhD economist experienced in wage-and-hour class litigation, to value the various potential outcomes in this case should it proceed to trial. *Id.* at ¶ 7. Based upon this damages model, Class Counsel estimated the FLSA and Rule 23 Late Overtime claims in this case have a maximum value of approximately $2.6 million. *Id.* at ¶ 8. The FLSA and Rule 23 Miscalculated Overtime claims have an estimated value of approximately $210,000. *Id.* at ¶ 9. And, the FLSA and Rule 23 Fluctuating Work Week claims based upon the failure to pay a fixed salary to recipients of On-

[2] Settlement funds that are unclaimed by Rule 23 Class Members and proceeds remaining from un-cashed checks will revert to Defendant. (Exh. 1, at ¶ 11(b)). The parties have structured this arrangement to address the claims that will remain if class members fail to participate. Unlike a pure Rule 23 settlement in which all liability is extinguished and all claims are released, the Rule 23 Class Members in this hybrid-FLSA case who fail to return a claim form will only release their state law claims and will retain their corollary FLSA claims and could file claims in the future. When potential liability remains, reversion of unclaimed funds to the defendant is appropriate. *See, e.g., Nur v. Tatitlek Support Services, Inc.,* 15-CV-00094, 2016 WL 3039573 (C.D. Cal. April 25, 2016) (preliminarily approving FLSA settlement, noting "claims-made settlements, with a reversion of unclaimed funds to the employer are routinely approved. . .") (collecting cases).

Call Pay ("ON3"), Night Differential Pay ("NDF"), and Security Differential Pay ("ARM") and failure to include those pay types into regular rate calculations have an estimated maximum value of approximately $1.6 million. *Id.* at ¶ 10. The total estimated value of these claims is approximately $4.41 million. *Id.* at ¶ 11. Consequently, the $4.5 million Settlement Total Available to Class, plus approved Attorneys' Fees and Costs of up to $2 million, achieved with this Settlement Agreement exceeds the full value for these claims, eliminates the risks associated with trial and appeal, and is an excellent result warranting approval. *Id.*

The parties filed their Joint Motion for Preliminary Approval of Class Settlement, on November 11, 2017. (Docs. 257-258). This Court thoroughly considered that motion and, on December 27, 2017, granted preliminary approval of the Settlement; approved the proposed form and method for disseminating settlement notices as "the best notice practicable;" appointed Davis George Mook LLC and Reavey Law LLC as class counsel; established deadlines for notice administration, objections, final approval and fee briefing; and set a final fairness hearing. (Doc. 259).

Since that time, the parties, with the aid of third-party administrator Analytics Consulting, LLC ("Analytics"), have exchanged the necessary data to calculate Rule 23 Class Members' and FLSA Opt-in Plaintiffs' eligible settlement payments, administered the settlement notice and claims process, and responded to notice recipients' inquiries regarding their rights and eligibility under the Settlement Agreement. (George Decl., Exh. 2, at ¶ 13).

The total value of the parties' Settlement Agreement, inclusive of Approved Attorneys' Fees and Costs, is $6,500,000 ("Qualified Settlement Fund"). (Exh. 1, at ¶¶ 2, 5, 10). The Settlement Total Available to Class is $4,500,000. *Id.* at 2. Following the notice and claims process, 1,119 Rule 23 Class Members and 339 FLSA Opt-Ins have claimed a total of

$2,745,017.36. (George Decl., Exh. 2, at ¶ 14; Declaration of Caroline P. Barazesh ("Barazesh Decl."), attached as Exhibit 3, at ¶¶ 17-21). This means eligible Class Members and FLSA Opt-in Plaintiffs claimed more than 61% of the net settlement value, which sits ready to disperse upon this Court's final approval order. (George Decl., Exh. 2, at ¶ 15; Barazesh Decl., Exh 3., at ¶ 21).

Not a single objection was raised to the parties' Settlement Agreement, and only 1 individual (e.g. .03% of eligible Class Members and FLSA Opt-in Plaintiffs) elected to opt out and retain their rights to pursue their own claims. The high take rate, zero objections, and low opt-out number further reflect the fairness, reasonableness, and adequacy of the relief afforded under the parties' Settlement Agreement, which warrants this Court's final approval.

II. THE PARTIES PROVIDED THE BEST NOTICE PRACTICABLE TO THE CLASS MEMBERS.

Constitutional due process requires that absent class members receive the best notice practicable, reasonably calculated to inform them of the pendency of the action and affording them the opportunity to object. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); Fed. R. Civ. P. 23(c)(2)(B). The mechanics of the notice process, however, "are left to the discretion of the court subject only to the broad 'reasonableness' standard imposed by due process." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

Pursuant to Rule 23(e)(1)(B), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). The purpose of notice is to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. National R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974)).

A. Contents of Notice.

In ruling on the parties' preliminary settlement approval motion (Doc. 257), this Court already evaluated the FLSA and Rule 23 notices and claim form. (Doc. 257-1). This Court determined that the proposed notices satisfy "the requirements of Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e)(1), and due process" and constitute "the best notice practicable under the circumstances." (Doc. 259, at 2; ¶¶ 6-7).

Accordingly, this Court already held that the content of both the Rule 23 Class Notice and the FLSA Opt-in Plaintiffs' Notice constitute the best notice practicable under the circumstances and satisfy all procedural due process requirements.

B. Distribution of Notice.

Similarly, in its Order granting preliminary settlement approval, the Court approved the Settlement Agreement's proposed method for disseminating the notices and claim form. (Doc. 259, at ¶ 7). In addition, Class Counsel posted the Settlement Agreement, notices, and claim form on Davis George Mook LLC's and Reavey Law's website for viewing. (George Decl., Exh. 2, at ¶ 17). This Court previously held that the "[notice] procedures, carried out with reasonable diligence and coupled with the prior notice given to the class members, will constitute the best notice practicable under the circumstances and will satisfy the requirements of Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e)(1), and due process." (Doc. 259, at 2; ¶ 7).

The Settlement Administrator did, in fact, disseminate the notices as directed. (Barazesh Decl., Exh. 3, at ¶ 7). On February 27, 2018, Analytics mailed the following by first class mail: (1) the approved FLSA Missouri Notice ("FLSA MO Notice") to the last known address of 226 FLSA Opt-In Plaintiffs who worked in Missouri; (2) the approved FLSA Non-Missouri Notice ("FLSA Non-MO Notice") to the last known address of 115 FLSA Opt-in Plaintiffs who worked

outside of Missouri; and (3) the approved Rule 23 Class Notice and Claim form ("Rule 23 Notice Packet") to the last known address of 2,954 Rule 23 Class Members. (Barazesh Decl., Exh. 3, at ¶ 7). It was ultimately determined, following research to consolidate duplicate records (e.g. Class Members with slightly different names but same social security numbers and employee IDs), that there are 340 unique FLSA Opt-in Plaintiffs and 2,955 unique Rule 23 Class Members. *Id.* at ¶ 7.

A total of 151 Rule 23 Notice Packets and 13 FLSA Opt-In Notices were initially returned as undeliverable by the Post Office. *Id.* at ¶ 9. Analytics ran a skip trace address search for individuals whose notice the Post Office returned as undeliverable without a forwarding address, in a further attempt to locate these individuals and provide them with the opportunity to participate in the settlement. *Id.* at ¶ 10. The undeliverable addresses were researched and 100 updated addresses for Rule 23 Class members and 8 updated addresses for FLSA Opt-In Plaintiffs were found. *Id.* at ¶ 11. Notice Packets were mailed to the updated addresses. *Id.* at ¶ 11.

Of the re-mailed notice packets, 13 Rule 23 Notice Packets and 1 FLSA Notice were again returned as undeliverable by the Post Office. *Id.* at ¶ 12. Six FLSA Notices were returned with a forwarding address, and these were promptly re-mailed to the updated address. *Id.* at ¶ 13. Six FLSA Notices and 17 Rule 23 Notice Packets were re-mailed at the request of class members who either contacted Analytics through the dedicated toll-free phone number or contacted Class Counsel, who then forwarded the request to Analytics. *Id.* at ¶ 14.

The Notices provided instructions on how Class Members could object to the Settlement. *Id.* at ¶ 15. Analytics did not receive any objections to the settlement. *Id.* The Notices also provided instructions on how Class Members and FLSA Opt-in Plaintiffs could exclude

themselves from the settlement. *Id.* at ¶ 16. As of May 31, 2018, 1 timely opt-out request was received by Analytics. *Id.* at ¶ 16.

As of May 31, 2018, 1,119 timely and valid Rule 23 Class Claim Forms have been received. *Id.* at ¶ 17. There are 1,119 Rule 23 Class Claimants, 225 FLSA MO Opt-in Plaintiffs, and 114 FLSA Non-MO Opt-in Plaintiffs. *Id.* at ¶ 17. The total value of the 1,119 valid Rule 23 claims is $1,973,259.64. *Id.* at ¶ 18. The total value of the settlement awards for all FLSA Opt-In Plaintiffs is $772,757.72. *Id.* at ¶¶ 19-20. Accordingly, following the notice and claims process, 1,458 Class Members (Rule 23 Claimants and FLSA Opt-Ins) have asked to receive $2,746,017.36 (e.g. 61.02%) of the $4,500,000 net settlement proceeds made available under the Settlement Agreement. (George Decl., Exh. 2, at ¶ 18).

The parties' notice plan, which this Court approved and the Settlement Administrator implemented, constituted the best notice practicable to inform the Rule 23 Class Members and FLSA Opt-in Plaintiffs of their rights and options under the Settlement Agreement.

III. THE TERMS OF THE RULE 23 SETTLEMENT ARE FAIR, REASONABLE AND ADEQUATE.

"Under Federal Rule of Civil Procedure 23(e), the district court acts as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 932 (8th Cir. 2005) (citing *Grunin,* 513 F.2d at 123). A district court is required to consider four factors in determining whether a settlement is fair, reasonable, and adequate:

(1) The merits of the plaintiff's case, weighed against the terms of the settlement;

(2) The defendant's financial condition;

(3) The complexity and expense of further litigation; and

(4) The amount of opposition to the settlement.

Id. (citing *Grunin,* 513 F.2d at 124 (citations omitted)). *See also Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir. 1988).

In assessing these factors "[j]udges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1148-49 (8th Cir. 1999) "[S]trong public policy favors agreements, and courts should approach them with a presumption in their favor." *Little Rock School District v. Pulaski County Special School District No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990); *see also Petrovic*, 200 F.3d at 1148. There is "an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation of being most complex." *Assoc. for Disabled Americans, Inc. v. Amoco Oil Corp*., 211 F.R.D. 457, 466 (S.D. Fla. 2002).

A. The Merits of Plaintiffs' Case, Weighed Against the Settlement Agreement's Terms, Support Final Settlement Approval.

"The most important consideration in this context is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Grunin*, 513 F.2d at 124 (quoting *West Virginia v. Charles Pfizer and Company, Inc*., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971)); *Petrovic*, 200 F.3d at 1150. Considering this factor for each of the claims, this Settlement Agreement is quite favorable and warrants final approval.[3]

1. The Late Overtime Settlement.

Plaintiffs negotiated a settlement that would re-pay Rule 23 Class Claimants and FLSA Opt-in Plaintiffs for 100% of their Missouri and FLSA Late Overtime Claims. (George Decl., Exh. 2, at ¶ 19). Class Counsel utilized a damages model, prepared with the assistance of a PhD

[3] In this section, Plaintiffs discuss the merits of the Rule 23 settlement together with the FLSA settlement because, as discussed, the claims are inextricable wound and the vast majority of FLSA Opt-in Plaintiffs are also Rule 23 Class Members. However, the standard for approving FLSA settlements is discussed separately at Paragraph IV.

economist experienced in wage-and-hour class litigation, to value the various potential outcomes in this case should it proceed to trial. *Id.* at ¶ 20. Based upon this damages model, Class Counsel estimated the FLSA and Rule 23 Late Overtime claims in this case have a maximum value of approximately $2.6 million. *Id.* at ¶ 21. Applying the Settlement Agreement's equitable point system, Rule 23 Class Members and FLSA Opt-in Plaintiffs with Late Overtime claims were allocated 2,700,482.61 points, and each point had a pro rata dollar value of $.992. *Id.* at ¶ 22. Accordingly, the Late Overtime Claim settlement proceeds total $2,679,351, which exceeds the $2.6 million estimated maximum claim value for Plaintiffs' Late Overtime claims. *Id.* at ¶ 23.

This is an exceptionally favorable result. Plaintiffs have nothing to gain by going to trial on this claim. *Id.* at ¶ 24. While Class Counsel estimate the likelihood of success on this claim as very high, Defendant has indicated its intent to appeal the issue of whether Missouri's Minimum Wage and Maximum Hours Law (the "MMWL") allows a private right of action for late payment of overtime. (Cerner Corporation's Request to Certify Issue For Interlocutory Appeal Under 28 U.S.C. § 1292(B), Doc. 244); (George Decl., Exh. 2., at ¶ 25). With this Settlement, Rule 23 Class Claimants and FLSA Opt-in Plaintiffs recover the full value of their Late Overtime claims under Missouri and federal law, without the risks and delay of trial and appeal. *Id.* at ¶ 26. Accordingly, this factor supports final approval.

2. The Miscalculated Overtime Settlement.

The parties' Settlement Agreement repays Rule 23 Class Claimants and FLSA Opt-in Plaintiffs for more than 100% of their Miscalculated Overtime claims. This, too, is a favorable result, warranting final approval. (George Decl., Exh. 2., at ¶ 27). Specifically, each Rule 23 Class Claimant and FLSA Opt-in Plaintiff is allocated a minimum $250 payment, designed to

compensate for release of the Rule 23 and FLSA Miscalculated Overtime claims. *Id.* at ¶ 28; (Settlement Agreement, Exh. 1, at ¶ 3). These minimum payments total $823,750. (George Decl., Exh. 2, at ¶ 29). However, Plaintiff's expert damages calculations estimate the Miscalculated Overtime claims have a value of approximately $210,000, and the average Miscalculated Overtime claim is $67 per Class Member. *Id.* at ¶ 30. Consequently, even with liquidated damages, the Settlement Agreement provides more relief for the Miscalculated Overtime claims than Plaintiffs could hope to recover at trial. *Id.* at ¶ 31.

With this Settlement Agreement, Plaintiffs avoid the risks, expense, and delay of continued litigation, trial, and appeal. This is more than a fair, adequate, and reasonable result for the Class Members.

3. The Fluctuating Work Week Settlement.

The Rule 23 and FLSA Fluctuating Work Week ("FWW") claims based upon the failure to pay a fixed salary to recipients of ON3, NDF, and ARM and failure to include those pay types into regular rate calculations have an estimated maximum value of approximately $1.6 million ($794,355 x 2 (liquidated damages) = $1,588,711).[4] *Id.* at ¶ 32. With this Settlement's equitable points system, individuals who were paid on a FWW basis during pay periods in which they earned ON3, NDF, and ARM during the applicable statute of limitations periods are allocated

[4] Plaintiffs would argue at trial that payment of the Wellness Incentive also runs afoul of the fluctuating work week's "fixed salary" requirement, and failure to include Wellness Incentive pay in regular rate calculations resulted in failure to contemporaneously pay at least 50% overtime premiums, thereby invalidating the fluctuating work week method. (George Decl., Exh. 2, at ¶ 12). However, Cerner vehemently disagrees, and there is an absence of case law on whether this type of incentive pay is sufficiently tied to continued employment (i.e. hour worked) to run afoul of the Fluctuating Work Week requirements. *Id.* Success on this theory of liability was far from certain, and in the interests of obtaining a fair and reasonable settlement, balanced against the risks of trial and appeal, Plaintiffs agreed to settle their claims for effectively full recovery on all other theories of liability. *Id.* Notably, this Settlement does provide full relief to recipients of the Wellness Incentive for Defendant's failure to include that pay type into overtime calculations—though, again, Defendant denies it was required to include Wellness Incentives in overtime calculations. *See* discussion *supra* at Paragraph III.A.2. If this Settlement is not approved, however, Plaintiffs will pursue all theories of liability relating to the Wellness Incentive. *Id.*

989,643 points, valued at $.992 per point, for a total of $981,726—these points and proceeds are allocated in addition to points and proceeds already allocated to these same individuals for their Late Overtime claims and Miscalculated Overtime claims stemming from Defendant's treatment of these same pay types. *Id.* at ¶ 33. Specifically, these same individuals each also received an additional $250 minimum payment for Defendant's alleged miscalculation of overtime flowing from its treatment of these same pay types, as well as full repayment of these same allegedly late overtime wages paid under the FWW method. *Id.* at ¶ 33. Accordingly, due to the overlapping nature of these claims (i.e. Late Overtime and Miscalculated Overtime allegations also support Plaintiffs' claims that Defendant violated the FWW requirements and, instead, owes time-and-a-half overtime), Rule 23 Claimants and FLSA Opt-in Plaintiffs who were paid on a FWW basis and received ON3, NDF, and ARM that was not included in their overtime pay ultimately receive nearly full recovery with this Settlement. *Id.* at ¶ 34. The total points allocated to these individuals equals 1,353,774, each valued at $992 per point, for a total of $1,342,944 to compensate for claims with a maximum value of $1,588,711—inclusive of liquidated damages. *Id.* at ¶ 35.

This, again, is an exceptional result. Plaintiffs' success on this claim would require not only legal rulings that Defendant was required to include each pay type (ON3, NDF, and ARM) into regular rate calculations when paying overtime, but also rulings that payment of each pay type violated the FWW's fixed salary requirements, and also a determination that Defendant failed to act in good faith in utilizing the FWW method (in order to obtain an award of liquidated damages). *Id.* at ¶ 36. And, while Plaintiffs were confident they would succeed in obtaining each of these rulings, Defendant vehemently disagreed and expressed intentions to litigate these issues through appeal. *Id.* at ¶ 37. Instead, this Settlement provides 85% of this claim's

maximum value—including liquidated damages—without any risks or delay associated with continued litigation, trial, and appeal. *Id.* at ¶ 38.

4. The Settlement On The Whole Is Fair, Reasonable and Adequate.

On the whole, Plaintiffs and Class Counsel agree that the Settlement Agreement affords exceptional relief to the Rule 23 Class and FLSA Opt-in Plaintiffs. (George Decl., Exh. 2, at ¶ 39). Plaintiffs' own damages expert determined the maximum claim value for the claims discussed above total approximately $4.41 million, and this Settlement provides a Settlement Total Available to Class of $4.5 million, plus Approved Attorneys' Fees and Costs plus the settlement administration costs. *Id.* at ¶ 40. Consequently, the result achieved with this Settlement Agreement exceeds the combined full recovery value for these claims, eliminates the risks associated with trial and appeal, and is an excellent result warranting approval. *Id.* at ¶ 41.

If the parties did not agree to settle this case, Defendant would have the opportunity to argue at trial that it acted in good faith and, if proven, avoid liquidated damages. *Id.* at ¶ 42. If Defendant avoided liquidated damages, Plaintiffs could potentially recover nothing, or only a nominal amount for interest, on their Late Overtime claims, and Plaintiffs' remaining damages claims would be cut in half. *Id.* at ¶ 43. Moreover, in the event Plaintiffs prevailed at trial, Defendant has already indicated its intent to file an appeal given the complex legal issues that underlie the claims in this case, including regarding the viability of Plaintiffs' late overtime and fluctuating work week theories and the corresponding validity of all Class Members' claims. *Id.* at ¶ 44. Defendant believes it has strong legal arguments against many of Plaintiffs' theories and would test them on appeal in the absence of a settlement. *Id.* at ¶ 45. In light of these risks, the proposed class Settlement constitutes a fair, reasonable, and adequate compromise of the issues in dispute that provides meaningful relief to the Class. *Id.* at ¶ 46.

Moreover, 1,119 Rule 23 Class Members and 339 FLSA Opt-in Plaintiffs (most of who are also settling Rule 23 claims) have elected to receive these settlement proceeds, and absent this litigation, many of these individuals' claims are time barred and/or restricted to individual arbitrations pursuant to Defendant's recent arbitration agreement, which purports to preclude an employee from filing or participating in any lawsuit to recover unpaid wages unless the lawsuit was already on file prior to the employee signing the arbitration agreement. *Id.* at ¶ 47. Consequently, this litigation—and this exceptional Settlement—is the only realistic hope many of these Rule 23 Class Claimants and FLSA Opt-in Plaintiffs have of recovering the unpaid overtime wages sought here.

For these reasons, the Settlement Agreement is a fair, reasonable, and adequate result for the Rule 23 Class, and this Court should grant final settlement approval.

B. The Defendants' Financial Condition Supports Final Settlement Approval.

Publically available financial disclosures confirm that Defendant's financial condition is strong and does not present any cause for concern that a future judgment might go unsatisfied. *Id.* at ¶ 49. This factor, however, weighs in favor of settlement in this case because Defendant is financially capable of protracting this litigation through motions practice, trial, and appeal, and Defendant is much more financially capable of defending against individual lawsuits or arbitrations than each Class Member is to file them. As discussed *supra*, without this litigation and this favorable Settlement, the Rule 23 Class Members and FLSA Opt-in Plaintiffs would need to file individual arbitrations to recover their unpaid overtime wages, and few if any attorneys could invest the time and resources—on a contingent basis—to pursue individual litigation to collect the relatively small amount of unpaid overtime one plaintiff might hope to recover. *Id.* at ¶ 50. This fact renders individual cases cost-prohibitive for the Class Members

but economically feasible for Defendant. This factor, therefore, weighs in favor of final settlement approval.

C. The Complexity and Expense of Further Litigation Supports Final Settlement Approval.

Plaintiffs and Class Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute this litigation through trial and likely appeal. With expert witness fees, video/technology consultant fees, witness travel and lodging, exhibit costs, and other trial-related expenses, Class Counsel estimate they would incur more than $50,000 in additional costs and expenses to try this case. *Id.* at ¶ 51. In addition, Class Members called to testify would lose even more wages when they are required to take off work to attend trial. *Id.* at ¶ 52. And, the attorneys' fees would substantially increase through trial and appeal. *Id.* at ¶ 53. All of these added expenses come at the risk of obtaining far less for the Class Members than this Settlement provides.

To be clear, Class Counsel believe that the claims asserted in the litigation are quite strong; however, Plaintiffs and Class Counsel have taken into account that there is no certain outcome and there are risks associated with further litigation. *Id.* at ¶ 55. Defendant, while also mindful of the uncertainties of litigation, has aggressively maintained its positions regarding liability and damages. They deny both. Class Counsel is mindful of Defendant's possible defenses to the claims asserted in the litigation. *Id.* at ¶ 56. Given the nature of the case, it is certain that any final decision on the merits would be appealed, which would undoubtedly cause further delay and increased expense.

In contrast, the Settlement Agreement provides significant benefits for Rule 23 Class Claimants and FLSA Opt-in Plaintiffs without the delay and expense described herein. Due to

the risks and expense associated with continued litigation and the uncertainty of prevailing both at trial and on appeal, this factor favors final approval of the Settlement Agreement.

D. There Are No Objections to This Settlement Agreement, Which Supports Final Settlement Approval.

Notably, not a single objection to the Settlement Agreement was filed in this case. With direct mail notice sent to every Rule 23 Class Member and FLSA Opt-in Plaintiff, to receive no objections to the Settlement Agreement is a testament to its ultimate fairness. Settlements have been approved with multiple objectors and numbers as high as 4-10% of the class objecting. *See Petrovic*, *supra.* Here, the lack of even one objection shows overwhelming support for the value and benefits delivered by the Settlement Agreement. This factor weighs heavily in favor of final settlement approval.

In this case, each of the four factors District Courts consider in evaluating a Rule 23 settlement weigh heavily in favor of final settlement approval. This Settlement Agreement offers fair, reasonable, and adequate relief for Class Members, and Plaintiffs request this Court's final approval.

IV. THE FLSA SETTLEMENT IS A FAIR AND EQUITABLE RESOLUTION OF A BONA FIDE WAGE AND HOUR DISPUTE.

To approve an FLSA settlement under 29 U.S.C. § 216(b), the court must find that: "(1) the litigation involves a bona fide wage and hour dispute; (2) the proposed settlement is fair and equitable to all parties concerned; and (3) the proposed settlement contains an award of reasonable attorneys' fees." *McGee v. Concentra Health Servs., Inc.*, No. 12-CV-1277-W-DGK, 2015 WL 58532, at *2 (W.D. Mo. Jan. 5, 2015) (quoting *Hill v. World Wide Tech. Holding Co.,* No. 11–CV–2108–AGF, 2012 WL 5285927, at *1 (E.D. Mo. Oct. 25, 2012)). Because all three criteria are satisfied here, this Court should grant FLSA settlement approval.

A. This Litigation Unquestionably Involves A Bona Fide Wage and Hour Dispute.

To satisfy the first element, the existence of a bona fide dispute, this Court requires the parties provide the following information:

> (1) a description of the nature of the dispute (for example, a disagreement over coverage, exemption or computation of hours worked or rate of pay); (2) a description of the employer's business and the type of work performed by the employees; (3) the employer's reasons for disputing the employees' right to a minimum wage or overtime; (4) the employees' justification for the disputed wages; and (5) if the parties dispute the computation of wages owed, each party's estimate of the number of hours worked and the applicable wage.

McGee, 2015 WL 58532, at *2 (citing *Gambrell v. Weber Carpet, Inc.,* No. 10–CV–2131–KHV, 2012 WL 162403, at *3 (D. Kan. Jan 19, 2012)).

This Court is, by now, well versed in the nature of the Parties' wage and hour disputes in this matter, having read and ruled on literally hundreds of pages of class certification briefing, dispositive motion briefing, certification for interlocutory appeal briefing, and settlement approval briefing. Plaintiffs include the following information, nonetheless, to illustrate the bona fide nature of their dispute.[5]

1. Defendant's Business and the Work Opt-In Plaintiffs Performed.

Defendant Cerner Corporation is a health information technology company that provides software applications and support to more than 27,000 provider facilities worldwide and employs more than 27,500 associates in 26 countries, primarily in the United States. *See* Cerner Corporation's Website, www.cerner.com/about (last visited June 1, 2018). Plaintiffs and the FLSA Opt-In Plaintiffs are hourly, non-exempt ("Hourly") and salaried, non-exempt ("FWW")

[5] Plaintiffs incorporate by reference, here, the parties' conditional certification and Rule 23 class certification briefing, which fully supports the representations in this section regarding the nature of the parties' bona fide dispute. (Docs. 69, 70, 97, 98, 107, 113, 153, 154, 166, 167, 172, 182, 187, 195).

employees who provide services to Cerner's contracted provider facilities and/or support Cerner's own operations in Missouri and throughout the United States.

2. Description and Nature of Wage Dispute.

Plaintiffs Fred Speer and Mike McGuirk, on behalf of themselves and others similarly situated, filed a FLSA collective and Rule 23 class action under the MMWL to recover unpaid overtime wages against Cerner. (Doc. 1). Subsequently, Plaintiffs filed an Amended Complaint reasserting substantially the same claims on January 14, 2015. (Doc. 39). Specifically, Plaintiffs allege Cerner subjected them and other nonexempt employees to unlawful pay practices, including: (1) late payment of overtime premiums, (2) miscalculation of overtime premiums, and (3) improper utilization of the fluctuating work week method for calculating and paying overtime wages. Plaintiffs pleaded that Cerner violated both the FLSA and the MMWL by failing to pay all of the overtime wages due and owing. (Doc. 39). Defendant denies that its practice of paying overtime a full pay period behind constituted late payment, denies that it miscalculated overtime, denies that its pay practices ran afoul of the FLSA's FWW requirements, and also denies that Plaintiffs and the FLSA Opt-in Plaintiffs can recover damages even if its pay practices are held to have violated FLSA's timing and FWW requirements. (Doc. 47).

3. Employer's Reasons For Disputing Employees' Right to Overtime.

Defendant admits the FLSA Opt-in Plaintiffs are non-exempt and entitled to overtime wages for work in excess of 40 hours in a workweek. However, in this case, Defendant contends that it paid overtime to the Late Overtime FLSA Opt-in Plaintiffs as soon as reasonably practicable following its calculation of the overtime owed. (Doc. 190). Defendant also contends it did not violate the FLSA when it omitted certain additional compensation from overtime calculations. (Doc. 47) And, Defendant contends that the DOL's interpretive guidance

concerning the FWW method for calculating and paying overtime, set forth in 29 C.F.R. 778.114, is not controlling and that it can utilize the FWW method whether or not it pays a fixed salary or otherwise meets the requirements of 778.114. (Doc. 104).

4. Employees' Justification For The Disputed Wages.

Plaintiffs and the FLSA Opt-in Plaintiffs contend that Defendant willfully elected to systematically pay overtime wages a full pay period behind to each of its salaried, non-exempt ("FWW") employees because it employed only one payroll clerk to complete the overtime calculations for these employees, it did not begin the calculations until several days after the close of the pay period, and the entire process only took 16-23 hours and could have easily been completed in time to pay the overtime on the regular pay day for the pay period in which the overtime was earned. (George Decl., Exh. 2, at ¶ 57). Plaintiffs also contend Defendant was required but failed to include all remuneration into overtime calculations because—until after this lawsuit was filed—it utilized a payroll calculation formula that omitted additional compensation from overtime calculations. *Id.* at ¶ 58. Plaintiffs also contend Defendant's payment of additional compensation, such as ON3, NDF, and ARM, violated the fixed salary requirement for utilizing the FWW method, and that Defendant also failed to pay at least 50% overtime premiums due to its miscalculated and late-paid overtime practices, thereby destroying the FWW method and requiring Defendant to pay time-and-half overtime premiums instead of half-time. *Id.* at ¶ 59. Plaintiffs also contend Defendant's violations were willful, as evidenced by the fact that Defendant promptly began including additional compensation into overtime calculations and also began timely paying overtime shortly after Plaintiffs filed this lawsuit. *Id.* at ¶ 60.

5. Computation of Disputed Unpaid Wages.

The parties do not necessarily have a dispute over the computation of alleged damages. Instead, the parties dispute whether Defendant's pay practices violated the FLSA and MMWL, whether Plaintiffs are owed any damages at all, whether Defendant failed to act in good faith even if it violated the law (liquidated damages), and whether any violation was willful (triggering the FLSA's 3-year statute of limitations).

All factors considered, there is no question this Settlement Agreement resolves a bona fide FLSA wage and hour dispute.

B. The Proposed Settlement Is Fair And Equitable To All Parties.

This settlement is the product of multiple, extensive arm's-length negotiations by experienced counsel and provides meaningful, significant, monetary relief to all the FLSA Opt-in Plaintiffs. It also eliminates the very real and inherent risks both sides would bear if this complex litigation continued to resolution on the merits. Under these circumstances, a presumption of fairness attaches to the proposed settlement. *See Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1354 (11th Cir. 1982) (courts rely on the adversarial nature of a litigated FLSA case resulting in settlement as indicia of fairness); *see also In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery") (citations omitted).

In evaluating the fairness and equitableness of the proposed settlement, courts consider many of the same factors used in evaluating a proposed Rule 23 class action settlement, including:

> (1) at what stage of the litigation the settlement was reached, and the complexity, expense, and likely duration of the remaining litigation; (2) how the settlement was negotiated, i.e., whether there are any indicia of collusion; (3) class counsel, the parties, and the class members' opinions about the settlement; and (4) whether the present value of the settlement outweighs the potential recovery after continued litigation.

McGee v. Concentra Health Servs., Inc., No. 12-CV-1277-W-DGK, 2015 WL 58532, at *3 (W.D. Mo. Jan. 5, 2015) (citing *Sanderson v. Unilever Supply Chain, Inc.,* No. 4:10–CV–0775–FJG, 2011 WL 5822413, at *2 (W.D. Mo. Nov. 16, 2011)). And, in this case, all applicable considerations support the fairness of this FLSA settlement.

1. Stage of The Litigation When Settlement Was Reached.

This Settlement Agreement was reached after years of litigation, including many months of discovery, extensive collective action and Rule 23 class certification briefing, and exhaustive dispositive motion briefing. *See* thorough discussion of litigation history at Doc. 258, at 1-5; *see also* Docket Sheet. This factor supports the fairness of the parties' Settlement Agreement, which was the well-informed, hard-fought result of years of litigation.

2. How The Settlement Was Negotiated.

The Settlement in this case was reached only following three separate mediations, with the aid of three reputable FLSA mediators. (George Decl., Exh. 2, at ¶ 61). The contentious and protracted procedural history in this case, together with multiple failed mediations prior to reaching an agreement, removes any question of collusion between the Parties. *Id.* at ¶ 62.

Furthermore, the parties negotiated the FLSA Opt-in Plaintiffs' and Rule 23 Class Members' eligible Settlement Total Available to Class separately from Class Counsels'

attorneys' fees. *Id.* at ¶ 63. And, Class Counsel agreed to seek a reduced lodestar fee award so as to maximize the settlement obtained for the Class. *Id.* at ¶ 64. In turn, Defendants agreed to pay these fees separate from and without reducing the Class Members' eligible settlement payments. *Id.* at ¶ 65.

Accordingly, this factor, too, supports the fairness of the Parties' Settlement Agreement.

3. Plaintiffs' and Class Counsels' Opinions About the Settlement.

Plaintiffs and Class Counsel, as well as the FLSA Opt-in Plaintiffs, concur that this Settlement Agreement is a highly favorable result. *Id.* at ¶ 66. For all the reasons set forth *supra* in Paragraph III.A., Plaintiffs and Class Counsel are confident this resolution is in the best interests of all the Class Members, including the FLSA Opt-in Plaintiffs. *Id.* at ¶ 67.

Additionally, Class Counsel have received numerous calls, on a near-daily basis, from Class Members, including FLSA Opt-in Plaintiffs, inquiring as to when they will receive their settlement payments. *Id.* at ¶ 68. This suggests the Class Members, including FLSA Opt-in Plaintiffs, very much want the benefits of this Settlement Agreement, even after receiving full and fair notice of the Settlement details and their rights to object or otherwise opt out. *Id.* at ¶ 69.

This Settlement's approval is further bolstered by the fact that not one Class Member objected to this Settlement Agreement, and only 1 Class Members (e.g., .03%) opted out of this case. This suggests the Class Members, including FLSA Opt-in Plaintiffs, view the Settlement Agreement as a fair and equitable result.

4. Whether The Present Value of The Settlement Outweighs The Potential Recovery After Continued Litigation.

Plaintiffs incorporate the briefing of this issue set forth *supra* at Paragraph III.A. The parties' Settlement Agreement provides nearly full recovery for Plaintiffs' FLSA and Rule 23

Late Overtime Claims; Miscalculated Overtime Claims; and Fluctuating Work Week claims based upon failure to pay a fixed salary to recipients of ON3, NDF, and ARM and failure to include those pay types into regular rate calculations. For the reasons set forth in Paragraph III.A., any remote possibility of greater success at trial is far outweighed by the added costs, risks, and delay of continued litigation. *Id.* at ¶ 71. This factor supports the fair and equitable nature of the Settlement Agreement, which warrants this Court's approval.

C. The Settlement Agreement Contains An Award Of Reasonable Attorneys' Fees.

The FLSA provides that the Court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action." 29 U.S.C. § 216(b) (2008). The Settlement Agreement contains an award of reasonable attorneys' fees, costs, and expenses. Plaintiffs separately filed their Unopposed Motion for Attorneys' Fees, Costs, and Service Awards With Integrated Suggestions in Support. (Doc. 263). Plaintiffs respectfully request this Court approve their requests for fees, expenses, and Service Awards, and they incorporate without restating here all their arguments set forth fully in their unopposed motion. (Doc. 263).

Considering each of the applicable factors, the FLSA settlement is a fair and equitable resolution of a bona fide wage dispute, and it includes an award of reasonable attorneys' fees. Accordingly, this Court should approve the FLSA settlement in the Parties' Settlement Agreement.

WHEREFORE, for the reasons set forth above and in the supporting declarations and exhibits, Plaintiffs ask this Court to grant final Rule 23 and FLSA approval of the parties' Settlement Agreement, and for such other relief as this Court deems proper.

Dated: June 6, 2018

Respectfully submitted,

DAVIS GEORGE MOOK LLC

/s/ *Tracey F. George*
Brett A. Davis, Mo. Bar 43299
Tracey F. George, Mo. Bar 52361
1600 Genessee, Ste. 328
Kansas City, MO 64102
Phone: 816-569-2629
Fax: 816-447-3939
brett@dgmlawyers.com
tracey@dgmlawyers.com

REAVEY LAW LLC

/s/ *Patrick G. Reavey*
Patrick G. Reavey, MO#47365
Kevin C. Koc, MO#56955
Livestock Exchange Building
1600 Genessee, Suite 303
Kansas City, Missouri 64102
(816) 474-6300 Telephone
(816) 474-6302 Facsimile
patrick@reaveylaw.com
kkoc@reaveylaw.com

Attorneys For Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of June, 2018, a true and correct copy of the foregoing was served via operation of the Court's ECF system on all counsel of record.

/s/ *Tracey F. George*
Attorney for Plaintiff