IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TOREY FITZGERALD, KENNETH MCCOY, and ALAN MOORE, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**No. 2:17-cv-02251-SHM-cgc**
v.	)	
P.L. MARKETING, INC.,	)	
Defendant.	)	

ORDER

Before the Court is the October 31, 2019 Motion for Unopposed Preliminary Approval of Class and Collective Action Settlement (the "Motion"), brought by Plaintiffs Torey Fitzgerald, Kenneth McCoy, and Alan Moore (collectively, "Plaintiffs" or "Named Plaintiffs").[1] (ECF No. 88.) Also before the Court is the January 16, 2020 Joint Motion for a Preliminary Conference (the "Motion for Preliminary Conference"). (ECF No. 92.)

[1] For purposes of this Order, the Court adopts all defined terms as set forth in the parties' proposed settlement agreement (ECF No. 88-1) unless otherwise defined in this Order.

For the following reasons, the Motion is GRANTED. The Motion for Preliminary Conference is DENIED AS MOOT.

I. Background

This dispute stems from Defendant P.L. Marketing, Inc.'s ("PLM") alleged failure to pay overtime compensation to certain employees. PLM provides in-store merchandise display work in Kroger Co. ("Kroger") grocery stores. (ECF No. 88 at 2.) Inter alia, PLM conducts store "sets" and "resets" in Kroger stores. (Id.) During store sets and resets, PLM employees travel to various Kroger stores and arrange products and pricing on shelves and displays. (Id. at 2-3.) Two types of PLM employees participate in store sets and resets: (1) Set/Reset/Surge Team Members ("STMs") and (2) Set/Reset/Surge Team Leads ("STLs").[2] (Id. at 2, 15.) Until December 2016, PLM classified STMs as salaried employees exempt from federal and state overtime laws. (Id. at 3.) Beginning in December 2016, PLM reclassified STMs as hourly employees who are not exempt from federal and state overtime laws. (Id.) PLM continues to classify STLs as salaried employees exempt from federal and state overtime laws. (Id.)

On April 13, 2017, Plaintiff Torey Fitzgerald filed a Complaint in this action (the "Initial Complaint"). (ECF No. 1.) In the Initial Complaint, Fitzgerald, a PLM employee,

[2] The parties do not explain what a "Surge Team Member" or "Surge Team Lead" is.

alleged that PLM had failed to pay overtime compensation to him and other similarly situated STMs and STLs as required under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. (Id. ¶ 1.) Fitzgerald alleged that PLM had incorrectly classified STMs and STLs as exempt from the federal overtime laws. (Id. ¶¶ 1, 30.) Fitzerald sought to represent himself and other similarly situated STMs and STLs in a collective action under the FLSA. (Id. ¶ 39.)

On August 14, 2017, PLM filed an Answer to the Initial Complaint. (ECF No. 29.) On September 22, 2017, the parties executed a tolling agreement (the "Tolling Agreement") in which they agreed to toll any federal or state law overtime claims arising in this litigation, as of an effective date of August 18, 2017, until final resolution of the claims presented. (ECF No. 88 at 3-4.)

On November 3, 2017, pursuant to an October 6, 2017 joint stipulation entered into by the parties, this Court conditionally certified the following set of similarly situated plaintiffs for the FLSA collective action asserted in the Initial Complaint:

> Any person who worked for Defendant as a Set/Reset Team Member, a Set Team Leader, a Surge Set Team Member or Surge Set Team Leader internally classified and/or paid or treated by Defendant as exempt from overtime pay requirements, and was paid on that basis for one or more weeks for that work by salary (not hourly) on a pay date occurring within the period beginning three (3) years prior to August 18, 2017 through the date of judgment.

(ECF No. 42 ¶ 5; ECF No. 50.) At the same time, and also pursuant to the October 6, 2017 joint stipulation entered into by the parties, this Court approved the distribution of notice and opt-in consent forms to putative members of the collective action. (ECF No. 42 ¶ 6; ECF No. 50.) The approved notice and opt-in consent forms were distributed and a total of 161 individuals opted in to the collective action. (ECF No. 88 at 4.)

On May 8, 2018, the parties engaged in a mediation session with a third-party mediator. (Id. at 6.) That mediation session was unsuccessful. (Id.) On July 10, 2019, the parties engaged in a second mediation session with the same mediator, during which the parties reached a settlement. (Id. at 7.)

On October 31, 2019, Fitzgerald and Plaintiffs Kenneth McCoy and Alan Moore filed the First Amended Complaint (the "Amended Complaint"). (ECF No. 86.) The Amended Complaint alleges three causes of action. First, Plaintiffs allege that PLM failed to pay overtime compensation to Plaintiffs and similarly situated STMs and STLs as required under the FLSA. (Id. ¶¶ 1, 42-53.) Second, Plaintiff Moore alleges that PLM failed to pay overtime compensation to Moore and a putative class of Ohio-based STMs under Ohio's overtime laws. (Id. ¶¶ 2, 54-64.) Third, Plaintiff McCoy alleges that PLM failed to pay overtime compensation to McCoy and a putative class of Kentucky-based STMs under Kentucky's overtime laws. (Id. ¶¶ 3, 65-74.) Pursuant to the

parties' Tolling Agreement, the claims presented in the Amended Complaint are deemed, for purposes of the applicable statutes of limitation, to have been filed on August 18, 2017. (ECF No. 88 at 3-4.)

On October 31, 2019, Plaintiffs filed the Motion and the parties' proposed settlement agreement (the "Settlement Agreement"). (See ECF Nos. 88, 88-1.) The Settlement Agreement proposes a settlement (the "Settlement") of all claims asserted in the Amended Complaint on behalf of the members of the FLSA opt-in collective action (the "FLSA Collective"), the members of the putative class of Ohio-based STMs (the "Ohio Class"), and the members of the putative class of Kentucky-based STMs (the "Kentucky Class"). (See ECF No. 88-1.) The Settlement Agreement defines the FLSA Collective, the Ohio Class, and the Kentucky Class as:

> FLSA Collective: All individuals who filed Consents in the Litigation that were not withdrawn as of the July 10, 2019 mediation date, and who work or worked for PLM as Set/Reset/Surge Team Members or Set/Reset/Surge Team Leaders and who were paid as exempt for that work.
>
> Ohio Class: All individuals reflected on the parties' agreed upon class list as of the July 10, 2019 mediation and who worked for PLM as Set/Reset/Surge Team Members and who were paid as exempt for that work within the period beginning August 18, 2015, through the December 4, 2016 pay date.[3]

[3] The covered time period for the Ohio Class extends back to August 18, 2015 to account for Ohio's two-year statute of limitations for

> Kentucky Class: All individuals reflected on the parties' agreed upon class list as of the July 10, 2019 mediation and who worked for PLM as Set/Reset/Surge Team Members and who were paid as exempt for that work within the period beginning August 18, 2012, through the December 4, 2016 pay date.[4]

(Id. ¶ 3.) The Settlement Agreement provides that PLM shall establish a Settlement Fund. (ECF No. 88-1 ¶ 6.) The Settlement Fund will first be used to pay attorney's fees, litigation costs and expenses, notice and administration expenses, and service payments to the Named Plaintiffs. (Id. ¶¶ 7-10.) The remaining amount will then be distributed pro rata among the members of the FLSA Collective, the Ohio Class, and the Kentucky Class according to a point-based system. (See id. ¶ 10.)

II. Jurisdiction

Plaintiffs allege violations of the FLSA. This Court has subject matter jurisdiction over the FLSA claims under the general grant of federal question jurisdiction in 28 U.S.C. § 1331.

Plaintiffs Moore and McCoy allege violations of Ohio and Kentucky overtime laws, respectively. This Court has supplemental jurisdiction over the Ohio and Kentucky state law

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overtime claims under Ohio law. See Ohio Rev. Code Ann. § 2305.11(A).

[4] The covered time period for the Kentucky Class extends back to August 18, 2012 to account for Kentucky's five-year statute of limitations for overtime claims under Kentucky law. See Ky. Rev. Stat. Ann. § 413.120(2); id. § 337.050(1); Arya v. Taxak, No. 3:17-cv-032, 2017 WL 5560411, at *7 (W.D. Ky. Nov. 17, 2017).

claims under 28 U.S.C. § 1367(a). Those claims derive from a "common nucleus of operative fact" with Plaintiffs' FLSA claims. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966); Soehnlen v. Fleet Owners Ins. Fund, 844 F.3d 576, 588 (6th Cir. 2016).

III. Standard of Review

A. Standard for Collective Action Settlements Under the FLSA

Plaintiffs seek preliminary approval of the Settlement Agreement under the FLSA. (ECF No. 88 at 8-25.)

Section 216(b) of the FLSA permits an employee to recover unpaid overtime compensation by suing an employer "in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike class actions under Federal Rule of Civil Procedure 23, when an employee sues his employer in a representative capacity under § 216(b), similarly situated plaintiffs choose whether to "opt into" the suit, which is known as a "collective action." Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006).

The FLSA's overtime compensation provisions are "mandatory and, except as otherwise provided by statute, are generally not subject to being waived, bargained, or modified by contract or by settlement." Kritzer v. Safelife Solutions, LLC, No. 2:10-cv-0729, 2012 WL 1945144, at *5 (S.D. Ohio May 30, 2012) (citing

Dillworth v. Case Farms Processing, Inc., No. 5:08-cv-1694, 2010 WL 776933, at *5 (N.D. Ohio Mar. 8, 2010), and Brooklyn Sav. Bank v. O'Neill, 324 U.S. 697 (1945)). There are two ways in which claims for back wages arising under the FLSA can be settled or compromised. See Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-53 (11th Cir. 1982). First, the Department of Labor can supervise a settlement. See Collins v. Sanderson Farms, Inc., 568 F. Supp. 2d 714, 719 (E.D. La. 2008) (citing 29 U.S.C. § 216(c)). Second, "[w]hen employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness." Lynn's, 679 F.2d at 1353 (citing Schulte, Inc. v. Gangi, 328 U.S. 108, 113 n.8 (1946)).

When parties submit a proposed FLSA settlement for a court's review, the court should review the proposed settlement to ensure that it is "a fair and reasonable resolution of a bona fide dispute over FLSA provisions." Id. at 1355. Where appropriate, the court preliminarily approves a proposed FLSA collective action settlement, authorizes notice of settlement, and schedules a fairness hearing. See, e.g., Barnes v. Winking Lizard, Inc., No. 1:18-cv-952, 2019 WL 1614822, at *1 (N.D. Ohio Mar. 26, 2019); Castillo v. Morales, Inc., No. 2:12-cv-650, 2015 WL 13022263, at *1-2 (S.D. Ohio Aug. 12, 2015); La Parne v. Monex

Deposit Co., No. 08-cv-0302, 2010 WL 4916606, at *4-5 (C.D. Cal. Nov. 29, 2010).

B. Standard for Class Action Settlements Under Rule 23

Plaintiffs seek conditional certification of the Ohio Class and the Kentucky Class (collectively, the "Classes") and preliminary approval of the Settlement Agreement under Federal Rule of Civil Procedure 23. (ECF No. 88 at 8-32.)

Rule 23(e) authorizes a court to grant preliminary approval of a proposed class action settlement and direct notice to putative class members if the parties show that "the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B); see also 4 William B. Rubenstein, Newberg on Class Actions ("Newberg") § 13:13 (5th ed. 2019).[5]

Rule 23(e)(1)(B)(ii) directs a court to determine, at the preliminary approval stage, whether it is likely to certify the settlement class. Rule 23(a), (b), and (g) set out the criteria for certifying a class action in federal court. The Rule requires a party seeking class certification to demonstrate that: (1) the proposed class and class representatives meet all of the

[5] Rule 23(e) was substantially amended effective December 1, 2018. Prior to that, courts followed judicially developed standards for preliminary approval of class action settlements. See Newberg § 13:10.

requirements of Rule 23(a); (2) the case fits into one of the categories of Rule 23(b); and (3) class counsel meets the requirements of Rule 23(g). Newberg § 3:1. The proposed classes are defined conditionally pending final approval of the settlement. Id. § 13:16. A district court must give undiluted, even heightened, attention to Rule 23 protections before certifying a settlement class. UAW v. Gen. Motors Corp., 497 F.3d 615, 625 (6th Cir. 2007).

Rule 23(e)(1)(B)(i) directs a court to determine, at the preliminary approval stage, whether it is likely to "approve the proposal under Rule 23(e)(2)." Rule 23(e)(2) provides the standard for the court's approval of a proposed class action settlement. Under Rule 23(e)(2), the court must review whether the proposed settlement is "fair, reasonable, and adequate after considering whether":

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
>> (i) the costs, risks, and delay of trial and appeal;
>>
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>>
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(A)-(D).

Plaintiffs seek approval of the notice that would be sent to the members of the Classes. (ECF No. 88 at 32-33.) "Before ratifying a proposed settlement agreement, a district court also must 'direct notice in a reasonable manner to all class members who would be bound' by the settlement." UAW, 497 F.3d at 629 (quoting Fed. R. Civ. P. 23(e)(1)(B)). "The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Id. at 629-30 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

Plaintiffs seek a final approval hearing pursuant to Fed. R. Civ. P. 23(e)(2). (ECF No. 88 at 2.) "A fairness hearing contains several procedural safeguards: Parties to the settlement must proffer sufficient evidence to allow the district court to review the terms and legitimacy of the settlement; class members may object to the proposed settlement on the record; and class members have a right to participate in the hearing." UAW, 497 F.3d at 635 (quotation marks, alterations, and citations omitted). "In satisfying these requirements, a district court

has wide latitude. It may limit the fairness hearing to whatever is necessary to aid it in reaching an informed, just and reasoned decision and need not endow objecting class members with the entire panoply of protections afforded by a full-blown trial on the merits." Id. (quotation marks and citations omitted).

IV. Analysis

A. FLSA Collective Action

Plaintiffs seek preliminary approval of the Settlement Agreement under the FLSA. (ECF No. 88 at 8-25.) A court reviewing a proposed settlement under the FLSA should ensure that the settlement is "a fair and reasonable resolution of a bona fide dispute over FLSA provisions." Lynn's, 679 F.2d at 1355.[6]

[6] In addition to reviewing whether the proposed settlement is a fair and reasonable resolution of a bona fide dispute, the Court must ensure that the members of the FLSA Collective are "similarly situated." See 29 U.S.C. § 216(b) (allowing collective actions under the FLSA by "one or more employees for and in behalf of himself or themselves and other employees similarly situated"). The "similarly situated" analysis takes place in two stages, see Comer, 454 F.3d at 546, neither of which is implicated at this time. In November 2017, the Court conditionally certified the set of similarly situated plaintiffs to whom notice and opt-in consent forms were delivered. (ECF No. 50.) When the parties move for final settlement approval after the final approval hearing, the Court will at that time decide whether to finally certify the FLSA Collective. See Bredbenner v. Liberty Travel, Inc., Nos. 09-cv-905, 09-cv-1248, 09-cv-4587, 2011 WL 1344745, at *16-17 (D.N.J. Apr. 8, 2011) (issuing final certification of an FLSA collective action at the final settlement approval stage); Burkholder v. City of Ft. Wayne, 750 F. Supp. 2d 990, 993 (N.D. Ind. 2010) (collecting cases).

"[T]he Court must ensure that there is a bona fide dispute between the parties as to the employer's liability under the FLSA, lest the parties be allowed to negotiate around the FLSA's requirements concerning wages and overtime." Kritzer, 2012 WL 1945144, at *5. The parties dispute whether PLM properly classified STMs as exempt from the FLSA's overtime provisions before December 2016. (ECF No. 88 at 11; see also Answer, ECF No. 29 at 9 ¶¶ 8-10 (asserting executive, administrative, and outside sales exemptions).) They dispute whether PLM's continued classification of STLs as exempt from the FLSA's overtime provisions is correct. (ECF No. 88 at 11.) They dispute whether overtime damages for the members of the FLSA Collective should be calculated using the "half-time" method or the "time-and-a-half" method, both of which find colorable support in case law. (Id.); see also Mitchell v. Abercrombie & Fitch, Co., 428 F. Supp. 2d 725, 732-734 (S.D. Ohio 2006) (noting "[t]he FLSA generally requires employees to be paid at a rate of one and one-half times their 'regular rate' for hours worked in excess of 40 in one week," but that the Supreme Court and the Sixth Circuit have approved an alternative "fluctuating workweek method of calculating an employee's 'regular rate'" that would result in overtime payments at a rate of one-half the employee's regular pay) (citing Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580 (1942), and Highlander v. K.F.C. Nat'l Mgmt. Co.,

805 F.2d 644, 647-48 (6th Cir. 1986)). This is not a situation where "no question exists that the plaintiffs are entitled under the statute to the compensation they seek." Collins, 568 F. Supp. 2d at 719. The Settlement Agreement resolves a bona fide dispute.

The Court must ensure that the Settlement is "fair and reasonable." Lynn's, 679 F.2d at 1355. "Courts consider several factors when determining whether a proposed FLSA settlement is fair and reasonable: (1) the risk of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the amount of discovery completed; (4) the likelihood of plaintiff's success on the merits; and (5) the public interest in settlement." Clevenger v. JMC Mech., Inc., No. 2:15-cv-2639, 2015 WL 12681645, at *1 (S.D. Ohio Sept. 25, 2015) (citing Padilla v. Pelayo, No. 3:14-cv-305, 2015 WL 4638618, at *1 (S.D. Ohio Aug. 4, 2015), and UAW, 497 F.3d at 631).

Each of those factors supports settlement here. The parties' settlement is the product of three years of contested litigation and two mediation sessions with a third-party mediator. (ECF No. 88 at 12.) Due to substantial gaps, discrepancies, and omissions in PLM's payroll recordkeeping during the time period covering the FLSA Collective's claims, the litigation involves complex issues of data extrapolation

requiring expert witness testimony. (Id. at 5-7.) The parties engaged in extensive fact and expert discovery. (Id. at 23-24.) At trial, the members of the FLSA Collective would have a strong case, but, "given the factual and legal complexity of the case, there is no guarantee that Plaintiffs would prevail at trial." Dillworth, 2010 WL 776933, at *6. Public policy favors settlement of class actions. See Barnes, 2019 WL 1614822, at *4 (citing Hainey v. Parrott, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007)). The Settlement Agreement is fair and reasonable.

B. Ohio and Kentucky Class Actions

1. Conditional Certification

Plaintiffs seek conditional certification of the Classes. (ECF No. 88 at 25-32.) Rule 23(e)(1)(B)(ii) directs a court to determine, at the preliminary approval stage, whether it "will likely be able to . . . certify the class for purposes of judgment on the proposal." If the court determines that it will likely be able to certify the class, it conditionally certifies the class pending final approval of the settlement. Newberg § 13:16.

Rule 23 requires a party seeking class certification to demonstrate that: (1) the proposed class and class representatives meet all of the requirements of Rule 23(a); (2) the case fits into one of the categories of Rule 23(b); and (3) class counsel meets the requirements of Rule 23(g).

a. Rule 23(a) Prerequisites for Class Certification

"[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) (quotation marks and citation omitted). Rule 23 requires a party seeking class action certification to demonstrate that the proposed class and class representatives meet all the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a); Newberg § 3:1. Courts consider two additional, implicit criteria: the class must be definite or ascertainable and the class representative must be a member of the class. Newberg § 3:1.

i. Implicit Requirements

The Classes must be definite, and the Class Representatives must be members of the Classes.[7] The "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537-38 (6th Cir. 2012).

[7] Plaintiff Moore is the proposed class representative for the Ohio Class. (ECF No. 86 ¶ 58.) Plaintiff McCoy is the proposed class representative for the Kentucky Class. (Id. ¶ 68.) Collectively, Moore and McCoy are the "Class Representatives."

The Ohio Class and the Kentucky Class are precisely defined. They comprise, respectively: (1) an enumerated set of 35 Ohio-based individuals who worked for PLM as STMs between August 18, 2015 and December 4, 2016; and (2) an enumerated set of 48 Kentucky-based individuals who worked for PLM as STMs between August 18, 2012 and December 4, 2016. (ECF No. 88-1 ¶ 3; id. at 15-18; ECF No. 88 at 27.) Plaintiff Moore is a member of the Ohio Class and Plaintiff McCoy is a member of the Kentucky Class. (ECF No. 86 ¶¶ 21-22.) Plaintiffs meet the implicit requirements of class certification.

ii. Rule 23(a)(1) -- Numerosity / Impracticability of Joinder

The Classes must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Determining the practicability of joinder is not a strictly numerical issue. See In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996). "[I]f individual claims are small and/or class members are financially unable to fund litigation themselves, individual joinder may be deemed practically impossible." Newberg § 3:11; see also Colo. Cross-Disability Coal. v. Taco Bell Corp., 184 F.R.D. 354, 359 (D. Colo. 1999) ("[O]ne of the central tenets of Rule 23 is that a class action permits plaintiffs, if their claims for damages are too small to justify the costs of litigation, the ability to seek redress.") (citing Deposit Guar.

Nat'l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980)). "The numerosity requirement is also satisfied more easily upon a showing that there is wide geographical diversity of class members, which makes joinder of all the class members more impracticable." In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 339 (N.D. Ohio 2001) (quotation marks and citation omitted).

The Ohio Class and the Kentucky Class have 35 and 48 members, respectively. These are small classes, but not so small that the numerosity requirement cannot be satisfied. See Gilkey v. Cent. Clearing Co., 202 F.R.D. 515, 521 (E.D. Mich. 2001) (citing cases where courts have certified classes with as few as eighteen members). The members of the Classes have overtime claims that in many instances may be "too small to justify the costs of [individual] litigation." Colo. Cross-Disability Coal., 184 F.R.D. at 359. Plaintiffs submit that the members of the Classes are geographically dispersed -- "the class members are not geographically located in one central city (and indeed many no longer live within the state where they previously worked for [PLM], during Kentucky and Ohio class periods beginning seven and four years ago respectively)." (ECF No. 88 at 28.) These factors weigh in favor of class certification. See, e.g., Wilson v. Anthem Health Plans of Ky., Inc., No. 3:14-cv-743, 2017 WL 56064, at *4-7 (W.D. Ky. Jan. 4, 2017) (certifying class of 27

members where "joinder of 27 parties into a single lawsuit would present several administrative complexities for the Court" and "it can hardly be said that class members are fully 'able' to institute their own lawsuits"). Given the geographical dispersion of the members of the Classes and the modest nature of the claims that many of the members likely possess, the Ohio Class and the Kentucky Class are sufficiently numerous.

iii. Rule 23(a)(2) -- Common Questions of Law or Fact

Each Class must have at least one common question of law or fact, and resolution of those questions must advance the litigation. Fed. R. Civ. P. 23(a)(2); Alkire v. Irving, 330 F.3d 802, 821 (6th Cir. 2003) (citing Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998)). "Even a single common question will do." Dukes, 564 U.S. at 359 (quotation marks, alterations, and citation omitted). "The threshold for commonality is not high." Bradberry v. John Hancock Mut. Life Ins. Co., 217 F.R.D. 408, 413 (W.D. Tenn. 2003) (quotation marks and citation omitted).

The Classes have common questions of law and fact. The members of the Ohio Class are current or former STMs who allege that they "were subject to [PLM's] common and company-wide policy and practice of internally classifying and paying . . . the Ohio Class [] members as exempt from Ohio's statutory overtime pay

provisions." (ECF No. 86 ¶ 54.) The members of the Kentucky Class are current or former STMs who allege that they "were subject to [PLM's] common and company-wide policy and practice of internally classifying and paying . . . the Kentucky Class [m]embers as exempt from Kentucky's statutory overtime pay provisions." (Id. ¶ 65.) The alleged misconduct -- the misclassification of the members of the Classes as exempt from Ohio and Kentucky overtime laws -- raises the same questions of law and fact among the members of the Classes. Resolution of those questions would advance the litigation.

iv. Rule 23(a)(3) -- Claim Typicality

The Class Representatives' claims must be typical of the claims of the members of the Classes. Fed. R. Civ. P. 23(a)(3). "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." Am. Med. Sys., 75 F.3d at 1082 (quotation marks and citation omitted). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." Id. (quotation marks and citation omitted). "The premise of the typicality requirement is simply stated: as

goes the claim of the named plaintiff, so go the claims of the class.” Sprague, 133 F.3d at 399.

Class Representatives Moore and McCoy worked for PLM as STMs in Ohio and Kentucky, respectively, during 2015 and 2016. (ECF No. 86 ¶¶ 21-22.) They allege that PLM misclassified them as exempt from Ohio and Kentucky overtime laws, respectively. (Id. ¶¶ 54-74.) This is the same claim alleged by all members of the putative Classes. (See id. ¶¶ 57, 67.) The Class Representatives’ claims are typical of the claims of the members of the Classes.

v. Rule 23(a)(4) -- Adequacy of Representation

The Class Representatives must fairly and adequately protect class interests.[8] Fed. R. Civ. P. 23(a)(4). “‘The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as class members.’” Beattie v. CenturyTel, Inc., 511 F.3d 554, 562 (6th Cir. 2007) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26 (1997)). Class members must not have “interests

[8] In 2003, Congress amended Rule 23 to include subpart 23(g), entitled “Class Counsel.” See generally Fed. R. Civ. P. 23(g). Although courts have historically determined adequacy of counsel under Rule 23(a)(4), Rule 23(g) now governs the adequacy of counsel determination. Id.

that are [] antagonistic to one another." Id. at 563 (quotation marks and citation omitted).

The Class Representatives and the members of the Classes do not have conflicts of interest. They seek the same relief based on the same legal theory. Advancement of the Class Representatives' interests advances those of the members of the Classes. The Class Representatives are fair and adequate representatives of the members of the Classes.

b. Rule 23(b) Class Action Categorization

A case must fit at least one Rule 23(b) category to be maintained as a class action. Fed. R. Civ. P. 23(b). Plaintiffs contend that this action fits category 23(b)(3). (ECF No. 88 at 31-32.)

A Rule 23(b)(3) class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Considerations include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the

litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).[9]

i. Predominance

"'The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" Beattie, 511 F.3d at 564 (quoting Amchem Prods., 521 U.S. at 632). To satisfy the predominance requirement in Rule 23(b)(3), "a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." Id. (quotation marks and citation omitted). "[C]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." Id. (quotation marks and citation omitted).

The Classes' common issues predominate over individual issues. Named Plaintiffs allege that PLM engaged in the same

[9] The last of the Rule 23(b)(3) factors -- "the likely difficulties in managing a class action" -- is not germane to the class settlement context. See Amchem Prods., 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

course of illegal conduct by misclassifying the members of the Classes as exempt from Ohio and Kentucky overtime laws. (ECF No. 86 ¶¶ 54-74.) The legal issues that are determinative of PLM's liability are common to the members of the Classes. Although there would potentially be individualized damages issues given the data extrapolation necessary to estimate the overtime pay due to each individual member of the Classes (see ECF No. 88 at 5-7), the common questions predominate.

ii. Superiority

"The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Amchem Prods., 521 U.S. at 617 (quotation marks and citation omitted). "'Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.'" Young, 693 F.3d at 545 (quoting Roper, 445 U.S. at 339).

"[C]ases alleging a single course of wrongful conduct are particularly well-suited to class certification." Id. (quotation marks and citation omitted). Where many individual inquiries are necessary, a class action is not a superior form

of adjudication. Id. However, where a threshold issue is common to all class members, class litigation is greatly preferred. Id.

Class action is the superior form of adjudicating the Classes' claims. Named Plaintiffs allege a single course of wrongful conduct. It may not be economically feasible for many of the members of the Classes to pursue individual claims for overtime damages. There are threshold issues common to all members of the Classes. The superiority element is met.

c. Class Counsel

Plaintiff seek appointment of C. Andrew Head and the Head Law Firm, LLC (collectively, "Head") as class counsel. (ECF No. 88 at 2.)

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). Fed. R. Civ. P. 23(g)(2). In appointing class counsel, the court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class[.]

Fed. R. Civ. P. 23(g)(1)(A). The court may consider any other matter pertinent to counsel's ability to represent the interests of the class fairly and adequately. Fed. R. Civ. P. 23(g)(1)(B).

The Court must consider the work Head has done in identifying or investigating potential claims. Fed. R. Civ. P. 23(g)(1)(A)(i). Head filed the instant action and participated in settlement negotiations with PLM and in two mediation sessions in 2018 and 2019. (ECF No. 88 at 3-7; see also ECF Nos. 1, 77, 84.) Head oversaw substantial discovery in the case. (ECF No. 88 at 23-24.) In October 2019, Head filed the Amended Complaint, which added the state law class action claims. (ECF No. 86.) Head has performed considerable work identifying and investigating potential claims.

The Court must consider Head's experience in handling class actions, other complex litigation, and the types of claims asserted in the action. Fed. R. Civ. P. 23(g)(1)(A)(ii). Head has substantial experience handling wage and hour collective and class actions. (See ECF No. 88 at 30 n.15 (collecting cases).) Head has been appointed lead or class counsel in several hybrid FLSA collective/state law class action cases across the country. (See id.)

The Court must consider Head's knowledge of the applicable law. Fed. R. Civ. P. 23(g)(1)(A)(iii). Head's attorneys have extensive experience in this area of law. Their past

representation in complex wage and hour litigation demonstrates the required knowledge of the applicable law.

The Court must consider the resources that Head will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(iv). Head has made a significant commitment in negotiating the settlement among the FLSA Collective, the Classes, and PLM. It has committed the necessary resources to representing the FLSA Collective and the Classes, and the Court expects that it will continue to do so.

For the foregoing reasons, Head (hereafter, "Class Counsel") is adequate class counsel under Rule 23(g).

2. Preliminary Settlement Approval

Plaintiff seek preliminary approval of the Settlement Agreement under Rule 23. (ECF No. 88 at 8-25.) Rule 23(e)(1)(B)(i) directs a court to determine, at the preliminary approval stage, whether it "will likely be able to . . . approve the proposal under Rule 23(e)(2)." Rule 23(e)(2), as amended December 1, 2018, sets out four factors for courts to consider when determining whether to preliminarily approve a class action settlement. See Day v. AMC Corp., No. 5:17-cv-183, 2019 WL 3977253, at *3 (E.D. Ky. July 26, 2019) (noting that the amendments to Rule 23(e) provide a "new rubric" for preliminary settlement approval). Under Rule 23(e)(2), the court must review

whether the proposed settlement is "fair, reasonable, and adequate after considering whether":

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(A)-(D).

a. Adequate Representation and Arm's Length Negotiation

The first two factors under Rule 23(e)(2) -- whether the class representatives and class counsel have adequately represented the class and whether the proposal was negotiated at arm's length -- "identify matters that might be described as 'procedural' concerns." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. Addressing those factors, the Advisory Committee has offered the following guidance:

> [T]he focus at this point is on the actual performance of counsel acting on behalf of the class.
>
> The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Id.

Class Representatives and Class Counsel have adequately represented the Classes in this case. The parties engaged in significant fact and expert discovery before settling. (ECF No. 88 at 5-7, 23-24.) Class Counsel has extensive experience with complex wage and hour litigation, including class actions. (Id. at 30 n.15.)

The Settlement Agreement was negotiated at arm's length. It was reached after adversarial negotiations that lasted more than a year. (Id. at 5-7.) It is the product of two mediation sessions with a third-party mediator. (Id. at 6-7.) The Settlement Agreement is the product of a procedurally fair process. See Hillson v. Kelly Servs. Inc., No. 2:15-cv-10803,

2017 WL 279814, at *6 (E.D. Mich. Jan. 23, 2017) (granting preliminary approval of class action settlement where "[t]he procedural history of [the] case reflect[ed] arms-length, noncollusive negotiations," including "both informal and formal written discovery" and "two mediation sessions").

b. Adequate Relief

Rule 23(e)(2)(C) requires a court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Each of these factors supports settlement in this case.

First, the settlement provides complete payment of the alleged overtime due to each member of the Classes for the relevant time periods. Plaintiffs represent that "[t]he net settlement payments to the Plaintiffs and class members, after deduction for all requested amounts for fees, costs, administration, and service payments, constitute . . . 100% of Plaintiffs' total potential back wages using Plaintiffs' preferred time-and-a-half methodology for that same period, based on hours worked determined by Plaintiffs' expert's analysis

of the in-store and travel time averages indicated by the data." (ECF No. 88 at 13.) This outcome avoids significant uncertainties at trial for the members of the Classes. "[I]t is unnecessary to scrutinize the merits of the parties' positions, but it is fair to say that there would have been an uncertain outcome, and significant risk on both sides, had this case gone to trial." Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 178 (W.D.N.Y. 2011). Throughout this litigation, PLM has contended that the members of the Classes were properly classified as exempt under the overtime laws. (ECF No. 88 at 11; see also ECF No. 29 at 9 ¶¶ 8-10.) PLM contends that the proper measure of damages for the claims of the members of the Classes is "half-time" damages rather than "time-and-a-half" damages. (ECF No. 88 at 11.) PLM would presumably raise those contentions at trial. In addition, the gaps in PLM's payroll data raise significant damages calculation issues. (Id. at 5-7.)

Second, the proposed distribution methods are effective. "[T]he goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." Newberg § 13:53. The Settlement Agreement's proposed notice and payment procedures are simple and direct. The members of the Classes are known. (See ECF No. 88-1 at 15-18.) Settlement notices

will be sent to the members of the Classes by mail and email. (Id. ¶ 11.) The members of the Classes will have 45 days from the date of the first notice distribution to opt out. (Id. ¶ 12.) Payment will be distributed directly to the members of the Classes via check. (Id. ¶ 13.)

Third, the proposed award of attorney's fees is reasonable. Class counsel seeks attorney's fees "not to exceed one-third of the Settlement Fund." (ECF No. 88-1 ¶ 7.) "Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nevertheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes; see also Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."). The Settlement Agreement will pay 100% of the back wages owed to the members of the Classes after attorney's fees and other costs are accounted for. (ECF No. 88 at 13, 21.) That is a good result. See Rotuna v. W. Customer Mgmt. Grp., LLC, No. 4:09-cv-1608, 2010 WL 2490989, at *8 (N.D. Ohio June 15, 2010) (noting that class action members obtain a "7% to 11% average result" and describing recovery for class members of between 25% and 75% of claimed unpaid wages as "exceptional"). The one-third

contingency fee arrangement reflected in the Settlement Agreement is "certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit." In re Se. Milk Antitrust Litig., No. 2:07-cv-208, 2012 WL 12875983, at *2 (E.D. Tenn. July 11, 2012); see also Gokare v. Fed. Express Corp., No. 2:11-cv-2131, 2013 WL 12094887, at *4 (W.D. Tenn. Nov. 22, 2013) (collecting cases in which courts in this Circuit have approved attorney's fee awards in common fund cases ranging from 30% to 33% of the total fund).

Fourth, the parties have identified no "agreement[s] made in connection with the proposal" other than the Settlement Agreement. Fed. R. Civ. P. 23(e)(3).

The Settlement Agreement provides adequate relief for the members of the Classes.

c. Equitable Treatment

Rule 23(e)(2)(D) requires a court to determine whether the "proposal treats class members equitably relative to each other." For this factor, "[m]atters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes.

The Settlement Agreement treats class members equitably relative to each other. It apportions settlement awards to members of the FLSA Collective, the Ohio Class, and the Kentucky Class using a point-based system that weights individual class members' awards by the number of weeks worked as an STM or STL during the relevant time periods while accounting for: (1) the additional commitment undertaken by the opt-in members of the FLSA Collective as compared to absent members of the Ohio Class and the Kentucky Class; (2) the greater risks at trial for members of the Ohio Class and the Kentucky Class as compared to members of the FLSA Collective; (3) the availability of liquidated damages under the FLSA and Kentucky overtime law but not under Ohio overtime law; and (4) additional executive exemption arguments PLM could make at trial regarding the STL members of the FLSA Collective. (See ECF No. 88-1 ¶ 10; ECF No. 88 at 14-15.) The proposed allocations are fair.

The Settlement Agreement will award appropriate service payments to Plaintiff Fitzgerald, the representative for the FLSA Collective, and to Plaintiffs Moore and McCoy, the Class Representatives for the Ohio Class and the Kentucky Class. (ECF No. 88 ¶ 8.) "[I]ncentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003). The proposed

service payments are similar to other collective and class action incentive awards approved by courts in this Circuit. See, e.g., Salinas v. U.S. Express Enters., Inc., No. 1:13-cv-00245, 2018 WL 1477127, at *10 (E.D. Tenn. Mar. 8, 2018) (collecting cases in which courts approved service payments to named plaintiffs between $7,500 and $10,000), adopted by 2018 WL 1475610 (E.D. Tenn. Mar. 26, 2018); Osman v. Grube, Inc., No. 3:16-cv-00802, 2018 WL 2095172, at *2 (N.D. Ohio May 4, 2018) (approving $7,500 service payment to named plaintiff in FLSA collective action). The service payments to the representatives of the FLSA Collective, the Ohio Class, and the Kentucky Class are appropriate.

3. Adequacy of Notice

Rule 23(b)(3) provides for what is sometimes called an "opt out" class because of the special requirements of Rule 23(c)(2) that all potential class members be provided reasonable notice and the opportunity to decline to participate. Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 448 (6th Cir. 2002) (citing Fed. R. Civ. P. 23(c)(2)). The additional requirements of notice and the opportunity to opt out are necessary because claims for money damages implicate individual interests that are necessarily heterogeneous. Id. at 448. The class treatment of claims for money damages also implicates the Seventh Amendment and due process rights of individual class members. Id.

When a class is conditionally certified under Rule 23(b)(3), the district court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. Id. The notice must clearly and concisely state in plain, easily understood language:

> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Id.

Plaintiffs propose to send two sets of notices (collectively, the "Notices"): one to the opt-in members of the FLSA Collective (the "Opt-In Notice") and one to the absent, non-opt-in members of the Classes (the "Class Notice"). (See Class Notice, ECF No. 88-2; Opt-In Notice, ECF No. 88-3.)

The Class Notice is substantively adequate under Rule 23(c)(2)(B). (See ECF No. 88-2.) It clearly states what the action is about and its procedural history. (Id. at 4-5.) It defines the Classes. (Id. at 5.) It identifies the Classes' claims and PLM's defenses. (Id. at 4.) It states that a class member may enter an appearance through an attorney if the member so desires. (Id. at 9.) It explains that the court will exclude from the class any member who requests exclusion. (Id. at 1, 8.) It identifies the time and manner for requesting exclusion. (Id. at 8.) It states the binding effect of a class judgment on members. (Id. at 7-8.) All information is presented in an easy-to-read manner with a table of contents and section headings such as "What am I giving up to get a payment or stay in the Class?" and "How do I know if I am part of the settlement?" (See generally id.)

The identities of the members of the Classes are known. PLM will provide final class lists (the "Final Class Lists") with updated contact information for the individual members of the Classes. (ECF No. 88 at 33.) A third-party settlement administrator (the "Settlement Administrator") will distribute the Class Notice by mail and email directly to the individual members of the Classes. (Id. at 32-33; ECF No. 88-1 ¶ 11.) The Class Notice adequately apprises the members of the Classes of

the Settlement Agreement and affords them the opportunity to make informed decisions.

The members of the FLSA Collective have already received notice of this suit and have opted in to the FLSA Collective, pursuant to the Court's November 3, 2017 Order authorizing the distribution of notice and opt-in consent forms. (ECF No. 50; see also ECF No. 88 at 4-5.) The Opt-In Notice will notify the members of the FLSA Collective of the Settlement Agreement and of their right to opt out of the suit. (See generally ECF No. 88-3.) The Opt-In Notice adequately apprises the opt-in members of the FLSA Collective of the Settlement Agreement and affords them the opportunity to make informed decisions.

4. Motion for Preliminary Conference

The parties request a preliminary conference on the Motion. (ECF No. 92.) Because the applicable inquiry supports granting the Motion, the Motion for Preliminary Conference is DENIED AS MOOT.

5. Final Approval Hearing

The Court will hold the Final Approval Hearing on June 4, 2020, at 1:30 PM, at the Clifford Davis/Odell Horton Federal Building, 167 N. Main Street, 9th Floor, Courtroom 3, Memphis TN 38103, in the manner set forth in the Notices.

V. Conclusion

For the foregoing reasons, the Motion is GRANTED. The Court ORDERS that:

1. The Settlement is conditionally APPROVED as fair, reasonable, and adequate to the members of the FLSA Collective, the Ohio Class, and the Kentucky Class, subject to further consideration at the Final Approval Hearing.

2. The Motion for Preliminary Conference is DENIED AS MOOT.

3. The parties are DIRECTED to provide notice of the proposed Settlement as provided in this Order and the Settlement Agreement.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court conditionally CERTIFIES the following Classes for purposes of this Settlement only and subject to further consideration at the Final Approval Hearing:

> Ohio Class: All individuals reflected on the parties' agreed upon class list as of the July 10, 2019 mediation and who worked for PLM as Set/Reset/Surge Team Members and who were paid as exempt for that work within the period beginning August 18, 2015, through the December 4, 2016 pay date.

> Kentucky Class: All individuals reflected on the parties' agreed upon class list as of the July 10, 2019 mediation and who worked for PLM as Set/Reset/Surge Team Members and who were paid as exempt for that work within the period beginning August 18, 2012, through the December 4, 2016 pay date.

5. The Court preliminarily FINDS, solely for purposes of the Settlement, that: (a) the Classes are so numerous that joinder of members of the Classes in the action is impracticable; (b) there are questions of law and fact common to the Classes that predominate over any individual questions; (c) the claims of the Class Representatives are typical of the claims of the Classes; (d) the Class Representatives have and will continue to fairly and adequately represent and protect the interests of the Classes; and (e) a class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

6. Named Plaintiff Alan Moore is conditionally APPROVED as representative of the Ohio Class and Named Plaintiff Kenneth McCoy is conditionally APPROVED as representative of the Kentucky Class.

7. C. Andrew Head and the Head Law Firm, LLC are APPROVED as Class Counsel, and the Court finds that Class Counsel has and will fairly and adequately protect the interests of the Classes.

8. The Court FINDS and ORDERS that the Notices fully satisfy the requirements of due process, provide the best notice practicable under the circumstances to the members of the FLSA Collective and the Classes, and provide individual notice to all members of the FLSA Collective and the Classes who can be identified through reasonable effort.

9. No later than seven (7) days after entry of this Order, Class Counsel shall provide the Settlement Administrator with final settlement payment calculations for the Notices.

10. No later than ten (10) days after entry of this Order, PLM shall produce to Class Counsel and the Settlement Administrator the Final Class Lists with updated address and contact information.

11. No later than seven (7) days after receiving the Final Class Lists, the Settlement Administrator shall distribute the Notices.

12. No later than forty-five (45) days after the date on which the Settlement Administrator distributes the Notices (the "Initial Distribution Date"), any member of the FLSA Collective or the Classes who wishes to make an exclusion request shall mail a written request to the Settlement Administrator at the address provided in the Notices. The request for exclusion must include the name, address, telephone number, and signature of the person seeking exclusion, as well as the employee ID number or the last four digits of the Social Security number of the person seeking exclusion. The request for exclusion must state that the person seeking exclusion requests exclusion from Fitzgerald v. P.L. Marketing, Inc., No. 2:17-cv-02251 (W.D. Tenn.), and that the person seeking exclusion understands that he or she will not receive money from the Settlement. The

request for exclusion must be postmarked or received by the Settlement Administrator no later than forty-five (45) days after the Initial Distribution Date.

13. Members of the FLSA Collective or the Classes who timely and validly request exclusion from the FLSA Collective or the Classes as set forth shall not be eligible to receive any payment out of the Settlement Fund as described in the Settlement Agreement, unless otherwise ordered by the Court.

14. Unless otherwise ordered by the Court, all members of the FLSA Collective and the Classes (other than those members who timely and validly request exclusion) shall be bound by all determinations and judgments in this action about the Settlement Agreement, whether favorable or unfavorable to the FLSA Collective or the Classes.

15. The Final Approval Hearing shall be held before the undersigned at 1:30 PM on June 4, 2020, which is not less than ninety (90) days from the entry of this Order, in Courtroom 3, at the United States District Court for the Western District of Tennessee, 167 North Main Street, Memphis, TN 38103, to consider whether:

(a) the proposed Settlement on the terms and conditions provided in the Settlement Agreement is fair, reasonable, and adequate, and should be approved by the Court;

(b) the request for attorney’s fees and other costs should be approved;

(c) the request for a service payment to the Named Plaintiffs should be approved; and

(d) to rule on such other matters as the Court may deem appropriate.

16. Any member of the FLSA Collective or the Classes who has not requested exclusion may appear at the Final Approval Hearing in person or by counsel (if an appearance is timely filed and served) and may be heard to the extent allowed by the court in support of, or in opposition to, the fairness, reasonableness, and adequacy of the Settlement, including the proposed awards of attorney's fees, service payments, and other costs; provided, however, that no member of the FLSA Collective or the Classes shall be heard in opposition of the Settlement unless, no later than twenty-one (21) days before the Final Approval Hearing, such member of the FLSA Collective or the Classes has:

(a) filed with the Clerk of the Court, United States District Court for the Western District of Tennessee, Clifford Davis/Odell Horton Federal Building, 167 North Main Street, Memphis, TN 38103, a written objection stating:

(i) the case name and number, Fitzgerald v. P.L. Marketing, Inc., No. 2:17-cv-02251 (W.D. Tenn.);

(ii) the objector's name, address, telephone number, signature, and, if represented by counsel, the name and contact information for counsel;

(iii) the specific grounds for objection;

(iv) whether the objection applies only to the objector, to a specific subset of the FLSA Collective or the Classes, or to the entirety of the FLSA Collective or the Classes; and

(b) served a copy of his or her written objection on the Settlement Administrator at the address provided in the Notices.

17. Any member of the FLSA Collective or the Classes who does not object in the manner prescribed above shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, and adequacy of the Settlement or the requests for awards of attorney's fees, service payments, and other costs.

18. No later than seven (7) calendar days before the Final Approval Hearing, Class Counsel shall cause to be filed with the Court a response to any timely filed objections to the Settlement.

19. Class Counsel shall submit its filings in support of final approval of the Settlement Agreement and the requests for awards of attorney's fees, service payments, and other costs no later than twenty (20) days before the Final Approval Hearing.

So ordered this 13th day of February, 2020.

/s/ *Samuel H. Mays, Jr.*
Samuel H. Mays, Jr.
UNITED STATES DISTRICT JUDGE