UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DAVERLYNN KINKEAD, SHIRLEY CAILLO, and CLAUDE MATHIEU, Individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No.: 3:15-cv-01637(JAM)**
HUMANA, INC., HUMANA AT HOME, INC., and SENIORBRIDGE FAMILY COMPANIES (CT), INC.	)	
Defendants.	)	

MOTION FOR PRELIMINARY APPROVAL OF THE SETTLEMENT, PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS, AND APPROVAL OF PROPOSED NOTICE OF SETTLEMENT

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INTRODUCTION

The Parties jointly move for preliminary approval of their class Settlement Agreement attached as Ex. 1. The Settlement, which is the product of arms-length negotiation between the Parties, provides for a Gross Settlement Amount of $17,000,000.00. Because the Settlement calls for expanding the existing New York and Connecticut classes, the Parties seek, as part of the preliminary approval of the Settlement, certification of the modified Settlement Classes and approval of the proposed notice to be issued to the Settlement Class Members. As discussed below, the Settlement achieved is fair, reasonable, and adequate, and preliminary approval should be granted so that notice of the settlement can be issued to class members, is appropriate.

CASE HISTORY AND SETTLEMENT NEGOTIATIONS

Plaintiffs and Settlement Class Members are home healthcare workers (HHWs) who go to the homes of elderly and disabled people to provide companionship services. Plaintiffs alleged that they were employed by Defendants Humana, Inc., Humana at Home, Inc., and related SeniorBridge Family Companies, to work 24-hour live-in shifts in a client's home or to work non-live-in hourly shifts that usually lasted 8 or 12 hours.

In 2013, the U.S. Department of Labor (DOL) promulgated a new regulation, 29 C.F.R. § 552.109, which extended Fair Labor Standards Act overtime protections to home health care workers employed by third-party employers, such as Humana at Home. *See Kinkead v. Humana, Inc.,* 206 F.Supp.3d 751, 753 (D. Conn. 2016). The new regulation was scheduled to become effective January 1, 2015. *Id.* The validity of the new regulation was put into doubt for some time due to an injunction entered by a district court in the District of Columbia until the D.C. Circuit reversed the district court's decision in August 2015. *Home Care Ass'n of Am. v. Weil,*

799 F.3d 1084 (D.C. Cir. 2015). While the regulation remained in limbo, Defendants continued to operate under the prior exemption from overtime in certain states.

On November 10, 2015, Plaintiff Daverlynn Kinkead sued Defendants, alleging that she and other similarly situated HHWs working for Humana were entitled to overtime pay for the hours they worked after January 1, 2015. Doc 1. Kinkead also brought cognate Connecticut Minimum Wage Act (CMWA) claims, Conn. Gen. Stat. § 31-58 *et seq.* In July 2016, this Court denied Defendants' motion to dismiss and held that, notwithstanding the intervening legal challenge to the rule's validity, the regulation went into effect on its intended effective date of January 1, 2015. *See Kinkead,* 206 F.Supp.3d at 753-755. In May 2017, the Court granted stipulated conditional certification to Plaintiff's FLSA claim on behalf of a collective of HHWs employed in the relevant states. Doc. 114.

In November 2017, Plaintiffs were granted leave to file an amended complaint, Doc. 181, which added Claude Mathieu as a Plaintiff as well as claims under New York Labor Law (NYLL). In May 2018, Plaintiffs moved to certify four Rule 23(b)(3) classes. The first two classes—the Connecticut Effective Date Class and the New York Effective Date Class—sought unpaid overtime for the period January 1 to October 12, 2015. These State law claims paralleled the FLSA claims previously certified as a collective action. The other two classes—the Connecticut Unpaid Hours Class and the New York Unpaid Hours class—sought unpaid straight-time and overtime for Defendants' policy of paying for only 8 hours of work for each 24-hour live-in shift. Plaintiffs sought to certify the New York class for the period November 11, 2009 to the present and the Connecticut Unpaid Hours class for the period January 1, 2015 through January 26, 2016.

While the class motions were pending, Plaintiffs moved to add Shirley Caillo as an additional class representative for the New York classes. The Court ultimately certified the classes but before notice issued, the Parties agreed to limit the New York classes to work performed through to January 26, 2016. Doc. 298.

After discovery was complete, the Parties filed cross motions for summary judgment. The Court granted in part and denied in part the motions. Specifically, the Court:

a. Granted summary judgment that Defendants were required to credit HHWs who worked 24-hour shifts with at least 13 hours of work in calculating overtime for the FLSA collective, and the NYLL, and the CMWA Effective Date classes, but held that disputed facts precluded summary judgment on Plaintiffs' claim that HHWs in these classes should be credited for all 24 hours of a live-in shift, leaving that question as an issue for trial. Doc. 392 at 8-11, 14-17, 20-23.

b. Denied Plaintiffs' motion for summary judgment that, in calculating the regular rate for 24-hour live-in shifts for purposes of the FLSA, NYLL, and CMWA, the amount paid for such shifts was intended to pay for only 8 hours of work. The Court also denied Defendants' motion that the rate paid for live-in shifts was intended to pay for all hours of work. The number of hours that the live-in shift payment was intended to compensate for remains an issue for trial. Doc. 392 at 11-13, 19-20, 37-38.

c. Denied summary judgment to the New York and Connecticut Unpaid Hours classes on their claim that they were entitled to unpaid straight time. As the Court noted "until it is clear if compensation for live-in shifts was on an hourly or daily basis, there are unresolved factual issues as to whether New York [and Connecticut] HHWs were paid only for 8, 10, or more hours per live-in shift for the purpose of determining any unpaid straight time." Doc. 392 at 23.

d. Denied summary judgment with respect to Plaintiffs' claim for gap time (unpaid straight time in weeks with fewer than 40 hours of work) under both NYLL and the CMWA on the grounds that Plaintiffs' amended complaint had not pled such a claim. Doc. 392 at 19, 23-25, 38.

e. Denied Defendants' motion for summary judgment that they were entitled to a good faith defense to liability as well as a good faith defense to FLSA liquidated damages, although as to the latter issue, the Court retained discretion to deny liquidated damages at a later date. Doc. 392 at 25-30.

f. Denied Defendants' motion that a two-year statute of limitations applied to Plaintiffs' FLSA claims finding that there was a disputed issue of fact as to whether Defendants' violations were willful. The statute of limitations applicable to the FLSA claims remains an issue for trial. Doc. 392 at 30-31.

g. Granted Defendants' motion for summary judgment that Plaintiffs' New York Unpaid Hours claims did not relate back to the filing of the original complaint, and that claims arising prior to November 9, 2011 were, therefore, barred by limitations. Doc. 392 at 31-34.

h. Denied Defendants' motion for summary judgment that the Caregiver Agreement was reasonable under 29 C.F.R. § 785.23. The Court did not decide whether that regulation applied to HHWs but, even assuming that it does, disputed facts precluded a finding of reasonableness. Doc. 392 at 35-36.

As a result of these rulings, if the Settlement is not approved, a jury would have to decide if there was an agreement to exclude regularly scheduled sleep periods and meal periods from hours worked per 24-hour live-in shift. If a jury found there was such an agreement, the FLSA, New York, and Connecticut classes would be entitled to overtime calculated at 13 hours per live-

in shift; in the absence of such an agreement they would be entitled to overtime calculated at 24 hours per 24-hour live-in shift. In addition, the jury would have to determine whether the compensation paid for live-in shifts was intended to compensate for 8 hours of work or all hours of work during a shift as the answer to that question would determine the regular rate used to calculate unpaid overtime amounts. Finally, the jury would have to determine whether Defendants' FLSA violations were subject to a two- or three-year statute of limitations.

As a further result of the Court's summary judgment rulings, Plaintiffs' claims for unpaid straight time under New York and Connecticut law were dismissed from the case subject to Plaintiffs' right to appeal those rulings. Also dismissed were Plaintiffs' New York unpaid hours claims for the period November 11, 2009 to November 9, 2011, again subject to Plaintiffs' right to appeal those issues.

After the motions for summary judgment were decided, Defendants moved to decertify the Plaintiffs' FLSA collective action as well as all four Rule 23(b)(3) classes to the extent they sought pay for more than 13 hours per 24-hour live-in shift or a regular rate based on 8 hours of pay per live-in shift. Plaintiffs opposed the motion and it remains pending.

In an effort to resolve the matter through negotiation, Defendants provided Plaintiffs with electronic data that included detailed partial wage-and-hour information. Plaintiffs used that data to model damages for mediation. The first mediation was an in-person mediation session in New York City in November 2018 under the direction of Charles Stohler, Esq., an experienced class and collective action mediator. The mediation did not result in settlement, but the Parties continued to share data and discuss settlement, and Plaintiffs provided detailed damage calculations to Defendants at several junctures over the following 20 months. Declaration of Michael J.D. Sweeney in Support of Preliminary Approval (Sweeney Decl.) at ¶ 6.

After the motion to decertify the classes was fully briefed, the Parties agreed to attempt another mediation. On July 23, 2020, the Parties engaged in an all-day mediation session under the direction of mediator Marc Isserles, Esq., an experienced class and collective action mediator. Although the Parties were unable to settle the case at that time, they continued negotiations through the mediator after the July 23, 2020 mediation and eventually, in October 2020, reached the Settlement that is the basis for this motion. Sweeney Decl. at ¶ 7.

THE SETTLEMENT AGREEMENT

The Settlement Agreement is attached hereto as Exhibit 1. In order to facilitate the Court's review of the Settlement Agreement, the Parties have prepared a Summary of Settlement Terms and Deadlines. The summary is attached hereto as Exhibit 4.

ARGUMENT

I. THE PRELIMINARY APPROVAL STANDARD

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.,* 04 CIV. 4488 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citations omitted). Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg on Class Actions et seq.* (4th ed. 2002) § 13.13. To grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *see also Edwards v. N. Am. Power & Gas, LLC*, 3:14-CV-01714 (VAB), 2018 WL 3715273, at *9 (D. Conn. Aug. 3, 2018); *see also Newberg*

§ 13.10 ("[A] court's preliminary evaluation of the proposed settlement" applies this test: "if the proposed settlement appears to be the product of serious, informed, non-collusive negotiation, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible [judicial] approval"); *see also Rincon-Marin v. Credit Control, LLC*, 3:17-CV-07 (VLB), 2018 WL 1035808, at *5 (D. Conn. Feb. 23, 2018).

"A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *McArthur v. Edge Fitness*, LLC, 3:17 CV 1554 (RMS), 2019 WL 718540, at *2 (D. Conn. Feb. 20, 2019) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). Courts examine procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. *Wal-Mart Stores, Inc.,* 396 F.3d at 116. "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Id.* (quotations omitted); *McArthur*, 2019 WL 718540, at *2; *see also Kiefer v. Moran Foods, LLC*, 12-CV-756 WGY, 2014 WL 3882504, at *4 (D. Conn. Aug. 5, 2014); *see also Henry v. Little Mint, Inc.*, No. 12-cv-3996(CM), 2014 WL 2199427, at *6 (S.D.N.Y. May 23, 2014) (citing *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) (recognizing that courts rely on the adversary nature of a litigated FLSA case resulting in settlement as indicia of fairness).

If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Kiefer*, 2014 WL 3882504, at *4 (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y.

July 27, 2007)). "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement. A presumption of fairness, adequacy, and reasonableness may attach to a class settlement in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *McArthur*, 2019 WL 718540, at *2 (citing *Wal-Mart Stores, Inc.*, 396 F.3d at 116-17); *see also Edwards*, 2018 WL 3715273, at *9 (same); *see also O'Connor v. AR Resources, Inc.*, 3:08CV1703 VLB, 2012 WL 12743, at *3 (D. Conn. Jan. 4, 2012) (same).

Ultimately, "[t]he Court gives weight to the parties' judgment that the settlement is fair and reasonable. . . ." *Macedonia Church v. Lancaster Hotel, LP*, 05-0153 TLM, 2011 WL 2360138, at *11 (D. Conn. June 9, 2011); *see also Torres v. Gristede's Operating Corp.,* 04-CV-3316 PAC, 2010 WL 5507892, at *3 (S.D.N.Y. Dec. 21, 2010) aff'd, 519 Fed. Appx. 1 (2d Cir. 2013). Moreover, "[a] settlement like this one, reached with the help of a third-party neutral, enjoys a 'presumption that the settlement achieved meets the requirements of due process.'" *Corte v. Fig & Olive Founders LLC*, No. 14-cv-7186(KPF), 2015 WL 12591677, at *2 (S.D.N.Y. June 24, 2015) (quoting *Johnson v. Brennan*, No. 10-cv-4712, 2011 WL 4357376, at *8 (S.D.N.Y. Sept. 16, 2011).

In evaluating a class action settlement, courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). *See Sherman v. Azar*, No. 3:15-cv-01468 (JAM) (D. Conn. Feb. 26, 2018). The *Grinnell* factors include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a

greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

As set forth below, all of the *Grinnell* factors weigh in favor of approval of the Settlement Agreement, and thus in favor of preliminary approval.

II. APPLICATION OF THE *GRINNELL* FACTORS

A. *Grinnell* Factor 1: Complexity, Expense, and Likely Duration of Litigation

This is an extremely complex case involving four Rule 23(b)(3) classes and a nationwide FLSA collective action. *Edwards*, 2018 WL 3715273, at *10 ("'Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them' and courts therefore favor class action settlements.") (citing *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001)). Plaintiffs' claims raise novel issues of federal law regarding the effect of an order enjoining the effective date of a federal regulation that was later reversed on appeal as well as questions of federal and state law regarding the circumstances under which sleep and meal times may be excluded from work time. It also raises complex factual questions regarding when pay rates stated as daily amounts should be treated as day rates paying for all hours of work or hourly rates for a specified number of hours of work per day.

The Court's summary judgment order simplified the issues but left the most contentious issues for trial. Accordingly, if this matter were to proceed to trial, it would likely involve a lengthy trial and extremely complex arguments over the proper way to charge the jury regarding regular rate calculations and sleep and meal period deductions. Not only would such a trial impose significant delay in resolving this case, but regardless of how the jury were to rule, one

side or the other, or more likely both sides, would pursue appeals involving multiple issues. Just to name a few, Defendants have already made clear that they intend to appeal the Court's ruling regarding the effective date of 29 C.F.R. § 552.109. They have also made clear that they intend to appeal the Court's decision to allow Plaintiffs to pursue their claim that they are entitled to pay for all 24 hours of a 24-hour shift, rather than merely 13 hours, and they will likely appeal the certification of some, if not all, of the classes if the Court does not grant their pending motion to decertify the classes. Plaintiffs for their part will appeal the denial of their New York and Connecticut straight-time claims based on their failure to specifically plead the statute under which they were claiming, and the denial of relation-back for New York claims which resulted in the dismissal of claims arising between November 11, 2009 and November 9, 2011. Moreover, given the Parties' diametrically opposed view of the law, it is a foregone conclusion that the losing side will appeal the jury instructions setting forth the law the jury is to apply in determining the hours worked during 24-hour shifts and the regular rate paid for such shifts.

All of these complex trial and appellate issues mean that, absent a settlement, this case is likely to go on for years before it is resolved through litigation with all of the ever-increasing costs and attorneys' fees such lengthy proceedings will inevitably entail. The advantages to both Parties to avoid that cost and delay, not to mention the risk inherent in forcing complex legal and factual issues to be resolved, up or down, through litigation are all significant considerations favoring settlement. It is surely rational from the perspective of absent class members to obtain compensation now rather than endure years of further litigation over these issues. *City of Providence v. Aeropostale, Inc.,* No. 11-CV-7132, 2014 WL 1883494 at *5 (S.D.N.Y. May 9, 2014); *Strougo ex re. Brazilian Equity Fund, Inc. v. Bassini,* 258 F.Supp.2d 254, 261 (S.D.N.Y. 2003) (Even if a shareholder or class member was willing to assume all the risks of pursuing the

actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Accordingly, *Grinnell* factor one weighs heavily in favor of granting preliminary approval to the Settlement Agreement.

B. *Grinnell* Factor 2: Reaction of the Class

The Class Representatives were happy with the Settlement once they understood the risks of proceeding with trial, post-trial, and potential appeals, and together with Class Counsel, they believe this Settlement is what is best for the Classes as a whole. Sweeney Decl. at ¶ 12. Although the Court will more fully analyze this factor after notice issues and class members are given the opportunity to opt-out or object, Plaintiffs anticipate that the reaction of the Class will be favorable.

C. *Grinnell* Factor 3: Stage of the Proceedings

For the third factor, courts evaluate whether the parties "entered into settlement only after a thorough understanding of their case." *Edwards*, 2018 WL 3715273, at *11, citing *Visa U.S.A., Inc.*, 396 F.3d at 118. "The factor requires the Court to consider whether the parties have adequate information about their claims." *Charron v. Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 198 (S.D.N.Y. 2012), *aff'd sub. nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013).

There is no question that the Parties had a thorough understanding of the case and adequate information to evaluate the claims prior to entering into the Settlement Agreement. This case has been pending over five years. All discovery had been completed, and cross motions for summary judgment setting forth in detail each Party's view of the case and the support for their respective positions were filed and decided. The Parties' respective understandings of the claims and the risks of proceeding to trial were as complete as they could be short of actually trying the

case. Thus, this factor clearly weighs in favor of granting approval to the Settlement. *Macedonia Church*, 2011 WL 2360138, at *12, (citing *Visa,* 396 F.3d at 118) ("The fact that the Parties have litigated summary judgment and have participated in mediation means that the stage of the proceedings is sufficiently ripe for final settlement approval.").

In addition to the fact that the Settlement occurred after the Parties had thoroughly explored the Plaintiffs' claims and were preparing for trial, the Settlement is also supported by the fact that the Parties engaged in multiple, lengthy arms-length negotiations utilizing respected independent mediators. The first mediation was an in-person mediation session in November 2018 under the direction of Charles Stohler, Esq., an experienced class and collective action mediator. Although that mediation was not successful, the Parties continued to exchange information for settlement purposes over the next 20 months. On July 23, 2020, the Parties engaged in an all-day mediation session under the direction of mediator Marc Isserles, Esq., an experienced class and collective action mediator. The Parties were unable to settle the claims in these sessions, but continued negotiations through the mediator after the July 23, 2020 mediation and finally reached agreement in October 2020. *Visa USA, Inc.,* 396 F.3d at 116. ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery."); *McArthur*, 2019 WL 718540, at *2; *see also Kiefer v. Moran Foods, LLC*, 12-CV-756 WGY, 2014 WL 3882504, at *4 (D. Conn. Aug. 5, 2014).

D. *Grinnell* Factors 4 and 5: Risks of Establishing Liability and Damages

The fourth and fifth *Grinnell* factors require that the Court "balance the benefits of a certain and immediate recovery against the inherent risks of litigation." *In re Med. X-Ray Film Antitrust Litig.,* CV-93-5904, 1998 WL 661515 at *4 (E.D.N.Y. Aug. 7, 1998); *see also Hall v.*

Pro Source Tech., LLC, 14-CV-2502 (SIL), 2016 WL 1555128 (E.D.N.Y. Apr. 11, 2016); *Siler v. Landry's Seafood House --North Carolina, Inc.,* 13-CV-587 (RLE), 2014 WL 2945796 at *6 (S.D.N.Y. June 30, 2014) ("[T]he primary purpose of settlement is to avoid the uncertainty of a trial on the merits.").

Although Plaintiffs believe their case is strong, it is certainly subject to considerable risk. The Court determined in its summary judgment ruling that a reasonable jury could find that the Caregiver Agreement, on its face, constitutes an agreement providing for regularly scheduled meal and sleep breaks sufficient to satisfy the requirements of 29 C.F.R. § 785.22 and related provisions of New York and Connecticut law. Plaintiffs disagree with that ruling, but it will affect how the jury is charged. If the jury were to find that the Caregiver Agreement is sufficient to satisfy § 785.22, then Plaintiffs would only be entitled to credit for 13 hours of work for each 24-hour shift under federal and state law. In addition, the Court has ruled that there is a fact issue whether the wage term set forth on the Caregiver Agreement, which specifies a dollar amount per 24-hour shift, should be treated as pay for 8 hours, 13 hours, or all hours worked during the shift regardless how many. Again, Plaintiffs strenuously disagree with that holding for the reasons set forth in their motion for summary judgment, but it is the Court's summary judgment decision that will inform the jury charge. In short, the Court has found that legally, the two most important and contentious issues in this case—the hours worked during a live-in shift and the regular rate to be applied to overtime involving live-in shifts—could reasonably be decided either way and it is simply a matter for the jury to determine from the facts how those issues should be resolved. The risks that those jury issues present to both Parties are enormous. If Plaintiffs were to convince a jury that they were entitled to pay for 24-hours per live-in shift and convince the jury that the pay rate quoted on the Caregiver Agreement was intended to pay for 8

hours of work, Plaintiffs estimate the overtime damages would be in excess of $70 million. On the other hand, if the jury were to find the Caregiver Agreement authorizes deduction for sleep and meal-time and that the rate for live-in shifts was intended to pay for all hours of work, the damages would be considerably less than the amounts that will be awarded under this Settlement. This enormous swing in the potential damages depending entirely on how a jury views the evidence places both Parties in a difficult position and strongly favors approving the mutually-agreed-upon Settlement that ensures Settlement Class members receive a certain and significant recovery while avoiding the risks of trial.

In weighing the risks of establishing liability and damages, courts "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d 164, 177 (S.D.N.Y. 2000); *see also Macedonia Church*, 2011 WL 2360138, at *11 (granting final approval and noting that "Serious questions of law and fact exist such that the value of an immediate recovery outweighs the mere possibility of further relief after protracted and expensive litigation.") (internal citations omitted). Here the relief offered by way of the Settlement is certain, significant, and timely.

Given the obvious risks of proceeding to trial, this factor weighs in favor of approval of the Settlement. "Indeed, '[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.'" *See Kiefer*, 2014 WL 3882504, at *2 (citing *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y.1969)).

E. *Grinnell* Factor 6: Risks of Maintaining the Class Action Through the Trial

In entering into the Settlement, Plaintiffs recognized that there was a risk that the classes could be decertified before trial. Defendants' motion to decertify the classes is still pending before the Court. There is no need to rehash the arguments for and against that motion as it has been

thoroughly briefed by both sides. Doc 394, 399, 401. The risk of decertification at trial or on appeal is always a concern and particularly so here. *Wal-Mart Stores*, 396 F.3d at 119 n. 24 ("[D]ecertification is always possible as a case progresses and additional facts are developed."). Accordingly, this concern also weighs in favor of finding a reasonable compromise to the claims advanced by Plaintiffs.

F. *Grinnell* Factor 7: Ability of Defendant to Withstand a Greater Judgment

As far as Plaintiffs know, Defendants have the ability to withstand a significant judgment, even one as large as the one that would result from Plaintiffs prevailing on all issues at trial. That fact alone does not weigh against settlement. *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d at 179 (noting that "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair"); *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 487 (S.D.N.Y. 2009) ("Just because a defendant is capable of making a larger payment does not mean that the settlement is inadequate."). However, Plaintiffs recognize that there is a risk that a jury may reject awarding such a large judgment. The key issue in this case is not whether HHWs were able to obtain sleep during the course of a 24-hour shift, but whether Defendants fulfilled their duty to ensure that that sleep was afforded to HHWs on a regularly scheduled basis. There are significant reasons, set forth in Plaintiffs' motion for summary judgment, why strict adherence to the requirement of regularly scheduled sleep is critical for the health and well-being of HHWs, but Defendants will, no doubt, argue to the jury that it complied with the regularly scheduled requirement on anything other than a hyper-technical reading, that compliance with which need not be measured strictly and that awarding $70 million to the class members would be a windfall. Here again, while Plaintiffs believe they have the better argument, they recognize the risk that their arguments may not

prevail. Nevertheless, the risks of asking a jury to award $70 million dollars or more for the violations at issue are quite real and weigh in favor of settlement.

G. *Grinnell* Factors 8 and 9: Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and In Light of All the Attendant Risks of Litigation

These factors consider whether the amount of the settlement and the method of distributing the settlement funds are fair and adequate for the class in light of the expense, delays, and risks of further litigation. "[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion. . . ." *Wal-Mart Stores, Inc.,* 396 F.3d at 119; *see also Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (holding that the determination of reasonableness "does not involve the use of a mathematical equation yielding a particularized sum") (internal quotation omitted). Therefore, "the question . . . is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces." *Bodon v. Domino's Pizza, LLC,* 09-CV-2941 (SLT), 2015 WL 588656 at *6 (E.D.N.Y. Jan. 16, 2015), *report and recommendation adopted sub nom. Bodon v. Domino's Pizza, Inc.*, 09-CV-2941, 2015 WL 588680 (E.D.N.Y. Feb. 11, 2015).

In weighing this factor, the Court must consider whether the overall amount of the settlement is fair and reasonable, whether the individual allocations are fair and reasonable, whether the fees, expenses, and service awards to be deducted from the gross amount are fair and reasonable, and whether the release that the Class Member must give in exchange for the Settlement is reasonable. The Court will have an opportunity to revisit all of these issues at the final fairness hearing in light of the objections, if any, filed by class members. But as an initial

matter, before notice is sent to the class members, the Court must satisfy itself that, on the present state of the litigation and facts, these aspects of the Settlement are fair and reasonable.

1. The Gross Settlement Amount Is Fair and Reasonable

As noted above, in light of the Court's summary judgment order finding that a jury could reasonably view the evidence as supporting all of Plaintiffs' core claims—i.e. those during the period November 11, 2011 through January 16, 2016—or, just as reasonably, reach a verdict for Defendants on all claims, the range of possible recoveries in this case covers a huge span: $6 million to $70 million. Prior to entering into the Settlement, and, indeed, prior to entering into negotiations, Class Counsel conducted a complex analysis of the fair settlement value of each of the claims in this case. This process entailed examining each cause of action, its likely value upon success, and then discounting that value for the likelihood of success on each of the elements of the claim. These separate values were then added together after eliminating any potential double recovery and then that sum was further discounted for factors affecting all claims such as the likelihood of decertification of the classes, risks of change in law, the time value of money, delays for appeals etc. Using this method, Class Counsel determined an overall fair settlement value for the case as a whole prior to entering into settlement negotiations. The $17 million settlement was within the range of what Class Counsel determined to be a fair settlement and Class Counsel would not have recommended the settlement if it were not. Moreover, the overall value of the Settlement is enhanced by the fact that no money will revert to the Defendants and that any unclaimed money will be redistributed among the Participating Settlement Class Members, which potentially increases the settlement value for those class members. For all of these reasons the Gross Settlement Amount is fair and reasonable.

2. The Individual Settlement Awards Are Fair and Reasonable

Assuming the amounts for attorneys' fees, expenses, service awards, and claims administration discussed below are approved, a Net Settlement Amount of $11,058,333.33 will be available for allocation to the Settlement Class Members.[1] Based on the allocation formula discussed in detail below, the average minimum award for all Settlement Class Members will be approximately $6,800, and for core period claims (prior to any redistribution) will be $10,361. *See* Ex. 2. The highest minimum award for any one Settlement Class Member will be approximately $120,982 and the lowest will be $500. *Id.*

The method for allocating these sums among the class members is fair and reasonable in light of the different claims of the Settlement Classes. In arriving at a formula for allocating the Revised Gross Settlement Amount, Class Counsel divided the class claims into three broad groups based on the likelihood of success of the claims of each group. Within each group, awards are calculated using the same formula. The first group, claims of New York class members arising between November 11, 2009 and November 9, 2011, have the least likelihood of success as the Court dismissed those claims on summary judgment. Nevertheless, Settlement Class members with these claims have a right to appeal the Court's ruling on relation-back and, while their chances of success are doubtful, they are not nonexistent. Accordingly, New York State Law Settlement Class members will receive $200 for their pre-November 11, 2011 claims. The second group—i.e. the claims of New York State Law Settlement Class and the Connecticut State Law Settlement Class members who worked 24-hour shifts between January 26, 2016 and the release date (November 30, 2020 or January 1, 2021)—also have a lower chance of success compared to the core group claims since Defendants changed their Caregiver Employment

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[1] This assumes deductions from the Gross Settlement Amount of (i) $50,000 in Settlement Expenses for claims administration, (ii) $100,000 in Service Awards, (iii) $50,000 Reserve Fund, (iv) $75,000 in Class Counsel Expenses, and (v), $5,666,666.67 in fees for Class Counsel.

Agreement effective January 26, 2016 to credit live-in shift workers with 13 hours of work per live-in shift and paid overtime on that basis after that date. Thus, the only existing class claim applicable to the period January 26, 2016 to November 30, 2020 (or January 1, 2021 in the case of existing class members) is the claim for 24 hours of work per live-in shift. Moreover, because it provided that HHWs were credited for 13 hours of work, the new Caregiver Employment Agreement undermined Plaintiffs' argument that the compensation for 24-hour live-in shifts was based on an hourly rate for 8 hours of work. The new Caregiver Employment Agreement also made clear that, as a matter of policy, HHWs would receive appropriate breaks and that 8 hours could be deducted for sleep time and 3 hours for meal breaks. Accordingly, class members with claims in this group will receive $10 per 24-hour shift. The Core Period Payment recipients—i.e. New York claims between November 11, 2011 and January 26, 2016 and FLSA and Connecticut claims between January 1, 2015 and January 26, 2016—have the greatest chance of success. For this reason, the allocation formula divides the funds remaining after the first and second groups are paid on a pro-rata basis based on the amount of overtime worked during that period. In calculating overtime for these workers, 13 hours per live-in shift is used because calculating overtime at 24 hours would shift the bulk of the settlement money to live-in shift workers to the disadvantage of hourly workers, is consistent with the Court's summary judgment rulings, and recognizes the limited likelihood of success on the 24-hour pay issue. To further compensate for Core Period Payments, which are by far the strongest claims, the Settlement provides that unclaimed settlement awards will be redistributed on a pro-rata basis among the Participating Settlement Class Members who worked during the core period. Class Counsel and the Claims Administrator will endeavor to ensure that all class members receive their Settlement Payments. In that regard, the Settlement Agreement allows claim forms to be filed until the last possible

date before the Final Approval Hearing, allowing Class Counsel just enough time to calculate the final awards to each Participating Settlement Class member which will presented for Final Approval.

Finally, all Settlement Class Members regardless of which group(s) their claims fall within will receive a base payment of $500 to compensate them for any other aspects of their claims that were or could have been alleged in the complaint that are not specifically compensated under the formula for the three groups. The overall allocation formula strikes a fair and reasonable balance between the need for an efficient allocation formula and one that accurately compensates Settlement Class Members for their damages taking into account their chances of success. Although there are variations in the formula, the overall formula ensures that all claims with similar chances of success are treated equally.

Viewed as an overall settlement amount or viewed from the perspective of individual Settlement Class Members, the settlement is fair, reasonable, and equitable in light of the risks and delays of further litigation. "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate." *Maley v. Del Global Tech Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y. 2002) (internal citation and quotations omitted). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. *See In re PaineWebber Ltd P'ships. Litig.,* 171 F.R.D. 104, 130 (S.D.N.Y. 1997). That is, "[a]s a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *Id.*

3. The Claims Process Is Fair and Reasonable

The Settlement calls for Settlement Class Members to be provided Settlement Notice of their Minimum Settlement Payments through mail and, to the extent possible, through email and text notices. As noted above, to ensure that Settlement Class Members have ample time to learn of the Settlement and file claim forms, the Settlement provides for claim forms to be filed up until 10 days before the Final Approval Hearing. Even then, claims forms filed after that date will be honored to the extent funds are available from the $50,000 Reserve Fund provided for in the Settlement. The Reserve Fund will also be used to correct errors, if any, in the calculation of Participating Settlement Class Members payments that come to the attention of Class Counsel or the Claims Administrator after final approval is granted. The Settlement also provides for a simple process for the representatives of deceased class members (or, in the absence of a representative, a family member) to file a claim and receive the class member's award. This claim process is clearly fair and reasonable.

4. The Service Awards Are Fair and Reasonable

The service awards provided in the Settlement Agreement—$20,000 for each of the three named plaintiffs and $10,000 for each of the opt-ins who assisted with depositions and discovery—are reasonable. As this Court has noted,

> Named plaintiffs in class and collective actions play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny. *See, e.g, Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, No. 08 Civ. 7670, at * 1(BSJ)(JCF), 2010 WL 532960 (S.D.N.Y. Feb. 9, 2010) ("Enhancement awards for class representatives serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts."); *Velez v. Majik Cleaning Serv.*, No. 03 Civ. 8698, 2007 WL 7232783, at *7 (S.D.N.Y. June 22, 2007) ("[I]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers .") (internal quotation marks and citation omitted) . . .

Aros v. United Rentals, Inc., No. 3:10-CV-73 JCH, 2012 WL 3060470, at *3–4 (D. Conn. July 26, 2012) (approving $7500 service award from $875,000 settlement fund). In examining the reasonableness of service awards, courts consider: (1) the personal risk incurred by the named plaintiffs; (2) time and effort expended by the named plaintiffs in assisting the prosecution of the litigation; and (3) the ultimate recovery in vindicating statutory rights. *Id.* at *3. Here, the Named Plaintiffs and the testifying opt-ins satisfy all three factors.

First, the Named Plaintiffs agreed to bring the action in their name and they along with the four opt-ins agreed to be deposed and testify at trial. In so doing, they assumed the risk of retaliation. Sweeney Decl. at ¶¶ 13-15*, see also Frank*, 228 F.R.D. at 187 (noting that incentive awards are "particularly appropriate in the employment context . . . [where] the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or coworkers"); *Velez*, 2007 WL 7232783, at *7 (observing that named plaintiffs "exposed themselves to the prospect of having adverse actions taken against them by their former employer and former co-workers"). Even where there is not a record of actual retaliation, class representatives merit recognition for assuming the risk of retaliation for the sake of absent class members. *Aros,* at *4; *Frank,* 228 F.R.D. at 187–88 ("Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded.").

Second, the Named Plaintiffs and four opt-ins should be awarded Service Awards for the significant work they undertook on behalf of the classes. They expended time and effort to assist in the preparation of the complaints, provide Plaintiffs' Counsel with relevant documents,

submitted declarations in support of Plaintiffs' claims, and assisted counsel in the investigation of Plaintiffs' claims. Sweeney Decl. at ¶¶ 13-17, *see Frank*, 228 F.R.D. at 187–88 (recognizing the important role that class representatives play as the "primary source of information concerning the claims[,]" including by responding to counsel's questions and reviewing documents).

Third, the amount of the requested service awards is consistent and reasonable with the excellent results obtained in the Settlement and awards given in other class and collective actions. *See, e.g., Edwards v. N. Am. Power & Gas, LLC,* No. 3:14-CV-01714 (VAB), 2018 WL 3715273, at *13 (D. Conn. Aug. 3, 2018) (approving awards of $5000 in consumer class action); *Kiefer v. Moran Foods, LLC,* 2014 WL 3882504 at *10 (D. Conn. Aug. 5, 2014) (approving service awards of $30,000 to one named plaintiff, $10,000 to other plaintiffs); *Bozak v. FedEx Ground Package Sys. Inc.,* 3:11-cv-738-RNC, 2014 WL 3778211 at *4-5 (D. Conn. July 31, 2014) (approving service award of $10,000 in FLSA case with $2M gross settlement). *See also Karic v. Major Auto. Cos., Inc.*, No. 09 CV 5708 (CLP), 2016 WL 1745037, at *8 (E.D.N.Y. Apr. 27, 2016) (collecting cases in wage and hour class action, and noting awards between $10,000 and $40,000).

5. The Attorneys' Fees and Costs Are Fair and Reasonable

Class Counsel's requested fee is 33 1/3 percent of the Gross Settlement Fund—i.e. $5,666,666.67. While a final decision on fees cannot be made until the Final Approval Hearing when the Court can consider any objections raised by the Class Members, it is important to consider the fee request at the preliminary approval stage so that accurate notice of the settlement can be provided to the Class. Awarding fees as a percentage of the gross settlement amount is consistent with the trend in the Second Circuit. *Davis v. JP Morgan Chase*, 827F.Supp.2d 172,

183-184 (W.D.N.Y. 2011) quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (FLSA case). The percentage method is particularly appropriate in wage and hour settlements.[2] The reasonableness of the proposed fee should be scrutinized under the *Goldberger* factors:

> (1) the time and labor expended by counsel;
> (2) the magnitude and complexities of the litigation;
> (3) the risk of the litigation;
> (4) the quality of representation;
> (5) the requested fee in relation to the settlement; and
> (6) public policy considerations.

Wal-Mart Stores, 396 F.3d at 121 (quoting *Goldberger v. Integrated Res., Inc.,* 208 F.3d 43, 50 (2d Cir. 2000). All six of these factors support the 33 1/3 percent fee sought by Class Counsel. Counsel has expended an enormous amount of work in this case as is evident from their time records that show as of February 24, 2021 a total of 3,558 hours of attorney time, 993 hours of data analyst time, and 1,040 hours of paralegal time. *See,* Sweeney Decl. at ¶ 18. The considerable complexities and risks of the litigation have been discussed above. The Court can evaluate the quality of Class Counsel's representation but Counsel believe they have achieved remarkable results, beginning with the uphill battle they faced arguing for a January 1, 2015 effective date for 29 C.F.R. § 552.109 despite the fact that, at that point, the only other cases to have addressed the issue had rejected that claim.

A fee of 33 1/3 percent of the settlement fund is well within the range typically awarded in cases such as this. *See Zorrilla v. Carlson Restaurants, Inc .,* 14-CV-2740 (AT), 2018 WL

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[2] *See, e.g., In re Penthouse Executive Club Compensation Litigation*, 10-CV-1145 (KMW), 2014 WL 185628 at *9 (S.D.N.Y. Jan. 14, 2014); *Febus v. Guardian First*, 870 F.Supp.2d 337 (S.D.N.Y. 2011) (FLSA); *Matheson v. T-Bone Restaurant, LLC*, 09-CV-4214 (DAB), 2011 WL 6268216 at *7 (S.D.N.Y. Dec. 13, 2011) (FLSA); *v. Altamarea Group LLC*, 10 CV6451, 2011 WL 4599822 at*7 (S.D.N.Y. Aug. 16, 2011) (FLSA/NYLL).

1737139 at *2 (S.D.N.Y. April 9, 2018) (approving fee of 1/3 of gross settlement amount of $19M FLSA settlement); *Shallin v. Payless Shoesource, Inc.,* 3:14-cv-335-RNC, 2015 WL 13636424 at *1 (D. Conn. June 10, 2015) (granting preliminary approval to common fund fee of 1/3 of $2.9M settlement as fair, reasonable, and justified); *Kiefer v. Moran Foods, LLC,* 12 CV 756-WGY, 2014 WL 3882504 at *8 (D. Conn. Aug. 5, 2014) (awarding 1/3 of $4.5M FLSA settlement as fees); *Bozak,* 2014 WL 3778211 at *6 (awarding 1/3 of $2M fund). *See also In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (approving fee of 30% of the $80 million settlement amount); *Velez v. Novartis Pharms. Corp.*, No. 04-CV-9194 (CM), 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases . . . where plaintiffs['] counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater."); *In re Amaranth Nat. Gas Commodities Litig.*, No. 07-CV-6377 (SAS), 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (approving fee of 30% of the $77.1 million settlement amount); *In re Bisys Sec. Litig.*, No. 04-CV-3840 (JSR), 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007) (approving fee of 30% of a $65.87 million settlement fund).

Finally, the public interest is served by encouraging able counsel to bring cases like this on behalf of workers such as the Plaintiffs here who are generally not in a position to be knowledgeable of their rights or well situated to defend those rights.

Plaintiffs' request for costs and expenses of up to $75,000 is also reasonable. *See* Sweeney Decl. at ¶ 11.

6. The Claim Administrator's Fee Is Reasonable

The Settlement Agreement calls for a fee of $50,000 to be deducted from the Gross Settlement Amount to pay the Claims Administrator. The Claims Administrator has estimated that its services will cost $37,195, *see* Sweeney Decl. at ¶ 20. Plaintiffs are requesting the additional funds to cover any cost overruns that may occur. If the final bill is less than the $50,000 set aside for the administration costs, the remaining funds will go to the *cy pres* recipient. In the unlikely event that the Claims Administration costs exceed $50,000, Class Counsel will cover those overruns. SSI has experience in administering class action settlements, is well qualified to carry out the administration of this settlement, and its fee is reasonable. *See* Sweeney Decl. at ¶ 19.

7. The Release Is Fair and Reasonable

Courts in the Second Circuit have made clear that general releases are not acceptable in settlement involving FLSA claims. *See e.g. Lopez v. Nights of Cabiria, LLC,* 96 F.Supp.3d 170, 181 (S.D.N.Y. 2015); *Bazile v. Asset Protection Group, LLC,* 18-CV-6820 (DLI) (SJB), 2019 WL 7985168 at *3 (E.D. N.Y. Nov. 27, 2019) ("a plaintiff who executes an FLSA settlement containing a limited release, while simultaneously executing a NYLL settlement containing a more general release, has not in fact received a limited release."). Accordingly, the Settlement Agreement requires the class members to release "all wage and hour claims and related claims which were or could have been asserted in the litigation under the NYLL and Connecticut Law, including, without limitations, all state claims for unpaid overtime, regular, straight or minimum wages, and related claims for penalties, statutory notice or statement violations, interest, liquidated damages, attorneys' fees, costs, and expenses to the maximum possible extent

permitted by law accruing up to November 30, 2020."[3] This release is limited in scope as it is limited to wage and hour claims and related claims that were or could have been asserted in the litigation and is temporally limited to claims through January 1, 2021 for previously noticed class members and through November 30, 2020 for the 556 new class members. As such it falls within the range of releases that Second Circuit courts have found to be acceptable. *See, e.g., Macaluso v. JZJ Servs., LLC,* 20-CV-1407 (RA), 2020 WL 6647517 at *2 (S.D.N.Y. Nov. 12, 2020) (approving release of claims for unpaid wages or that "otherwise arise out of or relate to the facts, acts, transactions, occurrence, events or omissions alleged in the Action or which could have been alleged in the Action."); *Bondi v. DeFalco,* 17-CV-5681 (KMK), 2020 WL 2476006 at *5-6 (S.D.N.Y. May 13, 2020) (approving release of defendants and affiliated persons and entities from "all wage and hour claims that could have been asserted under federal and state laws by and on behalf of the Class Members in the Lawsuit as of the date the Court issues the Preliminary Approval Order" including "all claims under federal or New York State laws for minimum or overtime wages, unreimbursed expenses, spread of hours, [and] any related wage and hour claims."); *Pucciarelli v. Lakeview Cars, Inc.,* 16-CV-4751 (RRM) (RER), 2017 WL 2778029 at *3 (E.D.N.Y. June 26, 2017) (approving release of all claims "based upon federal,

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[3] In addition, the Agreement provides that the settlement checks for members of the FLSA class will include the following (or similar) endorsement:

> *By signing this check, I consent to join the FLSA collective action against Defendants styled Daverlynn Kinkead v. Humana, Inc., et. al, 15-cv-01637 and release Defendants from all wage and hour claims under any state or federal law including but not limited to the Fair Labor Standards Act which were or could have been brought in this action, including but not limited to claims for unpaid overtime wages and statutory penalties.*

This endorsement is coterminous with the release that other class members are giving and does not expand on that release.

state or local laws governing minimum wage, overtime pay, wage payments, spread-of-hours payments, failure to pay for all hours worked, failure to provide wage statements and/or wage notices failure to keep appropriate timekeeping and payroll records, or otherwise arise out of or relate to the facts, acts, transactions, occurrence, events or omissions alleged in the Lawsuit or which could have been alleged in the Action.").

The Agreement provides that the three Named Plaintiffs and four opt-in Plaintiffs receiving service payments will execute a general release. Second Circuit courts recognize that general releases are acceptable when they are given in exchange for service payments. *Ray v. 1650 Broadway Assocs. Inc.,* 16-CV-9858 (VSB), 2020 WL 5796203 at *3 (S.D.N.Y. Sept. 29, 2020); *Bondi v. DeFalco,* 2020 WL 2476006 at *6 (S.D.N.Y. May 13, 2020).

III. THE PREVIOUSLY CERTIFIED CLASSES SHOULD BE REFORMULATED AND EXPANDED FOR PURPOSES OF SETTLEMENT ONLY

On March 18, 2019, this Court certified four Rule 23(b)(3) classes:

> (1) The Connecticut Effective Date class, consisting of all home healthcare workers employed by defendants in Connecticut who worked in excess of 40 hours in a week between January 1, 2015, and October 12, 2015.
>
> (2) The New York Effective Date class, consisting of all home healthcare workers employed by defendants in New York who worked in excess of 40 hours in a week including at least one 24-hour live-in shift between January 1, 2015, and October 12, 2015.
>
> (3) The Connecticut Unpaid Hours class, consisting of all home healthcare workers employed by defendants in Connecticut who worked 24-hour live-in shifts between January 1, 2015, and January 25, 2016.
>
> (4) The New York Unpaid Hours class, consisting of all home healthcare workers employed by defendants in New York who worked 24-hour live-in shifts between November 11, 2009 and the present.

Doc 293 at 35. Rule 23(c) notice was issued to these classes in November 2019 (except that, by the agreement of the parties, Notice was only issued to the New York Unpaid Hours class

members who worked between November 11, 2009 and January 25, 2016). Only one individual chose to opt-out of the New York class. No one opted-out of the Connecticut class.

Pursuant to the Settlement Agreement the Parties agreed to merge the above classes into two Settlement Classes, a New York State Law Settlement Class and a Connecticut State Law Settlement Class. The original members of the Connecticut Effective Date and Unpaid Hours Classes would be consolidated into the Connecticut State Law Settlement Class and the members of the New York Effective Date and Unpaid Hours classes would be consolidated into the New York State Law Settlement Class. In addition, the Parties agreed to temporally expand the Unpaid Hours classes to include HHWs in New York and Connecticut who worked 24-hour live-in shifts between January 26, 2016 and January 1, 2021 (November 30, 2020 for the 556 New Class Members). Inasmuch as Defendants were already paying hourly workers overtime and live-in shift workers for 13 hours per shift, the only claims alleged for this expanded period of time are claims that live-in shift workers should have been credited with 24-hours of work per 24-hour live-in shift. This temporal expansion enlarges the period of time covered by the claims of the existing Unpaid Hours class members and adds 556 new class members who only started working live-in shifts for Defendants after January 26, 2016. The reformulation of the classes and the temporal expansion of the classes does not change or otherwise affect the nature of the claims at issue in this action.

Provisional certification of classes for purposes of settlement serves several practical purposes, "including avoiding the costs of litigating class status while facilitating a global settlement, ensuring all class members are notified of the terms of the proposed Agreement, and setting the date and time of the final approval hearing." *Garcia Morales v. New Indian Foods LLC*, 18-CV-3401, 2019 WL 2544867, at *2 (S.D.N.Y. June 20, 2019) (granting preliminary

approval of class action settlement and provisionally certifying settlement class) (citations omitted); *Edwards*, 2018 WL 1582509, at *6 (same); *Esposito v. Nations Recovery Ctr., Inc.*, 3:18-CV-2089 (VLB), 2020 WL 3489417, at *5 (D. Conn. June 26, 2020) (same); *Rincon-Marin v. Credit Control*, LLC, 3:17-CV-07 (VLB), 2018 WL 1035808, at *4 (D. Conn. Feb. 23, 2018) (same). While settlement classes, like classes generally, must satisfy the requirements of Rule 23, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *See also*, *Newberg* § 11:27 (citing *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)), in the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" when determining whether to provisionally certify a settlement class. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal citation omitted). As set forth below, the reformulated and expanded classes meet the standards of Rule 23(a) and (b)(3) and should be certified for purposes of settlement only.

A. Rule 23(a) Requirements Are Satisfied

The Court previously found that the classes met the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). The reformulation of the classes for settlement purposes has no effect on any of those rulings: It only adds to the number of class members and, while it expands the temporal period of the claims of live-in shift workers, it does not change the nature of those claims so that commonality, typicality, and adequacy of representation requirements remain satisfied.

B. Rule 23(b)(3) Requirements Are Satisfied

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the

controversy." Fed. R. Civ. P. 23(b)(3). This Court previously found that the claims of the four certified classes satisfied predominance and superiority requirements of Rule 23(b)(3). Here again, because the reformulation of the classes does not change the nature of the claims being asserted and only expands that temporal period for which those claims are asserted, those prior rulings are unaffected by the reformulation of the class. The addition of 556 class members who worked only during the expanded class period does not affect either the question of predominance or superiority. Accordingly, the Court's prior class ruling establishes that the reformulated class satisfies the requirements of Rule 23(b)(3).

IV. THE PROPOSED NOTICE TO THE SETTLEMENT CLASSES SHOULD BE APPROVED

A. Content of Notice

When a class action is settled, Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Beyond that, the rule sets forth no specific requirements for the notice. Interpreting the rule, however, the Second Circuit has stated that

> [t]he standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." Notice is "adequate if it may be understood by the average class member."

Wal-Mart Stores, Inc., 396 F.3d at 113-114 (internal citations omitted). *See also McReynolds v. Richards-Cantave,* 588 F.3d 790, 804 (2d Cir. 2009) ("[t]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance").

The proposed Notice attached to this motion as Exhibit 3 satisfies the requirements of Rule 23(e). The Notice describes the terms of the settlement and the allocation plan in general terms and informs class members how to obtain a copy of the complete settlement agreement from the Claims Administrator. *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 57, 60 (S.D.N.Y. 1993) ("Settlement notices need only describe the terms of the settlement generally.") The Notice sets forth each Settlement Class Member's Minimum Settlement Payment. It describes the binding nature of the Settlement and the release that Settlement Class Members will be giving to Defendants in exchange for their Settlement Payments, the process by which Settlement Class Members can file claim forms and, if they choose to, file objections to the Settlement. The Notice also directs the Settlement Class Members to the Claims Administrator's settlement website where the Settlement Documents can be accessed and claim forms can be filed. The Notice provides a 60-day period for filing objections which is within the range typically afforded to class members. *See Lassen v. Hoty Livery Inc.,* 3:13-cv-1529 (VAB), 2018 WL 1370101 at *6 (D. Conn. Mar. 16, 2018), *enforcement denied sub nom. Lassen v. Hoyt Livery, Inc.*, 3:13-CV-1529 (VAB), 2018 WL 6313184 (D. Conn. Dec. 3, 2018) (affording 30-days to object to settlement); *Easterling v. Conn. Dept. of Correction,* 3:08-CV-826 (JCH), 2013 WL 12287996 at *3-4 (D. Conn. July 29, 2013) (affording class members 30 days to object to settlement); *Ahlquist v. Bimbo Foods Bakeries Distribution, Inc.,* 3:12-cv-1272-SRU, 2013 WL 12289910 at *2 (D. Conn. Jan. 18, 2013) (60-days to object to settlement). It also provides at least a 90-day period for filing claim forms.[4]

[4] The settlement provides that claim forms can be filed any time before 10 days before the final approval hearing and provides that that hearing should be set at no earlier than 105 days after mailing of the class notice. If the final approval hearing is set more than 105 days after the mailing, the period for filing claim forms will be extended as well.

Because the Settlement Classes include some new members who have not previously received notice, the Notice for those class members contains additional language to satisfy the requirements of Rule 23(c)(2)(B). That Rule requires class notice to state "in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3)." The proposed Notice for new class members includes all of the language provided in the Notice for the original class members which satisfies most of the requirements of Rule 23(c)(3). In addition, it contains specific language informing the new class members of their right to enter an appearance to object, and of their right to exclude themselves from the class if they do so within 60 days of mailing (a period that is reasonable and longer than the 30-day opt-out period provided in the original class notice.)[5] *See Ortega v. Uber Tech. Inc.,* 15-CV-7387 (NGG) (JO), 2018 WL 4190799 at *11 (E.D.N.Y. May 4, 2018) (approving 45-day opt-out period).

B. Method of Disseminating the Notice

[5] The original class members were afforded an opportunity to opt-out when the original class notice was issued. Although the district court may afford class members a second opportunity to opt-out when a settlement occurs after a class is certified, nothing in Rule 23 obligates it to. *See* Adv. Comm. 2003 Notes to Rule 23(e)(3); *Denny v. Deutsche Bank, AG,* 443 F.3d 253, 271 (2d Cir. 2006) (finding no abuse of discretion when court refused to permit a second opt-out period after settlement); *Seijas v. Republic of Argentina,* 04-CV-1085 (TPG), 2017 WL 1511352 at *7 (S.D.N.Y. Apr. 17, 2017) (refusing to allow a second opt-out period after settlement where initial notice adequately informed class members of their rights and the claims at issue); *In re PaineWebber Ltd. Partnerships Litig.,* 171 F.R.D. 104, 126 fn. 41 (S.D.N.Y. 1997) (approving class settlement as fair even though opt-out period expired more than a year before settlement was reached).

Under the due process clause of the Constitution, absent class members are entitled to notice "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." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Mail to the last known address typically meets this standard. *See, e.g.*, *McBean v. City of New York*, 02-CV-5426 (JGK), 2012 WL 3240600, at *2 (S.D.N.Y. Aug. 6, 2012) ("[N]otice by mail sent to the last known address of the absent class member meets the due process requirement of notice through reasonable effort") (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 369 (S.D.N.Y. 1996)). Here the Parties have agreed that Defendants will provide the Claims Administrator not only with the last known address of class members, but also email addresses and cell phone numbers to the extent available so that Notice can be distributed by email and text as well. *Hernandez v. Between the Bread 55th Inc.,* 17-CV-9541 (LJL), 2020 WL 6157027, at *14 (S.D.N.Y. Oct. 21, 2020) (requiring defendants to provide telephone numbers, email addresses, and any social media information so that claims administrator can distribute notice "by all means available").

CONCLUSION

For all of the foregoing reasons, the Settlement Agreement attached hereto as Ex. 1 is fair, reasonable, and adequate, and should be preliminarily approved so that Notice can be sent to the Settlement Class Members. The reformulation and temporal expansion of the classes provided for in the Settlement satisfies Rule 23 and should be approved for settlement purposes only. Finally, the language of the Notice to be issued to the class members satisfies the requirements of Rule 23(e), and the additional language to be added to that Notice for new class members satisfies the requirements of Rule 23(c). Accordingly, the Notices attached as Ex. 3 should be approved and a date for the Final Approval Hearing set.

March 26, 2021

Respectfully Submitted

/s/ Michael J.D. Sweeney

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Attorneys for Plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that my office caused the foregoing to be electronically filed with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all counsel registered in this case. Any counsel not registered for electronic notice of filing with the Clerk of Court will be mailed a copy of the above and foregoing, First Class U.S. Mail, postage prepaid and properly addressed.

March 26, 2021.

/s/ Michael J.D. Sweeney

Michael J.D. Sweeney