

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
RONEN SARTENA, ELIZABETH GORDON, :
NATHANIEL DEARTH, and ISABEL STROBING, on :
behalf of themselves and all others similarly situated, :
: **Index No.: 614389/2020**
Plaintiffs, :
:
- against - :
:
MELTWATER NEWS US, INC. and MELTWATER NEWS :
US 1, INC., :
Defendants. :
-----X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR FINAL SETTLEMENT APPROVAL

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PRELIMINARY STATEMENT

Plaintiffs Ronen Sartena, Elizabeth Gordon, Nathaniel Dearth, and Isabel Strobing (collectively, “Plaintiffs”) and Defendants Meltwater News US, Inc. and Meltwater News US 1, Inc. (collectively, “Defendants” or “Meltwater”) have settled this putative class and collective action for Fourteen Million Five Hundred Thousand Dollars (\$14,500,000.00), pending final approval of the Court. After the Court preliminarily approved the settlement (*see* NYSCEF No. 33), the Settlement Administrator notified the approximately 729 Class and Putative Collective Members of the settlement. To date, no individuals have opted out or objected to the settlement. Through this Unopposed Motion for Final Approval (“Final Approval Motion”) Plaintiffs respectfully request that the Court: (1) grant final approval of the settlement;¹ (2) approve the proposed Service Awards to the Named Plaintiffs and Class Member Witnesses; (3) approve Class Counsel’s attorneys’ fees and costs; and (4) approve the Settlement Administrator’s fees and costs.

FACTUAL BACKGROUND

Plaintiffs brought this action on behalf of themselves and similarly situated co-workers who worked as Hourly and Salaried Sales Representatives (together, “Sales Representatives”), seeking to recover unpaid overtime wages and related damages pursuant to the Fair Labor Standards Act (“FLSA”) and New York, California, Illinois, and Massachusetts state wage laws.²

¹ The Settlement Agreement is attached as Exhibit 1 to the Affirmation of Melissa L. Stewart in Support of Plaintiffs’ Unopposed Motion for Final Settlement Approval (“Stewart Aff.”). Unless otherwise indicated, all exhibits referenced herein are attached to the Stewart Aff.

² “Hourly Sales Representatives” means Business Development Representatives, Client Onboarders, Client Success Analysts, Client Success Representatives, Client Support Representatives, Growth Representatives, Sales Consultants, Sales Development Representatives, Senior Client Success Analysts, Senior Client Success Representatives, Senior Client Support Representatives, and/or Senior Sales Consultants. *See* Ex. 1 (Settlement

Plaintiffs allege, *inter alia*, that Defendants deprived Sales Representatives of proper overtime pay by maintaining policies and/or practices: prohibiting Hourly Sales Representatives from reporting their actual overtime hours per week and requiring Hourly Sales Representatives to work “off-the-clock”; miscalculating Hourly Sales Representatives’ overtime premium pay by failing to include non-discretionary payments, including bonuses and commissions, in the calculation of Hourly Sales Representatives’ regular rate of pay; and uniformly classifying Salaried Sales Representatives as exempt from federal and state overtime provisions and failing to pay Salaried Sales Representatives any overtime wages for overtime hours worked. *See* NYSCEF No. 4 (FAC) ¶ 6. The negotiated settlement of Fourteen Million Five Hundred Thousand Dollars (\$14,500,000.00) is a fair compromise that easily falls within the range of reasonableness.

PROCEDURAL BACKGROUND

I. INVESTIGATION

Before initiating this action, Class Counsel conducted a thorough investigation which included corporate research regarding Defendants’ business locations, corporate ownership, past federal and state litigation; and factual and legal research regarding the underlying merits of Plaintiffs’ claims, possible defenses, the proper measure of damages, and the likelihood of class and collective certification. *Stewart Aff.* ¶ 11. Class Counsel also conducted in-depth interviews with Plaintiffs and more than a dozen other similarly situated Sales Representatives. *Id.* ¶ 12. These interviews helped Class Counsel determine the hours that Sales Representatives worked, the nature of their duties, and Defendants’ policies as they relate to Sales Representatives. *Id.* ¶

Agreement) § 1.23. “Salaried Sales Representatives” means Client Success Managers and/or Sales Managers. *Id.* § 1.58.

13. Class Counsel also reviewed employment documents, including payroll information and onboarding materials. *Id.* ¶ 14.

II. SETTLEMENT DISCUSSIONS

On December 20, 2019, Class Counsel sent a letter to Meltwater outlining their claims and inviting Defendants to engage in pre-litigation settlement discussions. *Id.* ¶ 15. After Defendants reviewed the demand letter, the parties agreed to engage in a dialogue regarding the possibility of a resolution of the alleged claims and, on February 5, 2020, the parties entered into an agreement tolling the statute of limitations applicable to Sales Representatives' wage claims. *Id.* ¶ 16. The parties further agreed to an exchange of information and payroll data to facilitate settlement discussions. *Id.* ¶ 17.

The parties subsequently agreed to attend a full-day mediation before Jeffrey Ross, an experienced mediator. *Id.* ¶ 18. In advance of the mediation, Defendants produced payroll data and other discovery, including personnel files and job descriptions. *Id.* ¶ 19. Class Counsel evaluated the claims and Defendants' defenses based on the discovery produced by Defendants, as well as Plaintiffs' own investigation. *Id.* ¶ 20. Plaintiffs also used the discovery to calculate damages on a class-wide basis. *Id.* ¶ 21. Prior to the mediation, Plaintiffs produced a detailed mediation statement to Mr. Ross and the parties exchanged mediation briefs. *Id.* ¶ 22.

The parties participated in a full-day mediation session with Mr. Ross on September 14, 2020. *Id.* ¶ 23. Although the case did not settle at that time, the parties continued to engage in settlement discussions with the assistance of the mediator. *Id.* ¶ 24. Ultimately, on or about September 22, 2020, the parties each separately accepted a mediator's proposal (without knowledge of the other's position), and, on October 22, 2020, fully executed a memorandum of understanding setting forth material terms of settlement. *Id.* ¶ 25. Over the next few weeks, the

parties continued negotiating over the terms of the finalized settlement agreement, which was fully executed on December 10, 2020. *Id.* ¶ 26. At all times, settlement negotiations were conducted on an arm's-length basis. *Id.* ¶ 27.

III. LITIGATION

This settlement represents a global resolution of the instant lawsuit and two prior actions filed against Meltwater in federal court. *Id.* ¶ 28. On January 29, 2020, Plaintiff Isabel Strobing, together with two other former Sales Representatives (Nikia Lenef and Gavriel Reichman), filed an action against Meltwater in the United States District Court for the District of Massachusetts, asserting wage and hour claims on behalf of Hourly Sales Representatives under the FLSA and state wage laws (the “Massachusetts Action”). *See Strobing v. Meltwater News US, Inc.*, No. 20 Civ. 10181 (DPW). On the same date, another former Sales Representative, Paulina Ceballos, filed an action against Meltwater in the United States District Court for the Northern District of California, asserting wage and hour claims on behalf of Hourly Sales Representatives under the FLSA and California state wage laws (the “California Action”). *See Ceballos v. Meltwater News US, Inc.*, No. 20 Civ. 657 (LB).

On October 2, 2020, Plaintiff Sartena filed the instant matter in this Court on behalf of Hourly Sales Representatives in New York. *See* NYSCEF No. 1 (Compl.). During the course of negotiations, the parties agreed to seek approval of a global settlement in this forum. Stewart Aff. ¶ 29. Accordingly, the plaintiffs filed notices of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A) in the Massachusetts and California actions, in order to consolidate the actions for approval in this Court. *See Strobing*, No. 20 Civ. 10181 (D. Mass), ECF No. 20; *Ceballos*, No. 20 Civ. 657 (LB) (N.D. Cal), ECF No. 29.

On October 23, 2020, Plaintiffs filed the consolidated First Amended Complaint in this

matter. *See* NYSCEF No. 4 (FAC).

On December 14, 2020, Plaintiffs filed their Unopposed Motion for Preliminary Settlement Approval (“Preliminary Approval Motion”). *See* NYSCEF Nos. 11-18, Mot. Seq. 01. The Court granted the Preliminary Approval Motion on March 17, 2021. *See* NYSCEF No. 33, Mot. Seq. No. 01.

SUMMARY OF SETTLEMENT TERMS

I. ELIGIBLE SETTLEMENT PARTICIPANTS

There are approximately 729 unique Class, Putative Collective, and PAGA Members. *See* Ex. 3 (Affirmation of Mark Cowen Regarding Settlement Administration (“Administrator Aff.”)) ¶ 18. Putative Collective Members are Hourly and Salaried Sales Representatives employed by Meltwater nationwide during the period February 5, 2017 through November 16, 2020. *See* Ex. 1 (Settlement Agreement) §§ 1.22, 1.47. New York Class Members are Hourly Sales Representatives employed by Meltwater in New York during the period January 29, 2014 through November 16, 2020. *Id.* §§ 1.34-1.35. California Class Members are Hourly Sales Representatives employed by Meltwater in California during the period January 29, 2016 through November 16, 2020, and Salaried Sales Representatives employed by Meltwater in California during the period February 5, 2016 through November 16, 2020. *Id.* §§ 1.4-1.8. Illinois Class Members are Hourly Sales Representatives employed by Meltwater in Illinois during the period January 29, 2017 through November 16, 2020, and Salaried Sales Representatives employed by Meltwater in Illinois during the period February 5, 2017 through November 16, 2020. *Id.* §§ 1.24-1.28. Massachusetts Class Members are Hourly Sales Representatives employed by Meltwater in Massachusetts during the period January 29, 2017

through November 16, 2020.³ *Id.* §§ 1.30-1.31. PAGA Members are Hourly Sales Representatives employed by Meltwater in California during the period January 29, 2019 through November 16, 2020 and Salaried Sales Representatives employed by Meltwater in California during the period July 28, 2019 through November 16, 2020. *Id.* §§ 1.42-1.43.

II. THE SETTLEMENT FUND

Defendants have agreed to pay Fourteen Million Five Hundred Thousand Dollars (\$14,500,000.00) (the “Total Settlement Amount”) to cover: (1) individual settlement awards for Participating Class Members and Participating Collective Members (*id.* §§ 4(F)-(G), 9.5(A)); (2) PAGA Fund payments totaling \$18,125.00 to PAGA Members and \$54,375.00 to California’s Labor and Workforce Development Agency (“LWDA”) (*id.* § 9.4); (3) Service Awards of up to \$12,500.00 each to the Named Plaintiffs, including the Plaintiffs named in this action, as well as the other Named Plaintiffs defined in the Agreement: Paulina Ceballos (plaintiff in the California Action), Nikia Lenef, and Gavriel Reichman (plaintiffs in the Massachusetts Action), and up to \$7,500.00 each to Class Member Witnesses Bori Byun, Joseph Tull, and Alex White (\$110,000.00 total) (*id.* §§ 1.61-1.62, 9.3); (4) Class Counsel’s attorneys’ fees of no more than one-third of the Total Settlement Amount, plus reimbursement of actual litigation expenses and costs, up to \$30,000.00 (*id.* § 9.2); and (5) the Settlement Administrator’s fees and costs of \$32,000.00 (*id.* § 3(B)), Ex. 3 (Administrator Aff.) ¶ 29.

III. NOTICE TO CLASS AND COLLECTIVE MEMBERS

In accordance with the Settlement Agreement and the Court’s Preliminary Approval Order (NYSCEF No. 33), the Settlement Administrator notified Class and Putative Collective

³ New York, California, Illinois, and Massachusetts Class Members are referred to together herein as “Class Members.”

Members of the Settlement. *See* Ex. 3 (Administrator Aff.) ¶¶ 11-18. On May 21, 2021, the Settlement Administrator sent the Court-approved Notice and Claim Form to Class and Putative Collective Members via First-Class U.S. Mail, e-mail, LinkedIn message, and/or text message. *See id.* ¶¶ 11-14. The Settlement Administrator later sent Notices by mail and e-mail to one Class Member and Six Putative Collective Members who were inadvertently excluded from the Class List that Meltwater provided to the Administrator.⁴ *Id.* ¶¶ 17-18.

The Notices advised Class and Putative Collective Members of applicable deadlines and other events, such as the Final Approval Hearing, and how Class and Putative Collective Members could obtain additional information. *See id.*, Ex. A (Class Notice), Ex. B (Collective Notice). The Notices also informed Class and Putative Collective Members of Named Plaintiffs' and Class Member Witnesses' requests for Service Awards, as well as Class Counsel's intention to seek one-third of the Total Settlement Amount for attorneys' fees, plus reimbursement of actual litigation expenses and costs. *See id.*, Ex. A (Class Notice) ¶ 6, Ex. B (Collective Notice) ¶ 6. The Collective Notice informed Putative Collective Members how to submit a Claim Form. *See id.*, Ex. B (Collective Notice) ¶ 8. Class Members were not required to submit Claim Forms. *See id.*, Ex. A (Class Notice) ¶ 8.

During the notice period, Class Counsel assisted the Settlement Administrator by speaking with Class and Putative Collective Members about the terms of the settlement and providing updated mailing addresses to the Settlement Administrator. Stewart Aff. ¶ 30. The

⁴ The parties agreed that the Settlement would cover up to 40,000 workweeks, and that if the total number of workweeks increased by more than 8.5%, the Total Settlement Amount would increase by a proportional additional amount for each additional workweek above 8.5%. Ex. 1 (Settlement Agreement) § 9.1(B). The inclusion of the inadvertently excluded Class Member and Putative Collective Members resulted in 39,162.43 total workweeks, so did not trigger the increase provision. Ex. 3 (Administrator Aff.) ¶ 18.

Settlement Administrator also took reasonable efforts to locate the address of any Class or Putative Collective Member for whom Notice was returned as undeliverable. Ex. 3 (Administrator Aff.) ¶¶ 12, 15. The Settlement Administrator re-mailed approximately 222 Notices that had initially come back as undeliverable. *Id.* To date, only 35 of the approximately 729 Notices were ultimately undeliverable by the United States Post Office and only 37 of the approximately 732 e-mail Notices were returned as undeliverable. *Id.* ¶¶ 12, 15. Additionally, on June 10, 2021, the Settlement Administrator sent reminder postcards via First-Class U.S. Mail and email (where available) to 163 Putative Collective Members who had not yet responded to the Settlement, reminding them of the deadline of submit a Claim Form. *Id.* ¶ 24 & Ex. C.

As of the time of this filing, 282 of the 344 Putative Collective Members have submitted Claim Forms, no Class Member has opted out of the settlement, and no Class Member has objected to the settlement.⁵ *Id.* ¶¶ 20, 22, 23, 25.

IV. RELEASES

Class Members who do not timely opt out of the settlement (“Participating Class Members”) will release all “Released Class Claims.”⁶ *Id.* § 10.1.

Participating Collective Members who are not also Class Members who timely and validly submit a Claim Form and Participating Class Members who cash or otherwise negotiate a

⁵ Due to re-mailing of undeliverable Notices, several Putative Collective and Class Members have a Bar Date that falls later than the date of this filing, but before the final approval hearing. Ex. 3 (Administrator Aff.) ¶ 16. If there are any pertinent updates (e.g., objections or opt-outs) in advance of the hearing, Plaintiffs will file them with the Court as a supplement to this motion.

⁶ “Released Class Claims” means the applicable state wage and hour claims pled or that could have been pled based on the facts alleged in the First Amended Complaint that accrued during the Class Member’s employment in a covered position during the applicable limitations period, including without limitations, all applicable state claims for unpaid wages, premium pay of any kind, and all claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and expenses. *See* Ex. 1 (Settlement Agreement) §§ 1.49-1.50, 1.52-1.54.

Settlement Check will release all “Released Collective Claims.”⁷ *Id.* §§ 10.1(B). PAGA Members will release the “Released PAGA Claims.”⁸ *Id.* §§ 10.1(C).

Additionally, in consideration for the Service Awards, the Service Award Recipients and Defendants will agree to a mutual general release. *Id.* § 10.1(D)-(E).

V. ALLOCATION FORMULA AND PAYMENT

The Settlement Administrator will determine the settlement amount for each Participating Class Member and Participating Collective Member (together, “Settlement Class Member”) pursuant to a formula which allocates Participating Collective Members one (1) point for each eligible workweek worked during the FLSA Collective Period, and Participating Class Members one and one-fourth (1.25) points for each eligible workweek worked during the relevant class period.⁹ *Id.* § 9.5(A). To calculate each Settlement Class Member’s proportionate amount, the Settlement Administrator will: add all points for all Settlement Class Members together to obtain the “Denominator;” divide the number of points for each Settlement Class Member by the Denominator to obtain each Settlement Class Member’s “Portion of the Net Fund;” and multiply each Settlement Class Member’s Portion of the Net Fund by the Net Settlement Fund to determine

⁷ “Released Collective Claims” means wage and hour claims pled or that could have been pled based on the facts alleged in the First Amended Complaint that accrued during the Class or Participating Collective Member’s employment in a covered position, relating back to the full extent of the federal and relevant states statutes of limitations, including any period tolled by the parties’ February 5, 2020 tolling agreement, and continuing through November 16, 2020, including, without limitations, all federal claims for unpaid overtime wages, and related claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and expenses. *Id.* § 1.51.

⁸ “Released PAGA Claims” means the claims relating to penalties under the California Private Attorneys General Act pled in the First Amended Complaint that accrued during PAGA Members’ employment in a covered position during the applicable limitations period, including, without limitations, all state claims for unpaid wages, premium pay of any kind, and all claims for penalties, interest, liquidated damages, attorneys’ fees, costs, and expenses. *Id.* § 1.55.

⁹ The Settlement Administrator will not double count workweeks for Class Members who are also Putative Collective Members during an overlapping period. *Id.* § 9.5(A).

each Settlement Class Member's Net Amount. *Id.* PAGA Members will be entitled to an additional Net PAGA Amount based on weeks worked in the PAGA period. *Id.* § 9.5(B).

Fourteen (14) days after the settlement has been fully funded pursuant to Section 9.1(C), the Settlement Administrator will mail Settlement Checks to Settlement Class Members. *Id.* § 9.5(D). Each Settlement Class Member will have one hundred and twenty (120) days following the issuance of Settlement Checks to negotiate the check. *Id.* § 9.5(E). The Settlement Administrator will send reminders via e-mail and First-Class U.S. Mail within sixty (60) days after the initial distribution of checks to Settlement Class Members and PAGA Members who have not yet cashed their Settlement Checks reminding them to negotiate their checks prior to the one hundred twenty (120) day deadline. *Id.* § 9.5(F).

Any checks not cashed after the expiration of the one hundred twenty (120) days following issuance of checks shall be redistributed to Settlement Class Members who cashed or otherwise negotiated a settlement check, or, if redistribution is impractical on the basis that the amount remaining in the Net Fund is similar to or less than the cost of a second distribution, it shall be donated to the *cy pres* recipient. *Id.* § 9.1(D).

ARGUMENT

I. CLASS ACTION SETTLEMENT PROCEDURE

CPLR § 908 requires judicial approval for any compromise of claims brought on a class basis. *See* CPLR § 908. This approval process includes three steps: (1) conditional certification of the proposed class and preliminary approval of the settlement on a written motion; (2) dissemination of notice of settlement to all affected class members; and (3) a final settlement approval hearing at which class members may be heard, and at which argument concerning the propriety of the settlement may be presented. *See* Herbert B. Newberg & Alba Conte, *Newberg*

on *Class Actions* (“Newberg”), § 13:10 (5th ed.); see, e.g., *Lopez v. Dinex Grp., LLC*, 2015 N.Y. Slip Op. 31074(U) (Sup. Ct., N.Y. County 2015), at *4-5 (explaining settlement approval process).

With this Final Approval Motion, Plaintiffs request that the Court take the third and final step—granting final approval of the Settlement Agreement, approving the Service Awards and Class Counsel’s fees and costs, and authorizing the Settlement Administrator to disburse the Settlement Fund. Plaintiffs ask the Court to approve the following schedule:

<u>Deadline</u>	<u>Date</u>
Deadline for Defendants to pay 1/3 of the Total Settlement Amount into the QSF	5 days after the Court enters the Final Approval Order (Ex. 1 (Settlement Agreement) § 9.1(C)).
Deadline for Defendants to pay 1/3 of the Total Settlement Amount into the QSF	Two months after the Court enters the Final Approval Order (<i>Id.</i>).
Deadline for Defendants to pay 1/6 of the Total Settlement Amount into the QSF	Three months after the Court enters the Final Approval Order (<i>Id.</i>).
Deadline for Defendants to pay the final 1/6 of the Total Settlement Amount into the QSF	Four months after the Court enters the Final Approval Order (<i>Id.</i>).
Deadline for Settlement Administrator to transmit Court-approved Service Awards to Named Plaintiffs and Class Member Witnesses, and Class Counsel’s Court-approved attorneys’ fees and costs	7 days after the settlement has been fully funded (<i>id.</i> § 9.3(D)).
Deadline for Settlement Administrator to transmit Settlement Checks to Settlement Class Members, PAGA Payments to PAGA Members, and the PAGA penalty to the LWDA	14 days after the settlement has been fully funded (<i>id.</i> § 9.5(D)).
Deadline for Settlement Administrator to send check cashing reminder via e-mail and First-Class U.S. Mail to Settlement Class Members who have not cashed their Settlement Checks	60 days after the issuance of Settlement Checks (<i>id.</i> § 9.5(F)).
Deadline for Settlement Class Members to cash their Settlement Checks	120 days after the issuance of Settlement Checks (<i>id.</i> § 9.5(E)).

II. FINAL APPROVAL OF THE CLASS SETTLEMENT IS APPROPRIATE.

Courts review class action settlements for fairness, adequacy, and reasonableness, keeping in mind the class members' best interests. *See Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 537 (Sup. Ct., N.Y. County 2010) (collecting cases); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 (2d Dep't 2006). To determine whether to approve a settlement, courts consider the following factors: (1) the likelihood of success; (2) the support from the class; (3) the settlement value balanced against the potential recovery, in light of the litigation risks; (4) counsel's judgment; (5) the presence of good-faith negotiations; and (6) the issues at stake. *Jiannaras v. Alfant*, 2011 WL 12686099, at *5 (Sup. Ct., Queens County, Apr. 6, 2011, No. 21262/2009) (listing factors); *see also Mancina v. HSBC Secs.(USA) Inc.*, 2016 WL 833232, at *2 (Sup. Ct., Kings County, Feb. 19, 2016, No. 9400/2015) (same); *Klurfeld v. Equity Enters., Inc.*, 79 A.D.2d 124, 133 (2d Dep't 1981). These factors are applied flexibly based on the circumstances of the case and the "strong judicial policy" favoring class action settlements. *Jiannaras*, 2011 WL 12686099, at *5-6 (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). Here, each factor weighs in favor of settlement approval.

A. Factors 1 & 6: The Likelihood of Success and the Issues at Stake.

Although Plaintiffs believe their case is strong, it is subject to risk. Risks are inherent in litigation. *See Klurfeld*, 79 A.D.2d at 136 ("All lawsuits, more or less, present the risk of defeat[.]"). These risks are pronounced in wage and hour class actions, which are "inherently complex" and often burdened by "costs, delays and [a] multitude of other problems associated with them." *Johnson v. Brennan*, No. 10 Civ. 4712, 2011 WL 4357376, at *8 (S.D.N.Y. Sept. 16, 2011) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)). These cases "typically involve complex mixed questions of fact and law" that

must be resolved in light of “over [eight] decades of legal interpretation and administrative rulings.” *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981).

Plaintiffs recognize the legal, factual, and procedural obstacles to recovery. To fully succeed, Plaintiffs would have to, among other things: (1) prove that Meltwater knew or should have known of Class and Putative Collective Members’ off-the-clock work; (2) defeat Meltwater’s affirmative defense that Salaried Sales Representatives were properly classified as exempt from overtime, which would require several findings of fact and law in Plaintiffs’ favor; (3) prove the amount of overtime Sales Representatives worked; (4) prove that Meltwater failed to provide Sales Representatives with proper wage statements; (5) prove that Meltwater failed to timely pay Sales Representatives wages due upon separation from employment; (6) prove that Meltwater failed to provide Sales Representatives with proper meal and rest breaks; and (7) prove that Meltwater failed to reimburse Sales Representatives for reasonable and necessary business expenses. Stewart Aff. ¶ 31. Plaintiffs would also have to obtain class and collective certification and maintain a class and collective action through trial, which is not easy. *See id.* ¶ 32; *see also, e.g., Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 480 (S.D.N.Y. 2013) (collecting misclassification cases denying or decertifying class action status). *Zivali v. AT&T Mobility, LLC*, 784 F. Supp. 2d 456, 469 (S.D.N.Y. 2011) (decertifying off-the-clock collective action). Plaintiffs would need to achieve all of this in the face of Meltwater’s vigorous opposition at each stage of the proceedings, including collective certification, class certification (and decertification), dispositive motion practice, trial, and potential appeals. Stewart Aff. ¶ 33.

Because the parties’ position on the factual and legal issues at hand clash, and Plaintiffs’ case is far from a guarantee, these factors favor approval. *See Charles v. Avis Budget Car Rental, LLC*, 2017 N.Y. Slip Op. 32644(U), at *4 (Sup. Ct., N.Y. County 2017) (weighing that

“Defendant has and will continue to vigorously contest Plaintiff’s claims if the action does not settle” in favor of settlement); *Fernandez v. Legends Hospitality, LLC*, 2015 WL 3932897, at *2 (Sup. Ct., N.Y. County, June 22, 2015, No. 152208/2014) (same).

B. Factor 2: Extent of Support from the Class.

The class’s reaction to the settlement “is perhaps the most significant favor to be weighed in considering its adequacy.” *Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 173 (E.D.N.Y. 2012) (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362-63 (S.D.N.Y. 2002)). A favorable reaction “supports judicial approval” as it is “strong evidence” of a fair deal. *Milton v. Bells Nurses Registry & Emp’t Agency, Inc.*, 2015 WL 9271692, at *2 (Sup. Ct., Kings County, Dec. 21, 2015, No. 502303/2015). A lack of objections “may itself be taken as evidencing the fairness of the settlement.” *Weiss v. Drew Nat’l Corp.*, 465 F. Supp. 548, 551 (S.D.N.Y. 1979).

Class and Collective Members have shown an enthusiastic response and are eagerly awaiting finalization of the settlement. Stewart Decl. ¶ 34. Class Counsel have responded to numerous inquiries from Class and Collective Members regarding how to participate in the settlement. *Id.* ¶ 35. Of the approximately 422 Class Members, none has objected to the settlement or opted out of it. Ex. 3 (Administrator Aff.) ¶¶ 18, 20, 22. Moreover, 282 of the approximately 344 Putative Collective Members (82%) submitted Claim Forms. *Id.* ¶¶ 23, 25. The claims rate and the dearth of objectors and exclusions weighs in favor of approval. *See DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494, 2015 WL 2255394, at *4 (S.D.N.Y. May 11, 2015) (“‘The fact that the vast majority of class members neither objected nor opted out is a strong indication’ of fairness.” (quoting *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008))); *Sanchez v. Kambousi Rest. Partners, LLC*, No. 15 Civ. 5880, 2016 WL 11717105, at *8

(S.D.N.Y. Aug. 5, 2016) (approving settlement with 35% claims rate and collecting cases approving claims rates of between 20 and 50%).

C. Factor 3: The Value of the Settlement Balanced Against the Anticipated Recovery.

The value of the settlement compared to the anticipated recovery after trial, discounted for litigation risks, weighs heavily in favor of approval. The reasonableness of a settlement is not susceptible to “use of a ‘mathematical equation yielding a particulariz[ed] sum.’” *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015) (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005)). “Instead, ‘there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.’” *Frank*, 228 F.R.D. at 186 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

The Fourteen Million Five Hundred Thousand Dollars (\$14,500,000.00) that Defendants have agreed to pay to settle this case is substantial. Based on Class Counsel’s analysis, this represents a significant recovery for Settlement Class Members. Stewart Aff. ¶ 36. Specifically, Class Counsel estimates that the Total Settlement Amount represents approximately 37% of Class and Putative Collective Members’ damages, including unpaid overtime wages, liquidated damages, and related New York and California penalties, assuming that Class and Putative Collective Members worked 10 hours of overtime per week on average during overtime weeks, and that they worked overtime in approximately 90% of workweeks. *Id.* ¶ 37. The Settlement Administrator further estimates that the average individual recovery is approximately \$12,925, and the highest recovery exceeds \$61,175. Ex. 3 (Administrator Aff.) ¶ 28.

In sum, although there is a possibility that Settlement Class Members could recover more

money after trial (including after the resolution of any appeals), the settlement provides the significant benefit of a guaranteed and substantial payment to Settlement Class Members now, rather than “speculative payment of [a] hypothetically larger amount years down the road.” *Hosue v. Calypso St. Barth, Inc.*, 2017 N.Y. Slip Op. 31928(U), at *6 (Sup. Ct., N.Y. County 2017) (quoting *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)). Therefore, weighing the settlement benefits against the evidence and risks of further litigation, the settlement is an excellent result for Settlement Class Members.

D. Factor 4: Judgment of Counsel.

Where counsel is experienced in the type of litigation at bar, courts afford class counsel’s opinion “considerable weight.” *Smith v. Vista Org., Ltd.*, No. 89 Civ. 48, 1991 WL 152612, at *5 (S.D.N.Y. July 30, 1991) (quoting *Fielding v. Allen*, 99 F. Supp. 137, 144 (S.D.N.Y. 1951); see, e.g., *Gordon v. Verizon Commc’ns, Inc.*, 148 A.D.3d 146, 157 (1st Dep’t 2017) (counsel’s opinion weighed in favor of approval as the attorneys were “competent and experienced in the field of complex class action litigation” in the substantive area of law at issue). Here, this factor weighs in favor of approval because Class Counsel have drawn upon their wealth of wage and hour class action experience in reaching this settlement and advise that, in their judgment, the settlement is a fair, reasonable, and adequate compromise of the claims at issue. See Stewart Aff. ¶ 38 & Ex. 5 (Affirmation of James F. Misiano in Support of Plaintiffs’ Unopposed Motion for Final Settlement Approval (“Misiano Aff.”) ¶¶ 4-13.

E. Factor 5: Presence of Good-Faith Bargaining.

A settlement is presumed fair if it was “reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *Manual for Complex Litigation (Third)* § 30.42

(1995)). An experienced mediator’s assistance “reinforces that the Settlement Agreement is non-collusive.” *Ackley v. Atlantis Marine World, L.L.C.*, 2016 WL 11531765, at *1 (Sup. Ct., Suffolk County, Mar. 23, 2016, No. 63308/2014); *see also DeLeon*, 2015 WL 2255394, at *3 (finding the settlement “procedurally fair, reasonable, adequate, and not a product of collusion” where “the parties enlisted the services of an experienced employment mediator[.]”); *In re HSBC Bank U.S.A., N.A., Checking Account Overdraft Litig.*, 2015 WL 6698518, at *10 (Sup. Ct., N.Y. County, Oct. 27, 2015, No. 650562/2011) (“[The mediator’s] opinion supports the conclusion that the Settlement Agreement is fair, adequate, reasonable and in the best interest of the Class.”).

Here, this factor weighs in favor of approval. The hard-fought and arm’s-length negotiations in this case, involving a neutral mediator with significant experience mediating wage and hour matters such as this, have produced a result that Class Counsel believes to be in the best interests of the Settlement Class considering the risks of continued litigation. Stewart Aff. ¶ 39. Mr. Ross’s brokering of this settlement further demonstrates that it warrants Court approval. *Id.* ¶ 40.

III. THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

Under the proposed Settlement Agreement, and subject to Court approval, the Named Plaintiffs will receive Service Awards of up to \$12,500.00 each, including the four Plaintiffs named in this action, as well as the other Named Plaintiffs defined in the Agreement: Paulina Ceballos (plaintiff in the California Action), Nikia Lenef, and Gavriel Reichman (plaintiffs in the Massachusetts Action), and each Class Member Witness – Bori Byun, Joseph Tull, and Alex White – will receive up to \$7,500.00 (\$110,000.00 total for all Service Award Recipients) in addition to their allocated share of the Settlement Fund. Such awards compensate “plaintiffs for

the effort and inconvenience of consulting with counsel” for the duration of the case and for otherwise participating in the case and achieving a class-wide benefit. *Cox v. Microsoft Corp.*, 2007 WL 7045224, at *4 (Sup. Ct., N.Y. County, Feb. 2, 2007, No. 105193/2000). Service awards “are particularly appropriate in the employment context.” *Frank*, 228 F.R.D. at 187; *see, e.g., Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) (“A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded.”).

The Named Plaintiffs and Class Member Witnesses’ services were instrumental to the initiation and prosecution of this action, and they expended considerable time and effort to assist with this case. Stewart Aff. ¶ 41. Their services included but were not limited to: informing counsel of the facts initially and as the case progressed; providing Class Counsel with relevant documents in their possession; being available by phone and providing additional information during and in advance of the mediation; and reviewing and commenting on the terms of the settlement. *Id.* ¶ 42. As such, their actions exemplify the very reason courts grant service awards. *See Frank*, 228 F.R.D. at 187 (recognizing the important role that plaintiffs play as the “primary source of information concerning the claims,” including by responding to counsel’s questions and reviewing documents). Further, Named Plaintiffs took a significant risk by coming forward to represent other workers in this public lawsuit against their former employer. Stewart Aff. ¶ 43. This reputational risk is heightened in the context of the technology sales industry where online reputation is important to securing sales. *Id.* ¶ 44.

The Notices informed Class and Collective Members of the total amount to be paid as Service Awards to the Named Plaintiffs and Class Member Witnesses, in recognition of the

services they provided and the benefit they obtained for the Class. *See* Ex. 3 (Administrator Decl.), Ex. A (Class Notice) ¶ 6, Ex. B (Collective Notice) ¶ 6. No Class Member objected to the Service Awards. *Id.* ¶ 22. The Service Award amounts of \$12,500 and \$7,500 are eminently reasonable, represent in the aggregate less than 1% of the Total Settlement Amount, and are well within the range courts award in wage and hour matters. *See, e.g., Karic v. Major Auto. Cos.*, No. 09 Civ. 5708, 2016 WL 1745037, at *8 (E.D.N.Y. Apr. 27, 2016) (awarding \$20,000 to each of the seven named plaintiffs); *Mentor v. Imperial Parking Sys., Inc.*, No. 05 Civ. 7993, 2010 WL 5129068, at *1-2 (S.D.N.Y. Dec. 15, 2010) (awarding \$40,000 and \$15,000 as service payments to named plaintiffs); *Rodriguez v. Joseph Eletto Transfer, Inc.*, 2016 N.Y. Slip Op. 32592(U), at *3 (Sup. Ct., Nassau County 2016) (awarding lead plaintiff \$15,000).

Given the time, assistance, and substantial benefit afforded to the Settlement Class by virtue of the settlement, the Service Awards are appropriate and justified as part of the overall settlement.

IV. APPROVAL OF THE FLSA SETTLEMENT IS WARRANTED.

Plaintiffs also request that the Court approve the settlement of their FLSA claims pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). In addition to bringing class action claims pursuant to CPLR § 901, Plaintiffs also brought FLSA claims as a collective action. Unlike the procedure under CPLR § 907, collective members must affirmatively opt in to the litigation in order to join it. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 84 (S.D.N.Y. 2001). FLSA collective actions do not involve the same due process issues as class actions because individuals do not waive their FLSA rights by failing to opt in to a FLSA settlement – thereby enabling them to file their own suit at a later date. *See Beckman*, 293 F.R.D. at 476; *Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2011 WL

4599822, at *6 (S.D.N.Y. Aug. 16, 2011). Accordingly, the standard for approval of a FLSA settlement is lower than that for a class settlement. *See Chavarria*, 875 F. Supp. 2d at 176.

Instead, “[c]ourts generally approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes.” *Id.*; *Reyes*, 2011 WL 4599822, at *6. If the proposed settlement reflects a reasonable compromise of contested issues, a court should approve it. *Reyes*, 2011 WL 4599822, at *6. Here, as discussed in the sections above, the settlement involved contested claims and was the result of vigorous, arm’s-length negotiations between capable counsel with the assistance of an experienced mediator. Stewart Aff. ¶ 45. Because the settlement resolves a clear and actual dispute and was reached after arm’s-length settlement negotiations, the settlement of the FLSA claims should be approved.

V. CLASS COUNSEL’S FEES AND EXPENSES ARE APPROPRIATE AND SHOULD BE APPROVED.

The Court should approve the attorneys’ fees and litigation expenses that Plaintiffs request. An attorneys’ fees award of one-third of the settlement fund plus litigation expenses is appropriate in a wage-and-hour case. *See Varela v Bldg. Serv. Indus., LLC*, 2018 N.Y. Slip Op. 33514(U), at *3 (Sup. Ct., Nassau County 2018) (awarding one-third of the settlement fund); *Rodriguez*, 2016 N.Y. Slip Op. 32592(U), at *2-3 (same); *Milton*, 2015 WL 9271692, at *5 (same); *Fernandez*, 2015 WL 3932897, at *5 (same). “Courts routinely grant requests of one-third of settlement funds for attorney’s fees in wage and hour class actions such as this.” *Hastings v. Regeis Care Ctr., LLC*, 2018 WL 6488279, at *4 (Sup. Ct., Bronx County, Oct. 24, 2018, No. 23900/2016E); *see also Rodriguez*, 2016 N.Y. Slip Op. 32592(U), at *2-3; *Milton*, 2015 WL 9271692, at *5; *Fernandez*, 2015 WL 3932897, at *5; *Ryan v. Volume Servs. Am., Inc.*, 2013 WL 12147011, at *4 (Sup. Ct., New York County, Mar. 7, 2013, No. 652970/2012). The requested fees are also consistent with Plaintiffs’ retainer agreements, which provide for counsel

to receive one-third of any recovery. Stewart Aff. ¶ 46; *see Friedman v. Northville Indus. Corp.*, 1991 WL 11764344 (Sup. Ct., Suffolk County, Dec. 4, 1991, No. 2085/1988) (“[Retainer] agreements are strong evidence of what members of the class have found to be a reasonable fee.”).

A. The Requested Fee is Fair and Reasonable.

New York courts consider several factors to determine whether the requested fee is reasonable:

[T]he risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case’s history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

Charles, 2017 N.Y. Slip Op. 32644(U) at *4 (quoting *Fiala*, 899 N.Y.S.2d at 540). In this case, all factors weigh in favor of approval of the requested fee.

1. The Risks of Litigation Warrant Recovery of the Requested Fees.

The risk of litigation “is perhaps the foremost factor to be considered in determining the award of appropriate attorneys’ fees.” *Taft v. Ackermans*, No. 02 Civ. 7951, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). Courts will grant a “substantial fee award” to “recognize the outsize risks that [class counsel] took in investing in [an] uncertain lawsuit.” *Hart v. RCI Hosp. Holdings, Inc.*, No. 09 Civ. 3043, 2015 WL 5577713, at *16 (S.D.N.Y. Sept. 22, 2015) (noting that during the litigation period class counsel “retained its obligations to pay salaries and overhead, and assuredly forewent other potential clients and cases. A law firm is a business, too.”); *see also Hastings*, 2018 WL 6488279, at *4 (“Such ‘contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation . . . and

transfer a significant portion of the risk of loss to the attorneys taking a case.” (quoting *deMunecas v. Bold Food LLC*, No. 09 Civ. 440, 2010 WL 3322580, 8 (S.D.N.Y. Aug. 23, 2010))). Class Counsel took tremendous risks in litigating this matter under a complete contingency agreement and have not received any compensation since the commencement of their investigation nearly two years ago. Stewart Aff. ¶ 47. If this case had been dismissed on summary judgment, trial, or appeal, Class Counsel would have lost all the time and expenses put into this matter. *Id.* ¶ 48. Furthermore, as set forth above, the unsettled issues of fact and law in this matter, along with the factual and procedural obstacles to recovery, presented real challenges to any recovery whatsoever. *Id.* ¶ 49.

2. The Litigation’s Magnitude and Complexity, and the Responsibility Counsel Undertook Warrant Recovery of the Requested Fees.

This case presents complex issues of law, fact, and class-action procedure. Stewart Aff. ¶ 50. Plaintiffs’ claims hinged on three fact-intensive inquiries—whether Defendants had a policy of not paying Hourly Sales Representatives for hours worked over 40 in a workweek; whether Defendants had actual or constructive knowledge that Sales Representatives were working off-the-clock, but failed to take steps to address it; and whether Salaried Sales Representative were misclassified as exempt from overtime. *Id.* ¶ 51. As a result, the magnitude, complexity and numerous legal and factual issues involved in the resolution of Plaintiffs’ claims favor awarding the requested fees. *See Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 219, 222 (S.D.N.Y. 2015) (approving fees equal to 33% of the settlement fund in off-the-clock case, noting that plaintiffs’ assumptions of hours worked off-the-clock would “be very difficult to prove”); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 620 (S.D.N.Y. 2012) (awarding fees equal to 33% of the settlement fund in part because “the fact-intensive nature of Plaintiffs’ off-the-clock claim presents risk”); *Frank*, 228 F.R.D. at 189 (“mixed questions of fact and law” supported court’s

award of attorneys' fees representing 38% of the common fund); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 415 (S.D.N.Y. 1997) (considering the complexity of the case in determining the responsibility counsel undertook).

3. Counsel Did Not Have the Benefit of a Prior Judgment.

Counsel did not benefit from a prior judgment when this action was filed, nor during the pendency of the action. Stewart Aff. ¶ 52. Accordingly, this factor weighs in favor of the fee request.

4. The Amount Recovered is Proportional to the Requested Fees.

Class Counsel's work has led to the creation of a substantial Settlement Fund – \$14,500,000.00. As discussed above, this amount represents a significant percentage of the recovery that Class and Collective Members would have achieved if they had prevailed on all of their claims and survived an appeal. The Settlement Administrator estimates that the average recovery is approximately \$12,925, and the highest individual recovery exceeds \$61,175. Ex. 3 (Administrator Aff.) ¶ 28; *see Cheeks*, 796 F.3d at 207 (noting that wage-and-hour plaintiffs often settle for between \$500 and \$2,000 in unpaid wages). Therefore, the settlement represents an excellent result for Class and Collective Members.

5. The Case's History and Work Done by Counsel was Substantial.

Class Counsel's time invested in litigating and settling this case was significant and reasonable. Stewart Aff. ¶ 53. Further, Class Counsel will expend additional time overseeing settlement administration after final approval, for which they will not be compensated. *Id.* ¶ 54.

6. Counsel Maintains Reputable Standing Among the Bar.

Class Counsel have extensive experience representing workers in wage and hour class actions and an excellent reputation among the employment law bar. *See, e.g., Capilupi v.*

People's United Fin., Inc., No. 15 Civ. 5247, 2018 WL 4693588, at *2 (E.D.N.Y. Sept. 27, 2018) (“Class Counsel [O&G] are well qualified, experienced, and have aggressively litigated this action, thereby demonstrating their adequacy as counsel for the class.”); *see also* Stewart Aff. ¶¶ 4-10, 55 & Ex. 5 (Misiano Aff.) ¶¶ 4-11.

7. The Fee Is Consistent with What a Victorious Plaintiff Would Pay.

One-third of a recovery is a standard fee award for successful cases. “Courts routinely grant requests of one-third of settlement funds for attorney’s fees in wage and hour class actions[.]” *Hastings*, 2018 WL 6488279, at *4; *see also Rodriguez*, 2016 N.Y. Slip Op. 32592(U) (awarding one-third in fees); *Milton*, 2015 WL 9271692, at *5 (same); *Fernandez*, 2015 WL 3932897, at *5 (same); *Ryan*, 2013 WL 12147011, at *5 (same).

B. Counsel Is Entitled to Reimbursement of Expenses Under the Settlement.

Class Counsel request reimbursement of \$25,872.05 in out-of-pocket expenses, to be paid from the Settlement Fund. *See* Stewart Aff. ¶ 56 & Ex. 4. Attorneys may recover their litigation costs if such costs were incidental and necessary to the litigation. *See Cohan v. Columbia Sussex Mgmt., LLC*, No. 12 Civ. 3203, 2018 WL 4861391, at *6 (E.D.N.Y. Sept. 28, 2018) (approving \$19,336.01 in costs); *see also Friedman*, 1991 WL 11764344 (same for \$38,386.35).

“[Recoverable] costs routinely include filing fees, process servers, postage, travel, and photocopying.” *Capone v. Patchogue-Medford Union Free Sch. Dist.*, No. 04 Civ. 2947, 2011 WL 743573, at *5 (E.D.N.Y. Feb. 23, 2011). Here, Class Counsel’s actual expenses of \$25,872.05 were incidental and necessary to the representation of the Class. *See* Stewart Aff. ¶ 56. These reasonable expenses include court fees, expert fees for analyzing personnel data for mediation, Plaintiffs’ share of the mediator’s fees, and computerized research. *Id.* ¶ 57.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the Final Approval Motion and enter the Proposed Order attached as Exhibit 2 to the Stewart Aff.

Dated: New York, New York
August 2, 2021

Respectfully submitted,

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