

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

**HEATHER FITZGERALD**, individually )  
and on behalf of all others similarly )  
situated, )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. 3:20-cv-01004-DRL-MGG  
 )  
**FOREST RIVER MANUFACTURING** )  
**LLC**, )  
 )  
Defendant. )

**MEMORANDUM IN SUPPORT JOINT MOTION  
FOR APPROVAL OF FLSA COLLECTIVE ACTION SETTLEMENT**

**I. FACTUAL AND PROCEDURAL BACKGROUND.**

**A. The Action.**

**1. Procedural Background**

On December 2, 2020, Representative Plaintiff Heather Fitzgerald filed a lawsuit against Forest River Manufacturing, LLC (“Defendant”) in the United States District Court, Northern District of Indiana, Case No. 3:20-cv-01004-DRL-MGG (the “Action”), asserting a collective action for unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 216(b) (“FLSA”). In the Action, Representative Plaintiff asserted claims against Defendant on behalf of herself and others similarly situated under the FLSA.<sup>1</sup>

On February 11, 2021, Representative Plaintiff filed her Motion for Step One Conditional Certification and Notice Pursuant to the Fair Labor Standards Act (“First MCC”).<sup>2</sup>

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<sup>1</sup> ECF No. 1.

<sup>2</sup> ECF No. 24.

On March 5, 2021, Defendant filed its Motion for Leave to Conduct Limited Expedited Discovery (“Motion for Discovery”).<sup>3</sup> Defendant’s Motion for Discovery was opposed.<sup>4</sup> However, the Court granted Defendant’s Motion for Discovery and denied Representative Plaintiff’s First MCC by Order on March 11, 2021.<sup>5</sup>

Over the following three months, the Parties conducted written discovery and took depositions. On September 21, 2021, Representative Plaintiff filed her Renewed Motion for Step One Conditional Certification and Notice Pursuant to the Fair Labor Standards Act (“Renewed MCC”).<sup>6</sup> The Renewed MCC was contested.<sup>7</sup>

On February 23, 2022, the Court issued an Order granting Representative Plaintiff’s Renewed MCC.<sup>8</sup> Notice was sent to approximately 10,732 putative collective members. Approximately 1,000 putative collective members returned consent forms and joined this Action (“Opt-In Plaintiffs”).

The Court held a Rule 16 Preliminary Pretrial Conference on July 14, 2022, to discuss what discovery would be permitted following conditional certification and notice. The Court allowed Phase II discovery that included sending Defendant’s questionnaire to 100 Opt-In Plaintiffs and conducting five additional depositions. The Court also ordered the Parties to attend mediation no later than November 30, 2022.<sup>9</sup>

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<sup>3</sup> ECF No. 30.

<sup>4</sup> ECF No. 32.

<sup>5</sup> ECF No. 34.

<sup>6</sup> ECF No. 56.

<sup>7</sup> ECF No. 59.

<sup>8</sup> ECF No. 75.

<sup>9</sup> ECF No. 108.

The Parties completed the pre-mediation discovery and scheduled mediation with Lynn Cohn on November 17, 2022. Although the Parties attended the mediation, the mediation ended with the Parties at an impasse.

Nevertheless, the Parties continued settlement discussions and agreed on a settlement in principle which was memorialized in a Settlement Term Sheet.

## **2. The Settlement**

The terms of the settlement are more fully set forth in the Settlement Agreement, attached as **Exhibit 1**.<sup>10</sup> The settlement can be summarized as follows:

- The Global Settlement Fund is \$395,000.
- There will be no reversion. All amounts will be distributed to Participating Settlement Plaintiffs or remitted to a *cy pres* fund, except that any funds from uncashed Settlement Payment checks may first be applied to any settlement administration costs with the remainder being paid to Indianapolis Legal Aid Society, as the charity Representative Plaintiff has selected to receive any *cy pres* funds.
- Defendant's portion of payroll taxes and the costs of settlement administration will be paid separately outside of the Global Settlement Fund.
- The Parties agreed to \$7,500.00 for payment of Representative Plaintiff's Service Award.
- The Parties agreed to a payment of no more than one-third of the Global Settlement Fund (i.e., \$131,666.67) for Plaintiff's Counsel's attorneys' fees.
- The Parties agreed to \$42,369.73 out of the Global Settlement Fund as reimbursement to Plaintiff's counsel for litigation expenses.
- The Global Settlement Fund less the Representative Plaintiff's Service Award, the Plaintiff's Counsel's attorneys' fees, and the reimbursement of Plaintiff's counsel's litigation expenses equals \$213,463.60 ("Net Settlement Fund"). The Net Settlement Fund will be distributed approximately as follows:

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<sup>10</sup> Defined terms from the Settlement Agreement are used in the Joint Motion and have the same definition as set forth in the Settlement Agreement.

All Opt-In Plaintiffs will have the opportunity to participate in the settlement. Each Opt-In Plaintiff will be sent the Notice of Settlement with the Claim Form and Release with 60 days to elect to join the settlement. Those Opt-In Plaintiffs who join the settlement will become “Participating Settlement Plaintiffs” and will receive a Settlement Award. The Settlement Awards are determined on a pro rata basis by calculating each Opt-In Plaintiff’s number of workweeks where they were paid on a piece rate basis only. All settlement awards that would have been paid to non-participating Opt-In Plaintiffs will be redistributed to Participating Settlement Plaintiffs on a pro rata basis.

## **II. THE FLSA SETTLEMENT SHOULD BE APPROVED.**

Settlement of claims made pursuant to Section 216(b) of the FLSA are subject to approval by the Court. As shown in the attached Declaration of Robi J. Baishnab, and as explained below, Court approval is warranted on all scores.

As noted above, each Opt-In Plaintiff who timely returns a fully executed Claim Form and Release will become a Participating Settlement Plaintiff and will then be entitled to receive a Settlement Award. Each Participating Settlement Plaintiff will receive a pro rata share of the Net Settlement Fund based on the number of weeks they were paid on a piece rate basis for Defendant.

In addition, the Global Settlement Fund provides for payment of Plaintiff’s Counsel’s attorney’s fees and litigation costs reimbursement. Finally, the Global Settlement Fund also contains the Service Award of \$7,500.00 to Fitzgerald.

In exchange for the payments made to Participating Settlement Plaintiffs, they will provide a full release of all wage and hour claims as outlined in the Settlement Agreement. All Opt-In Plaintiffs who do not choose to participate will not waive any claims.

### **A. Standard for Approval of an FLSA Collective Action.**

A district court should approve an FLSA collective action settlement if it was reached as a result of contested litigation and it is a fair and reasonable resolution of a bona fide dispute between the parties. *Knox v. Jones Grp.*, 2017 WL 3834929, at \*1 (S.D. Ind. Aug. 31, 2017); *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-54 (11th Cir. 1982) (citing *Brooklyn Savings Bank v.*

*O'Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945)); *Roberts v. Apple Sauce, Inc.*, 2014 WL 4804252, at \*1 (N.D. Ind. Sept. 25, 2014); *Burkholder v. City of Ft. Wayne*, 750 F.Supp.2d 990, 994-95 (N.D. Ind. 2010); see also *Butler v. Am. Cable & Tel., LLC*, 2011 WL 4729789, at \*8-9 (N.D. Ill. Oct. 6, 2011). “It is a well settled principle that the law generally encourages settlements.” *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979).

The settlement in this case meets the standard for approval. There can be no doubt that the settlement was the result of vigorously contested litigation. The case was actively litigated by both parties. Defendant sought and received discovery before and after conditional certification, it contested Plaintiff’s Renewed MCC, and it sought interlocutory review. The Parties engaged in significant discovery. Accordingly, the “contested litigation” prong is easily satisfied.

The second prong of the Court's settlement approval inquiry, whether the settlement is a fair and reasonable resolution of a bona fide dispute between the parties, is also satisfied.

To determine whether a settlement is “fair and reasonable,” courts often analyze the following factors: (1) whether the parties fairly and honestly negotiated the settlement; (2) if serious questions of law and fact existed that placed the ultimate outcome of the litigation in doubt; (3) does the value of immediate settlement outweigh the mere possibility of future relief after protracted litigation; and (4) in the judgment of the parties, is the settlement is fair and reasonable. *Cannon v. Time Warner NY Cable LLC*, 2015 WL 4498808 (D. Colo. July 24, 2015).

Here, each of these factors is satisfied. Major disputes developed between the Parties regarding collective treatment, the definition of the collective, the content of notice, questions of liability, the valuation of the case, and the proper method of calculating damages. (Baishnab Decl. at ¶13). The settlement result is fair and reasonable. See *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank*

*& Trust*, 834 F.2d 677, 682 (7th Cir. 1987) (finding adequate a settlement of 10% of the total sought due to risks and costs of trial).

The Court can conclude that a bona fide dispute existed between the parties. Defendant denied the material allegations of Representative Plaintiff's claims and any violation of the FLSA, and it vigorously defended its position throughout the litigation, resulting in extensive motion practice and discovery on both sides. *Swartz v. D-J Eng'g, Inc.*, 2016 WL 633872, 2016 U.S. Dist. LEXIS 20017 (D. Kan. Feb. 17, 2016).

The Global Settlement Fund itself is fair and reasonable, especially considering the compounding risk of continuing the litigation. Plaintiff's Counsel has adopted a systematic approach to analyzing settlements that is grounded in empirical research and designed to achieve the maximum utility of a lawsuit. This approach is also specifically designed to avoid various decision-making biases that could result in the rejection of a favorable settlement or result in one that is disadvantageous to Plaintiff's Counsel's clients. (Baishnab Decl. at ¶14).

To mitigate unwarranted biases in settlement decisions, Plaintiff's Counsel performs an Expected Value ("EV") calculation for nearly all cases, which can be generalized as the anticipated value of a case at some point in the future after various uncertain events have occurred. (Baishnab Decl. at ¶15). Importantly, Judge Posner writing for a Seventh Circuit panel concluded that an EV is the proper method for determining the fairness of a class settlement: "A settlement is fair to the plaintiffs in a substantive sense...if it gives them the expected value of their claim if it went to trial...." *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 682 (7th Cir. 1987)(explaining an EV calculation where a settlement of \$7 million or more would be justified even where theoretical damages not accounting for compounded risk of loss could be up to \$1 billion).

Plaintiff's Counsel performed the EV calculation prior to mediation and before any significant settlement discussion. Essentially, the EV is calculated by summing the product of the probabilities of winning at each stage of the litigation and the expected outcome of success and the product of the probabilities of losing at each stage and zero. The EV of a case is calculated and visualized using the decision tree software TreeAge Pro<sup>®</sup>. (Baishnab Decl. at ¶15).

A decision tree is created with various decision and chance (i.e., probability) nodes at each stage of the case where there is a win/loss potential. At the end of each "branch" in the tree is a payoff node, which is the sum of the probabilities times damages for the branch. The probabilities and values of the entire case are then summed, resulting in a final EV. (Baishnab Decl. at ¶16).

Both potential damages and win/loss probabilities were determined through a collaborative process involving attorneys who are familiar with the case and relevant case law. All participating attorneys also have significant experience with state and federal wage and hour collective and class action litigation generally. Alleged damages and probabilities were determined by a combination of averaging these attorneys' estimates and/or their consensus opinion. (Baishnab Decl. at ¶16).<sup>11</sup>

Plaintiff's Counsel calculated potential damages pre-mediation using EmployStats, which is a research firm that performs economic and statistics research for the legal, business and governmental communities.<sup>12</sup> In calculating alleged and estimated overtime damages, EmployStats used the data produced by Defendant in preparation for mediation. The regular rate of pay analysis was based on the Opt-In Plaintiffs' payroll records primarily from the following files: FR00067128, FR00067129, FR00067611, FR00067612, and FR00067613. The analysis recalculated the regular rate of pay that each Opt-In Plaintiff should have received, based on the

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<sup>11</sup> The actual EV can be submitted for in camera review, if the Court so directs.

<sup>12</sup> <https://employstats.com/about-us/> (last viewed 1/11/2023).

alleged claims. Certain extrapolations were made for gaps or missing data. The model EmployStats created included a toggle field to adjust the estimated reduced hours per day. The analysis extrapolated the unpaid overtime wages through the present for the employees and pay periods where payroll records are not available in an Excel format. The extrapolation applied the average per person damages to the approximate 25 employees without payroll records. The extrapolation applied the average unpaid overtime wages per pay period during the relevant time period. (Baishnab Decl. at ¶17).

Here, the settlement reflects substantial benefit to Plaintiffs. For example, the Global Settlement Fund exceeded the value Plaintiffs' Counsel calculated using the EV method described above. The Global Settlement Fund reflects approximately one-half hour of reduction of the respective Opt-In Plaintiff's regular rate, or, in other words, an estimated dilution of the regular rate as alleged the Complaint, plus more than 26% liquidated damages. Settlement includes a minimum payment of \$100.00 per Opt-In Plaintiff. The Parties' settlement is an excellent outcome for Plaintiffs, considering the hotly contested issues, including Defendant's defenses. (Baishnab Decl. at ¶18). Accordingly, this factor favors approval of the settlement.

**B. One-Step Final Approval of the FLSA Collective Action Settlement is Appropriate.**

A one-step settlement approval process is appropriate. See, e.g., *Stokes v. Consol. Wings Inv., LLC*, No. 15-cv-01932-RLY-DKL (S.D. Ind.), ECF No. 61 (approving FLSA collective action settlement in one step); *Briggs v. PNC Fin. Servs. Group, Inc.*, 2016 WL 7018566 (N.D. Ill. Nov. 29, 2016) citing *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, 2016 WL 5109196, at \*1 (N.D. Ill. Sept. 16, 2016) (“A one-step settlement approval process is appropriate[ ]” in FLSA settlements.); *Castillo v. Noodles & Co.*, 2016 WL 7451626, at \*1 (N.D. Ill. Dec. 23, 2016) (granting request for one-step approval process); *Prena v. BMO Fin. Corp.*, 2015 WL 2344949, at



\*1 (N.D. Ill. May 15, 2015) (same). Collective actions under 29 U.S.C. § 216(b) require workers to affirmatively opt-in to the litigation, unlike in a Federal Rule of Civil Procedure 23 class action. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013); see also *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S.Ct. 1523, 1529, 185 L.Ed.2d 636 (2013) (“Rule 23 actions are fundamentally different from collective actions under the FLSA.”). Because the failure to opt in to an FLSA lawsuit does not prevent potential members of the collective from bringing their own suits in the future, FLSA collective actions do not implicate the same due process concerns as do Rule 23 actions. *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982) (discussing due process concerns present in Rule 23 class action that are not present in FLSA collective actions).

In this case, over 1,000 Opt-In Plaintiffs already affirmatively chose to participate. Therefore, it is appropriate that the Court grant final approval of the settlement and order that the Notice of Settlement be issued so that the Opt-In Plaintiffs can decide whether they wish to participate in the settlement and release their claims in exchange for their Settlement Awards.

**C. The FLSA Service Award Is Proper and Reasonable.**

Service or incentive awards serve the important purpose of compensating plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs. See, e.g., *Espenscheid*, 688 F.3d at 876-77 (Posner, J.); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at \*8 (E.D.N.Y. Nov. 20, 2012); *Follansbee v. Discover Fin. Servs., Inc.*, 2000 WL 804690, at \*7 (N.D. Ill. June 21, 2000) (recognizing the importance of incentive awards). Accordingly, incentive awards are commonly awarded to those who serve the interests of the class. *Massiah*, 2012 WL 5874655, at \*8 (collecting

cases); accord *Chesemore v. Alliance Holdings, Inc.*, 2014 WL 4415919, at \*4 (W.D. Wis. Sept. 5, 2014); *Hawkins v. Securitas Sec. Servs. USA, Inc.*, 280 F.R.D. 388, 395 (N.D. Ill. 2011).

In this case, only one Service Award is requested – payment of \$7,500.00 to Ms. Fitzgerald. Ms. Fitzgerald took the risk of filing the action, met with her attorneys and talked to former coworkers about her case. She also completed written discovery, had her deposition taken, and actively participated during the litigation, including being available throughout the day of mediation. Without her, there would be no collective or class recovery. (Baishnab Decl. at ¶19).

**D. The Attorneys Fees and Expenses to Plaintiff’s Counsel for the FLSA Claims Are Proper and Reasonable.**

The FLSA provides that a Court “shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and the costs of the action.” 29 U.S.C. § 216(b). In the Seventh Circuit, district court judges are allowed considerable discretion in deciding whether to apply the lodestar approach to attorney fees awards or the percentage approach. *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). Here, the percentage approach is reasonable. As the Manual for Complex Litigation recognizes, “one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring competent counsel continue to be willing to undertake risky, complex, and novel litigation.” Manual for Complex Litigation (4th) § 14.121.

The award of attorneys’ fee is to reflect “the market price for legal services, in light of the risk of nonpayment, and the normal rate of compensation in the market at the time.” *Chen v. Genesco, Inc.*, 2020 WL 360517, at \*5 (S.D. Ind. Jan. 22, 2020). Here, the request of one-third of the amount of the fund is in line with terms regularly approved by federal courts in our Circuit. *Id.* Additionally, lawyers practicing employment law in this region routinely contract for fees equaling one-third of the overall recovery amount. *Chen v. Genesco, Inc.*, 2020 WL 360517, at \*5 (S.D.

Ind. Jan. 22, 2020); *Brewer v. Molina Healthcare, Inc.*, 2018 WL 2966956, at \*3 (N.D. Ill. June 12, 2018); *Williams v. Rohm & Haas Pension Plan*, 2010 WL 4723725, at \*1 (S.D. Ind. Nov. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011).

This one-third percentage was agreed upon between Representative Plaintiff and her Counsel at the outset of this litigation before the amount of the final recovery was settled. Plaintiffs' Counsel accepted this case on a contingent fee basis and advanced all litigation fees, costs, and expenses. They will not be paid for any time during effectuation of the settlement. Thus, Plaintiffs' Counsel assumed a real risk in taking on this case, preparing to invest time, effort, and money over a period of years with no guarantee of recovery. (Baishnab Decl. at ¶20).

The Seventh Circuit has recognized that counsel accept a risk of nonpayment when they embark on representation of a class of plaintiffs on a contingency fee basis. *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007); see also *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, 2016 WL 5109196, at \*4. Accordingly, Plaintiffs' request for attorneys' fees is reasonable under all the appropriate criteria.

Plaintiffs' request for reimbursement of costs and expenses in the amount of \$42,369.73 likewise is reasonable, representing counsels' out-of-pocket costs and expenses incidental and necessary to litigating this matter, including the postage, notice administration to over 10,000 putative collective members, damages analysis and model, mediation fees, and court fees. (Baishnab Decl. at ¶21). See *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 550 (7th Cir. 1999); *Cheesman v. Nexstar Broad. Grp., Inc.*, 2008 WL 2225617, at \*3 (S.D. Ind. May 27, 2008).

Had this case not settled, Plaintiffs' Counsel would have continued to vigorously litigate the case without any promise of success and compensation. At every step of the litigation, Defendant could have succeeded. Therefore, Plaintiffs' Counsel were at great risk for no

compensation. This risk of no compensation strongly supports the amount requested here and warrants approval. (Baishnab Decl. at ¶21).

Defendant does not object to Plaintiffs' request for payment of fees or costs, and agrees that the request is fair and reasonable. Accordingly, the Court should approve the requested fees and costs, as well as approve reasonable increases above the current estimated costs to account for unforeseen costs incurred in effectuating notice and settlement.

### **III. CONCLUSION.**

For the foregoing reasons, the Parties respectfully request that this Court enter the proposed Order, attached to hereto as **Exhibit 3**:

1. Approving the Parties' Settlement Agreement, attached hereto as **Exhibit 1**, as a final, fair, reasonable, adequate and binding release of claims;
2. Granting final approval of the settlement, finding it is a fair, reasonable and adequate, and in the best interest of the Plaintiffs;
3. Approving the requested FLSA service award to Representative Plaintiff;
4. Approving the Notice of Settlement and Claim Form and Release, attached as **Exhibit A** to the Settlement Agreement;
5. Approve Plaintiffs' request for attorneys' fees and costs;
6. Approve all other terms of the Parties' Settlement Agreement as fair, reasonable and adequate;
7. Directing the Parties to effectuate the Settlement Agreement in accordance with its terms; and,
8. Dismissing the Action with prejudice

Respectfully submitted,

/s/ Hans A. Nilges  
Counsel for Plaintiffs

Hans A. Nilges (OH Bar 0076017)  
[hans@ohlaborlaw.com](mailto:hans@ohlaborlaw.com)  
NILGES DRAHER LLC  
7034 Braucher Street NW, Suite B  
North Canton, OH 44720  
Telephone: (330) 470-4428  
Facsimile: (330) 754-1430

Robert P. Kondras, Jr. (18038-84)  
[kodras@hkmlawfirm.com](mailto:kodras@hkmlawfirm.com)  
HASSLER KONDRAS MILLER LLP  
100 Cherry St.  
Terre Haute, IN 47807  
Telephone: (812) 232-9691  
Facsimile: (812) 234-2881

Robi Baishnab (OH Bar 0086195)  
[rbaishnab@ohlaborlaw.com](mailto:rbaishnab@ohlaborlaw.com)  
NILGES DRAHER LLC  
1360 E. 9th St., Suite 808  
Cleveland, OH 44114  
Telephone: (216) 230-2955  
Facsimile: (330) 754-1430

Matthew J.P. Coffman (OH Bar 0085586)  
COFFMAN LEGAL, LLC  
1550 Old Henderson Rd.  
Suite #126  
Columbus, Ohio 43220  
Telephone: (614) 949-1181  
Facsimile: (614) 386-9964  
Email: [mcoffman@mcoffmanlegal.com](mailto:mcoffman@mcoffmanlegal.com)

/s/ Michael C. Terrell (with consent)  
Counsel for Defendant

Michael C. Terrell (2124-49)  
[mterrell@taftlaw.com](mailto:mterrell@taftlaw.com)  
Blake J. Burgan (18350-49)  
[bburgan@taftlaw.com](mailto:bburgan@taftlaw.com)  
TAFT STETTINIUS & HOLLISTER LLP  
One Indiana Square, Suite 3500  
Indianapolis, IN 46204  
Telephone: (317) 713-3500  
Facsimile: (317) 713-3699

Rachel L. Schaller (*Pro Hac Vice*)  
[rschaller@taftlaw.com](mailto:rschaller@taftlaw.com)  
Andrew S. Murphy  
[amurphy@taftlaw.com](mailto:amurphy@taftlaw.com)  
TAFT STETTINIUS & HOLLISTER LLP  
111 E. Wacker Drive, Suite 2800  
Chicago, IL 60601  
Telephone: (312) 527-4000  
Facsimile: (312) 836-4145

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of January, 2023 the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Hans A. Nilges  
Counsel for Plaintiffs