IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

JILL TOMPKINS and ELLA METCALF, on behalf of themselves and all others similarly situated, Plaintiffs, v. FERNY PROPERTIES, LLC. d/b/a THE NORTHERN GENTLEMEN'S CLUB, and DOE DEFENDANTS 1-10, Defendants.	Civil Action No.: 3:18-cv-00190 **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT, CERTIFICATION OF A SETTLEMENT CLASS, APPROVAL OF PROPOSED CLASS NOTICE, APPOINTMENT OF CLASS COUNSEL, AND NOTICE OF A FINAL APPROVAL HEARING**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Ella Metcalf ("Plaintiff") respectfully submits this memorandum of law in support of her Unopposed Motion for Preliminary Approval of a Class and Collective Action Settlement ("Motion").[1] The proposed settlement agreement ("SA" or "Settlement Agreement") between Plaintiff and Defendant Ferny Properties, LLC, and Doe Defendants 1-10 ("The Northern Club" or "Defendants") was reached after seventeen months of arm's-length negations between the parties' respective counsel.

Plaintiff, with the consent of Defendants, moves for an order, among other things, to: (1) preliminary approve the terms of the Settlement as within the range of fair, adequate, and reasonable; (2) provisionally certify a class, for settlement purposes only, the Settlement class for a collective action pursuant to § 216(b) of the Fair Labor Standards Act for the opt-in FLSA claims and under Federal Rule of Civil Procedure Rule 23(b)(3) for the opt-out state law claims; (3) approve the Settlement Administrator,[2] Notice Program, the form and contents of the Notice, and the Claim form; and (4) appoint Class Counsel and Settlement Class Representatives. Plaintiff requests the Motion, which Defendants do not oppose, to be granted.

I. BACKGROUND

A. Factual Allegations and Procedural History

1. Factual Allegations

Plaintiff Tompkins filed her Complaint on September 19, 2018. ECF No. 1.[3] Plaintiff subsequently filed an Amended Class Action Complaint, adding Metcalf as a Named Plaintiff and

[1] Plaintiff's counsel has not yet heard from the estate of original Named Plaintiff Jill Tompkins. If and when Ms. Tompkins's estate decides to further participate in this lawsuit, Plaintiff's counsel will notify all parties and the Court.
[2] Capitalized terms contained within are defined within the Settlement Agreement.
[3] Ms. Tompkins passed away in mid-2020.

putative class representative, on September 23, 2020. ECF No. 105.[4] Plaintiffs Tompkins and Metcalf, in the original complaint and the first amended complaint, respectively, brought this case as class action and collective action against Defendants for their alleged violations of: (1) the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* (the "FLSA"); (2) the North Dakota Century Code, § 34-01, *et seq*.; (3) the North Dakota Minimum Wage and Work Conditions Order, N.D. Admin. Code § 46-02-07, *et seq.*; and (4) North Dakota common law. ECF No. 105. The crux of the FSLA and North Dakota State laws mentioned above is that (1) all employees are entitled to be paid mandated minimum wages for all hours worked; (2) all employees are entitled to premium overtime compensation for all hours worked in excess of forty hours per work week; and (3) that all tips earned by an employee are the property of the employee and may not be withheld by the employer.

Plaintiff, on behalf of herself and others similarly situated, allege Defendants willfully violated the FLSA and North Dakota State law by uniformly and consistently classifying their Dancers, including Plaintiff, as independent contractors. *See generally* Plaintiff's Amended Complaint, ECF No. 105. Specifically, Plaintiff alleges Defendants willfully violated the FLSA and North Dakota state law for systematic policies and practices in which Defendants (1) failed to pay dancers the appropriate minimum wage for all hours worked; (2) improperly denied Dancers overtime wages for all hours worked in excess of forty hours in a work week; and (3) inappropriately withheld and/or deducted unlawful amounts from the tips earned by Dancers. *Id.*

Plaintiff Tompkins began working for Defendants in March 2017 and continued working there at various times through May 2017. Compl. ¶ 12. Plaintiff and the putative opt-in members

[4] Miranda Brewer filed a Consent to Sue on May 14, 2019, ECF No. 48, but declined to serve as class representative.

share similar job duties. Declaration of Jill L. Tompkins ("Tompkins Decl."), attached to Plaintiff's Memorandum in Support of Plaintiff's Motion for Conditional Certification, ECF No. 34-1, ¶ 3. Dancers' duties are to perform dances on stage, private dancers for customers, and participate in lineups. Compl. ¶¶ 62-65. However, despite classifying Dancers as independent contractors, Defendants maintained uniform policies and procedures applicable to all Dancers, including Plaintiff, through which, Defendants maintained significant supervision and control over Plaintiff and similarly situated individuals. Compl. ¶¶ 30, 66.

Specifically, Defendants have the power to hire and fire dancers. Compl. ¶ 32. Defendants have rules governing the conditions under which the Dancers work: (1) Defendants have complete control over the final work schedule; (2) subject dancers to fees and possible termination if they do not arrive for a shift at a predetermined shift; (3) subject dancers to fees and penalties if they do not work until the end of their shift; (4) subject dancers to a house fee for each shift; (5) require dancers to pay all fees regardless of the amount of tips they receive during their shift; (6) require dancers to pay mandatory "tip-outs" to other employees at the Northern Club; (7) mandate Dancers to have their hair and make-up done, wear minimum three-inch shoes, and have the power to prevent the Dancers from performing if the Dancers' outfit does not meet such requirements; and (8) require Dancers to follow a mandatory stage rotation, require Dancers to perform in lineups, and require Dancers to perform dances for bachelor parties, all for which Dancers are not paid for. Compl. ¶¶ 33-65. Accordingly, Dancers face a very real possibility of finishing a shift with owing Defendants money and taking home zero dollars for a night's work. Compl. ¶ 57.

The goal of this Settlement Agreement is to remedy the aforementioned working conditions Dancers face at the Northern Club.

2. Procedural History

Plaintiff then filed her initial Motion to Certify Class for Conditional Certification on March 5, 2019 ECF No. 34, and that briefing on that motion was completed on April 1, 2019. ECF No. 40. The parties attended a settlement conference on April 18, 2019, and the Court stayed all deadlines in the case at the parties' request. ECF Nos. 44-45. The exchange of discovery and settlement negotiations continued from that point onward. On July 14, 2020, Plaintiff's counsel notified Defendant's counsel and the Court that they had just learned that Ms. Tompkins has passed away. During the Status Conference held on September 10, 2020, the parties informed the Court that the parties had reached a tentative settlement with Ella Metcalf as Named Plaintiff. *See* ECF 98–100. Plaintiff filed an Amended Complaint on September 23, 2020. ECF No. 105. Plaintiff now moves to have this Court preliminarily approve the proposed Settlement Agreement. Defendants do not oppose this motion.

B. Settlement Negotiations

The parties engaged in an early settlement conference on April 18, 2019 but were unable to reach a settlement at that time. Declaration of Edward W. Ciolko ("Ciolko Decl.") ¶ 15. The parties continued negotiations while participating in the informal exchange of discovery. Ciolko Decl. ¶ 17. Defendant hired additional counsel and on March 10, 2020, Matt Hoffer entered his appearance on behalf of Defendants. ECF No. 76. The parties continued to negotiate at arms'-length and notified the court on September 10, 2020 that they had reached a settlement in principle. ECF No. 98.

C. Summary of the Proposed Settlement

1. Settlement Class

For the Purposes of Settlement only, the Parties agree that the Court should certify the following Settlement Class for opt-in members under the FLSA and for opt-out members under Fed. R. Civ. P. 23(b)(3), which is defined as:

> All persons who performed at Ferny Properties, LLC, d/b/a The Northern Gentlemen's Club during the period from September 19, 2015 through the date of entry of the Preliminary Approval Order.

Ex. B to the Settlement Agreement.

2. Monetary Benefits to the Settlement Class

Under the Settlement Agreement, Defendants will create a non-revisionary Settlement Fund of $200,000. SA ¶ 6.1. The Settlement Fund will be used to pay: (1) disbursements to Settlement Class Members that file Approved Claims in accordance with the Distribution Plan (described below); (2) the Costs of Settlement Administration and any taxes due on the Settlement Fund account; (3) attorneys' fees, costs, and expenses to Class Counsel in amounts approved by the Court; and (4) Service Awards in amounts approved by the Court. SA ¶ 6.1 & 6.2.

Every eligible individual who does not submit an opt-out form will receive a portion of the Equal Distribution Fund, which is 33.3% of the Cash Pool. SA ¶¶ 3.22, 7.1. This Equal Distribution in intended to compensate class members for their state law wage claims. Ciolko Decl. ¶ 27.

Every eligible individual who timely submits a Cash Claim Form will receive her proportional share from the Proportional Distribution Fund, equal to 66.6% of the Cash Pool. SA ¶¶ 3.53-3.55, 7.2. The Proportional Distributions will be based on the number of shifts during which each Claimant performed at Defendants' Club in proportion to all other Claimants during

the Class Period. *Id.* The Proportional Distribution Fund is intended to compensate Claimants for their FLSA claims. Ciolko Decl. ¶ 30.

The fund will be apportioned between FLSA opt-ins and members of the state Rule 23(b)(3) class on a *pro rata* basis. SA ¶ 3.5.

3. Injunctive Relief

Under the Settlement Agreement, Defendants, within 90 days of this Court's final approval of the settlement terms, have also agreed to change several specified practices and policies for at least three years from implementation, unless ended or further modified in writing by the parties. SA ¶ 8.3. These changes include: (1) allowing dancers to make bookings over the phone, text, or email; (2) having the club fix the prices charged to customers for performances in the Couch and VIP Rooms and will be set at the following schedule:

a. For Couch Room dances the club will charge customers a $5 rental fee and the Dancer will charge the customer $20 per dance, for up to three consecutive dances; and

b. For VIP Room performances, the club will charge the customer a $25 rental fee for 15 minutes in the VIP Room, the Dancer will charge the customer $100 for the same period, and this will happen for each 15-minute period the customer is in the VIP Room;

(3) Dancers will pay a flat rental/appearance fee of

a. $0 if the dancer is ready to perform by 5:30pm;

b. $50 if the dancer is ready to perform by 6:30pm; and

c. $75 if the dancer is ready to perform at 7:30pm;

(4) each of the fees may be increased by $5 on the anniversary of the Court's preliminary approval of this Settlement; (5) a Dancer's credit card payments can only be held by the Club for no longer than 30 days on charges of $1,500 or more; (6) the club will not charge Dancers a credit card processing fee for using Defendant's or credit card system for payment; (7) the elimination of

"mandatory tip outs" to Defendants' other employees; (8) there will be no shoe "heel" minimum length or style; (9) Dancers will be free to decline any dance or request made by a customer, employee, or manager, but Dancers will be required to appear for their stage rotation dances so long as it is not during a Couch or VIP room dance and/or experience; and (10) unless a Dancer agrees in writing, any charges for the use of an affiliated "Dormitory" will be separately billed and cannot be added or deducted from any other fee from or payment to Dancer for Dancer's appearance at the club. SA ¶ 8.1

4. The Class Release

All Class Members will release the Defendants from any claims that were asserted in the Action or amendments to the Action, including claims for unpaid wages. SA ¶¶ 3.62, 11.5. The Settlement Class Plaintiff and any other Settlement Class Member receiving an enhanced payment have also agreed to generally release Defendants from any and all claims for any type of relief that can be released as a matter of law. SA¶¶ 3.29 11.5. A Class Member's Negotiation of any Settlement Check or Supplemental Settlement Check will be deemed as a consent to join the FLSA action, and shall fully release any and all FLSA claims against Defendants. SA ¶ 11.4. In turn, the Defendants will release Plaintiff and Participating Class Members from any counterclaims or related claims that could have been asserted in this action. SA ¶ 11.10.

5. Notice

For the purpose of effectuating notice under the Settlement Agreement, Defendants will provide an updated list of Class Member Contact information for the purposes of notice. SA ¶ 5.1. Notice will be effectuated by a combination of regular mail and electronic mail where available, and other communication methods agreed to be effective and cost efficient and approved by the Court, including posting a notice within the club. SA ¶¶ 3.59, 5.5. The proposed notice is attached

as Exhibit B to the Settlement Agreement. Notice will also be posted at the Club in the form attached to the settlement agreement at Exhibit C. SA ¶ 3.49.

6. Class Representative Service Awards and Class Counsel's Attorneys' Fees and Costs

Under the proposed Settlement Agreement, Plaintiff's Counsel will ask the Court to approve, and Defendants will not oppose, Service Awards of $5,000 for Plaintiff Metcalf. SA ¶ 6.2.2. Under the Settlement Agreement, Class Counsel will also request up to 33 ⅓ percent of the gross Settlement Fund from the Court for their attorneys' fees and will additionally request reimbursement of their reasonable costs and expenses from the Settlement Fund. SA ¶ 6.2.3. Defendants have agreed not to take a position as to Class Counsel's request for attorney's fees and reimbursement of reasonable costs and expenses to be paid from the Settlement Fund SA, so long as it does not exceed the agreed maximum stated above. ¶ 6.2.3.

II. THE SETTLEMENT AGREEMENT SHOULD BE PRELIMINARILY APPROVED BY THE COURT

"[A] class action settlement is a private contract negotiated between the parties." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). In the Eight Circuit, such settlement agreements are "presumptively valid." *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (internal citations omitted). This is especially true where the settlement was reached through arm's-length negotiations between the parties and after substantial discovery has taken place. *See Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 943 (D. Minn. 2016). Additionally, courts in the Eight Circuit have recognized that "[t]he policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993). This is true because "[s]ettlement of

the complex disputes often involved in class actions minimizes the substantial burdens to the parties and to scarce judicial resources that such litigation entails." *Id.*

A. Legal Standard for Approval of FLSA Claims.

In an FLSA action, prior to a hearing for final approval of a settlement agreement, "the district court properly performs a preliminary fairness review of the proposed class settlement." *Simmons v. Enter. Holdings, Inc.*, 2012 WL 718640, at *2 (E.D. Mo. Mar. 6, 2012). The standard for approval of an FLSA collective action only requires a determination that the compromise reached "involves a bona fide dispute and that the proposed settlement is fair and equitable to all parties." *King v. Raineri Const., LLC*, 2015 WL 631253, at *2 (E.D. Mo. Feb. 12, 2015) (citing *Lynn's Food Stores Inc. v. United States*, 678 F.2d 1350, 1353 (11th Cir. 1982)).

Although the Eighth Circuit has not yet specifically addressed what factors district courts should consider in evaluating settlement agreements under the FLSA, district courts in this Circuit have referred to the considerations set forth in *Lynn's Food Stores*. *See* S*tainbrook v. Minnesota Dep't of Pub. Safety*, 239 F. Supp. 3d 1123, 1126 (D. Minn. 2017); *King*, 2015 WL 631253, at *2; *Valencia v. Greater Omaha Packing*, 2013 WL 5347442, at *1 (D. Neb. Sept. 23, 2013); *Moore v. Ackerman Inv. Co.*, 2009 WL 2848858, at *3 (N.D. Iowa Sept. 1, 2009). Under *Lynn's Food Store*, "[a] settlement is bona fide if it reflects a reasonable compromise over issues actually in dispute, since employees may not waive their entitlement to minimum wage and overtime pay under [the] FLSA." *King*, 2015 WL 631253, at *2. To determine if a settlement is reasonable and fair, courts may consider:

> (1) the stage of the litigation and the amount of discovery exchanged, (2) the experience of counsel, (3) the probability of the plaintiff's success on the merits, (4) any overreaching by the employer in the settlement negotiations, and (5) whether the settlement is the product of arm's length negotiations between represented parties based on the merits of the case.

Stainbrook, 239 F. Supp. 3d at 1126.

It is not disputed that the Settlement Agreement resolves a bona fide dispute as Defendants filed an Answer to Plaintiff's Complaint denying Plaintiff's claims for unpaid wages. ECF No 11. ¶ 22. Moreover, the Settlement Agreement contains no provisions that would be contrary to the purposes of the FLSA or frustrate the implementation of the FLSA in the workplace. Indeed, the settlement furthers the purposes of the FLSA by providing Participating Settlement Class Members with substantial recovery for their unpaid wages, that, because of the lack of bargaining power inherent in employer-employee relationships, they may have otherwise been unable to recover. Because the settlement facilitates goals the FLSA and is a fair and reasonable resolution of a bona fide dispute, it should be approved as reasonable.

In addition to reviewing proposed settlements through the spectrum of *Lynn's Food Stores*, district courts have looked to the same factors used in evaluating the fairness of class action settlements under Fed. R. Civ. P. 23 because the Eight Circuit has not definitively set out FLSA specific criteria to use when assessing the fairness and reasonableness of a proposed settlement agreement. *See McClean v. Health Sys., Inc.*, 2014 WL 3907794, at *3 (W.D. Mo. Aug. 11, 2014) ("To determine whether an FLSA settlement is fair and equitable, courts use many of the same factors used in evaluating a proposed Rule 23 class action settlement."). As detailed below, the proposed Settlement Agreement is fair and reasonable under Fed. R. Civ. P. 23.

B. The Standard for Approval of Class Action Settlements.

Under Fed. R. Civ. P. 23(e), a class action settlement requires court approval. *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 217 (W.D. Mo. 2017). Approval under Rule 23(e) is a two-step process; "first, the Court must enter a preliminary approval order, and second, after providing notice of the proposed settlement to the class and a final fairness hearing is conducted,

the Court must enter a final approval order." *Dryer v. Nat'l Football League*, 2013 WL 1408351, at *1 (D. Minn. Apr. 8, 2013). In determining whether to grant preliminary approval, a court must find that the requirements for class certification are met and that the terms of the proposed settlement fall within a range of reasonableness. *Briles v. Tiburon Fin., LLC*, 2016 WL 4094866, at *1 (D. Neb. Aug. 1, 2016).

"In approving a class settlement, the district court must consider whether it is fair, reasonable, and adequate." *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (internal citations omitted). In making this determination, district courts must analyze the four *Van Horn* factors: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *Huyer v. Njema*, 847 F.3d 934, 939 (8th Cir. 2017). The most important consideration is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 933 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999)). However, "[a] court must not substitute '[its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.'" *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 860 (S.D. Iowa 2020) (quoting *Petrovic*, 200 F.3d at 1148–49). Rather, "the district court acts as a fiduciary who must serve as guardian of the rights of absent class members." *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003).

1. The Merits of the Plaintiff's Case, Weighted against the Terms of the Settlement.

In weighing the merits of the plaintiff's case against the terms of a settlement, a court is not to attempt to try the case; "[t]he very purpose of compromise is to avoid the delay and expense . . . of trial." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975). As such, a

district court "need not resolve all of the underlying disputes . . . and the value of the settlement need not be determined with absolute precision." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995). It does not matter if one party believes they would be ultimately able to prevail at trial. *See Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 649 (8th Cir. 2012). Nor are "parties to a class action . . . required to incur immense expense before settling as a means to justify that settlement." *DeBoer*, 64 F.3d at 1178. Nonetheless, relevant factors to consider are the difficulty in obtaining class certification, plausible defenses, and the recovery to be provided to the class members by the settlement. *See Marshall v. Nat'l Football League*, 787 F.3d 502, 514 (8th Cir. 2015).

Here, the benefits offered by the Settlement Agreement weigh in favor of preliminary approval. Prior to agreeing to the Settlement, the Parties had an opportunity to obtain discovery of the facts and documents relevant to this action. Ciolko Decl. ¶ 33. During this time, Plaintiff's Counsel obtained a full understanding of Defendants' practices and policies which Defendants used to misclassify their Dancers as independent contractors. *Id*. It was also during the discovery period that that Plaintiff Tompkins filed her initial Motion for Conditional Certification and Judicial Notice. ECF Doc. No. 33. Because Defendants exert the same significant control and supervision over their Dancers as a matter or common policy, Plaintiff believes that she may have ultimately ended up able to prevail on class certification, but that outcome is not guaranteed. Additionally, pursuant to these common practices and policies to each Dancer, Defendants improperly withheld tips Dancers earned and inappropriate failed to pay Dancers the minimum wage under federal and state wage and hour laws. As such, Plaintiff is confident that this case is meritorious.

However, all complex class actions carry the risk of uncertain outcomes, difficulties of proof, and duration, and this action is no different. This is demonstrated by the fact that Defendants' opposed Plaintiff's initial claims, raised affirmative defense, vigorously opposed conditional certification, and has indicted that they would similarly vigorously oppose class certification outside of the settlement context. Ciolko Decl. ¶ 45. For example, Defendants would have argued that Settlement Class members were independent contractors, were not similarly situated, and that common issues did not predominate. (*See* ECF Doc. No. 11) *See, e.g., Nelson v. Texas Sugars, Inc.*, --- Fed. Appx. ---, No. 19-20567, 2020 WL 7134143 (5th Cir. Dec. 4, 2020) (affirming jury verdict finding exotic dancers to be non-employees). And even if Plaintiff could establish these facts, Defendants would still argue that they did not willfully violate the FLSA. ECF Doc. 11. Indeed, Defendants have denied, and continue to deny, any and all fault, wrongdoing, and liability for Plaintiff's claims SA ¶ 2.11. Nonetheless, Defendants have entered into this Settlement because they recognize and wish to avoid the burden an expense associated with further litigation, the uncertainties associated with trial, and the very real possibility that Plaintiff could prevail.

At trial, Plaintiff would pursue judgment against Defendants seeking compensatory damages for Class members and meaningful injunctive relief. As outlined above, this is the precise relief the Settlement provides. The relief includes compensation for tips withheld and minimum wages not paid. Ciolko Decl. ¶ 37. The relief further includes adjusted Couch and VIP Room Fees to ensure the Dancers retain their tips; reduced rental fees for club appearances; the elimination of mandatory "tip outs," credit card processing fees, and mandatory stage rotation dances; and the ability to decline any dance request by a customer. SA ¶ 8.1. Accordingly, the settlement affords the Settlement Class substantial relief.

As a result, the fact that the proposed Settlement achieves the primary relief the Class would have pursued at trial, coupled with the strength of Plaintiff's case, and the serious threats that continued adverse litigation would pose, this factor weighs in preliminary approval.

2. The Defendant's Financial Condition

The Defendant's financial condition neither favors nor disfavors granting preliminary approval. This factor is neutral because Defendants are financially able to pay the agreed upon amount. *See Dryer*, 2013 WL 1408351, at *2 (concluding that ability to pay is "not at issue" when a defendant has the ability to pay any judgment against it). While Defendants provide in-person entertainment-based services and understandably have been hit by the financial repercussions of the COVID-19 pandemic, the Parties negotiated a settlement amount that would not unnecessarily strain the Northern Club's financial viability. Ciolko Decl ¶ 42. Moreover, Defendants' ability to pay is not undermined by North Dakota's COVID-19 guidance, as it allows Northern Club to remain open for business. *See* James MacPherson, *North Dakota Governor Changes Tack and Issues Mask Mandate*, AP NEWS (Nov. 14, 2020), https://apnews.com/article/bismarck-north-dakota-coronavirus-pandemic-45788d9dfaae23c1db8125088dfa242b. Still, it should be noted that North Dakota recently has experienced a large surge in the number COVID-19 cases, and might again, which could undermine Northern Club's ability to attract customers. *See* Christianna Silva, *Covid-19 Hospitalizations Surge in Dakotas: 'It's Like We Opened up a Spigot'*, NPR (Nov. 14, 2020), https://www.npr.org/sections/health-shots/2020/11/14/934185297/covid-19-hospitalizations-surge-in-dakotas-its-like-we-opened-up-a-spigot.

Nonetheless, when the amount of the Settlement is compared to the millions of dollars Defendants would face if a judgment was entered against them if this case went to trial, further suggests that the Settlement amount is reasonable and that it will not adversely affect the

defendant's continued viability. Ciolko Decl. ¶ 42. As such, this factor is neutral in regard to preliminary approval.

3. The Complexity and Expense of Further Litigation

"Class actions, in general, place an enormous burden of costs and expense upon parties." *Marshall*, 787 F.3d at 512. Litigation always carries inherent risk and can never be predicted with absolute certainty, especially where there are complex and disputed issues of law and fact. *See Pollard*, 320 F.R.D. at 220. As a result, the "expense or proving class members' claims," the certainty that results from a settlement foreclosing subsequent appeals, and "the fear that, unsettled, the ultimate resolution of the action . . . could well extend into the distant future," will all weigh in favor of the settlement's approval. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013).

The complexity and expense of further litigation weigh in favor of preliminary approval. Here, further litigation would be costly, complex, and time-consuming. Further litigation would be costly, complex, and time consuming because such litigation could include: (1) court-mandated attempts at alternative dispute resolution; (2) contested hearings on conditional and class certification; (3) additional and expensive discovery that would include depositions, interrogatories, requests for admission, and document production; (4) contested motions, briefs, and hearings on final class certification; (5) potential interlocutory appeals of any class determination; (6) costly merits and class expert reports and discovery; (7) summary judgment motions; (8) trial; (9) post-trial motions; and (10) appeals of any final decision on the merits. Ciolko Decl. ¶ 44. Additionally, each step towards final resolution on the merits would likely be vigorously opposed by Defendants and subject to appeal, meaning that barring a settlement, this case could drag on for years, cost large sums of money, and minimize any potential recovery for

the class. Ciolko Decl. ¶ 45. Consequently, the nature of the litigation, coupled with the certainty of continued complex and expensive proceedings, counsel in favor of preliminary approval.

4. The Amount of Opposition to the Settlement

When preliminarily approving a class action settlement, a court must consider the views of the parties. *See DeBoer*, 64 F.3d at 1178. The district court has a duty to the silent majority as well as the vocal minority. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 933. Thus, courts routinely consider "the lack" of opposition to the settlement, *Hashw*, 182 F. Supp. 3d at 945, and "[t]he fact that only a handful of class members object[] to the settlement" will weigh in favor of settlement. *DeBoer*, 64 F.3d at 1178. Additionally, a court may give "great weight" to the opinion of counsel and "is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement;" but a court "cannot merely rubber stamp the views of counsel." *Welsch v. Gardebring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987).

This settlement is fair in the views of both the Class Members and the Parties' Counsel. First, this settlement was achieved after seventeen months of negotiations and numerous drafts between experienced counsel at arm's-length negotiations. Ciolko Decl. ¶ 21. Moreover, in light of Counsel's experience in this type of case, Counsel is confident that this is a fair and adequate settlement. Ciolko Decl. ¶ 38. Accordingly, this Settlement is "not the product of fraud or collusion" between Counsel. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 934.

In sum, (1) the merits of Plaintiff's case, weighed against the terms of the Settlement, favor approval because of the benefits to the Settlement Class and the uncertain outcome of continued litigation; (2) Defendants' financial condition is neutral as to preliminary approval because they have the ability to pay; (3) the likelihood that further litigation would be highly contested,

appealed, and expensive weighs in favor of approval; and (4) the amount of opposition to the settlement weighs in favor of approval because the Parties arrived at the Settlement as a result of arm's-length negotiations on behalf of experienced counsel. Accordingly, this Court should preliminarily approve the proposed Settlement.

III. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT CLASSES

At this stage, Plaintiff seeks provisional certification of the Settlement Class and authorization from the Court to send Notice of the Settlement-to-Settlement Class Members. As a general matter, an action may be certified for class treatment for settlement purposes. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997). Moreover, this Court allows parties to bring both an FLSA collective action and a Rule 23(b)(3) North Dakota state-law class action. *See Crouch v. Missouri Basin Well Serv., Inc.*, 2017 WL 11569962, at *1 (D.N.D. Mar. 31, 2017). Here, Plaintiff wishes to certify the Opt-in Class Members under § 216(b) of the FLSA and the Opt-out Class Members under Fed. R. Civ. P. 23(b)(3).

A. The Standard for a Collective Action Pursuant to Section 216(b) of the FLSA

Section 216(b) of the FLSA provides, in relevant part, that an action may be maintained against an employer "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); *Acosta v. Tyson Foods, Inc.*, 800 F.3d 468, 471 (8th Cir. 2015). The collective action mechanism allows for efficient adjudication of similar claims so that "similarly situated" employees, whose claims are often small and not likely to be brought on an individual basis, may join together and pool their resources to prosecute their claims. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

"The standards for conditional certification of a collective action under 29 U.S.C. § 216(b) are far less stringent than the requirements typically required of class actions under Rule 23 of the

Federal Rules of Civil Procedure." *Burruss v. Wyoming Casing Serv., Inc.*, 2017 WL 3687345, at *2 (D.N.D. Mar. 29, 2017); *McLaurin v. Big Roy Trucking Inc.*, 2016 WL 11494737, at *3 (D.N.D. Apr. 1, 2016); *Ball v. Dynamic Support Servs., LC*, 2015 WL 13751963, at *3 (D.N.D. Oct. 13, 2015). A plaintiff need only demonstrate that she is "similarly situated" to the potential plaintiffs with a "colorable basis" that she and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law. *Burruss v*, 2017 WL 3687345, at *1; *Smith v. Heartland Auto. Servs., Inc.*, 404 F. Supp. 2d 1144, 1149 (D. Minn. 2005) (Plaintiffs "need show only that their positions are similar, not identical to the positions held by the putative class members."). As such, "[p]laintiffs may be similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014).

The FLSA, however, does not define the term "similarly situated," and neither the United States Supreme Court nor the Eight Circuit has yet provided meaningful guidance on the proper method and standard for determining whether plaintiffs are "similarly situated" within the meaning of Section 216(b). *Lindsay v. Clear Wireless LLC*, 2014 WL 813875, at *3 (D. Minn. Mar. 3, 2014). Instead, this Court has adopted a two-step process to "commonly analyze FLSA certification questions." *Williams v. Baker Hughes Oilfield Operations, Inc.*, 2016 WL 11477039, at *2 (D.N.D. Feb. 8, 2016). "First, the Court must determine whether the class should be conditionally certified for notification and discovery purposes." *Burruss v. Wyoming Casing Serv., Inc.*, 2017 WL 3687345, at *1 (D.N.D. Mar. 29, 2017). Second, "[a]fter discovery is completed, courts then conduct an inquiry into several factors if there is a motion to decertify

the class." *Id.*[5]

1. Plaintiff is "Similarly Situated" with Potential Opt-in Plaintiffs

In this case, Plaintiff and potential opt-in plaintiffs are similarly situated because this case is about Defendants' misclassification of Plaintiff and all other former and current Dancers. Here, Defendants maintained a company-wide policy of failing to treat Plaintiff and other putative opt-in members as employees, and therefore failed to pay such Dancers the applicable minimum wage under federal and state wage and hour laws. In addition to being similarly situated by virtue of a common misclassification, Plaintiff and other similarly situated are also similarly situated for the reasons the opt-out plaintiffs meet the requirements for class certification pursuant to Fed. R. Civ. P. 23 below.

Conditional certification furthered by the fact that several other cases have found that exotic Dancers are similarly situated with respect to their challenge of being classified as either independent contractors or some role other than employee. *See Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013) (holding that exotic Dancers were employees, rather than independent contractors, of an adult entertainment club for FLSA purposes, and noting that "[t]he Court has conditionally certified this as a collective action under the FLSA"); *Stevenson v. Great Am. Dream, Inc.*, 2013 WL 4217128 (N.D. Ga. Aug. 14, 2013) (granting plaintiff's motion to conditionally certify a collective action of all entertainers who worked at Pin Ups Nightclub over the past three years); *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 761659 (N.D. W.Va. Mar. 7,

[5] "These factors include: (1) the extent and consequences of disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant that appear to be individual to each plaintiff; and (3) other fairness and procedural considerations." *Burruss v. Wyoming Casing Serv., Inc.*, 2017 WL 3687345, at *1 (D.N.D. Mar. 29, 2017). "If the class is decertified, opt-in class members are dismissed without prejudice and the case proceeds only in the putative class representatives' individual capacities." *Id.*

2012) (granting conditional certification for a class defined as all former exotic Dancers who worked for any of the defendants' three exotic dance clubs in West Virginia during the relevant time period and were not paid at an hourly rate at least equal to the federal minimum wage). *Green v. Plantation of La.*, LLC, 2010 WL 5256354, at *1 (W.D. La. Nov. 24, 2010) ("a class consisting of exotic Dancers should be conditionally certified"), report and recommendation adopted, 2010 WL 5256348 (W.D. La. Dec. 15, 2010).

As such, this Court should conditionally certify the Settlement Class under § 216(b) of the FLSA.

B. The Standard for Class Certification Under Fed. R. Civ. P. 23

Fed. R. Civ. P. 23 governs the certification of a class. To be certified as a class, plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b). *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005). Additionally, implicit in this Rule 23 analysis, is that the class be "adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016). While "class certification is a procedural determination and should not include an inquiry into the merits," *Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 509 (D.N.D. 2005), a court must still take a "rigorous analysis" when certifying the class. *See Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006). However, "[t]he requirements for class certification are more readily satisfied in the settlement context" as opposed to in a continuing litigation context. *White*, 822 F. Supp. at 1402.

1. Ascertainability

Implicit in Rule 23 is "that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr.*, 821 F.3d at 996. The test for ascertainability "adheres to a rigorous analysis of the Rule 23

requirements." *Id.* Under this approach, "[a] class may be ascertainable when its members may be identified by reference to objective criteria." *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017). However, a court cannot "be required to resort to speculation, or engage in lengthy, individualized inquiries." *Brown v. Kerkhoff*, 279 F.R.D. 479, 496 (S.D. Iowa 2012) (internal citations omitted).

The Settlement Class is "clearly ascertainable" because the class is defined by objective criteria. The criteria are objective as it covers (1) a specific type of person—all current and former Dancers who have worked for the Defendants in the state of North Dakota—and (2) a specific time frame—the statutory period covered by the complaint, which runs from September 19, 2015, though the date of preliminary approval of the settlement. Additionally, Defendants have agreed to provide the following information for Class Members: (i) names; (ii) last known addresses; (iii) email addresses to the extent available; and (iv) dates of shifts each shift during which each Class Member performed at Defendants' Club, as maintained in the ordinary course of Defendants' business. SA ¶ 5.1. As a result, this Court has an objective method for verifying members of the Settlement Class, thus satisfying Rule 23's implicit ascertainability requirement.

2. The Requirements of Rule 23(a) are Satisfied

Class certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a). These requirements are commonly referred to as "numerosity, commonality, typicality, and adequacy of representation." *See Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 942 (D. Minn. 2018). Plaintiff will address each requirement in turn.

a. Numerosity

Numerosity under Rule 23(a)(1), focuses on whether "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the Eighth Circuit, "[n]o arbitrary rules regarding the necessary size of classes have been established." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559 (8th Cir. 1982). However, courts in the Eighth Circuit have found that a putative class size of forty will support numerosity, but much smaller classes have been certified. *See Portz*, 297 F. Supp. 3d at 944; *see also J.S.X. Through Next Friend D.S.X. v. Foxhoven*, 330 F.R.D. 197, 206 (S.D. Iowa 2019) ("The United States Court of Appeals for the Eighth Circuit has affirmed the certification of classes with as few as twenty members."). In addition to the size of the class, a court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Paxton*, 688 F.2d at 559–60.

Furthermore, the fluidity of a class will not defeat numerosity; rather courts in the Eighth Circuit "assess numerosity based on the plaintiff's reasonable estimate of the class size." *Foxhoven*, 330 F.R.D. at 206. Thus, the fact that the exotic dancing is an industry with a notoriously high turnover rate is not a bar to meeting numerosity. *See Dean v. 1715 Northside Drive, Inc.*, 224 F. Supp. 3d 1302, 1321 (N.D. Ga. 2016). In the action at hand, Plaintiff Counsel's estimate, based on information obtain from Defendants during discovery, is that the Settlement Class is approximately 500 Dancers. Ciolko Decl. ¶ 11. Accordingly, the Settlement Class size estimate exceeds the 40 members this Circuit generally requires, rendering joinder impracticable. Thus, the numerosity requirement is satisfied.

b. Commonality

Commonality under Rule 23(a)(2) focuses on whether there exists "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Questions are common to the class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 563 U.S. 338, 350 (2011). "Commonality is not required on every question raised in a class action. Rather, Rule 23 is satisfied when the legal question linking the class members is substantially related to the resolution of the litigation." *DeBoer*, 64 F.3d at 1174 (internal citations omitted).

Here, there are many common issues of fact and law, for example:

- Whether the Defendants maintained a company-wide policy of treating Dancers as independent contractors and therefore failed to pay them the applicable minimum wage under federal and state wage and hour laws;
- Whether Plaintiff and other Dancers are similarly situated in regard to their job duties and the fact that Defendants exerted the same significant supervision and control over each of them as a matter of policy and practice of misclassifying its Dancers;
- Proof that Defendants policies and practices relative to the misclassification of Dancers does not vary, but rather affects all Dancers who work at Defendants' club in Fargo the same way; and
- Proof of Defendants' policies and practices will be made on a facility-wide basis and will focus on Defendants' conduct, as opposed to the experience of any individual Dancer

Compl. ¶ 77. The answers to these questions would drive the litigation forward and resolve issues as to all Settlement Class Members, either favorably or unfavorably. Accordingly, the Settlement Class satisfies commonality.

c. Typicality

Rule 23(a)(3) requires that the class representatives' claims or defenses be "typical" of the claims or defenses of the class. *See* Fed. R. Civ. P. 23(a)(3). "Typicality under Rule 23(a)(3) means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)). "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer*, 64 F.3d at 1174. And generally, "typicality is established if the claims of all members arise from a single event or share the same legal theory." *In re Teflon Prod. Liab. Litig.*, 254 F.R.D. 354, 364 (S.D. Iowa 2008) (citing *Paxton*, 688 F.2d at 561–62)).

Here, the claims of Plaintiff and Settlement Class Members arise from the same conduct. Specifically, Plaintiff's and Settlement Class Members' claims arise from Defendant's misclassification of its Dancers as independent contractors and therefore the failure to pay them the applicable minimum wage under federal and state wage and hour laws. Compl. ¶ 76. As such, Plaintiff's claims are typical of the claims of members of the Settlement Class and the typicality requirement is satisfied.

d. Adequacy

The final requirement under Rule 23(a) is adequacy, which requires that a representative party must fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). The test for adequacy is two-parts: "[1] whether the class representatives and their counsel will competently and vigorously pursue the lawsuit and [2] the concern that differences exist between the interests of the class representatives and the class." *Hervey v. City of Little Rock*, 787 F.2d 1223, 1230 (8th Cir. 1986). Thus, adequacy requires that a "class representative 'must be part of

the class and 'possess the same interest and suffer the same injury' as the class members." *Alpern*, 84 F.3d at 1539 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

As to the first factor, Plaintiff is represented by counsel that is highly experienced and skilled in matters relevant to this litigation. Edward Ciolko, of Carlson Lynch LLP, possesses substantial experience in FLSA cases, class actions and other complex litigation. *See* Ciolko Decl. ¶ 7. Carlson Lynch engaged Lockridge Grindal Nauen P.L.L.P. as local counsel in this matter; LGN also has substantial experience in FLSA cases, class actions and other complex litigation. *See* Ciolko Decl. at ¶ 8. Counsel has also vigorously prosecuted this case though the filing of Plaintiff's Complaint, Amended Complaint, Motion to Conditionally Certify a Class, and all the supporting briefs and declarations, as well as though Counsel's persistent communication with the Judge and Opposing Counsel, and Counsel's work to facilitate this Settlement. Ciolko Decl. ¶¶ 9-24.

As to the second factor, Plaintiff and each member of the Settlement Class are aligned in their interests via-a-vis this litigation and Northern Club. All Settlement Class Members will receive settlement distributions according to an objective methodology that values claims using the same criteria. SA ¶ 7.5. There are no fundamental conflicts of interest among Plaintiff or Settlement Class Members, and the named Plaintiff does not have interests antagonistic to the Settlement Class. Therefore, Plaintiff has established adequacy and all four requirements under Rule 23(a) are met.

3. The Requirements of Rule 23(b) are Satisfied

Once a plaintiff has satisfied the four prerequisites of Rule 23(a), a plaintiff need only show that the requirements of one subsection of Rule 23(b) have been met for the claims to be certified for class-wide treatment. *See In re St. Jude Med., Inc.*, 425 F.3d at 1119. Plaintiff seeks certification

under Fed. R. Civ. P. 23(b)(3), which requires a showing of "predominance" and "superiority." *See In re Baycol Prod. Litig.*, 218 F.R.D. 197, 208 (D. Minn. 2003).

a. Predominance

Fed. R. Civ. P. 23(b)(3) "requires that, before a class is certified . . . a district court must find that questions of law or fact common to class members predominate over any questions affecting only individual members." *Tyson Foods, Inc. v. Bouaphakeo*, -- U.S. --, 136 S.Ct. 1036, 1045 (2016). "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation . . . and goes to the efficiency of a class action as an alternative to individual suits." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016) (internal citations omitted). The inquiry requires "an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). The inquiry does not, however, require "that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013).

Individualized damage variations among class members do not by themselves preclude a finding of predominance. First, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. *See Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 833 (8th Cir. 2016). Second, a plaintiff class may prove class wide damages through use of representative evidence and statistical modeling, provided that the methodology offered is mathematically sound and comports appropriately with the plaintiffs' liability theory. *See Tyson Foods*, 136 S.Ct. at 1047–49; *Comcast Corp. v. Behrend*, 569 U.S. 27, 35–37 (2013). Apportionment and disbursement of the class wide damages to individual class members can be

accomplished at a later stage without undermining the propriety of class certification during earlier phases. *See Tyson Foods*, 136 S.Ct. at 1049–50.

Common questions of law and fact readily predominate. When common issues present a significant aspect of the case, and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative basis rather than on an individual basis. *See Jones v. CBE Grp., Inc.*, 215 F.R.D. 558, 569 (D. Minn. 2003) ("All significant aspects of the case could be resolved in one action. Therefore, the preponderance requirement of Fed. R. Civ. P. 23(b)(3) is satisfied."). In this case, Plaintiff alleges that Defendants' practices and policies did not vary with individual members of the Settlement Class—Defendants exerted the same significant supervision and control over every Dancer as a matter of common policy and practice. Additionally, the Settlement Class members seek a remedy of a common legal grievance—namely minimum wages for all hours worked, the payment of tips improperly withheld, and injunctive relief that will benefit all Dancers at Defendants' club. As a result, Plaintiff's action presents common operative facts and common questions of law that predominate over any factual variations. Consequently, Plaintiff has established predominance.

b. Superiority

The superiority factor focuses on whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b). Accordingly, superiority requires the Court to determine whether the class action is manageable." *In re Baycol Prod. Litig.*, 218 F.R.D. at 209. Rule 23(b)(3) lists the following factors to guide the superiority inquiry: (a) class members' interests in individually controlling the prosecution of separate actions; (b) whether litigation concerning the controversy has already begun by or against class members; (c) whether concentrating the litigation of the claims in the particular forum is

desirable; and (d) the likely difficulties in managing a class action. *See* Fed R. Civ. P. 23(b)(3). Plaintiff will address each factor in turn.

It is in the interest of the individual Settlement Class Members to proceed with this litigation as a class action. Although Settlement Class Members collectively suffered significant damages as a result of being misclassified as independent contractors and thus not paid the applicable minimum wage under federal and state wage and hour laws, Settlement Class Members will have no incentive to litigate against Defendants individually, as their damages may be limited. As such, after costs of litigation are considered, the distributions offered by this Settlement likely provide better net recoveries than what the Settlement Class Members could obtain by suing Defendants individually.

Additionally, Plaintiff is only aware of one other pending lawsuit by Settlement Class Members concerning the same facts and claims—*Metcalf v. Ferny Properties LLC*, 3:19-cv-00169-PDW-ARS (D.N.D.) Nonetheless, as part of this Settlement, Plaintiff Metcalf has dismissed her suit against Defendants and instead was brought into this case as a named plaintiff in the Amended Complaint. SA ¶ 2.2, ECF No. 105. Moreover, litigation in this forum is beneficial as all of Defendants' conduct giving rise to the claims in this action occurred in this forum. ECF No. 105. Lastly, this Court need not inquire whether the "case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc.*, 521 U.S. at 620 (internal citation omitted). Instead, resolving these actions by way of a class settlement in this forum is therefore a superior procedure than individual actions. Therefore, Plaintiff has established superiority.

In sum, all the requirements of Rule 23(a) and (b)(3) have been satisfied, and the Court should conditionally certify the Settlement Class for the purpose of dissemination of the notice.

IV. THE PROPOSED NOTICE WILL ADEQUATELY APPRISE THE CLASS OF THEIR RIGHTS UNDER THE SETTLEMENT

A. The Scope of the Notice Program is Adequate

Under Fed. R. Civ. P. 23(e)(1), a court "must direct to class members the best notice that is practicable under circumstances." The notice "need only satisfy the broad reasonableness standards imposed by due process." *Petrovic*, 200 F.3d at 1153 (internal citations omitted). This means that the notice must "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). As such, "the notice of settlement must be sufficiently detailed to permit class members to determine the potential costs and benefits involved, or at least whether additional investigation into the matter would be an efficient use of their time." *Petrovic*, 200 F.3d at 1153 (citing *Reynolds v. Nat'l Football League*, 584 F.2d 285 (8th Cir. 1978)); *see also DeBoer*, 64 F.3d at 1176 ("Each class member was notified by mail and notice was also printed in a national publication. Although neither extensive nor remarkably thorough, we find the notice sufficient to comply with the strictures of due process.").

Here the notice is adequate because Class Counsel has arranged for Defendant to submit to the Settlement Administrator updated Settlement Class Member contact information. SA ¶ 5.1. Such information includes mailing addresses and email addresses, where available. *Id.* The Settlement Administrator will use this data, along with other reasonably available sources to compile a final list of potential Settlement Class Members, to which the proposed notice will be issued.

B. The Form and Content of the Proposed Notices is Adequate

The form of the class notice is governed by Rule 23(c)(2), which provides that "[t]he notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action;

(ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). The proposed notices are written in plain English; describe the litigation, the claims being made, and the terms of the settlement; and inform class members about the deadlines and their rights to opt out or object. *See* SA Exs. B and C. Thus, the proposed notices in this case meet all of the Rule 23(c)(2)(B) requirements.

C. The Proposed Claim For is Adequate

The Claim Form, attached as Ex. A to the Settlement Agreement, clearly informs the Settlement Class Members of the process they must follow. It is only 13 pages long and requires Settlement Class Members to provide very basic information, and is only required to be filled out if the Claimant is requesting part of the Proportional Settlement Fund. Ciolko Decl. ¶ 51.. This information will be easy for current and former Dancers to provide. Plaintiff believes that the Claim Form is adequate, and that the stark simplicity of the process will increase participation from Settlement Class Members.

D. The Settlement Administrator is Adequate

The Court should also approve Analytics Consulting, LLC ("Analytics") to serve as the Settlement Administrator. Analytics is a well-known firm with a history of successfully administering many class action settlements. *See Claims Administration*, ANALYTIC LLC, https://www.analyticsllc.com/claims-administration/, (last visited March 3, 2021). Class Counsel, with Defendant's taking no position, selected Analytics and believe that Analytics will be able to

meet the obligations imposed on the Settlement Administrator under the Settlement in a cost-effective manner. Ciolko Decl. ¶ 48.

VII. Lead Counsel Should be Appointed as Class Counsel

Edward W. Ciolko should be appointed as Class Counsel. Rule 23(g) enumerates four factors for evaluating the adequacy of proposed class counsel:

> (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and types of claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). All of these factors militate in favor of appointing Mr. Ciolko as Class Counsel, who have devoted significant time and resources to prosecuting this action on behalf of Plaintiff and the proposed class. Ciolko Decl. ¶¶ 9-24. Mr. Ciolko has extensive experience in class actions, particularly those FLSA claims as demonstrated by the numerous times their respective firms have been appointed to leadership positions in similar actions. Ciolko Decl. ¶¶ 3-7. Accordingly, Mr. Ciolko will adequately represent the interests of the Class and should be appointed as Class Counsel.

VIII. THE PROPOSED TIMELINE FOR SETTLEMENT

If the Court preliminarily approves the Settlement Agreement envisions the following schedule:

Event Date	Event
30 days after entry of preliminary approval order	Last day for Defendants to provide the Administrator with the list of Class Members to whom to provide Class Notice.
30 days after entry of preliminary approval order	Deadline for Defendants to fund the Cash Pool
20 days after receipt of class member information	Deadline for Administrator to send first Class Notice to putative class members
60 days after Notice Date	Deadline to submit opt-in and claim form

Event Date	Event
TBD	Last day for Class Counsel to file a Request for a Fee And Expense Award and/or a request for an Incentive Fee Award.
TBD	The Claims Request Deadline and Objection/Exclusion Deadline.
TBD	Last day for Class Counsel to file with the Court and serve upon Defendant's Counsel any written objections received.
TBD	Last day for the parties to submit any motion and supporting documentation/ evidence to the Court in support of Final Approval (including evidence by the Administrator concerning the effectiveness of Class Notice).
TBD	Final Approval Hearing.
7 days after Judgment becomes Final	Deadline for Administrator to distribute Enhancement Payments and Attorney Fee and Expense Award
30 days after Judgment becomes Final	Deadline for Administrator to distribute Cash Payments

The parties respectfully request that the Court adopt the above settlement schedule and provide the parties a hearing date for Final Approval.

IX. CONCLUSION

Plaintiff respectfully requests that this Court enter the proposed Preliminary Approval Order submitted concurrently herewith and set a hearing for final approval on the first available date convenient to the court.

DATED: March 12, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of March 2021, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Edward W. Ciolko

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

JILL TOMPKINS, on behalf of herself and all others similarly situated, Plaintiff, v. FERNY PROPERTIES, LLC. d/b/a THE NORTHERN GENTLEMEN'S CLUB, and DOE DEFENDANTS 1-10, Defendants.	Civil Action No.: 3:18-cv-00190 **DECLARATION OF EDWARD W. CIOLKO IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

DECLARATION OF EDWARD W. CIOLKO IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

I, Edward W. Ciolko, declare:

1. I make this declaration of my own personal knowledge, except where stated on information and belief, and if called to testify in Court on these matters, I could do so competently.

2. I am co-counsel of record for Named Plaintiff Jill Tompkins, Opt-in Plaintiffs Miranda Brewer and Ella Metcalf, and the Class Members. I am duly licensed to practice law in the District of Columbia and am admitted to practice in the District of North Dakota (*pro hac vice*), the U.S. Court of Appeals for the Eighth Circuit, and other federal courts. I am a partner of the law firm of Carlson Lynch, LLP ("Carlson Lynch"). I make this declaration in support of the motion for preliminary approval of the settlement agreement.

Adequacy of Counsel

3. I graduated from Wesleyan University with a B.A. in Economics/Ancient and Medieval History, and I received my Juris Doctorate from Georgetown University Law Center.

4. I began my legal career at the law firm of Kessler Topaz Meltzer & Check, LLP where I helped to create, expand, and ultimately manage the Employee Retirement Income Security Act ("ERISA")/Consumer/Antitrust Department. I later joined Carlson Lynch in 2018.

5. Throughout my 20-year career, I have prosecuted ERISA and RESPA claims, antitrust claims, lending discrimination, data breach and privacy, student lending, breach of contract, and wage and hour and worker misclassification claims under the Fair Labor Standards Act ("FLSA") and similar state laws. I have litigated and settled over dozens of wage and hour and worker misclassification lawsuits.

6. Carlson Lynch is experienced in litigating and settling class actions, including wage and hour worker misclassification lawsuits, such as this action. Carlson Lynch represents plaintiffs in a wide variety of employment matters, including individual and class action litigation involving wage and hour matters. The firm resume of Carlson Lynch LLP is attached as **Exhibit A**.

7. Given my substantial experience in prosecuting wage and hour and worker misclassification class actions, along with my co-counsel's substantial experience, I am confident that Carlson Lynch, the attorneys who worked on this case, and I are well qualified to serve as Class Counsel in this action.

8. Carlson Lynch engaged Lockridge Grindal Nauen P.L.L.P. as local counsel in this matter; LGN also has substantial experience in FLSA cases, class actions and other complex litigation.

Plaintiff's Initial Investigation of Potential Claims

9. Plaintiff Tompkins retained Carlson Lynch for legal representation on May 28, 2018. Beginning in May 2018 through the filing this action, Carlson Lynch conducted a thorough investigation into the merits of the potential claims and defenses. This included investigation and legal research on the underlying merits of the class claims, the likelihood of obtaining liquidated damages, the proper measure of damages, and the likelihood of class certification. After substantial investigation and corroboration of Plaintiff Tompkins' allegations, Plaintiffs initiated this lawsuit.

10. Plaintiffs' Counsel also conducted in-depth interviews with Named Plaintiff Tompkins, opt-in Plaintiffs Miranda Brewer and Plaintiff Ella Metcalf, to determine the hours that they individually worked, unpaid overtime, unpaid promised wages, wages they were paid, any unauthorized deductions that were withheld from their pay, and other information relevant to their claims and those of other putative plaintiffs and Rule 23 Class Members and Collective Action Members.

11. Based on information obtained from Defendant's during discovery, I estimate the size of the class to be 500 individuals.

12. Throughout this litigation, Plaintiff's Counsel has maintained contact with each named and opt-in plaintiff, addressing concerns, providing progress updates, and seeking additional information regarding new assertions by Defendants.

The Litigation and Settlement Negotiations

13. This action has been litigated vigorously on behalf of the Class for two years. On September 19, 2018, Plaintiff Tompkins filed her Complaint against Defendants in the U.S. District Court for the District of North Dakota, alleging violations of: (1) the FLSA, 29 U.S.C. § 201 *et. seq.*; (2) the North Dakota Century Code, § 34-01, *et seq*.; (3) the North Dakota Minimum

Wage and Work Conditions Order, N.D. Admin. Code § 46-02-07, *et seq.*; and (4) North Dakota common law.

14. On October 15, 2018, Defendants filed their Answer, raising numerous affirmative defenses.

15. On March 3, 2019, Plaintiffs filed a Motion to Certify Class of Conditional Certification and Judicial Notice Pursuant to Section 216(b) of the FLSA. Defendants filed their response to the motion on March 15, 2019. Plaintiffs filed a reply to Defendants' response on April 1, 2019. Ultimately, this motion was never decided.

16. The parties engaged in an early settlement conference on April 18, 2019 but were unable to reach a resolution during that conference.

17. The parties continued to negotiate while exchanging informal discovery from that point forward.

18. On December 12, 2019, Magistrate Judge Senechal ordered an additional Settlement Conference. This conference was moved back numerous times and postponed due to the COVID-19 Emergency. Ultimately, a settlement conference was scheduled for September 10, 2020, but was cancelled when the Parties notified this Court that they had reached a settlement.

19. After notifying the Court of a Settlement, Plaintiffs Tompkins and Metcalf filed their Amended Class Action Complaint on September 23, 2020.

20. Beginning in April 2019, the parties began discussing possible settlement, which resulted in a series of arms' length negotiations between counsel for Plaintiffs and Defendants.

21. For seventeen months, between the parties' initial settlement conference in April 2019 and through the signing of the settlement agreement, the Parties engaged in numerous telephonic conversations, and conducted extensive negotiations among counsel, including

discussion of the terms of the settlement as well as the final settlement amount. The discussion of the terms of the settlement involved the exchange of numerous drafts of each of the settlement documents.

22. During the settlement negotiations, Plaintiffs obtained substantial information from Defendants concerning the allegations in Plaintiffs' Complaint. Plaintiffs also requested information from Defendants, and Defendants provided information sufficient to permit Plaintiffs' and Class Counsel to evaluate the claims and potential defenses and to meaningfully conduct informed settlement discussions, especially regarding a potential "ability to pay" or withstanding judgment defense.

23. During settlement negotiations, Carlson Lynch continued to investigate the underlying facts and analyzed the veracity of the claims. These efforts included evaluation of the relevant law, facts, and allegations to assess the merits of the claims and potential claims and to determine the strength of anticipated defenses in the action in the event that the settlement discussion fell though.

24. Based on these discussions and Carlson Lynch's continued investigation, Plaintiffs expect that Defendants would attempt to present certain materials as evidence and arguments that would seek to result in the dismissal of claims against Defendants, as detailed in ¶ 2.11 of the Settlement Agreement. These arms-length, spirited, lengthy and Court-aided settlement discussions ultimately resulted in the attached Settlement Agreement. Each aspect of the Settlement has been extensively negotiated, to an almost unprecedented degree for the undersigned, and the Class Representatives expended substantial time and effort in the litigation and settlement of this matter. They reviewed case documents, stayed in regular contact with Class Counsel, and responded to all inquiries they were called to answer.

Settlement Terms

25. Attached as **Exhibit 1** to Plaintiff's contemporaneously filed Motion for Preliminary Approval is a true and correct copy of the Settlement Agreement approved and executed by all parties to this action.

26. Every eligible individual who does not submit an opt-out form will receive a portion of the Equal Distribution Fund, which is 33.3% of the Cash Pool.

27. This portion is intended to compensate class members for their state law wage claims.

28. Every eligible individual who timely submits a Cash Claim Form will receive her proportional share from the Proportional Distribution Fund, equal to 66.6% of the Cash Pool.

29. The Proportional Distributions will be based on the number of shifts during which each Claimant performed at Defendants' Club in proportion to all other Claimants during the Class Period.

30. The Proportional Distribution Fund is intended to compensate Claimants for their FLSA claims.

31. This settlement includes unique, uniquely valuable, and class-protective injunctive relief. Defendants have agreed to make the following changes to their policies and procedures:

a. Allowing dancers to make bookings over the phone, text, or email.

b. Prices charged to customers for performances in the for Couch and VIP Rooms will be set at the following schedule:

i. For Couch Room dances, the Club will charge customers a $5 rental fee and the Dancer will charge the customer $20 per dance, for up to three consecutive dances; and

ii. For VIP Room performances, the Club will charge the customer a $25 rental fee for each 15 minute increment rental of the VIP Room and the Dancer will charge the customer $100 for the same period;

c. Dancers will pay a flat rental/license/appearance fee of

i. $0 if the dancer is ready to perform by 5:30pm;

ii. $50 if the dancer is ready to perform by 6:30pm; and

iii. $75 if the dancer is ready to perform at 7:30pm;

d. Each of the fees may be increased by $5 on the anniversary of the Court's preliminary approval of this Settlement;

e. A Dancer's credit card payments will be held by the Club for no longer than 30 days and only on charges of $1,500 or more;

f. The club will not charge Dancers a credit card processing fee for using Defendant's credit card system for payment;

g. There will be no mandatory tip outs to any Club employees;

h. There will be no shoe "heel" minimum length or style;

i. Dancers will be free to decline any dance or request made by a customer, employee, or manager. Dancers will be required to appear for their stage rotation dances so long as it does not occur during a Dancer's Couch or VIP room dance and/or experience; and

j. Unless a Dancer agrees in writing, any charges for the use of an affiliated "Dormitory" will be separately billed and cannot be added or deducted from any other fee from or payment to Dancer for Dancer's appearance at the club.

Merits of the Plaintiffs' Case Weighted Against the Terms of the Settlement

32. Plaintiffs' Counsel believes that the claims, allegations, and contentions asserted in this lawsuit have merit.

33. During Plaintiffs' investigation, discovery and settlement discussions, Plaintiffs' Counsel was able to obtain a full understanding of Defendants' policies and practices, which Defendants used to misclassify their Dancers as independent contractors. As such Plaintiffs' Counsel is confident that this evidence would allow Plaintiffs to ultimately prevail at trial.

34. Additionally, Plaintiffs are confident that they would succeed on class certification as: Defendants applied common practices and policies to each Dancer, improperly withheld tips from Dancers and failed to pay Dancers the minimum wage under federal and state wage and hour laws.

35. However, all complex litigation carries the risk of uncertain outcomes, difficulties of proof, and duration, especially whereas here, Defendants have denied any and all wrongdoing, and would vigorously oppose each step towards a final decision in this lawsuit.

36. Class Counsel believes that this Settlement confers substantial benefits upon the Collective Action Members and the Rule 23 Class Members because the terms of the Settlement provide many of the same damages Plaintiffs would seek at trial—including but not limited to—compensatory damages and injunctive relief.

37. The relief by the Settlement includes compensation for tips withheld and minimum wages not paid.

38. Based on my own independent investigation and evaluation, I have determined that the Settlement set forth in the Settlement Agreement is fair and adequate and is in the best interest of the FLSA Collective Members and the Rule 23 Settlement Class Members. Class Counsel is

confident that an independent review of this Settlement by the Court in the approval process will confirm this conclusion.

Defendant's Financial Condition

39. During settlement negotiations, Defendants revealed their financial condition with Plaintiffs' Counsel.

40. As an entertainment club, Defendants provide in-person services and have understandably been affected by the COVID-19 Pandemic. In light of these circumstances, Plaintiffs' Counsel have worked with Defendants to negotiate a settlement amount that the Defendants have the ability to pay, reaching an agreed upon amount of $200,000.00.

41. During negotiations, Defendant's informed Plaintiffs' Counsel that they will not be closing due to the COVID-19 Pandemic, and as such, that they will be able to continue to entertain guests and generate a revenue stream. Defendants further informed Plaintiffs' Counsel that they are confident in their ability to pay the negotiated amount because the Northern Club will remain open.

42. Accordingly, it is my belief that the Defendants have the ability to pay the negotiated settlement amount and payment will not threaten Defendants' financial viability.

The Complexity and Expense of Further Litigation

43. Plaintiffs' Counsel recognizes and acknowledges the risk inherent in any litigation, as well as the expense and delay of continued, lengthy proceedings necessary to prosecute this lawsuit against Defendants through trial and appeals.

44. Based on my experience in wage and hour and worker misclassification lawsuits, as well discussions with Defendants, to further prosecute this litigation to a final decision, Plaintiffs' Counsel would face: (1) court-mandated attempts at alternative dispute resolution; (2)

a contested hearing on conditional class certification; (3) additional and expensive nationwide discovery that would include depositions, interrogatories, requests for admission and document production; (4) contested motions, briefs, and hearings on final class certification; (5) potential interlocutory appeals of any class determination; (6) costly merits and class expert reports and discovery; (7) summary judgment motions; (8) trial; (9) post-trial motions; and (10) appeals of any final decision on the merits.

45. Defendants have also informed Plaintiffs' Counsel that they would vigorously oppose each step towards final resolution on the merits, meaning that barring a settlement, this lawsuit could drag on for years, cost large sums of money, and minimize any potential recovery for the Class Members.

46. As such, it is in the best interest for both the Class Members and Defendants to settle this lawsuit.

The Proposed Settlement Administrator

47. Subject to Court approval, Class Counsel, with the Defendants taking no position, intends to retain Analytics Consulting, LLC ("Analytics") to serve as the Settlement Administrator.

48. Carlson Lynch has utilized Analytics as a Settlement Administrator in prior class action settlements, and I am confident that Analytics will be able to meet the obligations imposed under the Settlement Agreement in a cost-effective manner.

Proposed Notice

49. To assist Analytics effectuate notice to the Settlement Class, Defendants have agreed to provide Analytics with updated contact information for the members of the class. Such information shall include, but is not limited to, telephone numbers, regular mail addresses, and electronic mail addresses.

50. The Settlement Administrator will use this data, along with other reasonably available sources to compile a final list of potential Settlement Class Members, to which the proposed notice will be issued.

51. The Claim Form, **Exhibit A** to the Settlement Agreement, will clearly inform the Members of the Settlement Class of the process they must follow. It is written in plain English, describes the litigation, the claims being made, the terms of the settlement, and informs class members about the relevant deadlines and their rights to opt out. Additionally, it is only 13 pages long and only requires Class Members to provide basic information and, is only required if requesting part of the Proportional Distribution Fund. A portion will be forwarded to them automatically.

52. As such, I am confident that the Court will find the proposed notice is adequate as it satisfies the "broad reasonableness standards imposed by due process," *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150, 1153. (8th Cir. 1999), and the requirements of Federal Rule of Procedure 23.

CONCLUSION

53. Based upon Carlson Lynch's investigation, research, information review, interviews, as well as my personal knowledge and experience, I believe that the Settlement is in the best interests of the Class and that the Settlement is clearly fair, reasonable and adequate. The

benefits afforded by the Settlement reflect reasoned compromise which not only takes into consideration the risks inherent in all complex class litigation, but also the various issues in this case specifically, which had the potential to completely eliminate recovery available to the class.

54. While I believe that the claims asserted in this action have merit and the evidence developed to date supports these claims, I also recognize and acknowledge, based on my experience, the expense and length of time necessary to prosecute this case to judgment. I have also taken into account the uncertain outcome and the risk of any litigation, as well as the difficulties and delays inherent in such litigation, and, specifically here, the real risk of inability to collect a significantly larger judgement due to the COVID-19 related general business shutdown, COVID-19's unique, and severe impact on this in person service industry, and the financial condition of the Defendants.

55. I further believe that the request of 33 and 1/3% to cover Plaintiffs' counsel fees and expenses is modest in relation to the actual costs incurred litigating this matter.

56. Plaintiffs and the Settlement Class Members have waited years to receive compensation and would have had to wait more years had the case proceeded through trial and appeal. The class would be exposed to the attendant risks of litigation, including the uncertainties and difficulties pertaining to a disputed class certification proceeding, a likely motion to dismiss, a likely summary judgment motion, the length of time necessary to see this matter though trial, the uncertainties of the outcome of litigation, appeals of any final decisions on the merits, and the likelihood that resolution of the class claims whenever and however determined, would be appealed.

57. Therefore, I respectfully ask the Court to preliminary approve this Settlement Agreement.

I declare under penalty of perjury, under 28 U.S.C. § 1746 and the laws of Pennsylvania, that the foregoing is true and correct to the best of my knowledge.

Executed this March 12, 2021

Respectfully Submitted,

/s/ Edward W. Ciolko
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Exhibit A

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FIRM RESUME
MARCH 2021

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FIRM SUMMARY

With offices in Pittsburgh, San Diego, Los Angeles, Philadelphia, and Chicago, Carlson Lynch is a national firm specializing in complex class and collective actions and is involved in several high-profile multidistrict litigation proceedings. The attorneys of Carlson Lynch LLP ("Carlson Lynch") have litigated complex class-action matters involving financial fraud (including securities fraud, derivative actions, and mortgage fraud), data breach, privacy, consumer fraud, labor and employment, antitrust, civil rights, and wage and hour laws, in federal and state courts throughout the country. Litigation prosecuted by Carlson Lynch has resulted in substantial monetary recoveries and injunctive benefits on behalf of class members, described in more detail below. In addition, Carlson Lynch cases have generated seminal legal authority in both trial and appellate courts.

Carlson Lynch was founded in 2004 by Bruce Carlson and Gary Lynch, who started the firm to merge and build upon their collective experiences litigating complex class action matters. In 2015, the firm expanded to the west coast with the addition of its San Diego office, managed by Todd Carpenter. Continuing its growth, in 2019, the firm added an office in Chicago, managed by Katrina Carroll, and its Los Angeles office, managed by Eddie (Jae) K. Kim. In 2020, the firm opened an office in Philadelphia, managed by Edward Ciolko.

In October 2020, Carlson Lynch was named Litigation Department of the Year in Pennsylvania by *The Legal Intelligencer*.

NOTABLE CASES[1]

WAGE AND HOUR LITIGATION

Wintjen v. Denny's, Inc. (W.D.Pa.). In this litigation, brough on behalf of tipped employees at a number of the defendants' restaurants, Honorable Judge Wiegand recently granted summary judgment on the plaintiffs' claims based on the defendants' failure to comply with the FLSA's tip credit notification requirements, as well as the defendants' failure to keep adequate records regarding the time the plaintiff and the putative class spent performing non-tipped work.

Verma v. 3001 Castor Inc., (E.D. Pa.). As co-class counsel, Carlson Lynch won a $4.5 million jury verdict in 2018 for misclassified workers at a Philadelphia nightclub. The claims were brought under the FLSA and Pennsylvania Minimum Wage Act. The trial verdict was fully affirmed by the Third Circuit in August 2019.

Gardner v. Country Club, Inc. (D.S.C.). Carlson Lynch served as class counsel for a class of

[1] This Firm Resume is intended to be representative and is not comprehensive. Carlson Lynch has prosecuted, and continues to prosecute, many substantial cases that are not identified here.

nightclub workers who were misclassified as independent contractors, subjected to deductions from their tip income, and denied wages. Carlson Lynch won two significant dispositive motions, obtaining a ruling that the workers were legally employees, and a legal opinion determining as a matter of first impression under South Carolina wage laws that tip income was protected from employer deductions. The case then settled for a total of $1.5 million, and final approval was granted in 2019.

Herron v. Investment Professionals Inc. (W.D. Pa.). Carlson Lynch secured a $450,000 settlement for 12 financial advisors who were misclassified by a financial services company and consequently did not receive overtime compensation. The settlement was approved in February 2018.

Herzfeld v. 1416 Chancellor Inc. (E.D. Pa.). Carlson Lynch is class counsel for a litigation-certified Rule 23 class and FLSA collective of more than 100 nightclub entertainers alleging misclassification and violations of the FLSA and Pennsylvania wage and hour laws. A settlement for a total amount of $415,000 was reached and granted preliminary approval in January 2018. Final approval was granted following a fairness hearing in June 2018.

Correll v. One Three Five, Inc. (W.D. Pa.). Carlson Lynch was class counsel for a class of several hundred nightclub performers who alleged that they were misclassified by the club's owner as independent contractors, resulting in violations of the Fair Labor Standards Act and Pennsylvania state wage laws. A class settlement was granted final approval in 2016 and provided $815,000 in total relief for the class.

Genesis Healthcare v. Symczyk (U.S. Supreme Court). Gary Lynch served as Counsel of Record before the United States Supreme Court in an appeal addressing the application of mootness principles in a putative collective action filed under Section 216(b) of the Fair Labor Standards Act. When defendant served Carlson Lynch' client with a Rule 68 offer of judgment for "make whole" relief, the district court dismissed the case as moot. Gary Lynch successfully argued the appeal in the United States Court of Appeals for the Third Circuit, which held that the FLSA collective action did not become moot upon the plaintiff's receipt of a Rule 68 offer of judgment for full satisfaction of her individual claim. The Supreme Court reversed in a 5-4 opinion, with Justice Kagan writing a strong dissent on behalf of Carlson Lynch' client—a position which was subsequently adopted by the majority of the Court in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). Carlson Lynch's position before the Supreme Court was supported by the United States as Amicus Curiae.

Gualano v. Abercrombie & Fitch Stores, Inc., (W.D. Pa). Carlson Lynch was co-lead counsel in this wage and hour litigation alleging that defendant retail clothier was violating federal and state minimum wage laws. Following the fairness hearing in early 2005, where a multi-state settlement was presented to the Court for approval, the Court entered Findings of Fact and Conclusions of Law addressing lead counsels' adequacy as follows:

> "The Court finds the plaintiffs' counsel, Bruce Carlson and Gary Lynch, are experienced class counsel and that they have met all of the requirements of Rule

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> 23(g)(1)(B) and (C). Consistent with the underlying purpose of Fed. R. Civ. P. 23, plaintiffs' counsel have achieved, with utmost efficiency, a quality result for the entire class and are commended for the diligence and effective advocacy they have displayed on behalf of their clients."

Pasci v. Express, LLC, (W.D. Pa.). This case was similar to the *Abercrombie* case discussed above and proceeded to a fairness hearing in November 2004, where a multi-state settlement was presented to the Court for approval. Regarding the adequacy of Carlson Lynch, the Court issued Findings and Conclusions stating:

> "With respect to the adequacy of counsel, the Court finds that class counsel have capably and vigorously represented the class. Bruce Carlson and Gary Lynch have substantial experience in class-based litigation involving consumer fraud and employment claims . . . . Class counsel achieved an efficient and excellent result on behalf of the class."

Ellis v. Edward Jones, (N.D. Ohio). Carlson Lynch chaired the Plaintiffs' Leadership Committee in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After Defendant filed an answer and after significant discovery wherein Defendant produced in excess of 500,000 pages of documents and hundreds of videotapes, the parties commenced mediation to pursue a potential global settlement. The first mediation, which occurred in Atlanta in March 2007, was unsuccessful. Ultimately, the parties participated in a second mediation in San Francisco, at which the parties arrived at the basic terms of a proposed settlement pursuant to which class members from multiple states received in excess of $19,000,000. After a fairness hearing on January 5, 2009, the Court granted final approval of the settlement.

Byers v. PNC Financial Services Group, Inc., (W.D. Pa.). Carlson Lynch was lead plaintiff's counsel in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. A multi-state settlement was approved following a fairness hearing in June 2008.

Steen v. A.G. Edwards, Inc., (S.D. Cal.). Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant stock brokerage company violated federal and state overtime laws. A mediated national class-based settlement has been reached and preliminary approval has been granted. A fairness hearing was held on August 31, 2009 in Los Angeles, after which the Court entered an Order granting final approval of the settlement.

Meola v. AXA Financial, Inc., (N.D. Cal.). Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant financial services company violated federal and state overtime laws. A mediated national class-based settlement was negotiated in this matter, and final approval was granted following a fairness hearing in the fall of 2009.

In re St. Francis Health System, (C.P., Allegheny County Pennsylvania). Carlson Lynch was counsel for the class in connection with this wage and hour litigation on behalf of certain former

employees of the St. Francis Health System in Pittsburgh. Plaintiff asserted that the class was deprived of severance benefits when St. Francis Health System was acquired by another hospital group in Western Pennsylvania. Prior to the disposition of Plaintiff's class certification motion, the parties engaged in extensive mediation before reaching a class-based settlement.

Haag v. Janney Montgomery Scott, (E.D. Pa.). Carlson Lynch was a member of the three firm Executive Committee in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After protracted litigation and two separate mediations, the parties reached a multi-state settlement. A fairness hearing was conducted in Philadelphia on June 30, 2009, where Gary Lynch appeared on behalf of the class. Following the hearing, the Court granted final approval of the settlement.

Steinberg v. Morgan Stanley & Co., (S.D. Cal.). Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant stock brokerage company violated federal and state overtime laws. A mediated national class-based settlement was reached, and final approval of the settlement was granted.

Ramsey v. Ryan Beck, Inc. (S.D.N.Y.). Carlson Lynch was co-class counsel in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After protracted litigation, the parties reached a multi-state settlement, and final approval was granted in June 2010.

Kniess v. Heritage Valley Health Systems, Inc., (C.P., Allegheny County, Pennsylvania). Carlson Lynch was lead counsel in this wage and hour class action alleging that the defendant hospital system failed to pay overtime compensation to its nurse practitioners and physician's assistants. The parties reached a mediated class settlement whereby class members received the majority of the back pay alleged by Carlson Lynch.

Leadbitter v. The Washington Hospital, Inc., (W.D. Pa.). Carlson Lynch was lead counsel in this wage and hour class action alleging the defendant hospital system failed to pay overtime compensation to its nurse practitioners and physician's assistants. The parties reached a mediated class settlement whereby class members will be eligible to receive the majority of the back pay alleged by Carlson Lynch, and the settlement has received final approval from the Court.

Career Education Corporation Misclassification Litigation, (W.D. Pa.). In early 2011, Carlson Lynch filed a putative collective action on behalf of admissions representatives employed by culinary schools operated by Career Education Corporation. Carlson Lynch alleged that these individuals were misclassified and improperly denied overtime benefits. A class settlement was negotiated and final approval of the settlement was granted in December 2011.

Atrium Centers, LLC Automatic Meal Break Deduction Litigation, (N.D. Ohio). Carlson Lynch was lead counsel in this collective action on behalf of hourly health care workers (primarily nurses) alleging improper pay practices in connection with automatic meal break deductions. After the court granted Plaintiffs' motion for conditional certification of a collective action under the FLSA, extensive discovery ensued. Following the close of discovery in the fall of 2012, the Parties

engaged in mediation with a former United States Magistrate Judge and reached an agreement to settle the case on a collective basis. The settlement was approved by the court in December 2012, and the settlement proceeds have been distributed.

Northwestern Memorial Healthcare Automatic Meal Break Deduction Litigation, (N.D. Ill.), Carlson Lynch was lead counsel in this collective/class action on behalf of hourly health care workers (primarily nurses) alleging improper pay practices in connection with automatic meal break deductions. After extensive discovery and the denial of Defendant's motion for summary judgment, the Parties reached a mediated class settlement in the fall of 2012. In December 2013, the Court granted final approval of the settlement, and the settlement proceeds have been distributed to the class.

C*rozer-Keystone Health System Overtime Litigation,* (E.D. Pa.), Carlson Lynch filed a putative collective action against Crozer-Keystone Health System in the Eastern District of Pennsylvania. The Complaint challenged pay practices related to nurse practitioners and/or physicians' assistants. The plaintiffs in these cases allege that they were illegally being denied overtime compensation by their employers. After discovery, the Parties filed cross motions for summary judgment. In a widely reported opinion issued on January 4, 2011, the Court granted Plaintiffs' motion for summary judgment, holding that Defendant had misclassified individuals in Plaintiff's job positions. Defendant's motion for reconsideration of the federal court's summary judgment decision was denied in a twenty-one page opinion and order issued on August 15, 2011. Following mediation, the settlement of this case was approved in August 2012.

SECURITIES LITIGATION

In re Tenet Healthcare Corp. Securities Litigation, No. 02-cv-8462 (C.D. Cal.) (securities fraud)- settlement of nearly $300M finally approved; separate auditor settlement. You'd have to pull the docket to get details on settlement papers. I wrote a lot of the briefs on the expert issues where we survived Daubert challenges (opinion attached).

In re Motorola Securities Litig., 505 F. Supp. 2d 501, 504 (N.D. Ill. 2007) (denying motions for summary judgment in certified nationwide securities fraud class action; case settled on eve of trial for $190 million). I was the designated "lead associate" on this file.

New Jersey v. Sprint Corp., 531 F. Supp. 2d 1273 (D. Kan 2008) (sustaining complaint for securities fraud under Tellabs standard). Note: this case ultimately lost on summary judgment so not sure you want to do a whole write up on it. The MTD opinion was favorable and a "big deal" in the securities world.

Rubin v. Mercer Ins. Grp., Inc., No. CIV.A. 10-6816 MLC, 2011 WL 677466 (D.N.J. Feb. 15, 2011) (merger action, successfully remanded to state court). This was a smaller case but we got a great opinion.

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PAYMENT CARD DATA BREACH LITIGATION WITH ICBA / CUNA MEMBERS

In re Equifax, Inc. Customer Data Security Breach Litig., MDL 2800 (N.D. Ga.). Gary Lynch was appointed co-lead counsel for financial institution plaintiffs in multidistrict litigation related to the notorious 2017 Equifax data breach, which is potentially the largest and most damaging data breach of all time. More than 400 lawsuits filed by consumers and financial institutions were consolidated in the MDL. The court granted preliminary approval to a proposed class action settlement on June 5, 2020.

In re Home Depot Customer Data Breach Litig., 1:14-md-02583, MDL 2583 (N.D. Ga.). Carlson Lynch represents five different financial institutions in litigation related to the major data breach at the retailer which continued for almost six months in 2014 and resulted in the compromise of approximately 56 million payment card accounts. Gary Lynch was appointed by Judge Thrash to be one of three lead counsel managing the financial institution track of the litigation. Over forty financial institutions and seventeen credit union associations filed a consolidated complaint in May 2015. Judge Thrash denied the majority of Home Depot's motion to dismiss on May 18, 2016. In September 2017, the Court granted final approval to a comprehensive settlement that provides over $27 million in relief to the class.

In re Target Corporation Customer Data Breach Litig., 0:14-md-02522, MDL 2522 (D. Minn.). Carlson Lynch represents nine different financial institutions in consolidated multidistrict litigation related to the massive data breach that occurred in late 2013. Gary Lynch is on the five-member Plaintiffs' Executive Committee that is managing this litigation on behalf of all Plaintiffs. A settlement agreement which provides $10 million to affected individual customers was granted final approval in November 2015. A separate settlement providing approximately $39 million in relief to plaintiff financial institutions was given final approval in May 2016.

First Choice Federal Credit Union v. The Wendy's Company et al, 2:16-cv-0506, (W.D. Pa.). Gary Lynch was appointed co-lead counsel in a group of consolidated cases brought by financial institutions against the Wendy's fast food chain in the aftermath of a late 2015 data breach that exposed customers' credit card information. Magistrate Judge Maureen P. Kelly recommended the denial of Wendy's motion to dismiss in February 2017, and that report and recommendation was adopted by District Judge Nora Barry Fischer in March 2017. The case ultimately settled for $50 million, which received final approval in 2019.

Greater Chautauqua Federal Credit Union et al v. Kmart Corporation et al, No. 15-cv-02228 (N.D. Ill.). Gary Lynch served as a member of the plaintiffs' executive committee, and Katrina Carroll served as liaison counsel, in this consolidated case in which financial institutions were seeking recovery for losses sustained as a result of a 2014 data breach at one of the nation's largest discount retail chains. A settlement was reached and approved in June 2017.

OTHER PRIVACY/DATA BREACH

In re Marriott International Customer Data Security Breach Litigation, MDL No. 2879 (D. MD.). Gary Lynch was appointed to the Plaintiffs' Steering Committee in this multidistrict

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litigation related to the data breach involving Starwood guest information dating back to at least 2014. The MDL includes more than 100 cases and is in pretrial litigation.

Dittman et al v. UPMC d/b/a The University of Pittsburgh Medical Center and UPMC McKeesport, (Allegheny Cty., Pa. No. GD-14-003285). Carlson Lynch is representing several employees of the health care group UPMC in a class action stemming from a breach of UPMC's personnel files. Hundreds of employee files were compromised, and numerous fraudulent tax returns were filed using the stolen data. On November 21, 2018 the Pennsylvania Supreme Court vacated and remanded a dismissal of this case, finding that employers have a duty to exercise reasonable care to safeguard employees' sensitive data and the claims from negligence can be brought by employees when an employer's internet-accessible computer systems are breached. In addition, the Court held that Pennsylvania's economic loss doctrine does not prohibit a negligence claims where the plaintiff can establish breach of a duty arising under common law.

In re Anthem, Inc. Customer Data Security Breach Litig., No. 5:15-md-02617, MDL 2617 (N.D. Cal.). Carlson Lynch represented customers of a national health insurer which experienced a data breach involving the personal information, including social security numbers, of up to an estimated 80 million customers. The case was consolidated and transferred to the Northern District of California in June 2015. Carlson Lynch participated in discovery related to Highmark, the Pennsylvania-based member of the Blue Cross Blue Shield Association and a co-defendant in the MDL. The parties reached a settlement valued at $117 million, which was approved by the Court.

In re Community Health Systems, Inc., Customer Data Security Breach Litigation, 2:15-cv-00222, MDL 2595 (N.D. Ala.). Gary Lynch served as a member of the plaintiffs' steering committee in consolidated multidistrict litigation stemming from a 2014 data breach involving one of the nation's largest hospital chains. The breach affected over 200 hospitals and the sensitive personal information of approximately 4.5 million patients was compromised.

In re SuperValu, Inc. Customer Data Security Breach Litig., 0-14-md-02586, MDL 2586 (D. Minn.). In April 2015, Ed Kilpela of Carlson Lynch was appointed as interim co-lead counsel in this consolidated case. The litigation stems from a 2014 data breach that compromised the sensitive personal and financial information of customers of approximately 1,000 grocery stores operating under a variety of brand names in over a dozen states.

In re Ashley Madison Customer Data Security Breach Litig., MDL No. 2669 (E.D. Mo.). In this well-publicized data breach case, Katrina Carroll, prior to joining Carlson Lynch, represented individuals whose highly sensitive account information was leaked from a social media company. The case was consolidated and transferred to the Eastern District of Missouri in December 2015. A class settlement for $11.2 million was given final approval in November 2017.

In re Vizio, Inc. Consumer Privacy Litig., MDL No. 2693 (C.D. Cal.). Carlson Lynch represented individuals who purchased Vizio "Smart TVs," which contained software that collected information about the users in a manner that allegedly violates numerous consumer protection statutes. The case was consolidated and transferred to the Central District of California in April 2016, and Gary Lynch was appointed to the Plaintiffs' Steering Committee. In March 2017,

District Judge Staton granted in part and denied in part a motion to dismiss, leaving the most significant claims intact and granting plaintiffs leave to re-plead the dismissed counts. After plaintiffs filed a second consolidated amended complaint, a second motion to dismiss was denied in July 2017. Vizio's attempt to certify an interlocutory appeal was denied in October 2017. The case was settled as a class action and received final approval in 2019.

Storm et al. v. Paytime, Inc., No. 1:14-cv-011380-JEJ (M.D. Pa.). Carlson Lynch represented individuals whose sensitive personal and financial information was stolen from the systems of a Pennsylvania payroll processing company. The case was appealed to the Third Circuit and settled on a class basis while the appeal was pending.

Sullivan v. Wenner Media LLC, No. 1:16-cv-960 (M.D. Mich.). Carlson Lynch was co-lead counsel for plaintiffs who brought claims against the publisher of *Rolling Stone* magazine. Plaintiffs allege that *Rolling Stone* sold subscriber information to marketing partners without the subscriber's consent, in violation of Michigan state privacy laws. The parties reached a proposed settlement including a $1.1 million settlement fund and alternative forms of relief. The settlement was approved in May 2018.

Lewert v. PF Chang's China Bistro, Inc., No. 1:14-cv-04787 (N.D. Ill.): Katrina Carroll served as Court-appointed Co-Lead counsel representing P.F. Chang's customers who had their personal financial information compromised in a 2014 security breach. This matter was one of the first data breach cases on record. Ms. Carroll oversaw all of the appellate briefing in ultimately obtaining a landmark ruling in the Seventh Circuit on Article III standing, hailed by Law360 as one of the "top privacy cases" of 2016.

Salam v. Lifewatch, Inc., No. 1:13-cv-09305 (N.D. Ill.): In this hard-fought litigation, Carlson Lynch partner Katrina Carroll is currently involved as court-appointed Co-Lead Counsel on behalf of a certified class in this privacy matter brought under the Telephone Consumer Protection Act ("TCPA"). Ms. Carroll has been directly involved in all aspects of litigation, including discovery and motion practice which culminated in a total victory for plaintiffs in contested class certification.

Bakov v. Consolidated World Travel Inc., No. 1:15-cv-02980 (N.D. Ill.): Katrina Carroll serves as court-appointed Co-Lead Counsel in this TCPA litigation on behalf of a certified class of consumers.

Additional Data Breach/Privacy Cases. In addition to the foregoing, Carlson Lynch represents plaintiffs in several other similar pending or settled data breach and privacy-related actions, including:

- *Friske v. Bonnier Corp.*, 2:16-cv-12799 (E.D. Mich.)
- *In re Arby's Restaurant Group*, 1:17-mi-55555 (N.D. Ga.)
- *Veridian Credit Union v. Eddie Bauer LLC*, 2:17-cv-356 (W.D. Wash.)
- *In re Premera Blue Cross Customer Data Security Breach Litig.*, No. 3:15-md-2633-SI,

CARLSON LYNCH

MDL 2633 (D. Or.)

- *Miracle-Pond, et al. v. Shutterfly, Inc.*, 2019-CH-07050 (1st Dist. Cook County, Ill.)
- *Holm v. Presence Health Network*, 2017-L-012793 (1st Dist. Cook County, Ill.)
- *Viverette, et al. v. Infusion Management Group, Inc. D/B/A the Signature Room at the 95th*, 2019-CH-05660 (1st Dist. Cook County, Ill.)
- *Albrecht v Oasis Power, LLC*, No. 1:18-cv-01061 (N.D. Ill.)

CONSUMER PROTECTION/PRODUCTS LIABILITY

Morrow v. Ann Inc., 16-cv-3340 (S.D.N.Y.). Carlson Lynch was co-class counsel in a case alleging deceptive pricing practices by a major national retail chain. After plaintiffs overcame a motions to dismiss, the case settled for $6.1 million worth of class benefits. The settlement was approved in April 2018.

Luca v. Wyndham Hotel Group, LLC, 2:16-cv-746 (W.D. Pa.). Carlson Lynch was co-lead counsel in a class action against the Wyndham hotel companies for violations of New Jersey consumer protection statutes. Plaintiffs alleged that Wyndham's websites deceptively masked the resort fees charged at certain hotels and forced patrons to agree to illegal terms and conditions. In 2017, plaintiffs defeated a motion to dismiss filed by two of the primary operating subsidiaries. A class settlement worth up to $7.6 million was reached in 2019 and approved later that year.

Robert Brown, et al. v. Electrolux Home Products, Inc., d/b/a Frigidaire, No. 15-11455 (11th Cir.). In July 2015, Carlson Lynch attorneys co-authored a brief on behalf of Public Justice, P.C.; the National Association of Consumer Advocates; U.S. PIRG (United States Public Interest Research Group); Consumer Action; and the Consumer Federation of California, appearing as *amici curiae* to the Eleventh Circuit and arguing in support of affirmance of a district court's certification of a class of purchasers of defective washing machines.

Kobylanski v. Motorola Mobility, Inc., et al., No. 2:13-cv-1181 (W.D. Pa.). Carlson Lynch represented purchasers of MOTOACTV wearable fitness devices who alleged that the devices, although marketed as "sweat-proof" and "rain-resistant," were in fact susceptible to damage from even slight amounts of moisture. A settlement was reached which provided for full refunds for class members who had previously submitted a claim for water damage to Motorola but were denied a repair or replacement, and additional forms of relief for class members who had not previously complained of water damage. The settlement was approved in October 2014.

Quinn et al. v. Walgreen Co., Wal-Mart Stores, Inc., Supervalu, Inc., and Perrigo Company of South Carolina, Inc., No. 7:12-cv-8187 (S.D.N.Y.). Carlson Lynch served as co-lead counsel on behalf of purchasers of glucosamine/chondroitin products manufactured by Perrigo and sold by various retailers. A settlement was reached in 2014 which provided for a total settlement fund of $2.8 million and provided for full or partial refunds to class members who submitted valid claims. Final approval was granted in March 2015.

***In re Nutramax Cosamin Marketing and Sales Practices Litigation* – MDL No. 2498,** (D. Md.). Carlson Lynch represented several plaintiffs in nationwide litigation regarding Nutramax's false

and misleading marketing of glucosamine/chondroitin supplements, which multiple studies have determined to be without efficacy for the conditions they purport to treat. After the cases were consolidated for pre-trial proceedings, Carlson Lynch partner Ed Kilpela was appointed to the Executive Committee overseeing the litigation.

In re Wireless Phone Equipment Replacement Insurance Litigation, (C.P. Allegheny County, Pennsylvania). Carlson Lynch was lead counsel in this national litigation alleging consumer fraud in connection with wireless phone equipment replacement insurance. In November 2004, the Court approved a class settlement and entered Findings of Fact and Conclusions of Law which commented on the adequacy of Carlson Lynch as lead counsel as follows:

> "Class counsel have abundant experience as lead counsel in consumer class action litigation. Indeed, class counsel have frequently appeared before this Court. Other courts have routinely recognized class counsels' adequacy . . . . This Court readily agrees with these other courts, and finds that Bruce Carlson and Gary Lynch are more than adequate counsel, and indeed are capable and diligent class action attorneys."

Mednick v. Precor, Inc., No. 14-cv-03624 (N.D. Ill.): Katrina Carroll served as court-appointed Co-Lead Counsel in this products liability matter concerning the heart rate monitoring feature on Precor fitness machines. Due to Ms. Carroll's efforts, the plaintiffs defeated a contested class certification motion and obtained class certification for a multi-state consumer class. Ms. Carroll was instrumental in negotiating a class settlement providing meaningful relief for class members shortly thereafter, for which the Court recently issued final approval.

Bishop et al. v. Behr Process Corp. et al., No. 1:17-cv-4464 (N.D. Ill.): Carlson Lynch partner Katrina Carroll currently serves as court-appointed Co-Lead Counsel in this national products liability class action matter relating to defective deck paint. Together with her co-counsel, Ms. Carroll obtained a substantial settlement for the class, which has been finally approved by the Court and is currently being administered.

In re Rust-Oleum Restore Marketing, Sales Practices and Prods. Liab. Litig. No. 1:15-cv-1364 (N.D. Ill.): In this sprawling products liability MDL relating to defective deck resurfacing products, Katrina Carroll was instrumental in negotiating a $9.3 million settlement providing meaningful relief to consumers, which received final approval in March of 2017 by the Honorable Amy J. St. Eve of the United States District Court for the Northern District of Illinois, now a sitting Judge of the Court of Appeals for the Seventh Circuit. Over the course of the litigation, among other things, the court resolved an extremely challenging motion to dismiss substantially in plaintiffs' favor, issuing a sixty-page opinion, oft-cited in warranty and consumer fraud class actions across the country. Ms. Carroll oversaw the plaintiffs' briefing on that motion.

FINANCIAL FRAUD / LENDING PRACTICES

In re: FedLoan Student Loan Servicing Litigation **– MDL No. 2833,** (E.D. Pa.). Carlson Lynch

serves as court-appointed co-lead counsel on behalf of student loan borrowers and federal grant recipients in this multidistrict litigation. The claims relate to widespread and systemic failures on the part of a student loan servicer and the U.S. Department of Education to adequately service the programs and advise its participant. A consolidated complaint was filed in November 2019.

Rescap Bankruptcy, (S.D.N.Y. Bkr.). On November 27, 2013, the Bankruptcy Court in the Southern District of New York granted final approval of a class settlement on behalf of in excess of 45,000 residential mortgage borrowers. Carlson Lynch is co-lead counsel for the class. The settlement is for an allowed claim amount of $300 million dollars. There is a guaranteed payout of approximately $36 million dollars. The debtor assigned its insurance rights to the class and insurance will potentially cover the difference between the $36 million dollar guaranteed payout and the allowed claim amount of $300 million. Upon signing the Order granting final confirmation of the bankruptcy plan, the judge stated that this was the most factually and legally complex matter that he had presided over since taking the bench.

CitiMortgage SCRA Litigation, (S.D.N.Y.). Carlson Lynch was tri-lead counsel in this class action against CitiMortgage on behalf of Sergeant Jorge Rodriguez in the Southern District of New York. This case alleges that CitiMortgage improperly foreclosed upon Mr. Rodriguez's home (and the homes of similarly situated individuals) while he was serving his country in Iraq, in violation of the Servicemembers Civil Relief Act. The case settled on a class basis, securing a total recovery of $38.2 million. Court granted final approval of the settlement in October 2015.

***Pitts v. NovaStar Home Loans, Inc. et al.*,** (S.D. Ga.). Carlson Lynch was co-lead counsel for plaintiffs in this national RESPA class action. The Southern District of Georgia was the MDL court for this litigation. After the Court denied defendant's motion to dismiss, after the Court denied defendants' motion for summary judgment and granted plaintiffs' motion for class certification in a related Maryland state court action – where Carlson Lynch was also co-lead counsel -- and after extensive discovery including the video depositions of several of defendants' top executives, the parties participated in multiple mediation sessions and ultimately arrived at a national cash settlement on behalf of class members for $17.3 million.

In re Community Bank of Northern Virginia and Guaranty National Bank of Tallahassee Secondary Mortgage Loan Litigation, (W.D. Pa./3d Cir.). Carlson Lynch was co-lead class counsel in this national litigation on behalf of second mortgage borrowers under the Real Estate Settlement Procedures Act. The class was certified by the district court and affirmed by the Third Circuit, 795 F.3d 380 (2015). A class settlement was finalized in early 2017 and obtained a total recovery of $24 million.

Kahrer v. Ameriquest Mortgage Co., (W.D. Pa./MDL N.D. Ill.). Carlson Lynch was counsel for plaintiff in connection with this consolidated group of class actions alleging the existence of a kick-back scheme in violation of RESPA, along with numerous other unfair lending practices. The specific case being handled by Carlson Lynch created new law under RESPA. Specifically, Carlson Lynch filed this action as a test case to challenge what they viewed as a negative trend in the law regarding how federal trial courts were determining whether a consumer has standing to sue under RESPA, as well as the manner in which damages are calculated under RESPA. Every

prior federal trial court to consider these issues had sided with defendants. In opposing the Ameriquest motion to dismiss that was filed in this case, Carlson Lynch argued that these other federal trial courts had fundamentally misinterpreted the legislative history of RESPA in their decisions to dismiss the prior cases. In a seminal decision, the United States District Court for the Western District of Pennsylvania departed from the holdings issued by these other federal courts and agreed with the arguments of Carlson Lynch, denying the motion to dismiss. *See Kahrer v. Ameriquest Mortgage Co.*, 418 F.Supp.2d 748 (W.D. Pa. 2006) (Hay, J.). Multiple federal courts of appeal have adopted the *Kahrer* reasoning, including at least the Sixth and Third Circuits. This case was ultimately settled as part of MDL proceedings against Ameriquest in the Northern District of Illinois, and final approval of the settlement was granted.

***Bannon v. First One Lending, Inc.*,** (C.P., Allegheny County, Pennsylvania). Carlson Lynch was co-lead counsel in this class action filed on behalf of Pennsylvania second mortgage loan borrowers alleging that they were charged excessive settlement fees in violation of the Pennsylvania Secondary Mortgage Loan Act. After the court denied defendant's motion to dismiss, the case ultimately settled and plaintiffs and the class were refunded 100% of the alleged overcharges.

EMPLOYMENT DISCRIMINATION

White v. United Steel Workers of America, (W.D. Pa.), Carlson Lynch was co-lead counsel in this age-discrimination class action against the U.S.W.A. After overcoming a motion to dismiss on a legal issue regarding a substantial split of authority, the defendant requested mediation to explore the possibility of settlement. After extensive mediation over a one month period in June 2004, the case ultimately settled for an amount that defense counsel characterized as the highest ever paid by the U.S.W.A. in connection with civil litigation.

ANTITRUST

***In Re Railway Industry Employee No-Poach Antitrust Litigation,* MDL 2850,** (W.D. Pa.), Carlson Lynch represents a putative class of employees who allege defendants and their co-conspirators entered into unlawful agreements to reduce and eliminate competition among them for employees and to suppress the compensation of those employees. Chief Judge Joy Flowers Conti appointed Carlson Lynch partner Kelly K. Iverson as Liaison Counsel on behalf of the putative class.

***In Re Blue Cross Blue Shield Antitrust Litigation,* MDL No. 2406**, (N.D. Ala.). Carlson Lynch represents healthcare subscriber plaintiffs in four states in this nationwide class action challenging the anti-competitive practices of Blue Cross/Blue Shield's nationwide network of local insurers who do not compete with each other based on geographic boundaries. In addition to Carlson Lynch's work on the individual cases, Carlson Lynch attorneys have been significantly involved in the discovery process. In November 2020, Judge Proctor preliminarily approved a $2.67 billion settlement of the Subscriber plaintiffs' claims.

CARLSON LYNCH

ENVIRONMENTAL

Steward et al. v. Honeywell Int'l, Inc., No. 3:18-cv-01124 (S.D. Ill.) Carlson Lynch is currently involved in this property damage class action involving nuclear and non-nuclear contamination of large swaths of the City of Metropolis and the County of Massac. Carlson Lynch and co-lead counsel are prosecuting claims for injunctive relief, property damage, and medical monitoring in this extremely complicated environmental contamination case.

CIVIL RIGHTS

ADA (Americans with Disabilities Act) Accessibility Litigation. Carlson Lynch is currently counsel for plaintiffs in a substantial number of putative class actions filed on behalf of disabled individuals to enforce the ADA's accessibility requirements. Over the last six years, Carlson Lynch has represented the visually disabled in seeking improved access to ATMs, Point of Sale devices, automated retail kiosks, and websites. Carlson Lynch has also represented individuals with limited mobility in seeking elimination of architectural barriers found in parking lots, paths of entry, interior store design, and other places of public accommodation. These cases have been prosecuted in numerous federal courts across the country. Carlson Lynch has overcome motions to dismiss in more than twenty-five of these cases. A substantial number of the cases have been settled, and in all of those cases, the defendants have agreed to equitable relief calculated to guarantee the accessibility to public accommodations that is required by the ADA.

Moreover, in January 2016, Magistrate Judge Robert C. Mitchell of the United States District Court for the Western District of Pennsylvania recommended certification of a national class of mobility-disabled individuals who were denied full and equal access to Cracker Barrel stores due to the company's inadequate centralized ADA maintenance policies. Judge Mitchell recommended that Carlson Lynch be appointed as counsel for the Class. Cracker Barrel has over 630 stores across the country. The report and recommendation was adopted by District Judge Mark Hornak in July 2016. The case subsequently settled, securing injunctive relief for the nationwide class.

More recently, Carlson Lynch was representing an individual with a mobility disability in *Egan v. Live Nation Worldwide, Inc.*, 2:17-cv-445 (W.D. Pa.). The claims involve wheelchair inaccessibility and ticket unavailability at Pittsburgh-area concert events promoted by Live Nation and ticketed by Ticketmaster. In March 2018, Judge Mark Hornak denied Live Nation's attempt to force arbitration of the potential class action. On appeal, the Third Circuit remanded the arbitration question for trial on disputed factual issues. The case settled before trial.

CARLSON LYNCH

ATTORNEYS

R. Bruce Carlson

Bruce Carlson is from Wilkinsburg, Pennsylvania, where he attended Pittsburgh Public School. He graduated from the University of Pittsburgh School of Law in 1989, where he was the Executive Editor of the *Journal of Law and Commerce*. He also obtained his undergraduate degree from the University of Pittsburgh, graduating *summa cum laude* in political philosophy. After law school, he was employed for approximately four years at Eckert Seamans Cherin & Mellott, in Pittsburgh. Subsequently, he was a member at the Pittsburgh plaintiffs-FELA and mass tort firm previously known as Peirce, Raimond, Osterhout, Wade, Carlson & Coulter. During his five year tenure at the Peirce firm, Bruce developed and managed one of the largest, if not the largest, pediatric lead poisoning practices in the country. After his practice evolved and began to focus more on consumer class action litigation, he affiliated the practice with a prominent Pittsburgh-based plaintiffs' class action firm. During the almost four years that he was affiliated with that firm, Bruce originated and was lead counsel in more consumer class cases than any lawyer in Western Pennsylvania. These cases were filed not only in Western Pennsylvania, but in state and federal courts throughout the country. In June 2004, Bruce ended his relationship with his former firm and co-founded Carlson Lynch.

Bruce is admitted to practice in the state courts of Pennsylvania and West Virginia, the United States District Courts for the Western, Middle and Eastern Districts of Pennsylvania, the Northern and Southern Districts of West Virginia, the Northern District of Ohio, the Northern, Southern, Eastern and Western Districts of Texas, the District of Maryland, the Western District of Tennessee and the United States Courts of Appeal for the Third, Fifth, Ninth and Eleventh Circuits. He is a member of the Million Dollar Advocates Forum. He is a member of the American Association of Justice, and the Pennsylvania, Western Pennsylvania and West Virginia Trial Lawyers Associations.

Gary F. Lynch

Gary Lynch was born and grew up in Western Pennsylvania. Gary earned his Juris Doctor in 1989 from the University of Pittsburgh School of Law, where he served as an Editor of the *University of Pittsburgh Law Review*, and his Bachelor of Science in Accounting from the Pennsylvania State University in 1986. He was admitted to the State Bar of the Commonwealth of Pennsylvania in 1989 and the State Bar of New York in 2018, and is admitted to practice in the United States Supreme Court, the United States Courts of Appeals for the First, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, and the United States District Courts for the Western, Middle, and Eastern Districts of Pennsylvania, the Northern and Southern Districts of Ohio, the Northern and Central Districts of Illinois, the Western District of New York, the Eastern and Western Districts of Michigan, and the District of Maryland. Gary has also been admitted *pro hac vice* in numerous jurisdictions nationwide.

Gary has been engaged in the practice of law for the last twenty-nine years, beginning his

CARLSON LYNCH

legal career at Reed Smith, LLP (formerly Reed Smith Shaw & McClay). After leaving Reed Smith in 1991, Gary served as the Managing Partner of Lynch & Kunkel and Gary F. Lynch, P.C., focusing his practice on the representation of clients in employment-related matters, particularly complex litigation. Since co-founding Carlson Lynch in June of 2004, Gary has developed a nationally recognized plaintiffs' class action practice in the areas of consumer protection litigation and employee rights.

Gary has served in a leadership capacity in several MDL/class action proceedings, including many of the largest data breach cases in recent years. For example, as Co-Lead counsel representing a class of financial institution plaintiffs in *In re Equifax, Inc. Customer Data Security Breach Litigation* (N.D. Ga.); *First Choice Federal Credit Union v. The Wendy's Company* (W.D. Pa.), and *In re: The Home Depot, Inc. Customer Data Security Breach Litigation* (N.D. Ga.); as a member of the Plaintiffs' Steering Committee representing the consumer plaintiffs in *In re Marriott International Customer Data Security Breach Litigation* (D. Md.), and as member of the overall executive committee in *In re Target Corporation Customer Data Breach Litig.*, (D. Minn.).

His appointments extend beyond data breach cases, however, and in 2018, Hon. C. Darnell Jones II appointed him Co-Lead counsel representing a class of student loan borrowers in *In re: FedLoan Student Loan Servicing Litigation* (E.D. Pa.). In *Ellis v. Edward Jones* (N.D. Ohio No. 1:08-cv-00540, MDL No. 1779), he chaired the Plaintiffs' Leadership Committee in a wage and hour class/collective action, which returned more than $19 million to the class.

In 2018, Gary successfully argued before the Pennsylvania Supreme Court in *Dittman et al v. UPMC,* where the Court issued its landmark decision establishing a general duty of care to protect against data breaches and clarifying the parameters of the economic loss doctrine in the data breach context, as well as any other context where an independent legal duty is sought to be enforced for purely economic damages. Gary also served as Counsel of Record before the United States Supreme Court in the case of *Genesis HealthCare Corp. v. Symczyk.*

Gary currently serves on the Local Rules Advisory Committee for the United States District Court for the Western District of Pennsylvania. He has been rated as a "Super Lawyer" and has received Martindale Hubbell's "AV" rating. Gary is a frequent local and national Continuing Legal Education lecturer.

Gary is active in a number of community non-profit organizations, including past President and current board member of the Human Services Center, Inc. (an outpatient behavioral healthcare provider), board member of the Highland House, Inc. (a halfway home for women recovering from addiction), and former board member of the Lawrence County (Pennsylvania) Historical Society.

Edwin J. Kilpela, Jr.

Ed Kilpela is a native of Pittsburgh and a graduate of the Pennsylvania State University and the University of Michigan Law School, where he won the prestigious Campbell Moot Court Competition while earning awards for both best brief and as the best oral advocate in the

competition. Ed lives in Mt. Lebanon with his twin sons, Devin and Graham, and his wife, Gina. Ed has litigated and tried complex class-action and mass tort matters both at Carlson Lynch on behalf of individuals and consumers and, previously, at both Williams & Connolly LLP and Wheeler Trigg O'Donnell LLP, two of the finest complex litigation firms in the country.

Mr. Kilpela's current practice focuses on consumer-oriented class actions and financial fraud matters. Currently, Ed represents a class of insurance purchasers in Western Pennsylvania, Rhode Island, and Hawaii in an antitrust conspiracy class-action alleging illegal collusion between the members of the nationwide network of Blue Cross/Blue Shield insurers, resulting in increased insurance premiums and lack of competition in the health insurance market. In addition, Ed serves as counsel for purchasers of glucosamine/chondroitin health supplements who were defrauded by multiple companies in their marketing and advertising of those supplements in which unsupported and medically false claims were made regarding joint health benefits the supplements do not provide.

A representative sample of Ed's past litigation experience includes 1) serving as counsel for a large financial institution and its officers and directors in connection with securities class action and ERISA lawsuits stemming from alleged accounting manipulation and corresponding stock losses; 2) serving as national Counsel for large multinational pharmaceutical corporation in multiple cases across the country defending against allegations that the company failed to adequately warn consumers and prescribing health providers about potential product risks; and 3) representing a large multi-national consumer goods manufacturer in multiple products liability class action matters stemming from claims regarding alleged product defects.

Ed was selected by his peers in 2011, 2012, and 2013 as a Rising Star in SuperLawyers, a distinction given to no more than 2.5% of his peers under the age of 40.

Todd Carpenter

Todd Carpenter is a former shareholder at the Phoenix based, Bonnett, Fairbourn, Friedman & Balint, P.C. His practice focuses on consumer class action, representing plaintiff classes in major insurance fraud, unfair business practices, false and deceptive advertising, product liability cases, and anti-trust violations. Todd has represented plaintiffs in numerous class action proceedings in California and throughout the country, in both state and federal courts.

Todd, through his participation in a multidistrict litigation action before U.S. District Court Judge James Lawrence King in Miami, Florida, represented consumers in separate actions against Union Bank, N.A. and Bank of the West to recover damages stemming from alleged fraudulent overdraft fee practices. The cases resulted in favorable settlements, resulting in nearly $50 million dollars in recovered fees to customers. Todd has filed similar actions against several other banks and credit unions across the country, alleging that each institution manipulated the processing of customer debit card purchases to maximize overdraft fees.

Todd has successfully represented several plaintiff classes in recovering statutory penalties resulting from violations of California's Song Beverly Credit Card Act §1747.08. Additionally,

his efforts as part of a collaborative team of lawyers have resulted in the recovery of millions of dollars in compensation for California consumers of food and supplement products arising from misleading advertising claims made by producers and manufacturers about the safety and efficacy of the products.

Todd received his B.B.A in 1999 from the University of New Mexico, where he was awarded the University's Karen Abraham's Outstanding Service Award in 1997 and again in 1998 for his development and participation in after-school recreational leagues for underprivileged youth. He received his law degree from the University of San Diego School of Law in 2002. While in law school, Todd served as Vice President for the Democratic Student Association and garnered recognition for representing indigent litigants through the University of San Diego School of Law's Legal Clinic. Todd is a member of the California Bar and has also been admitted to practice in all Federal District Courts in the state of California.

Katrina Carroll

Katrina Carroll is the founding partner of Carlson Lynch's Chicago office and serves as Co-Chair of the Firm's Executive Management Committee. She graduated from Northwestern University, with honors in political science in 1997, and in 2000, received her law degree from Seton Hall University. In 2018, Katrina was selected one of the top 25 class action lawyers in the State of Illinois by the National Trial Lawyers Association. She has also been named multiple times as a SuperLawyer, an honor based on extensive peer review.

Katrina devotes herself exclusively to fighting for workers, consumers and investors. Her experience includes products liability, privacy, antitrust and securities cases. Over the course of her career, she has recovered more than $1 billion for her clients. Prior to joining Carlson Lynch in 2019, Katrina was the managing partner of Lite DePalma Greenberg's Chicago office. While at Lite DePalma, Katrina served as Co-Lead counsel in *In Re: Rust-Oleum Restore Marketing, Sales Practices and Products Liability Litigation* (MDL; N.D. Ill.), a sprawling products liability MDL class action. During the final hearing, the Honorable Amy J. St. Eve, now a sitting justice on the Seventh Circuit, praised Ms. Carroll as a "model I wish all lawyers would follow." Katrina now serves as Co-Lead Counsel in *Bishop v. Behr Process Corporation* (N.D. Ill.), a similar national class action matter relating to defective deck paint.

Katrina is recognized nationally as an authority on topics arising in class action litigation. She has spoken at many local and national conferences, including the American Bar Association's 18th National Institute on Class Actions (2014), Perrin's Class Action Litigation Conference (2015), the American Association for Justice's Annual Convention (2016), Loyola University School of Law's Consumer Law Review Academic Symposium (2017), Practicing Law Institute's Consumer Financial Services Institute (2018), the American Bar Association's Section of Litigation Annual Conference (2018), the Class Action Mastery Program hosted by HB Litigation Conferences (2018) and Mass Torts Made Perfect (2018, 2019).

In April 2018, Katrina was honored to appear as a panelist at "May it Please the Court: Symposium on Women Lawyers in the Courtroom," a prestigious event sponsored by the United

CARLSON LYNCH

States District Court for the Northern District of Illinois and the Chicago Bar Association.

Katrina frequently appears as a panelist on class action issues at the Chicago Bar Association. She currently serves on the Advisory Board of Loyola University School of Law's Institute for Consumer Antitrust Studies and mentors law students and young lawyers. She is a member of the Class Action Trial Lawyers Association, the Chicago Bar Association and a former member of New Jersey's John C. Lifland American Inn of Court.

Edward W. Ciolko

Ed joined Carlson Lynch as a partner in 2018. Ed concentrates his practice in the areas of ERISA, Antitrust, RESPA and Consumer Protection.

Prior to joining Carlson Lynch, Ed was a Partner at Kessler Topaz Meltzer & Check, LLP, where he served as counsel in a variety of nationwide ERISA breach of fiduciary duty class actions, brought on behalf of retirement plans and their participants alleging, inter alia, imprudent investment of plan assets which caused significant losses to the retirement savings of tens of thousands of workers. These cases include: *Harris v. First Regional Bancorp*, No. 2:10-cv-07164 (C.D. CA); *In re Advanta Corp. ERISA Litig.*, No. 09-CV-04974 (E.D. Pa.); I*n re YRC Worldwide, Inc. ERISA Litig.*, No. 09-CV-2593 (D. Kan.); *In re R.H. Donnelley ERISA Litig.*, No. 09-CV-07571 (N.D. Ill.); *In re: SLM Corp. ERISA Litig., et al.*, No. 08-CV-4334 (S.D.N.Y.); and *In Re SunTrust Banks, Inc. ERISA Litigation*, No. 1:08-cv-03384 (N.D. Ga.).

Ed's efforts have also helped achieve a number of large recoveries for affected retirement plan participants: *In re National City ERISA Litig.*, No. 08-nc-70000 (N.D. Ohio) (settled -- $43 million recovery); *In re Sears Roebuck & Co. ERISA Litig.*, C.A. No. 02-8324 (N.D. Ill.) (settled — $14.5 million recovery); and *In re Honeywell Intern'l ERISA Litig.*, No. 03-CV-1214 (DRD) (D.N.J.) (settled — $14 million recovery, as well as significant structural relief regarding the pension plan's administration and investment of its assets).

Ed also concentrates part of his practice to the investigation and prosecution of pharmaceutical antitrust actions, medical device litigation, and related anticompetitive and unfair business practices including *In re Wellbutrin SR Antitrust Litigation*, 04-CV-5898 (E.D. Pa. Dec. 17, 2004); *In re Remeron End-Payor Antitrust Litigation*, Master File No. 02-CV-2007 (D.N.J. Apr. 25, 2002); *In re Modafinil Antitrust Litigation*, 06-2020 (E.D. Pa. May 12, 2006); *In re Medtronic, Inc. Implantable Defibrillator Litigation*, 05-CV-2700 (D. Minn. 2005); and *In re Guidant Corp. Implantable Defibrillator Litigation*, 05-CV-2883 (D. Minn. 2005).

CARLSON LYNCH

Eddie Jae K. Kim

Eddie Jae K. Kim is a partner at Carlson Lynch and manages its Los Angeles office. Eddie grew up in Southern California and received an undergraduate degree in English Literature from the University of California, at Berkeley, and a law degree from Cornell Law School. He has devoted his entire career to protecting the rights of individuals and small businesses.

During law school, Eddie clerked for the Orange County Public Defender and the Neighborhood Defender Service of Harlem, where he advocated for the civil and criminal rights of indigent defendants. Upon graduation from law school, he worked and became a partner at the Southern California law firm McCune Wright Arevalo, LLP, where he played a substantial role in building a nationally-recognized consumer class action practice.

His work includes a number of significant and high profile cases, including *Gutierrez v. Wells Fargo*, which resulted in the $203 million trial verdict on behalf of one million California bank customers based on the unlawful assessment of overdraft fees. *Gutierrez* subsequently spawned a national multi-district litigation against many of the largest banks in the country that resulted in several billion dollars' worth of settlements. Eddie then managed a series of class actions against banks and credit unions throughout the country based on another unlawful overdraft fee practice, resulting in over $28 million worth of settlements.

He also worked on class actions relating to product liability, including developing the first-filed case *Espinosa v. Hyundai*, which challenged the auto manufacturer's advertisement of inflated fuel efficiency numbers and became the basis for the multidistrict litigation *In re Hyundai and Kia Fuel Economy Litigation* and the resultant $200 million settlement. He served as co-trial counsel in a class action against the boat manufacturer Correct Craft which resulted in a verdict for the class that included reimbursement of the purchase price and an injunction requiring the recall of dangerous boat showers that put people at risk of fatal carbon monoxide poisoning.

In addition to representing individual consumers, Eddie has also represented small businesses through collective action, including a series of class actions on behalf of small trucking companies in California against nine of the largest intermodal shipping companies in the world, including MOL, MSC, Evergreen, Hyundai, and Wan Hai, based on the unlawful assessment of per diem fees for the lease of cargo containers. The lawsuits resulted in restitution and cessation of the unlawful practice.

Eddie has handled successful appeals in both state court and multiple federal circuit courts that have resulted in significant rulings, including rulings banning heads-I-win-tails-you-lose indemnification provisions from home purchase contracts and finding unconscionable the intermodal shipping industry's industry-wide arbitration provision.

He served as the co-chair of the Pro Bono Committee of the Korean American Bar Association of Southern California in 2013, which assists low-income, Korean-speaking clients at

a Legal Aid Foundation clinic in Los Angeles. When he is not practicing law, Eddie enjoys hiking in the mountains and composing music.

Kelly K. Iverson

Kelly Iverson was born and raised in Pittsburgh. She received Juris Doctor, *summa cum laude*, from Duquesne University School of Law, where she was honored with the Shalom Moot Court Award for Outstanding Trial Advocacy and an appointment to the Louis L. Manderino Honor Society for Meritorious Service to the Trial Advocacy Program. Kelly has extensive litigation experience in both state and federal courts. In 2016, she served as lead trial counsel in a medical malpractice action in federal court, receiving a verdict in her client's favor for the maximum available statutory damage award. Kelly's trial practice also includes second chair experience in both jury trials and commercial arbitration.

Kelly joined Carlson Lynch as a partner in February 2018. She prosecutes consumer protection matters with a focus on consumer fraud, data breach and privacy, and civil rights class actions. Kelly was Court appointed as co-lead counsel in *Flynn v. Concord Hospitality Enter. Co.* (W.D. Pa.), and as Plaintiffs' Liaison Counsel in *In Re Railway Industry Employee No-Poach Antitrust Litigation* (W.D. Pa.). Kelly also serves as a committee member for the leadership teams in the following multidistrict litigation proceedings: *In re Equifax, Inc. Customer Data Security Breach Litigation* (N.D.Ga.); *In Re: Marriott International, Inc., Customer Data Security Breach Litigation* (D. Md.) and *In re Arby's Restaurant Group, Inc. Data Security Litig.* (N.D. Ga.). She also assisted lead counsel in prosecuting the consolidated action, *First Choice Fed. Credit Union v. The Wendy's Co.* (W.D. Pa.), which recently received final approval of a $50 million class settlement.

In 2019, Kelly was selected to SuperLawyers - Rising Stars, a distinction given to no more than 2.5% of her peers under the age of 40.

Kelly currently serves on the Board of Millvale Athletic Association, a local fastpitch softball organization. From 2010 through 2017, she served as a high school mock trial attorney advisor for Fort Cherry High School and Pittsburgh Science and Technology Academy. Kelly lives in Lawrenceville with her husband Nathan, their three children, and their dog.

Pam Miller

Pam is the head of Carlson Lynch's Injury and Disability Group. She was born and raised in Western Pennsylvania. As the proud daughter of a railroad worker, Pam grew up with an acute awareness of the hazards and risks of personal injury which American workers constantly face. Consequently, after graduating from Westminster College, Pam obtained her law degree from the University of Pittsburgh School of Law in 1993, with the sole intent to represent injured and disabled workers.

CARLSON LYNCH

For nearly twenty years now, Pam has tirelessly advocated for her clients before the Social Security Administration, the Pennsylvania Bureau of Workers' Compensation, and in Federal Employer Liability Act litigation in federal court. Pam has handled over one thousand claims for Social Security Disability and continues to develop her practice in this increasingly significant area of federal administrative law.

Jamisen Etzel

Jamisen attended Duquesne University where he graduated *magna cum laude* in 2008 with a Bachelor of Arts in Political Science. He obtained his law degree from New York University School of Law in 2011. While at NYU Law, Jamisen was Managing Editor of the *Journal of Legislation and Public Policy*. During the summer of 2010, Jamisen served an internship with United States District Judge William H. Walls of the United States District Court for the District of New Jersey.

Jamisen works primarily in the firm's data breach, privacy, consumer, and employment class litigation practices, and has been involved in most of the firm's recent appellate work, securing three favorable, published opinions from U.S. Courts of Appeals in 2018 and 2019. Jamisen has been involved in most of the firm's recent data breach litigation, contributing at every stage, including initial pleadings, dispositive motions practice, discovery, settlement negotiation, and appeals.

In March 2018, Jamisen was part of a three-person trial team that obtained a jury award of $4.5 million in unpaid wages and illegally confiscated tips for class of misclassified nightclub workers in *Verma v. 3001 Castor Inc.*, 2:13-cv-3034-AB (E.D. Pa.). Jamisen then then briefed and presented oral argument in the defendant's post-trial appeal to the Third Circuit, and obtained an across-the-board affirmance of Carlson Lynch's trial victory. *Verma v. 3001 Castor Inc.*, 937 F.3d 221 (3d Cir. 2019). He served as the primary briefing and arguing counsel for successful appellants in *Mickles v. Country Club, Inc.*, 887 F.3d 1270 (11th Cir. 2018), and for successful appellees in *DeGidio v. Crazy Horse Saloon and Restaurant, Inc.*, 880 F.3d 135 (4th Cir. 2018), wherein the Fourth Circuit held that an employer's mandatory arbitration agreements were unenforceable due to the employer's abusive tactics in disseminating the agreements and the employer's delay in moving to enforce the agreements in the district court proceedings.

Jamisen was also one of the primary brief writers in the *Dittman v. UPMC* appeals, leading to a groundbreaking opinion from the Supreme Court of Pennsylvania—in favor of Carlson Lynch's clients—which clarified Pennsylvania's economic loss rule and recognized that employers have a common law duty to use reasonable care when collecting sensitive employee data. 196 A.3d 1036 (Pa. 2018).

In 2019 and 2020, Jamisen was selected to SuperLawyers - Rising Stars, a distinction given to no more than 2.5% of his peers under the age of 40.

CARLSON LYNCH

Kyle A. Shamberg

Kyle is a Chicagoland native. After graduating from the Loyola Chicago School of Law, magna cum laude, Kyle moved to New York where he worked first as a Staff Attorney at the U.S. Court of Appeals for the Second Circuit and then at New York's largest asbestos litigation firm, handling complex motion practice and appeals on behalf of clients, largely former union tradesmen and military servicemen, who had developed terminal diseases from their asbestos exposures.

Since coming home to Chicago in 2014, Kyle has focused exclusively on litigating consumer class actions, representing clients for injuries ranging from identity theft and financial fraud as a result of a data breach to massive property damage caused by failing plastic plumbing systems. He joined Carlson Lynch in 2019, where he continues to advocate for consumer and privacy rights. Kyle has argued appeals in front of the Seventh and Second Circuits and the New York Appellate Division. He is the former Chair of the Chicago Bar Association's Class Action Committee.

Elizabeth Pollock Avery

Elizabeth was born and raised in Buffalo, New York. After obtaining her bachelor's degree from the State University of New York at Buffalo, she attended Indiana University- Bloomington Maurer School of Law, graduating in 2012. While in law school, Elizabeth assisted indigent members of society as a law clerk at the Monroe County Public Defenders' Office and at the Indiana University Disability Law Clinic.

After graduating, Elizabeth moved to Pittsburgh and worked for a family law firm prior to joining a Plaintiff side employment litigation firm in 2013. As a plaintiff's employment litigator, Elizabeth worked to right the wrongs committed against employees in a variety of areas of employment law, including the Fair Labor Standards Act, the Family and Medical Leave Act, and litigating cases dealing with sexual harassment, gender discrimination, race, age and disability discrimination.

Elizabeth's practice is primarily split between the firm's antitrust and labor and employment practice groups, including Fair Labor Standards and state wage law. She has also completed significant work on cases involving ADA, data breach, and consumer protection.

Nicholas R. Lange

Majoring in English with a concentrated study in philosophy, Nicholas attended the University of Illinois at Urbana Champaign, the last six of months of which he lived abroad in East Africa, broadening his horizons while completing coursework in international law. His work there culminated in a presentation to the International Criminal Tribunal for Rwanda in Kigali, Rwanda. Nicholas returned home to graduate from the DePaul University College of Law, with honors.

During law school, Nicholas cut his teeth clerking at one of Chicago's prominent complex litigation firms. Initially after law school, his practice focused on representing condominium and

other common-interest communities— and their directors and managers— in all manners of civil litigation, including fraud, tort, breach of contract, fiduciary duties, and corporate matters, and including fights with developers, insurers, and municipalities. Since then, Nicholas has been, and continues to be, involved in a wide variety of class litigation, including some of the most complex class actions pending in the country.

Kristin Graham

Kristy Graham is a native of Pittsburgh, Pennsylvania. She attended the University of Virginia in Charlottesville and graduated in 1998 with a bachelor's degree in environmental sciences. Before returning to Charlottesville for law school, Kristy taught English in Madrid, Spain and, later, worked as an analyst for Booz Allen Hamilton at its headquarters in Northern Virginia. Kristy graduated from the University of Virginia School of Law in 2003. While in law school, she served as an Articles Editor for the *Virginia Law Review*.

Kristy began her legal career as a commercial litigation associate with Holland & Hart, a Denver-based law firm with over 400 attorneys in 15 offices. While at Holland & Hart, Kristy was involved in all aspects of litigation in federal and state court, from preparing pleadings and conducting discovery through drafting dispositive motions and supporting briefs. Kristy was also part of a multinational energy company's defense team in a severance pay class action lawsuit stemming from one of the largest mergers in U.S. history. Prior to joining Carlson Lynch in January 2015, Kristy also practiced law with small firms in Pennsylvania and Colorado. Kristy's broad array of litigation experience includes general commercial, labor, and employment, ERISA, oil and gas, real estate, and personal injury cases. Kristy works in all aspects of Carlson Lynch's complex litigation practice.

Robin Bolea

Robin Bolea was born and raised in Pittsburgh where she received her degree in Philosophy and Physics from Duquesne University, cum laude, and her Juris Doctor from Duquesne University School of Law, cum laude. Prior to attending law school, Robin spent six years working in banking with Citizens Bank where she handed retail clients as well as accounts for law firms and claims administrators, assisting with the funds management for class action settlements.

After law school, Robin joined a local law practice where she worked on both commercial and individual disputes and transactions. In 2016, she had the opportunity to join a large Pittsburgh based firm focused on environmental toxic torts. During this time Robin represented numerous individuals in large scale mass tort litigation brought on by corporate environmental hazards. Robin represented individuals and estates of individuals who suffered from severe injury brought on by their working conditions. Following that role, Robin began performing litigation support for national practices working closely with the litigation teams to ensure timely production of relevant discovery materials.

CARLSON LYNCH

In 2020, Robin was given the opportunity to join Carlson Lynch and to continue her career in representing plaintiffs and expand her practice into class action litigation. She lives locally in Pittsburgh with her husband, Stephen, and their dog, Winston.

Matthew Brady

Matthew was born and raised in Pittsburgh, Pennsylvania. His parents are from McKeesport, Pennsylvania and he grew up in Penn Hills. Matthew joined Carlson Lynch as a professional and educator with more than twenty years of experience living and working in developing and emerging markets, designing and overseeing operations in the United States and abroad, and providing policy recommendations to key stakeholders, including US and foreign government officials.

Having lived or worked in parts of Africa, Asia, Europe, and Central and South America, Matthew's background enables him to assist corporate clients with cross-border banking and financial transactions, debt management, employment and immigration matters, grant writing, hospitality and tourism laws, nonprofit and for-profit tax matters, as well as federal and foreign audits, and US federal regulations (BIS, FAR, State Department, Treasury Department, OFAC and USAID).

He has helped non-profit and for-profit organizations from the conceptual and start-up phase to mature institutions, as well as distressed companies. His efforts have allowed organizations to increase revenue, overcome institutional challenges and grow strategically while maintaining good governance and compliance with domestic and foreign laws, including international law, bilateral agreements and multilateral treaties.

Matthew has been to the United Nations Commission on Human Rights in Geneva, Switzerland four times as part of multinational delegations, and he has raised more $14 million for projects with community groups, artivists, human rights defenders and social entrepreneurs in Europe, Latin America and the United States. He has also published articles in the *Miami Herald*, *El Nuevo Herald*, and *Huffington Post* and contributed to Freedom House's human rights publications *Freedom in the World*, *Freedom of the Press* and *Freedom on the Net*.

Since joining Carlson Lynch, Matthew has augmented his portfolio to include complex class action and multidistrict litigation in a range of areas, such as Americans with Disabilities Act (ADA) compliance, antitrust, consumer protection, data privacy and digital security, financial services and transactions, Medicaid/Medicare fraud, and fair labor standards and employment practices. He also assists individual clients with estate administration, estate planning, and individual claims.

Matthew is proficient in French, Spanish and Russian.

CARLSON LYNCH

Scott Braden

Scott Braden is an associate who joined the firm's San Diego office in 2019. He received his J.D. from the University of San Diego School of Law in 2013, and received his undergraduate degree from California State University, Fresno.

Nicholas Colella

Nick was born and raised in Western Pennsylvania. After receiving his bachelor's degree from Penn State University, he moved to Florida to attend the University of Florida College of Law. While there, Nick became a member of the University's Alternative Dispute Resolution team where he and his partner placed top ten nationally amongst their peers.

During his time in law school, Nick worked with multiple private firms, as well as the U.S. Attorney's Office for the Middle District of Florida, gaining invaluable hands on experience in a wide array of practice areas. He was first exposed to class action litigation during his summer internship with Carlson Lynch, assisting in data breach and privacy matters. Prior to rejoining Carlson Lynch, Nick started his professional career with a boutique firm in North Florida, representing financial institutions and corporations and focusing mainly on regulatory and compliance matters, incorporating areas of securities law, corporate and banking law.

Tom Withers (Of Counsel)

Tom Withers became Of Counsel to Carlson Lynch in June 2008, and often provides advice and counsel to the firm regarding trial strategy. Tom graduated from the University of Georgia law school in 1984. He also received his undergraduate degree from the University of Georgia. After graduating from law school, Tom joined Oliver, Maner and Gray, in Savannah, Georgia, where he was a partner from 1988 until 1990. While at Oliver, Maner and Gray, Tom was primarily engaged in the defense of medical malpractice cases for physicians. During his six years with the firm, Tom tried approximately ten medical negligence cases to verdict, all of which resulted in verdicts for the defendants.

Thereafter, Tom joined the United States Attorney's Office in the Southern District of Georgia, where he remained for eight years. Tom initially served as an Assistant U.S. Attorney in the Criminal Section before becoming Chief of the Criminal Section in 1993. Tom also served as a Professional Responsibility Officer during his time with the United States Attorney's Office and was given the Department of Justice's Director's Award in 1997. In 1998, Tom left the United States Attorney's Office and became a founding partner of Gillen Parker & Withers (now, Gillen Withers & Lake, LLC). Tom's practice focuses on federal and state criminal defense, Medicare/Medicaid fraud, and complex civil litigation.

Tom is admitted to practice in the state courts of Georgia, the United States District Courts for the Southern and Northern Districts of Georgia, and the United States Court of Appeals for the Eleventh Circuit.