IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JAVIER RODRIGUEZ, JORGE ESQUILIN, HARRY CHARCALIS, and DARREN COUTURIER, individually and on behalf of all persons similarly situated, Plaintiffs, v. TRI-WIRE ENGINEERING SOLUTIONS, INC.; COMCAST CORPORATION; and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, Defendants.	No.: 1:21-cv-10752 Hon. Patti B. Saris, U.S.D.J.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR APPROVAL OF COLLECTIVE SETTLEMENT AND PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

I. INTRODUCTION

The Parties have reached a settlement of this Action, as memorialized in the proposed Class Action Settlement Agreement and Release ("Settlement").[1] Plaintiffs now seek preliminary approval of the Settlement as to the state law classes ("Class") and approval of the Settlement as to the Collective. This Settlement resolves in full the class and collective action ("Action") brought by Plaintiffs Javier Rodriguez, Jorge Esquilin, Harry Charcalis, and Darren Couturier (collectively, "Plaintiffs"). Plaintiffs brought the Action on behalf of individuals employed by Tri-Wire Engineering Solutions, Inc. ("Tri-Wire") who provided services for Tri-Wire to the customers of Comcast Cable Communications Management, LLC ("Comcast") as hourly non-exempt employees working as cable technicians ("Technicians"). The Action is based on alleged violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), and Maine, Massachusetts, New Hampshire, New Jersey, and Pennsylvania labor laws during the relevant time period. Plaintiffs allege that Tri-Wire violated the FLSA and various state wage-and-hour laws in connection with their employment. Plaintiffs further allege that Comcast was their joint employer and was therefore liable for Tri-Wire's pay violations. Comcast denies that it was Plaintiffs' joint employer and that any wage and hour violations occurred, but have agreed to the relief requested pursuant to the Settlement, for purposes of settlement only, but have agreed to the relief requested pursuant to the Settlement, for purposes of settlement only.[2]

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[1] The Settlement is attached as Exhibit 1 to the accompanying Declaration of Ori Edelstein ("Edelstein Decl."). This approval motion uses terms as defined in the Settlement.

[2] Comcast does not oppose the relief requested by Plaintiffs' Motion, but does not agree to any characterization regarding the Settlement, including as to Class and Collective certification. Comcast disputes that the proposed Classes meet the requisites for certification under Rule 23 and that the Collective members are similarly situated so as to permit collective action treatment under the FLSA except for purposes of the Settlement, and has agreed to the relief requested, including Class and Collective Certification for purposes of the Settlement alone. *See* Settlement, ¶¶ 19.a, 40.

Absent the proposed Settlement, continued litigation of this Action would be fraught with risk. This is because Tri-Wire has filed for bankruptcy, and it is far from certain that Plaintiffs can prove their joint employment allegations against Comcast. Not only is Tri-Wire insolvent and protected by federal bankruptcy law, and is thus not party of the pending Settlement, Tri-Wire was also subject to a data breach causing irreparable corruption to its relevant timekeeping and pay records. As a result, after about two years of hard-fought litigation—including conditional certification of the collective, dissemination of notice to prospective collective members, written discovery, extensive informal discovery, and intensive mediation and arms' length negotiations with the assistance of a respected wage and hour mediator—the Parties have reached a settlement that provides approximately 572 Settlement Class and Collective Members with the benefit of a non-reversionary, gross settlement fund of $1,995,000 (the "Gross Settlement Amount"). Plaintiffs submit that this Settlement provides a very positive recovery for the members of the State Classes and Collective under the unique circumstances of this case and is an efficient outcome in the face of risky and expanding litigation. The Settlement is fair, reasonable, and adequate in all respects, and is a fair and reasonable resolution of a *bona fide* dispute.

Plaintiffs therefore respectfully request that the Court grant the requested preliminary approval of the Parties' Rule 23 class action settlement and approval of the Parties' FLSA collective action settlement, and enter the accompanying attached proposed Preliminary Approval Order. Comcast does not oppose this Motion.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Tri-Wire was a multi-state entity providing residential and commercial cable technician services on behalf of cable operators—including Comcast—throughout Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, and other states. Plaintiffs allege that Tri-Wire violated the FLSA and labor laws of Maine, Massachusetts, New Hampshire, New Jersey, and

Pennsylvania with respect to the Technicians. Plaintiffs allege that Tri-Wire and Comcast jointly employed Technicians and that they, along with the Class and Collective Members, were not paid proper minimum wages, overtime wages, or completed piece rates, and were forced to incur work-related expenses, which included requiring them to purchase their own tools and gasoline and improperly deducting other work-related expenses from earned wages. *See* Dkt. 1 at ¶¶ 46-112. Comcast denies that it employed the Technicians, jointly or otherwise, and that any wage and hour violations occurred.

On September 10, 2021, Plaintiffs filed a Motion for Conditional Certification and to Facilitate Notice Under 29 U.S.C. § 216(b) (Dkt. 24). On September 14, 2021, Tri-Wire filed a notice of bankruptcy, which automatically stayed this litigation as to Tri-Wire alone. Dkt. 30; 11 U.S.C. § 362(a)(1). Further complicating this litigation, on October 11, 2021, Plaintiffs were informed that a substantial portion of Tri-Wire's employee-related documents and data no longer exists due to a ransomware attack. Dkt. 58-1, ¶ 3. Plaintiffs thus served a subpoena *duces tecum* on Automatic Data Processing Inc. ("ADP"), requesting Tri-Wire's employee tax and payroll documents, payroll policies, and communications with ADP regarding payroll. *Id.*, ¶ 4.

On October 27, 2021, Comcast filed an opposition to the motion for conditional certification solely on jurisdictional grounds and a motion to dismiss or, in the alternative, a motion to strike for lack of personal jurisdiction. Dkts. 44-45. On November 15, 2021, Comcast filed a motion for protective order regarding Plaintiffs' subpoena to ADP. Dkt. 50. On January 25, 2022, the Court denied Comcast's motion to dismiss and motion for protective order, and it granted Plaintiffs' motion for conditional certification. Dkt. 66. On February 24, 2022, ADP released the payroll records of all class and collective members in response to Plaintiffs' subpoena. Edelstein

Decl., ¶ 12. To date, a total of 249 individuals have filed opt-in consent forms to join the FLSA portion of this Action. *See, e.g.,* Dkt. 96.

Plaintiffs' Counsel analyzed and evaluated the merits of the claims made against Tri-Wire and Comcast in this Action, conducted approximately 100 interviews with Plaintiffs and the Opt-In Plaintiffs, and obtained and reviewed documents that Comcast and ADP had produced during the course of discovery. This included documentation relating to Comcast's contractual relationship with Tri-Wire and Tri-Wire's compensation policies and practices, payroll data for the Settlement Class, and a 20% sampling of data relating to the Technicians' work for Tri-Wire on Comcast customers' accounts. Edelstein Decl., ¶¶ 8-9, 11-13.

On November 30, 2022, the Parties conducted a hybrid in-person and remote, full-day mediation before Magistrate Judge Diane Welsh (Ret.), JAMS-Phila., that lasted into the evening. The Parties reached a settlement in principle that evening to resolve all claims in this litigation. *Id*., ¶ 16. Prior to the mediation, Plaintiffs had prepared a detailed mediation statement, and performed calculations of potential damages based on their investigations and the extensive payroll and timekeeping data produced by ADP and Comcast. *Id.*, ¶ 15. The Parties executed a memorandum of understanding on December 28, 2022, and extensively met and conferred to memorialize the terms of the long-form settlement agreement over the next few months. *Id.*, ¶ 17. The Parties eventually reached an accord with Judge Welsh's assistance, which resulted in the Parties' execution of the long-form settlement agreement on March 9, 2023. *Id.*; Settlement.

III. TERMS OF THE SETTLEMENT AGREEMENT

A. Basic Terms of the Settlement

Comcast has agreed to pay an all-in non-reversionary Gross Settlement Amount of $1,995,000. Settlement, ¶ 21. The $1,995,000 Gross Settlement Amount includes (subject to Court approval) amounts to cover Class Counsel's attorneys' fees, not to exceed one-third of the Gross

Settlement Amount (*i.e.,* $665,000.00); reimbursement of out-of-pocket costs, not to exceed $75,000;[3] service awards, not to exceed $5,000 to each of the four named Plaintiffs; the costs of Settlement Administration, currently estimated to be $21,000; and a Contingency Reserve Fund of $10,000, which will be used to correct any errors relating to the Settlement Award allocations, make payments to individuals who were not included as Settlement Class Members but have a good faith claim for participation, or any other reasonable purpose necessary to effectuate the Settlement. *Id.*, ¶¶ 2.c, 2.f, 2.k, 2.o, 2.aa, 22; Edelstein Decl., ¶ 19.

After deducting the requested amounts of attorneys' fees and costs, service awards, settlement administration costs, and the Contingency Reserve Fund, the entire remaining amount (the "Net Settlement Amount") will be distributed to all Settlement Class Members (with the exception of State Class Members who timely exclude themselves from the Settlement) in the form of a settlement award check without the need to submit a claim form. *See* Settlement., ¶¶ 2.q, 14, 22. The Net Settlement Amount is currently estimated to be approximately $1,204,000. Edelstein Decl., ¶ 20.

Each Settlement Class Member will receive a *pro rata* portion of the Net Settlement Amount under an allocation formula based on the total number of workweeks (settlement shares) that the respective Class and Collective Member worked for Tri-Wire during the applicable limitations period. Settlement, ¶ 26. Workweeks during which work was performed in New Hampshire and Pennsylvania will be credited with 1.1 settlement shares. Workweeks during which work was performed in Massachusetts and New Jersey will be credited with two settlement shares to recognize the increased value of those state law claims. All other workweeks during which work

[3] Plaintiffs will file a Motion for Approval of Attorneys' Fees and Costs and Plaintiffs' Service Awards and for Final Approval of the Settlement prior to the Court's Final Fairness Hearing.

was not performed in those states will be credited with one settlement share. *See id.*, ¶ 26.a.iii. The total number of settlement shares will be added together, and the resulting sum will be divided into the Net Settlement Amount to reach a per share dollar figure, which will then be multiplied by each Class Member's number of settlement shares to determine the Settlement Class Member's Settlement Award. *Id.*, ¶ 26.a.iv.

All Settlement Award determinations shall be based on the relevant work records provided to the Settlement Administrator, as explained in the Settlement Notice. The Settlement Administrator will send the Settlement Notice to Settlement Class Members, including the number of workweeks credited for each Settlement Class Member and the number of workweeks in Maine, Massachusetts, New Hampshire, New Jersey, and Pennsylvania. *Id.*, ¶¶ 2.a.i, 15. Settlement Class Members will be able to dispute their workweeks by submitting evidence proving they worked more workweeks than shown by the work records. *Id*.

Upon Court approval, Comcast will transfer the Gross Settlement Amount into a Qualified Settlement Fund ("QSF"), to be set up and administered by the Settlement Administrator, within twenty-one days after the Effective Date. Settlement, ¶¶ 21, 29. The QSF will be administered by Phoenix Class Action Administration Solutions ("Phoenix"),[4] an independent and highly respected third-party claims administration company, subject to appointment by the Court pursuant to this Motion. *See id.*, ¶ 2.bb. Phoenix's total fees and costs are currently estimated at $21,000. Edelstein Decl., ¶ 19.

[4] "Phoenix has numerous years of successful class action case management, which has allowed it to emerge as a leader in Class Action Administration…. Phoenix provides expert industry consultation, secure data resources, emerging technologies in noticing, class identification, and media planning, in case involving labor and employment, as well as consumer and securities cases, among others." *See* https://www.phoenixclassaction.com/about-us/.

Under the schedule set forth in the Settlement Agreement, Settlement Awards for each Settlement Class Member will be mailed to them within 45 days of the Effective Date. *Id.*, ¶ 22. After the 180-day check-cashing period, the remaining uncashed check amount and any amount remaining in the Contingency Reserve Fund will be distributed to the Parties' agreed-upon *cy pres* recipient National Employment Law Project[5] (subject to this Court's approval), or will be redistributed to Settlement Class Members who cashed their initial Settlement Award checks if Plaintiffs' Counsel and the Phoenix determine that it is economically feasible to do so and would not result in a *de minimis* payment to a Settlement Class Member (as such an additional distribution of $5.00 or less would not be recognized for redistribution under this provision). Settlement, ¶ 33. If there are any funds remaining after any redistribution, and after deducting related additional settlement administration costs, the remaining amount shall revert to the Parties' agreed-upon *cy pres* beneficiary, National Employment Law Project ("NELP"), a national nonprofit legal and policy advocacy organization that protects employees, *see* https://www.nelp.org/. *See id.*; *see also* Edelstein Decl., ¶ 39, Ex. 2. No funds from the Gross Settlement Amount will revert to Comcast. Settlement., ¶¶ 2.o, 21.[6]

B. Definitions of the Proposed Settlement Classes and Collective

Pursuant to the Settlement, an individual is a member of the "State Classes" if he or she was employed in Maine, Massachusetts, New Hampshire, New Jersey, or Pennsylvania, by Tri-Wire and provided Technician services for Tri-Wire to the customers of Comcast, in whole or in part, as an hourly non-exempt employee between May 5, 2018 and October 29, 2021 (for Maine,

[5] NELP is a national nonprofit legal and policy advocacy organization that protects employees. *See* https://www.nelp.org/. The Court should approve NELP as a worthy and appropriate recipient of *cy pres* funds in this case. *See* Edelstein Decl., ¶ 39, Ex. 2.

[6] However, Comcast's portion of payroll taxes – to be paid separate from the Gross Settlement Amount – may be returned to Comcast by the relevant taxing authority only to the extent that Settlement Awards are not cashed by some individuals. *See* Settlement, ¶¶ 2.o, 29.

Massachusetts, New Hampshire, and Pennsylvania Class Members) or between May 5, 2015 and October 29, 2021 (for New Jersey Class Members). Settlement, ¶¶ 2.r, 2.s, 2.t, 2.u, 2.x, 2.gg.

Pursuant to the Settlement, the following individuals are members of the "Collective": all individuals employed by Tri-Wire as hourly non-exempt employees who provided services for Tri-Wire to the customers of Comcast between May 5, 2018 and October 29, 2021, and whose opt-in consent form has been filed (and not withdrawn) in this Action. *Id.*, ¶ 2.e. Collective and State Class Members are collectively referenced as Settlement Class Members, who total approximately 572 individuals. *Id.*, ¶ 2.dd.

C. Scope of Release

Upon the Effective Date, Collective Members will release claims against the Releasees arising from any employment by Tri-Wire under the FLSA, as well as any state and local minimum wage and overtime wage claims based on or arising out of the same factual predicates alleged in the Complaint between May 5, 2018, and the Effective date. *Id.*, ¶¶ 2.z, 11.a.

State Class Members will release claims arising from any employment by Tri-Wire that were or could have been alleged in the Complaint, based on the factual allegations therein, including claims under the wage and hour laws of Maine, Massachusetts, New Hampshire, New Jersey, and/or Pennsylvania, as applicable. *Id.*, ¶ 11.b-f.

In addition, State Class Members who are not also Collective Members and who negotiate their Settlement Award checks will also release any and all claims arising from or related to their work for Tri-Wire against the Releasees under the FLSA. *Id.*, ¶ 11.g. The named Plaintiffs further agree to a broader "general release" in exchange for the additional consideration of their service awards. *Id.*, ¶ 13. Finally, each settlement check will contain an endorsement on the back of the check to satisfy any applicable procedural protocols under the FLSA, as appropriate for named Plaintiffs and Collective Members and other Settlement Class Members. *Id.*, ¶ 12.

D. Settlement Notice to Be Issued

Within ten business days after the Court's Preliminary Approval Order, Phoenix will receive the Class List from Comcast. Settlement, ¶ 14.c. In order to provide the best notice practicable, Phoenix will make reasonable efforts to identify current addresses via public and proprietary systems. *Id.*, ¶ 14.d. Within ten business days of completing such efforts, Phoenix will mail and email (if an email address is available) the Settlement Notice to all Settlement Class Members. *Id.*, ¶ 14.e; Exs. A-B (collectively, "Settlement Notice"). Phoenix will also provide to Comcast's Counsel and Class Counsel regular updated reports indicating steps taken by Phoenix to locate address information and resend Notices, as well as lists of names and addresses of Settlement Class and Collective Members who object to, or request exclusion from the Settlement, or who dispute the payment calculations. *Id.*, ¶¶ 14.e-14.g, 14.i. In addition, Phoenix will create a website for the Settlement (previewed by Class Counsel and Comcast's Counsel) and a toll-free call center to field inquiries from State Class and Collective Members during the Notice and Settlement Administration periods. *Id.*, ¶ 14.b.

State Class Members will have a period of 60 calendar days from the time the Settlement Notice is initially mailed to object to or opt-out of the Settlement (the "Notice Deadline"), and, among other provisions (discussed further below), the Notice will clearly explain the objection and exclusion options and procedures, and the deadlines to do so. *Id.*, ¶¶ 16-18; Exs. A-B.

IV. ARGUMENT

A. The Court Should Approve the Settlement as to the FLSA Collective

Settlements are favored in law, including those resolving wage claims under the FLSA. *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946). A court may approve an FLSA settlement if it is "a fair and reasonable resolution of a *bona fide* dispute over FLSA provisions." *Michaud v. Monro Muffler Brake, Inc.*, No. 2:12-cv-00353-NT, 2015 WL 1206490, at *9 (D. Me. Mar. 17,

2015) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982)); *see also Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17-cv-10219-JGD, 2017 WL 6460244, at *1 (D. Mass. June 8, 2017). A proposed settlement resolves a *bona fide* dispute where, as here, the terms of the settlement "reflect a reasonable compromise over issues, such as…. back wages, that are actually in dispute." *Lynn's Food*, 679 F.2d at 1354. Further, in assessing the fairness of an FLSA settlement, **"**the factors supporting approval of a Rule 23 settlement of state wage and hour claims may also support approval of a collective action settlement of FLSA claims." *Michaud*, 2015 WL 1206490, at *9 (citing *Scovil v. FedEx Ground Package Sys., Inc.*, No. 1:10-cv-515-DBH, 2014 WL 1057079, at *8 (D. Me. Mar. 14, 2014)).

In this case, the wages and other FLSA issues that were the subject of a *bona fide* dispute in this litigation and that would have impacted the case moving forward, include, but are not limited to: (1) whether Comcast employed or jointly employed the Technicians; (2) the amount of time Technicians spent performing their work, and whether Technicians were pressured by Tri-Wire to underreport the amount of time worked, and whether all hours worked were reported/captured by Tri-Wire's timekeeping system; (3) whether Technicians were paid for all hours worked, including overtime; (4) whether the Technicians were required to incur unreimbursed expenses that reduced their overtime wages, and whether the wages were improperly deducted from their pay; (5) whether Plaintiffs would be able to prove that Tri-Wire's pay system violated the FLSA and, if so, whether Comcast would be able to meet its burden of demonstrating the alleged unlawful pay system by Tri-Wire was made in good faith with reasonable grounds for its belief that it complied with the FLSA pursuant to 29 U.S.C. § 216(b) such that Comcast could avoid imposition of liquidated damages; (6) whether Plaintiffs could maintain a collective action;

and (7) whether Plaintiffs and/or Comcast would appeal myriad legal or factual determinations, including collective action treatment, liability, and damages.[7]

Ultimately, the Settlement represents a compromised resolution of these issues, as well as others, that takes into account the risks that members of the proposed Collective would face if the case proceeded to trial. Edelstein Decl., ¶¶ 18, 29-36. The Settlement provides certain and substantial payments for the Technicians who are members of the Settlement Collective in this case. The proposed Settlement thus meets the standard for approval of an FLSA settlement because it is a fair and reasonable compromise of a *bona fide* dispute and, as discussed below, the requirements for approval of the Settlement under Rule 23 are met. The Court should therefore approve the Settlement as to the Collective.

B. The Court Should Preliminarily Certify the State Classes under Rule 23

In order to obtain approval of the class action settlement on behalf of the State Classes, the Court must first ensure that the prerequisites of class certification under Rule 23 are satisfied. *Accord. Jean-Pierre v. J&L Cable TV Servs., Inc.*, 538 F. Supp. 3d 208, 212 (D. Mass. 2021). Here, the Parties have stipulated that, for settlement purposes only, the requirements for establishing class certification pursuant to Rule 23(a) and (b)(3) have been met. Settlement, ¶ 8.[8] Plaintiffs now move for preliminary certification of the State Classes.

"To obtain certification of a class action for money damages under Rule 23(b)(3), a plaintiff must satisfy Rule 23(a)'s … prerequisites of numerosity, commonality, typicality, and adequacy of representation … and must also establish that 'the questions of law or fact common

[7] The Court has already granted conditional certification of the Collective and should now confirm that the Collective should be certified for purposes of settlement. *See* Dkt. 66.

[8] The Parties have not stipulated that the manageability requirement pursuant to Rule 23(b)(3) has been satisfied because there is no need to reach that issue where, as here, the case will be settled in lieu of proceeding to trial.

to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013) (quoting Rule 23(b)(3)). The proposed State Classes satisfy the relevant criteria.

1. Numerosity

The numerosity requirement is satisfied here where joinder of all class members would be "impracticable." Fed. R. Civ. P. 23(a)(1); *see also Michaud*, 2015 WL 1206490, at *2 (finding proposed class of 23 satisfies numerosity requirement because adjudicating such claims would promote judicial economy and "[t]he numerosity requirement is more readily met where a class contains employees suing their present employer"). Here, the relevant work records identify the 467 State Class Members, which renders the classes so large and geographically disparate as to make joinder impracticable.[9] *Accord In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294, 301 (D. Mass. 2021) ("[T]here is no requirement of a minimum number of plaintiffs and courts in similar cases have found the numerosity requirement to be satisfied where, as here, class members are geographically dispersed and judicial economy favors proceeding as a class action.").

[9] Based on the relevant work records, approximately six Class members resided in Maine, approximately 160 resided in Massachusetts, approximately 20 resided in New Hampshire, approximately 230 resided in New Jersey, and approximately 68 resided in Pennsylvania during the relevant periods applicable to each State. But based on Plaintiffs' Counsel's investigations, these totals represent unique individuals who often traveled to different states to provide services, such that the actual number of class members per state are greater than what is represented by their respective residences. Indeed, based on Plaintiffs' Counsel's investigations, approximately 6% of all Class Members (*i.e.*, 28 Class Members), reported working in multiple states outside of their resident state. Edelstein Decl., ¶ 21, n.1.

2. Commonality

A class also must share common questions of law or fact. Fed. R. Civ. P. 23(a)(2). When the claims arise out of a companywide policy or practice, the commonality prerequisite is satisfied. *See, e.g., Overka v. Am. Airlines, Inc.*, 265 F.R.D. 14, 18 (D. Mass. 2010) (the "commonality requirement usually is satisfied" where "implementation of [a] common scheme is alleged"). Here, the proposed State Classes satisfy the "commonality" prong because all class members challenge Tri-Wire's compensation policies that allegedly denied Technicians payment for all hours worked or jobs completed and allegedly failed to pay proper overtime wages and all wages owed. *See, e.g.*, *Ripley v. Sunoco, Inc*., 287 F.R.D. 300, 308 (E.D. Pa. 2012) (finding that the class maintained a common claim that the employer broadly enforced an unlawful policy denying employees earned overtime compensation and that the policy was "the common answer that potentially drives the resolution of [the] litigation," though "each Plaintiff's recovery might be different due to the number of hours that he or she worked without proper compensation").

3. Typicality

To meet the requirement of typicality, the class representatives' claims must "arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and [be] based on the same legal theory." *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (internal quotation marks omitted). Here, the claims of each of the four Plaintiffs for unpaid wages and overtime are identical to those asserted on behalf of the Rule 23 class members in the State each Plaintiff seeks to represent. *See, e.g., Garcia v. E.J. Amusements of New Hampshire, Inc.*, 98 F. Supp. 3d 277, 288 (D. Mass. 2015) (holding that plaintiff's "overtime claims are typical of the claims he intends to bring on behalf of the class"); *Michaud*, 2015 WL 1206490, at *3 (typicality met where the named plaintiff for each of the four state law classes alleges he was injured by defendant's practice of failing to account for all compensation in calculating overtime,

since his injury arises from the same course of conduct and legal theories as the other proposed class members in that state).

4. Adequacy

To satisfy the adequate representation requirement, "[t]he moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp*., 780 F.2d 124, 130 (1st Cir. 1985). Here, each of the named Plaintiffs share interests identical to those of the putative State Class Members that each Plaintiff seeks to represent; namely, all seek to obtain alleged unpaid overtime wages for times in which they worked more than forty hours per week for Tri-Wire. *See* Edelstein Decl. ¶ 23. In addition, Class Counsel are highly experienced and have successfully acted as representative counsel in numerous wage and hour actions as well as other complex class actions, in federal and state courts, including class actions involving virtually identical claims. *See id*., ¶¶ 5-7, 30, 38.[10]

5. Predominance

Predominance is satisfied upon showing that a sufficient constellation of common issues bind class members together. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 296 (1st Cir. 2000). The requirement is "merely that common issues predominate, not that all issues be common

[10] The same factors supporting the adequacy of Class Counsel also support appointment of Class Counsel under Fed. R. Civ. P. 23(g) which directs courts to appoint class counsel when certifying a class. Rule 23(g)(1)(A) requires the court to consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *See, e.g., Michaud*, 2015 WL 1206490, at *5-6 (proposed class counsel's experience in wage and hour litigation, extensive work performed in present litigation, continued commitment to represent the class, and absence of conflicts with interests of proposed class support their appointment as counsel for the class and collective under Rule 23(g)).

to the class." *Smilow v. Sw. Bell Mobile Sys., Inc*., 323 F.3d 32, 39 (1st Cir. 2003). Courts have routinely held that the predominance requirement is satisfied in overtime cases such as this in which employees challenge a uniform policy of their employer, because there are common answers that will determine the outcome of the litigation.

Plaintiffs contend that common questions raised in this Action predominate over any individualized questions and resolution of Plaintiffs' claims hinges on Tri-Wire's alleged uniform policies and practices, including those that allegedly resulted in workers not receiving compensation for all hours worked. *See Michaud*, 2015 WL 1206490, at *4 (predominance satisfied where "all class members' claims arise out of the same compensation practice—the exclusion of [certain additional] payments in calculating overtime pay, and implicate the same law—the overtime provisions in either Maine, Massachusetts, New Hampshire, or Vermont"). As a result, Plaintiffs submit that resolution of these alleged class claims would be achieved through common forms of proof and would not require inquiries specific to individual class members.

6. Superiority

The requirement of superiority ensures that resolution by class action will achieve economies of time, effort, and expense, as well as promote uniformity of decisions as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results. *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 70 (D. Mass. 2005). Superiority is satisfied here, where the class members may not have the means to pursue individual actions to recover their damages, and important labor rights might go unaddressed due to the difficulty of finding legal representation and filing claims on an individual basis. In addition, allowing the members of the State Classes to participate in a class settlement that yields immediate and certain relief is superior to having a multiplicity of individual and duplicative proceedings in this Court.

Because the requirements of federal Rule 23(a) and Rule 23(b)(3) other than as to manageability are satisfied, Plaintiffs respectfully request that the Court preliminarily certify the State Classes for settlement purposes only.

C. The Class Settlement Should Be Preliminarily Approved

Courts in this Circuit recognize the "clear policy in favor of encouraging settlements." *Durett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990); *E.E.O.C. v. Astra U.S.A., Inc*., 94 F. 3d 738, 744 (1st Cir. 1996). Further, it is well established that "the law favors class action settlements." *In re Lupron Mktg. & Sales Prac., Litig*., 228 F.R.D. 75, 88 (D. Mass 2005)). The dismissal or compromise of any class action requires the Court's approval. Fed. R. Civ. P. 23(e). "Court approval of a class action settlement involves a two-step process" by which the Court must first determine whether the parties' proposed settlement warrants preliminary approval and then, after notice of the settlement is given to class members, whether final approval is justified. *Miller v. Carrington Mortg. Serv. LLC*, No. 2:19-cv-00016-JDL, 2020 WL 2898837, at *4 (D. Me. June 3, 2020) (citing Fed. R. Civ. P. 23(e)).

Under Rule 23(e), where a class settlement is "proposed," the court "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i)(ii) (emphasis added). *See, e.g.*, *Miller*, 2020 WL 2898837, at *4 (at preliminary approval stage, the court considers whether it "will likely be able to" approve the settlement). "Thereafter, following notice to all putative class members pursuant to the court's direction, the court would determine whether the settlement was 'fair, reasonable, and adequate.'" *Id.* (citing Fed. R. Civ. P. 23(e)(1)(B), 23(e)(2)).

In determining whether the Settlement is fair, reasonable, and adequate for purposes of preliminary approval, the Court should consider whether:

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

See Fed. R. Civ. P. 23(e)(2); *Cohen v. Brown Univ.*, 16 F.4th 935, 943-44 (1st Cir. 2021). Here, the proposed Settlement meets each of the above requisites.

1. Plaintiffs and Plaintiffs' Counsel have Adequately Represented the State Classes and the Settlement Was Reached Only After Arm's-Length Negotiations Between Experienced Counsel

"The duty of adequate representation requires counsel to represent the class competently and vigorously and without conflicts of interest with the class." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 n.12 (1st Cir. 2009); *see also Nat'l Ass'n of Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-30024-KAR, 2020 WL 1495903, at *3 (D. Mass. Mar. 27, 2020) (first factor met where plaintiffs retained qualified and highly skilled attorneys with a demonstrated record of success in similar cases, plaintiffs' counsel engaged in extensive discovery and analysis of the information received from defendant and negotiated long and hard seeking best outcome for their clients); *City P'shp. Co. v. Atl. Acquisition Ltd. P'shp.*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement.").

The four named Plaintiffs' interests and the interests of the proposed State Classes are in alignment. Because Plaintiffs "seek 'the same remedy . . . based on an identical theory' as the rest

of the class, there is no conflict between the class representatives and other members of the proposed class." *Nat'l Ass'n of the Deaf v. Harvard Univ*., No. 3:15-cv-30023-KAR, 2019 WL 6699449, at *3 (D. Mass. Dec. 9, 2019) (citation omitted). Plaintiffs have retained highly experienced and skilled attorneys and further provided invaluable assistance throughout the prosecution of this action, filing the claims in the Complaint on behalf of themselves and other similarly situated Technicians, and demonstrating willingness to serve as active class representatives on behalf of the State Classes. Edelstein Decl., ¶¶ 37-38.

In the course of this pursuing this litigation, Plaintiffs' Counsel vigorously and competently represented Plaintiffs and the State Classes in reaching the Settlement. The Settlement was only reached following extensive investigation into the claims and defenses of the action, which allowed Plaintiffs and Plaintiffs' Counsel to accurately assess the legal and factual issues that would arise if the case proceeded to trial. Prior to the November 30, 2022, mediation, Comcast produced a 20% sampling of Settlement Class data relating to the Technicians' work for Tri-Wire on Comcast customers' accounts, in addition to multiple relevant class-wide data points, which Plaintiffs' Counsel reviewed and analyzed extensively. *Id.*, ¶¶ 8, 13, 15, 24. Further, the Parties had already conducted substantial discovery, including through ADP's production of thousands of pages of Tri-Wire's payroll documents for all Class and Collective members since 2015. *Id.*, ¶¶ 8-13. Finally, the Parties conducted extensive factual and legal research in connection with Plaintiffs' motion for certification of the collective and facilitation of notice to potential collective members. *Id*., ¶ 15. Thus, at the time Settlement was negotiated, the Parties had a well-informed basis to evaluate the merits of the claims and defenses in the action. *See id.*

Moreover, in reaching this Settlement, Plaintiffs' Counsel relied on their substantial litigation experience in similar wage and hour class and collective actions. *Id*., ¶ 30. Plaintiffs are

represented by highly experienced and competent counsel who have litigated numerous wage and hour cases aggressively and successfully in this Circuit and district courts throughout the United States. *See id*., ¶ 5-7, 30, 38. Settlements in wage and hour class actions brought by Plaintiffs' Counsel have been approved in dozens of cases, including a recent settlement on behalf of cable technicians that contained similar methods for notifying class members and for distributing the settlement fund among class members. *See id*., ¶ 5-7.[11] Plaintiffs' Counsel premised their liability and damages evaluation on a careful and extensive analysis of the effects of Tri-Wire's wage and hour policies and practices on Settlement Class Members' pay. *Id.*, ¶¶ 24-25. Ultimately, facilitated by the mediator, the Parties used this information and discovery to fairly resolve the litigation. *See id.*, ¶¶ 16-17.

The First Circuit has recognized "[i]f the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *Jean-Pierre v. J&L Cable TV Servs., Inc.*, 538 F. Supp. 3d at 213 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 32-33). Here, the Gross Settlement Amount is a negotiated amount that resulted from mediation and subsequent arms'-length negotiations with the assistance of a neutral mediator, Judge Diane Welsh (Ret.), an experienced wage and hour mediator. *Id*., ¶¶ 14-17. The Parties further spent several months negotiating the long form settlement agreement, with several rounds of revisions and proposals related to the terms and details of the Settlement. *Id*., ¶ 17.

[11] *See, e.g., Jean-Pierre v. J&L Cable TV Servs*., 538 F. Supp. 3d at 213-14; *Soto v. O.C. Comm.*, No. 17-cv-00251 (N.D. Cal. Oct. 23, 2019) Order (Dkt. 305) (granting final approval of settlement in wage and hour dispute involving cable technicians and certifying California and Washington state law classes for purpose of settlement).

There should be no doubt that Plaintiffs and their counsel have adequately represented the interests of the States Classes, and that the Settlement is not only presumed to be fair, but as demonstrated below is a commendable recovery in the circumstances.

2. The Relief Obtained for the State Classes Is Wholly Adequate, Especially When Measured Against the Risk of Continued Litigation

In determining the reasonableness of the settlement, "usually, the ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F. 3d 30, 44 (1st Cir. 2009). Here, the relief offered by the settlement is wholly adequate. The Gross Settlement Amount is a negotiated amount that resulted from substantial arms' length negotiations, investigation, and analysis by Plaintiffs' Counsel. Edelstein Decl., ¶ 24. Class Counsel based their damages analysis and settlement negotiations on formal and informal discovery, including Tri-Wire payroll data produced by ADP, data relating to the Technicians' work for Tri-Wire on Comcast customers' accounts, and extensive interviews with State Class Members and Opt-In Plaintiffs. *Id*., ¶¶ 24-25.

Plaintiffs' Counsel built a comprehensive exposure model from the payroll data produced by ADP and the relevant work records, and applied inputs based on its investigation and interviews to determine the total alleged exposure for unpaid wages. *Id*. Using this model, Plaintiffs estimate that the total potential exposure if Plaintiffs prevailed on their claims – inclusive of penalty claims and claims for liquidated damages – is approximately $7,403,232.35. *Id*. This total exposure was based on the assumptions that employees worked 1.4 hours per day off-the-clock and worked

approximately 4.9 shifts per week at the average hourly rate of $20.70.[12] *Id.*, ¶ 26. Based on those favorable assumptions, Plaintiffs calculated a maximum potential liability for the overtime claims of $2,286,835.02,[13] and liquidated damages and penalties of $5,116,397.33. *Id.*, ¶ 27. The negotiated non-reversionary Gross Settlement Amount of $1,995,000 represents approximately ***87% of Defendants' substantive exposure*** of $2,286,835.02 for off-the-clock overtime claims, and approximately ***27% of Defendants' total estimated potential exposure*** of $7,403,232.35. *Id.,* ¶ 28.[14]

The proposed Settlement offers an average recovery of approximately $2,104.90 to Settlement Class Members (dividing the Net Settlement Amount by 572 total Settlement Class members). *Id.* This amount provides fair compensation to the Technicians, and the Settlement provides a good recovery under the unique circumstances of this case in the face of expansive and uncertain litigation, well within the reasonable standard when considering the difficulty and risks presented by expanding litigation. *Id.*, ¶ 36.

[12] Plaintiffs calculated that the average alleged non-reimbursed work expenses per Technician are $1,206.47. Edelstein Decl., ¶ 26. Given, however, that such expenses rarely if ever dipped Technicians' wages under the applicable state or federal minimum wage, such damages were *de minimis*. *Id*.

[13] Plaintiffs' Counsel did not separately calculate damages attributable to minimum wage violations because the overtime damages calculation accounted for the straight time owed for the off-the-clock hours (the data indicated that, in most if not all applicable workweeks, Settlement Class Members were compensated at an effective hourly rate that exceeded minimum wage). That is, in calculating these damages, Plaintiffs' Counsel used 1.5 times the hourly rate for each hour of off-the-clock work to calculate potential off-the-clock exposure for the Settlement Class Members under the FLSA and applicable state laws. Edelstein Decl., ¶ 27.

[14] These figures are based on Plaintiffs' assessment of a best-case scenario. Edelstein Decl., ¶ 29. To have obtained such a result at trial, Plaintiffs would have had to succeed in obtaining certification of the State Classes and withstand any decertification motions, as well as prevail on the merits of all claims and prove that all 572 Settlement Class Members experienced the violations at the levels described for every shift and prove that Comcast acted knowingly or in bad faith. *Id.* Comcast would, of course, hotly dispute and contest these figures.

The final negotiated settlement amount takes into account the substantial risks inherent in any class action wage and hour case. *Id.*, ¶¶ 31-36. While Plaintiffs believe their case is very strong, Comcast denies the allegations, denies that it was the joint employer of Tri-Wire's Technicians, and denies it is liable or owes damages to anyone with respect to the alleged facts or causes of action asserted. Settlement, ¶¶ 6, 36. Comcast has raised defenses to each of the disputed legal and factual issues described above, including, in particular, the alleged joint employment of the Technicians. The dispute regarding potential joint employment would be heavily litigated, and Comcast would vigorously contest that it was the employer or joint employer at summary judgment and at trial. If Comcast is found not to be a joint employer, the value of the case would plummet, given Tri-Wire has declared bankruptcy. *Id.*, ¶ 31.

Further, although the Court has conditionally certified the collective, there is a risk that Plaintiffs would not succeed in maintaining a collective or certifying and maintaining state law classes through trial. *Id.* In addition, a trial on the merits would involve significant risks for Plaintiffs as to both liability and the appropriate rate and calculation of damages, and any verdict at trial could be delayed based on appeals by Comcast. For example, the FLSA provides that, if an employer that shows any act or omission giving rise to an FLSA violation "was in good faith" or made under "reasonable grounds for believing that his act or omission was not a violation," a court may award "no liquidated damages or award any amount thereof." 29 U.S.C. § 260. Comcast – while denying employer status – would be prepared to submit evidence purporting to show that it had acted in good faith and on reasonable grounds that its actions were not in violation of the FLSA, and whether this Court agrees with Comcast would be a risk that Plaintiffs would necessarily undertake had litigation continued. *Id.*, ¶ 32.

The path to an award of additional damages and penalties at trial for overlapping FLSA and state law claims is equally uncertain. Plaintiffs' recovery analysis above assumes State Class Members could receive liquidated damages under the FLSA as well as civil penalties or liquidated damages under applicable state case law for the same underlying overtime and minimum wage claims. *Id*., ¶ 33. Although Plaintiffs are confident they would be able to succeed in arguing for these penalties and liquidated damages, Comcast disputes the propriety of such an approach, and would argue that such remedies could not be ordered on top of FLSA damages as a "double recovery." *Id.* Thus, as in any complex action, the Plaintiffs generally face uncertainties.

Measured against these risks and delays, the Settlement will result in immediate and certain payment to Settlement Class Members. In contrast, if the Action were to go to trial as a class and collective action (which Defendants would vigorously oppose if the Court does not approve this Settlement), Class Counsel estimates that fees and costs, including very significant expenditures for expert fees and discovery costs, would exceed $3,000,000. Edelstein Decl., ¶ 34-35. Litigating the class and collective action claims would require substantial additional preparation and discovery. *Id*. It would require third-party discovery, depositions of experts, the presentation of percipient and expert witnesses at trial, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. *Id*.

Courts routinely approve settlements that provide a fraction of the maximum potential recovery in this case. This is a good recovery in the face of expanding and uncertain litigation and is fair, reasonable, and adequate. *See Scovil*, 2014 WL 1057079, at *5 (approving settlement as fair, reasonable, and adequate, because while "clearly a compromise that discounts to some degree [plaintiffs'] total claims.… [t]hese concrete dollar numbers to be received now are a fair-trade-off

for the uncertainties of trial and appeal and a prolonged delay in receiving any money"). In light of all the risks, the settlement amount is fair, reasonable, and adequate.

3. The Settlement Treats Each State Class Member Equitably

A class action settlement need not benefit all class members equally. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). Rather, although disparities in the treatment of class and collective members may raise an inference of unfairness and/or inadequate representation, this inference can be rebutted by showing that the unequal allocations are based on legitimate considerations. *Holmes*, 706 F.2d at 1148.

All Settlement Class Members will receive equitable treatment under the settlement. To ensure fairness, the Parties have agreed to allocate the settlement proceeds among Settlement Class Members based on the number of workweeks that each Settlement Class Member worked for Tri-Wire and provided services to Comcast customers' accounts in the applicable period, which ensures that longer-tenured workers receive a greater recovery. *See* Settlement, ¶ 26. The allocation also tracks the differences in the increased value of substantive law and penalty claims of specific state laws by providing each workweek worked in those states with additional settlement shares instead of one.[15] *Id.*, ¶ 26.a.iii. This allocation method acknowledges Plaintiffs' contention that Massachusetts and New Jersey unpaid wages claims, which allow for treble damages, are more valuable, as well as the greater value of New Hampshire and Pennsylvania claims, which allow for liquidated damages of 10% to 25%. *See* Edelstein Decl., ¶ 22. Plaintiffs provide a rational and legitimate basis for the allocation method here, and they submit that it should be approved by the Court. *See, e.g., Soto v. O.C. Comm.*, No. 17-cv-00251 (N.D. Cal. Oct. 23,

[15] *See also Reynolds v. Fid. Inves. Instit. Operations Co., Inc*., No. 1:18-cv-423, 2020 WL 91874 (M.D.N.C. Jan. 7, 2020) ("differential treatment" among class members justified by "availability of greater damages" in certain states).

2019) (granting final approval of settlement in wage and hour dispute involving cable technicians and approving allocation plan that tracks the differences in substantive law among states).

D. The Service Awards for the Named Plaintiffs Are Justified

Javier Rodriguez, Jorge Esquilin, Harry Charcalis, and Darren Couturier will each seek incentive payments of $5,000 for their efforts in bringing and prosecuting this Action as representative Plaintiffs. Settlement, ¶¶ 2.aa, 22.a. Subject to Court approval, these amounts will be in addition to Plaintiffs' recovery as Settlement Class Members, and in exchange for Plaintiffs' general release of claims. *Id*.

"Incentive awards are recognized as serving an important function in promoting class action settlements, particularly where, as here, the named plaintiffs participated actively in the litigation." *In re Relafen Antitrust Litig*., 231 F.R.D. at 82. Awards in wage and hour cases and other employment cases are generally higher than in other types of cases, and "recently awards of $10,000 and $15,000 are not uncommon, and on occasion reach $20,000, $30,000 and higher."[16] *Scovil*, 2014 WL 1057079 at *6 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (2006) and collecting cases)). *See, e.g.*, *Sewell v. Bovis Lend Lease, Inc.*, No. 09-cv-6548(RLE), 2012 WL 1320124, at *14-15 (S.D.N.Y. Apr. 16, 2012) (finding reasonable and approving service awards of $15,000 and $10,000 in wage and hour action).

[16] In *Scovil*, the court approved $130,000 in incentive payments ranging from $10,000 to $20,000 for each of nine named plaintiffs who actively participated in the litigation. *Id.* 2014 WL 1057079, at *7. One of the reasons for awarding higher incentive payments in employment cases, including wage and hour cases, is because of the risk of retaliation. *See, e.g.*, *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 187 (W.D.N.Y. 2005) ("[Enhancement] awards are particularly appropriate in the employment context. In employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.").

"In determining whether an incentive or service award is warranted, courts consider the steps these individuals have taken to protect the interests of the class, the degree to which the class has benefited from those actions, the amount of time and effort they have expended in pursuing the litigation, and any negative effects that they have risked." *Scovil*, 2014 WL 1057079, at *6. Here, Plaintiffs provided invaluable assistance to Class Counsel over the course of this litigation concerning the allegations in this lawsuit. They worked with Class Counsel, providing background information about their employment and Tri-Wire's policies and practices, including allegations relating to Tri-Wire's practices in Maine, Massachusetts, New Hampshire, New Jersey, and/or Pennsylvania and the facts forming the basis for their alleged belief that Comcast was their joint employer. Edelstein Decl., ¶ 37. Each of the Plaintiffs participated in numerous telephone conferences with counsel to assist with the case, responded to significant written discovery, searched for and produced relevant documents, and provided declarations in support of the motion for conditional certification. *Id.* Each Plaintiff stepped forward to represent the interests of their fellow workers, despite the perceived risk of knowing their names would appear on a public docket available through an internet search and that employers might take their participation into consideration when making hiring decisions. *Id.* All State Class and Collective Members will be receiving a significant benefit in the form of monetary compensation as a result of Plaintiffs' service. *Id.* Finally, the service awards requested in connection with the final approval of the Settlement are in line with others approved in class actions including wage and hour collective and class actions in this District.[17]

[17] *See, e.g., Civil v. Spirit Delivery*, No 4:13-cv-12635-TSH (D. Mass. July 24, 2018) (Dkt. 242) (approving $25,000 for named plaintiff)*; Matamoros. v Starbucks Corp.*, No. 1:08-cv-10772 (D. Mass. Aug. 16, 2013) (Dkt. 169) (approving $25,000 incentive payment each for three lead plaintiffs and $15,000 each to two lead plaintiffs in wage action); *Hayes v. Aramark Sports Service*

E. The Proposed Settlement Notice Should Be Approved

The threshold for class notice is that it be "reasonably calculated to reach the class members and inform them of the existence of and the opportunity to object to the settlement." *Nilsen v. York County*, 382 F. Supp. 2d 206, 2010 (D. Me. 2005) (citing Fed. R. Civ. P. 23). Procedural due process requires only that notice be reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Federal Rule 23(c)(2)(B) requires the absent class members receive the "best notice practicable under the circumstances." It is well-settled that notice by first-class mail satisfies the notice requirement of Rule 23. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974); *Parks v. Portnoff Law Assoc.*, 243 F. Supp. 2d 244, 249-50 (E.D. Pa. 2003) (notices mailed to class members' last known address held reasonable and adequate).

The proposed Settlement Notice (attached as Exhibits A-B to the Settlement) and manner of distribution satisfies the requirements of Rule 23. *See* Settlement, ¶¶ 14.b-14.i, Exs. A-B. The Notice clearly identifies basic information about the lawsuit, including the monetary awards that will be provided to Settlement Class Members, the allocation formula, the scope of the release, and the requests for attorneys' fees and costs, and service awards, as well as explains how class members can claim a share of the settlement and dispute a claim, and the procedures and deadlines if they wish to exercise their right to opt-out or object to the Settlement. The Settlement Notice will also list the date, location, and time of the Final Fairness Hearing and include contact information for the Settlement Administrator if they seek further information. The Notice clearly

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LLC, No 08-cv-10700-RWZ (D. Mass. Sept. 25, 2009) (Dkt. 41) (approving $25,000 service awards to each of two lead plaintiffs); *Sola v. CleanNet USA, Inc.*, No 12-cv-10580 (D. Mass. Nov. 26, 2013) (Dkt. 33) (approving $25,000 each to four class representative plaintiffs).

states that the Settlement does not constitute an admission of liability by Comcast and makes clear that the final settlement approval decision by the Court has yet to be made. *See id.*, Exs. A-B. Thus, the notice is sufficient.[18]

Class Counsel expects that the Settlement Administrator will be able to contact most all of the Class members through first-class mail and by email (if available). In addition, a Settlement website will be created to provide Settlement Class members with access to a generic form of the Settlement Notice, the Settlement, other case-related documents, and contact information for the Settlement Administrator. *See* Settlement, ¶ 14.b.

F. The Requested Attorneys' Fees and Costs Are Fair and Reasonable

Courts generally favor awarding attorney's fees from a common fund based upon a percentage of the fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), and a one-third attorneys' fee award in a common fund case has been routinely approved as fair and reasonable. *See, e.g., Mansingh v. Exel Direct, Inc*., No. 12-cv-11661-DPW (D. Mass. May 7, 2014) (awarding one-third fee in settlement for $1 million); *Chalverus v. Pegasystems, Inc*., No. 97-cv-12570-WGY (D. Mass. 2000) (awarding as an attorneys' fee one-third of a more than $5 million recovery). However, "the Court does not need to determine attorney's fees at the preliminary approval stage, [as] Class Counsel … will fully address the reasonableness of their requested fee award in their forthcoming Motion for Attorneys' Fees, Costs, and Incentive Awards." *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-2335-GPC-MDD, 2020 WL 520616, at *7 (S.D. Cal. Jan. 31,

[18] *In re Compact Disc Minimum Advertised Price Antitrust Litig*., 216 F.R.D. 197, 203 (D. Me. 2003) ("The notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class."); *Lapan v. Dick's Sporting Goods, Inc*., No. 1:13-cv-11390-R, 2015 WL 8664204, at *3 (D. Mass. Dec. 11, 2015) (notice of settlement to FLSA and state law classes complies with due process and Rule 23, as it "describes the terms of the settlement, informs the class about the allocation of attorney's fees, and provides specific information regarding the date, time, and place of the final approval hearing").

2020); *Reyes v. Experian Info. Sols., Inc.*, No. 16-cv-00563-AG (AFMx), 2020 WL 466638, at *3 (C.D. Cal. Jan. 27, 2020) ("Plaintiff's requested attorney fees will be reviewed further at the final approval stage when Plaintiff's counsel provides more information regarding the hours spent litigating this case.").

In connection with the final approval of the Settlement, Plaintiffs will request an award of attorneys' fees of $665,000, or one-third of the total Settlement, to compensate Class Counsel for all work performed in the case as well as all work remaining to be done. Settlement, ¶¶ 2.k, 22.b. Plaintiffs will also request reimbursement for litigation expenses not to exceed $75,000. *Id.*, ¶¶ 2.c, 22.b. The proposed Settlement Notice will inform class members that Plaintiffs' Counsel will seek attorneys' fees and costs in these amounts. *See id*., Exs. A-B.

G. The Proposed Implementation Schedule

The Settlement Agreement contains a proposed schedule for notice and final approval of the Settlement. Settlement, ¶¶ 14-22, 29, 31-34. Plaintiffs respectfully request that the Court approve the following proposed schedule:

Comcast to send CAFA Notice	Within ten (10) days after submission of the Settlement Agreement to the Court
Comcast to Provide Settlement Administrator and Class Counsel with Settlement Class Information	Within ten (10) business days after the Court's Preliminary Approval Order
Settlement Administrator's completion of reasonable efforts to identify current addresses for members of the State Classes and Collective	As soon as practicable
Settlement Notice to Be Sent by Settlement Administrator	Within ten (10) business days after the Settlement Administrator completes reasonable efforts to identify current addresses
Deadline to Postmark Objections or Requests for Exclusion ("Notice Deadline")	Sixty (60) days after the Settlement Notice is initially mailed
Filing of Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, and	Twenty one (21) days prior to the Notice Deadline

Plaintiffs' Service Awards	
Filing of Plaintiffs' Motion for Final Approval of Settlement	Fourteen (14) days prior to the Final Approval Hearing
Final Approval Hearing	At the Court's convenience, no earlier than thirty (30) days after the Notice Deadline

V. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court enter the accompanying Preliminary Approval Order to grant preliminary approval of this proposed Settlement and direct Plaintiffs to issue the proposed Notice, attached to the Settlement as Exhibits A and B.

Dated: March 17, 2023

Respectfully submitted,

/s/ Ori Edelstein

Carolyn H. Cottrell
Ori Edelstein
Michelle S. Lim
SCHNEIDER WALLACE
COTTRELL KONECKY, LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94608
Tel.: (415) 421-7100
Fax: (415) 421-7105
ccottrell@schneiderwallace.com
oedelstein@schneiderwallace.com
mlim@schneiderwallace.com

Shanon J. Carson
Camille Fundora Rodriguez
Lane L. Vines
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel.: (215) 875-3000
scarson@bm.net
crodriguez@bm.net
lvines@bm.net

Jason M. Leviton (MA Bar No. 678331)
BLOCK & LEVITON LLP
260 Franklin Street, Suite 1860
Boston, MA 02110
Tel: (617) 398-5600
Fax: (617) 507-6020
jason@blockleviton.com

Attorneys for Plaintiffs, the Collective and the Proposed Class

CERTIFICATE OF CONFERENCE

In accord with LR 7.1(a)(3), I hereby certify that Plaintiffs' counsel has conferred with counsel for Defendants Comcast Corporation and Comcast Cable Communications, LLC and that Defendants assent to the relief requested.

Dated: March 17, 2023

/s/ Ori Edelstein
Ori Edelstein

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, a copy of this document was served by electronic filing on all counsel of record.

/s/ Ori Edelstein
Ori Edelstein