UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

QUAWNTINA GREENE, individually and on behalf of all other similarly situated persons, Plaintiffs, vs. SITEMETRIC, LLC Defendant.	§ § § § § § § § § §	Case No. 4:24-CV-02326

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

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STATEMENT OF NATURE AND STAGE OF THE PROCEEDING

Quawntina Greene (the "Named Plaintiff"), individually and on behalf of all Opt-Ins, Class Members, and Collective Members (collectively "Plaintiffs"), and Defendant Sitemetric, LLC ("Sitemetric") (collectively, the "Parties"), have agreed to a global settlement of REDACTED (the "Settlement"). The proposed settlement resolves the claims Plaintiffs asserted in their Class and Collective Action Complaint, including claims under the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* ("FLSA"), and applicable state wage and hour laws of Ohio, Oregon, Virginia, and Washington. *See* Dkt. 1. The Parties engaged in extensive arms-length negotiations before reaching a settlement that provides a fair and substantial recovery for the Plaintiffs, and Sitemetric reclassified its workers as of January 1, 2025 per the Settlement Agreement.

The Parties request that the Court: (1) grant preliminary approval of the Settlement as memorialized in the Parties' Settlement Agreement and Exhibits (the "Settlement Agreement"), attached as Exhibit A to the Declaration of Matt Dunn in support of this motion and enter the Preliminary Approval Order in the form attached as Exhibit 2 to this motion; (2) provisionally certify the proposed settlement class under Federal Rule of Civil Procedure 23(b)(3) in connection with the settlement process; (3) appoint Getman, Sweeney & Dunn, PLLC as Class Counsel; (4) appoint Named Plaintiff Greene as Class Representative; (5) grant certification of the FLSA collective for settlement purposes under 29 U.S.C. § 216(b); (6) set dates for Class Members to opt out of and/or object to the Settlement Agreement; (7) set dates for Collective Members to opt into and/or object to the Settlement Agreement; (8) schedule a Final Fairness Hearing; (8) approve the Putative Plaintiff Notice, Class Notice, and Opt-in Notice, attached as Exhibits 7, 8, and 9, respectively, to the Settlement Agreement, and manner of notice distribution; and (10) appoint ILYM Group, Inc. as the Settlement Administrator.

STATEMENT OF ISSUES TO BE RULED UPON BY THE COURT

1. Should the Class and Collective Settlement Agreement be preliminarily approved by the Court? Rule 23(e)*; Lynn's Food Stores, Inc. v. U.S*, 679 F.2d 1350 (11th Cir. 1982).

2. Should the Court provisionally certify the Rule 23 Class and FLSA Collective for settlement purposes? Rule 23(a), (b)(3); 29 U.S.C. § 216(b).

3. Should the Court issue the proposed notices? Rule 23(c), (e).

The standard of review is abuse of discretion. *Newby v. Enron Corp*., 394 F.3d 296, 300 (5th Cir. 2004).

FACTUAL AND PROCEDURAL BACKGROUND

Between October 20, 2023 and February 5, 2024, 14 Sitemetric Workers filed arbitration demands against Sitemetric, alleging that that Sitemetric misclassified them as independent contractors and failed to pay overtime premium wages for hours worked over 40 in a workweek. They filed in arbitration because they had signed an arbitration agreement. Dunn Decl. ¶¶ 5-6.

In February 2024 the Parties agreed to explore the possibility of settlement and requested that the arbitrations already filed be held in abeyance. The Parties engaged in seven months of negotiation with Mediator F. Bradford Stillman, a retired federal magistrate judge. Dunn Decl. ¶¶ 7-8. The Parties conducted a full day mediation on April 29, 2024. Before mediation, Sitemetric provided wage and hour data for all of the workers who had filed claims in arbitration, and the additional eight individuals who came forward to pursue their claims. Dunn Decl. ¶ 9.

As a result of the April mediation, the parties agreed to explore the possibility of a class-wide settlement. Dunn Decl. ¶ 10. To further those discussions, Sitemetric provided class-wide wage and hour data for all Sitemetric workers who logged their time through the "When I Work" application, approximately 1,377 Sitemetric workers. Dunn Decl. ¶ 11. Plaintiffs analyzed the data to prepare a detailed demand and evaluation of the claims in the case, which included a calculation of each individual worker's damages under federal and state law. Dunn Decl. ¶ 12.

Sitemetric consented to tolling the FLSA and state law statutes of limitations as of April 29, 2024, and the filing of a federal complaint for the purposes of settlement. Dunn Decl. ¶ 13. Plaintiffs filed the complaint on June 20, 2024, alleging that Sitemetric misclassified its employees as independent contractors and thus failed to pay Plaintiffs overtime under the FLSA and wages under the state laws of Ohio, Oregon, Virginia, and Washington. Dunn Decl. ¶ 14.

The Parties held a second full-day mediation on September 30, 2024, but were unable to reach a settlement. Dunn Decl. ¶ 15. REDACTED [redacted] Dunn Decl. ¶ 16. Plaintiffs hired a highly qualified forensic accountant, Dr. Thomas L. Porter, to review Sitemetric's finances. In October, Dr. Porter met with Sitemetric's CEO and Vice President of Finance and Accounting and the Parties' counsel to further vet the documents. Dunn Decl. ¶ 17.

The Parties continued to negotiate through the mediator, and on December 3, 2024, the Parties reached an agreement to resolve the dispute and memorialized the material terms in a term sheet and subsequently negotiated a comprehensive settlement agreement. Dunn Decl. ¶¶ 18-19. In addition to the Settlement Agreement submitted here, the global settlement includes the resolution of 22 claimants in arbitration, who will not participate in this action. Those claims were settled and approved by arbitrator Lisa Bertini.

On January 20, 2025, the Parties fully executed the Settlement Agreement.

SUMMARY OF SETTLEMENT TERMS

I. Scope of Settlement

The Settlement Agreement resolves the claims of the Named Plaintiff, Opt-Ins, and all Class Members, including FLSA Collective Members and Rule 23 Class Members from Ohio,

Oregon, Virginia, and Washington who do not opt out of the Settlement. Dunn Decl. ¶ 21. The list of Employee IDs for the Opt-Ins, FLSA Collective Members, and Rule 23 Class Members are attached to the Settlement Agreement as Exhibits 1, 2, and 4.

II. Settlement Amount

The Settlement Agreement creates a non-reversionary fund of REDACTED [1] ("Settlement Amount") to settle the action. Settlement Agreement ("S.A.") § II. Plaintiffs' Counsel may seek an award of fees of up to 33.33% of the Settlement Amount plus reasonable costs, to be paid out of and deducted from the Settlement Amount. S.A. § IV(A). Additionally, Plaintiffs may seek, and Sitemetric will not oppose, a Service Award of up to $25,000 to be paid out of the Settlement Amount to Named Plaintiff Greene, in addition to her settlement share. S.A. § V(C). Any Court-approved Service Award, settlement administration costs, and attorneys' fees and costs will be deducted from the Settlement Amount, resulting in the Net Settlement Amount that will be distributed to the Participating Plaintiffs. S.A. § II, IV, V(C).

III. Settlement Allocations

The Net Settlement Amount will be distributed to Participating Plaintiffs on a pro rata basis as set forth in Exhibit 5 of the Settlement Agreement. The allocations represent the Parties' compromise in resolving Plaintiffs' claims. Plaintiffs' Individual Allocations are calculated for all hours they worked over 40 in a workweek within the applicable statute of limitations. Dunn Decl. ¶ 38. Plaintiffs used Sitemetric's payroll and time records to calculate Plaintiffs' overtime backpay in accordance with the applicable law under the FLSA and applicable state wage and hour laws. Dunn Decl. ¶ 39. Individual Allocations unclaimed by Class Members and Putative Collective members will be redistributed among Plaintiffs who file a claim form and Opt-In

[1] Combined with the individual arbitration settlement, the gross settlement is REDACTED.

Plaintiffs on a pro rata basis. Any settlement checks left unnegotiated shall be sent to the applicable state department of unclaimed funds in the name of the non-cashing claimant. S.A. § II (D). None of the settlement funds will revert back to Sitemetric.

IV. Structured Payments and Distribution Process

The Settlement Agreement calls for Sitemetric to make structured payments: one payment of REDACTED 14 days after final settlement approval (less any amounts paid in the arbitration settlement), and three payments of REDACTED one year, eighteen months, and two years after final settlement approval. S.A. § X(B). Plaintiffs will receive their pro rata shares from the first three payments, with certain minimum payments each round, as described in the agreement. S.A. § X(B)(1)-(3). Plaintiffs' Counsel will receive the bulk of its attorneys' fees from the final payment. S.A. § X(B)(1)-(4). The Named Plaintiff will receive any Service Award spread amongst all four payments. S.A. § X(B)(1)-(4).

V. Reclassification

The Settlement Agreement provides that Sitemetric reclassify its workers as employees for wage and hour purposes as of January 1, 2025. S.A. § III.

VI. Releases

Upon Final Approval of the Settlement, each Participating Plaintiff and class member who does not opt out will release Sitemetric from any and all wage and hour claims and wage and hour causes of action through November 25, 2024, as fully set out in the Agreement. *See* S.A. § VI. Putative Collective Members who do not file a claim form do not release any claims.

VII. Attorneys' Fees and Costs and Service Award

Plaintiffs' Counsel may seek reimbursement from the Settlement Amount for attorneys' fees of up to one-third of the Settlement Amount, plus actual litigation costs incurred, to

compensate them for time spent litigating this case without payment to date. Plaintiffs may also request the Court approve a Service Award of up to $25,000 in recognition of the Named Plaintiff's service on behalf of the Class in addition to her Individual Allocation. S.A. § V. Pursuant to Rules 23(h) and 54(d)(2), Plaintiffs' Counsel will file a motion for approval of attorneys' fees and costs and the Service Award with the motion for Final Approval. Dunn Decl. ¶ 48. The Settlement Agreement is not contingent on the amount of attorneys' fees and costs ultimately awarded by the Court and any fees not awarded will revert to the Class. S.A. § IV. The Settlement Notices will provide Class Members with information regarding the fees, so their position will become clear following the settlement notice period. S.A. Exhibits 7-9.

VIII. Settlement Administrator

The Parties have agreed to name ILYM Group, Inc., as the Settlement Administrator. The Settlement Administrator's fees and expenses are deducted from the Settlement Amount, and both Parties will have equal access to the Settlement Administrator. Among other responsibilities, the Settlement Administrator will be responsible for generating and mailing the Notice and Claim Forms to Putative Plaintiffs and Class Members, generating and mailing reminder notices, receiving and handling any Change of Address forms, objections, and opt-outs, and providing Plaintiffs' Counsel and Sitemetric's Counsel with regular reports regarding the same. S.A. § IX.

SUMMARY OF ARGUMENT

The Court should approve the proposed class and collective action settlements because the settlement is fair, reasonable, and adequate, and is a result of contested litigation and resolves a bona fide dispute. In doing so, the Court should provisionally certify the Rule 23 Class because it readily satisfies the elements of numerosity, commonality, adequacy, predominance, and superiority. The Court should also certify the FLSA collective for settlement purposes only

because the Putative Collective members are similarly situated. Finally, the Court should issue the proposed notices as they are reasonable and readily comply with due process and Rule 23.

THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED CLASS AND COLLECTIVE ACTION SETTLEMENT

Under Rule 23(e), a class action may be settled "only with the court's approval.'" *In re Chesapeake Energy Corp.*, 21 Civ. 1215, 2021 U.S. Dist. LEXIS 158564, at *13 (S.D. Tex. Aug. 23, 2021). FLSA Collective Action settlements may similarly be approved by the Court. *Alden v. Black Gold Rental Tools, Inc.*, 2:18 Civ. 215, 2019 U.S. Dist. LEXIS 212457, at *3 (S.D. Tex. Nov. 21, 2019). Settlement Approval has three steps: "First, the court must preliminarily approve the settlement. Then, the members of the class must be given notice of the proposed settlement, and finally, after a hearing, the court must determine whether the proposed settlement is fair, reasonable, and adequate." *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993). Plaintiffs request that the Court Preliminarily approve the Class and Collective Action Settlement, issue notice, and schedule a fairness hearing.

I. THE COURT SHOULD PRELIMINARILY APPROVE THE RULE 23 CLASS ACTION SETTLEMENT

A. The Settlement Meets the Standard for Preliminary Approval and Is Entitled to a Presumption of Fairness

The standard for preliminary approval is a less exacting one than for final approval. "[A]t this preliminary approval stage" the Court need only determine whether "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] that there is good cause to order issuance of notice to the proposed settlement classes of the proposed settlement, and to proceed with a hearing to determine whether the proposed settlement should be approved as being fair, reasonable, and

adequate to the members of the proposed classes." *Ortiz v. Am. Airlines, Inc*., 4:16 Civ. 151-A, 2016 U.S. Dist. LEXIS 160588, at *10 (N.D. Tex, Nov. 18, 2016). "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981) (quotation omitted). Thus, "[a] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *ODonnell v. Harris Cnty., Texas*, 16 Civ. 1414, 2019 WL 4224040, at *8 (S.D. Tex. Sept. 5, 2019) (citation omitted).

The circumstances surrounding the Settlement overwhelmingly support the application of an initial presumption of fairness. First, the Settlement was reached after seven months of negotiations through an experienced mediator, including two full-day mediations. *See Jones v. Singing River Health Servs. Found.,* 865 F.3d 285, 295 (5th Cir. 2017) ("The involvement of an experienced and well-known mediator is also a strong indicator of procedural fairness," and such settlements "are likely non-collusive.") (quotations omitted). Second, the Parties engaged in significant informal discovery during settlement discussions, including Sitemetric's production of wage and hour data for its entire hourly workforce, which permitted Plaintiffs to calculate Class Members' unpaid overtime wages. Dunn Decl. ¶ 11-12. Sitemetric also produced business and financial records, which Plaintiffs heavily vetted. Dunn Decl. ¶ 16-17. Finally, Plaintiffs' Counsel are experienced wage and hour litigators and have thoroughly reviewed the relevant data for each individual Class Member, assessing the litigation risks and Sitemetric's finances to determine the rational settlement value of this case. Dunn Decl. ¶ 12, 38, 85-106.

Moreover, the settlement has no obvious deficiencies and does not improperly grant preferential treatment to class representatives or segments of the class. All class members will

receive a pro-rata share of the Settlement Fund calculated based on the number of hours they worked over 40 in workweeks, or a minimum payment of $50. They are treated relatively equally under the agreement. For the reasons discussed in Part B below, the settlement is fair, reasonable, and adequate, and therefore there is good cause to issue notice and proceed to a fairness hearing.

B. The Settlement Is Fair, Reasonable, and Adequate Pursuant to Rule 23

Rule 23(e)(2) states that a court may approve a settlement proposal that would bind class members "only after a hearing and on finding that it is fair, reasonable, and adequate." At the preliminary approval stage, Courts consider whether there is good cause to issue notice and proceed to the final approval stage—that is, whether there is a likelihood that the Court will grant final approval. Fed. R. Civ. P. 23(e)(1)(B). In analyzing whether a class action settlement is fair and reasonable at the final approval stage, courts in the Fifth Circuit consider the six factors set forth in *Reed v. Gen. Motors Corp.,* 703 F.2d 170, 172 (5th Cir. 1983):

> (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members.

"The gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby*, 394 F.3d at 301. Moreover, there is an "overriding public interest in favor of settlement" in class actions. *In re Deepwater Horizon,* 739 F.3d 790, 807 (5th Cir. 2014).

Here, the six *Reed* factors support preliminary approval, and therefore there is good cause to issue notice and proceed to the final approval stage.

i. Factor 1: Evidence That the Settlement Was Obtained by Fraud or Collusion

As discussed in Part A above, the Parties agreed to the proposed settlement only after months of negotiations through a highly qualified mediator, and an exchange of significant

informal discovery. There is no evidence that the Parties have engaged in fraud or collusion. *See Shell Oil*, 155 F.R.D. at 559). Moreover, there is "a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary." *Camp v. Progressive Corp*., 01 Civ. 2680, 2004 U.S. Dist. LEXIS 19172, at *25 (E.D. La. Sep. 23, 2004).

ii. Factor 2: The Complexity, Expense, and Likely Duration of the Litigation

Courts conclude that the second factor favors settlement where it "avoids the risks and burdens of potentially protracted litigation." *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). The Settlement here resolves a complex wage-and-hour class and collective action that would have been lengthy and expensive to continue litigating. *See Camp*, 2004 U.S. Dist. LEXIS 19172, at *27 (recognizing the complexity of litigation in a misclassification case).

This case involves the claims of approximately 1,045 Class and Putative Collective members under the FLSA and the wage and hour laws of four states. Dunn Decl. ¶ 57. The Parties have already undertaken considerable time and expense in evaluating the claims and defenses in this case and engaging in vigorous settlement discussions. Further litigation without settlement would necessarily result in additional expense and delay. Dunn Decl. ¶ 59; *see Kemp v. Unum Life Ins. Co. of Am*., 14 Civ. 0944, 2015 U.S. Dist. LEXIS 166164, at *14-15 (E.D. La. Dec. 11, 2015) ("Class action litigation is inherently complex" and thus "inevitably costly in terms of both time and money."). And because Sitemetric required Plaintiffs to sign arbitration agreements with class and collective action waivers, it is unlikely they would recover any money without a settlement unless they filed claims in arbitration. Indeed, Sitemetric, with the sole exception of this Settlement, does not waive any rights to compel arbitration.

iii. Factor 3: The Stage of the Litigation and Available Discovery

In considering this factor, courts evaluate whether the proceedings have sufficiently developed for the Parties to have "enough information to evaluate the respective strengths and

weaknesses of their case." *Jasso v. HC Carriers, LLC*, 5:20 Civ. 212, 2022 U.S. Dist. LEXIS 207043, at *11 (S.D. Tex. Oct. 19, 2022). Courts in this circuit have approved settlements based on informal discovery so long as the settlement is not "the product of uneducated guess work," and that "[a]t the point the parties reached the settlement, they had ample information with which to evaluate the merits of the competing positions." *Melby v. America's MHT, Inc.,* 3:17 Civ. 155-M, 2018 U.S. Dist. LEXIS 233989, at *27 (N.D. Tex. June 22, 2018) (quotation omitted).

The Parties conducted significant informal discovery and contentiously negotiated the settlement for over seven months, fully evaluating the relative strength of the claims and defenses and reach a settlement. Sitemetric produced, and Plaintiffs analyzed, payroll data for all workers in the class definition, a total of 1,377 workers, and Plaintiffs' Counsel interviewed dozens of workers about their job duties, pay, and hours worked. Dunn Decl. ¶ 11-12, 58. Thus, the Parties engaged in sufficient discovery to appreciate the merits of the case.

iv. Factor 4: The Probability of Plaintiffs Prevailing on the Merits

For this factor, courts evaluate the risks of litigation, including obtaining and maintaining a class, by weighing the likelihood of success and potential damages award against the settlement's immediate recovery. *See Reed,* 703 F.2d at 172; *Camp*, 2004 U.S. Dist. LEXIS 19172 at *29-43. However, "[t]he court should not engage in a trial on the merits when examining the fairness of a proposed settlement because the very purpose of the compromise is to avoid the delay and expense of a trial." *Camp*, 2004 U.S. Dist. LEXIS 19172, at *29.

Plaintiffs face significant procedural risks that could endanger their chances of prevailing on the merits. The Plaintiffs signed an arbitration agreement, which Sitemetric would seek to enforce absent this settlement. And even if Plaintiffs were able to invalidate the agreement and proceed in Federal Court, Plaintiffs face the risk of never having the FLSA collective or the Rule

23 class certified. Dunn Decl. ¶ 61-62; *see In re Heartland Payment Sys.,* 851 F. Supp. 2d 1040, 1066 (S.D. Tex. 2012) (considering the risk of maintaining a class under this factor).

Plaintiffs also face risk on the merits, particularly their ability to show that Plaintiffs were misclassified as independent contractors, which Sitemetric strongly contests. Dunn Decl. ¶ 60; *see Plunkett v. Firstkey Homes LLC,* 3:23 Civ. 2684-L-BN, 2024 U.S. Dist. LEXIS 224946, at *10 (N.D. Tex. Nov. 21, 2024) (finding settlement reasonable in a misclassification case). Such a finding could have resulted in the Class obtaining no damages at all after years of litigation.

v. Factor 5: The Range of Possible Recovery and Certainty of Damages

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The Settlement Agreement represents the Parties' compromise given these limitations. Nevertheless, Plaintiffs have secured a substantial recovery, tolled the statute of limitations, and reached an agreement to reclassify workers as employees. *See Reed*, 703 F.2d at 173 (considering injunctive relief under this factor).

vi. Factor 6: Opinions of Plaintiffs' Counsel, Named Plaintiff, and Class Members

When reviewing settlement agreements, courts are "entitled to rely upon the judgment of experienced counsel for the parties ... [and] absent fraud, collusion, or the like, [courts] should be hesitant to substitute [their] own judgment for that of counsel." *Cotton v. Hinton*, 559 F.2d 1326

at 1330. Plaintiffs' Counsel have a positive opinion of the settlement. The Named Plaintiff is pleased with the Settlement and together with Plaintiffs' Counsel, she believes this Settlement is best for the Class as a whole. Dunn Decl. ¶ 51. The Court will be able to judge the opinion of absent class at a settlement fairness hearing, *See* S.A.§ IV, and Plaintiffs' Counsel is optimistic that the Class Members' reaction will be positive. Dunn Decl. ¶ 50.

II. THE COURT SHOULD PRELIMINARILY APPROVE THE FLSA SETTLEMENT

FLSA settlements should be approved when they are reached as a result of contested litigation to resolve bona fide disputes. *See Lynn's Food,* 679 F.2d at 1353 n.8. Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Id*. "Because, under the FLSA, parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date, FLSA collective actions do not implicate the same due process concerns as Rule 23 actions." *Beckman v. Key-Bank, N.A*., 293 F.R.D. 467, 476 (S.D.N.Y. 2013). "Accordingly, the standard for approval of an FLSA settlement is lower than for a class action under Rule 23." *Id.*

A. The Settlement Resolves a Bona Fide Dispute

"A court may approve a settlement 'in an employee FLSA suit [if it reflects] a reasonable compromise over issues . . . that are actually in dispute.'" *Jasso,* U.S. Dist. LEXIS 207043, at *4 (quoting *Lynn's Food,* 679 F.2d at 1354). A bona fide dispute exists when there is "some doubt" as to whether the plaintiffs would succeed on the merits through litigation of their claims. *Collins v. Sanderson Farms, Inc*., 568 F. Supp. 2d 714, 719-20 (E.D. La. 2008).

Here, there is no question that the Settlement resolves several bona fide disputes. Plaintiffs contend that they were misclassified and that Sitemetric was required to pay them the overtime premium pay. Sitemetric denies these allegations and argues that Plaintiffs are not

entitled to overtime wages because it properly classified them as independent contractors. Dunn Decl. ¶ 60. This constitutes a bone fide dispute. *See Jasso,* 2022 U.S. Dist. LEXIS 207043, at *9 (finding a bona fide dispute where the parties disagree as to whether the plaintiffs "are exempt from the overtime requirements of the FLSA"); *Shaw v. CAS, Inc.,* 5:17 Civ. 142, 2018 U.S. Dist. LEXIS 136394, at *3-4 (S.D. Tex. Jan. 31, 2018) ("An actual dispute over the amount of overtime compensation due to an employee is sufficient to create a bona fide dispute[.]").

Even if the Plaintiffs could establish that they were misclassified, the Parties would still dispute whether Plaintiffs are similarly situated. Dunn Decl. ¶ 62. *See Chano v. City of Corpus Christi,* 2:17 Civ. 141, 2019 U.S. Dist. LEXIS 153143, at *9 (S.D. Tex. July 11, 2019) ("[T]he likelihood of continued contested litigation and the uncertainty of its outcome is further reason to find a bona fide dispute exists."). Moreover, absent settlement, Sitemetric would attempt to enforce arbitration agreements against the claimants. Dunn Decl. ¶ 61; *See Shaw*, 2018 U.S. Dist. LEXIS 136394, at *4 ("[T]here is a bona fide dispute regarding whether arbitration agreements require Plaintiffs to arbitrate their claims on an individual . . . basis."). The Parties reached the Settlement in recognition of the uncertain legal and factual issues involved.

B. The Settlement Is Fair and Reasonable to the Employees

For the same reasons as described above in the Rule 23 class action analysis, Section II, the Settlement is fair and reasonable. *See Chano*, 2019 U.S. Dist. LEXIS 153143, at *7 ("[T]he Rule 23(e) standard encompasses the 'fair and reasonable' settlement standard of the FLSA collective action.") (quotation omitted).

THE COURT SHOULD PROVISIONALLY CERTIFY THE RULE 23 CLASS AND CERTIFY THE FLSA COLLECTIVE FOR SETTLEMENT PURPOSES

I. THE COURT SHOULD PROVISIONALLY CERTIFY THE RULE 23 CLASS

For settlement purposes, Plaintiffs seek to certify a Settlement Class consisting of the individuals listed in Exhibit 2 to the Settlement Agreement: all workers who Sitemetric classified as independent contractors and that billed work time through the "When I Work" software within the applicable statute of limitations period in Ohio, Oregon, Virginia, and Washington.

Class certification requires plaintiffs to satisfy four requirements under Rule 23(a):

> (1) numerosity, meaning that the class must be 'so numerous that joinder of all members is impracticable'; (2) commonality, meaning that there must be 'questions of law or fact common to the class'; (3) typicality, or that the claims or defenses of the representative parties must be 'typical of the claims or defenses of the class'; and (4) adequacy of representation, meaning that the representative parties must 'fairly and adequately protect the interests of the class.'

Humphrey v. Hall, 22-60227, 2023 U.S. App. LEXIS 7478, at *7-8 (5th Cir. Mar. 29, 2023) (quoting the Rule). "Rule 23(b)(3) then authorizes class certification where (1) 'questions common to the class members predominate over questions affecting only individual members,' and (2) 'class resolution is superior to alternative methods for adjudication of the controversy.'" *Elson v. Black*, 56 F.4th 1002, 1006 (5th Cir. 2023) (internal quotation omitted).

A. Numerosity

Numerosity is generally presumed when the potential number of class members exceeds 40. *See Newberg on Class Actions* § 3.05, at 3-25 (3d ed. 1992) (suggesting that a class of more than 40 "should raise a presumption that joinder is impracticable"), *cited with approval in Mullen v. Treasure Chest Casino, L.L.C.,* 186 F.3d 620, 624 (5th Cir. 1999). Here, the settlement class consists of 762 members, with more than 40 in each covered state.

B. Commonality and Predominance

To satisfy commonality, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Similarly, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23. Consequently, the commonality requirement "is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Elson*, 56 F.4th at 1006 (5th Cir. 2023) (quotation omitted).

The same common issues underly all Class Members' claims. The Named Plaintiff's and Class Members' claims arise from the same legal question of whether they were misclassified, and whether they were entitled to and received overtime premium pay. Plaintiffs' claims are largely the same whether they arise under the state laws of Ohio, Oregon, Virgina, or Washington. *See* Ohio Rev. Code Ann. § 4111.03 (requiring overtime pay of time and one-half for hours worked over 40 in a workweek); Va. Code Ann. § 40.1-29.2 (same); Wash. Rev. Code Ann. § 49.52.070 (same); Or. Rev. Stat. Ann. § 653.261, Or. Admin. R. 839-020-0030 (same).

Courts in this circuit have found commonality and predominance where cases involve the issue of whether the defendant's wage payment policy "complied with the FLSA … and related state wage laws." *Skinner v. Hunt Military Cmtys. Mgmt. LLC*, 22 Civ. 00799-JKP, 2023 U.S. Dist. LEXIS 181462, at *2 (W.D. Tex. Jan. 23, 2023). Here, as in that case, "[e]ach of the state laws that [Plaintiff] has sued upon have the minimal common and predominate element of requiring … overtime premium payment for hours worked in a workweek." *Id.* Thus, the Settlement Class satisfies the commonality and predominance factors.

C. Typicality

To satisfy the typicality requirement, the class representatives' claims must be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3), a test that is "not demanding." *Mullen*, 186

F.3d at 625. The Named Plaintiff and Class Members' overtime claims arise from the same claim that Sitemetric allegedly misclassified them and failed to pay them overtime premium wages. Dunn Decl. ¶¶ 4, 70. Accordingly, the Named Plaintiff's claims are typical of the Class.

D. Adequacy

The adequacy analysis "encompasses three separate but related inquiries: (1) the zeal and competence of the representatives' counsel; (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees; and (3) the risk of conflicts of interest between the named plaintiffs and the class they seek to represent." *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (quotation omitted).

Plaintiffs' Counsel and the Named Plaintiff fulfill the requirements of each inquiry. Plaintiffs' Counsel have done substantial work identifying and investigating Plaintiffs' claims and have extensive knowledge of the applicable wage-and-hour law, given their experience successfully litigating class and collective wage-and-hour cases on behalf of workers, including numerous misclassification cases. Dunn Decl. ¶¶ 58, 85-106. Further, the Named Plaintiff is a member of the FLSA Settlement Collective the Rule 23 Settlement Class, whose claims are all based on Sitemetric's same conduct and policy of allegedly misclassifying workers and failing to pay them overtime premium pay. Further, the Named Plaintiff has spent substantial time assisting Plaintiffs' Counsel in adjudicating the claims, including consulting with Plaintiffs' Counsel and providing information and documents, reviewing the complaint, and participating in mediation and settlement discussions. Dunn Decl. ¶¶ 68-72. The history of settlement negotiations and the efforts of the Named Plaintiff and Plaintiffs' Counsel to bring this case to a successful resolution demonstrate that they have and will continue to adequately represent the class.

E. Superiority

"Rule 23(b)(3)'s superiority requirement asks whether 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Robertson v. Monsanto Co.*, 287 F. App'x 354, 361 (5th Cir. 2008) (quoting the Rule). To evaluate superiority, Rule 23(b)(3) provides a non-exhaustive list of factors for courts to consider, including: class members' interest in bringing individual actions; whether any class members have already initiated any individual actions; the desirability of concentrating the litigation; and the difficulties of proceeding as a class action. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D).

Here, class adjudication is superior to individual adjudication because a class action is the most efficient and fair method for adjudicating and resolving the Class Members' claims. The Settlement Class contains approximately 762 workers with relatively modest claims, and absent certification, Plaintiffs would have to conduct individual arbitrations, which would likely prove too costly and burdensome for the individuals and Sitemetric. The Court should therefore preliminarily certify the Rule 23 Class for settlement purposes only.

II. THE COURT SHOULD GRANT CERTIFICATION OF THE FLSA COLLECTIVE FOR SETTLEMENT PURPOSES

To approve a FLSA collective settlement, courts must also certify the FLSA collective. *See Briz v. Protrans Int'l, LLC*, 7:22 Civ. 00144, 2023 U.S. Dist. LEXIS 124965, at *6 (S.D. Tex. July 20, 2023). A FLSA collective action may be maintained "by any one or more employees for and [o]n behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); *see also Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 433 (5th Cir. 2021).

For the same reasons that Plaintiffs met the standard to provisionally certify the Rule 23 classes, Plaintiffs satisfy the standard to finally certify the FLSA collective for settlement purposes only. The Opt-in and Putative Plaintiffs are similarly situated to the Named Plaintiff in that they all allege they were subject to Sitemetric's same unlawful policy of misclassifying them

as independent contractors and failing to pay them overtime premium pay. Dunn Decl. ¶¶ 4, 70. Courts in this District have approved certification for settlement purposes in substantially similar circumstances. *See, e.g., Briz v. Protrans Int'l, LLC*, 7:22 Civ. 00144, 2023 U.S. Dist. LEXIS 110271, at *5 (S.D. Tex. June 27, 2023) (accepting parties' stipulated collective for settlement because members were denied appropriate overtime wages under the same employer plan).

III. THE PROPOSED CLASS NOTICES SATISFY DUE PROCESS AND THE METHOD OF NOTICE IS REASONABLE

A court approving a class action settlement must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). For any class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). There are no rigid rules for determining whether a settlement notice satisfies constitutional or Rule 23(e) requirements. *Heartland*, 851 F. Supp. 2d at 1060. Instead, a notice "need only satisfy the broad reasonableness standards imposed by due process." *Katrina Canal Breaches Litig. v. Bd. of Comm'rs*, 628 F.3d 185, 197 (5th Cir. 2010) (quotation omitted). "Due process is satisfied if the notice provides class members with the information reasonably necessary for them to make a decision whether to object to the settlement." *Heartland,* 851 F. Supp. 2d at 1060 (quotation omitted).

The Proposed Settlement Notices ("Notices") fully comply with due process and Rule 23. In clear language, the Notices describe the nature of the litigation; the settlement class and terms of the settlement; the allocation of attorneys' fees and Service Awards; the release provisions; how to timely opt out of or object to the Settlement, and the date, time, and place of the final approval hearing. S.A., Ex. 7-9. The Notices inform Class Members of their minimum individual share of the Settlement Amount and the methodology used for the allocation. Additionally, the

Notices fairly, accurately, and neutrally describe the claims and Parties in the litigation, the terms of the proposed settlement, and the identity of persons entitled to participate in it.

Moreover, the notice distribution method satisfies the requirement that notice be sent "in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). A third-party Settlement Administrator will distribute the Notices and accompanying settlement forms by mail, e-mail, and text message, S.A. §§ IX(B)(1), (C)(1), and will also send a reminder notice by mail, email, and text message 30 days after distribution of the initial notice S.A. §§ IX(B)(3), (C)(3). Class Members will have 60 days from the date of mailing to opt out or object to the Settlement. S.A. §§ IX(B)(2), (C)(2). Thus, the Settlement provides a reasonable manner for notice distribution.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court issue an order: (1) granting preliminary approval of the Settlement; (2) provisionally certifying the proposed settlement class under Federal Rule of Civil Procedure 23(b)(3); (3) appointing Getman, Sweeney & Dunn as Class Counsel; (4) appointing Named Plaintiff Quawntina Greene as Class Representative; (5) granting certification of the FLSA collective for settlement purposes; (6) setting dates for Class Members to opt out of and/or object to the Settlement Agreement; (7) setting dates for Collective Members to opt into and/or object to the Settlement Agreement; (8) Scheduling a Final Fairness Hearing; (8) approving the Notices and manner of notice distribution; and (10) appointing ILYM Group, Inc. as the Settlement Administrator.

Dated: February 14, 2025

s/ Matt Dunn
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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2025, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and electronically transmitted the attached document to the party below upon his written consent:

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