**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| RICHARD KRITZER, *et al.*, on behalf of themselves and all others similarly situated, | : | CASE NO. 2:10 cv 729 |
| | : | JUDGE FROST |
| Plaintiffs, | : | |
| v. | : | MAGISTRATE JUDGE KING |
| SAFELITE SOLUTIONS, LLC, *et al.*, | : | |
| Defendants. | : | |

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**JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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On February 10, 2012, the Named Plaintiffs Rick Kritzer, Joshua Pursley, Richard Ruppert, Sharon Ruppert, Jo McIntosh, Tom Walsh ("Named Plaintiffs") and Defendants Seafelite Solutions, LLC and Safelite Group, Inc. (collectively "Defendants" or "Safelite") ("the Parties") jointly moved this Court for an Order requesting that it certify, on a conditional basis, a settlement class with respect to overtime claims asserted by the Plaintiffs in their Complaint, and requesting that the Court approve on a preliminary basis the settlement of those claims. On February 13, 2012, the Court granted the Parties' joint motion, ordering that, *inter alia*:

- A settlement class would be certified, for settlement purposes only, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), and consisting of all Customer Sales Representatives and Telephone Sales Representatives employed by Defendants in Ohio and any Opt-in

Plaintiffs in the FLSA collective action employed in Arizona, between August 13, 2007 and February 10, 2012.

- The Named Plaintiffs Rick Kritzer, Joshua Pursley, Richard Ruppert, Sharon Ruppert, Jo McIntosh, and Tom Walsh were appointed as the Class Representatives.
- The Court appointed Robert E. DeRose, Robert K. Handelman, and Katherine A. Stone of Barkan Meizlish Handelman Goodin DeRose Wentz, LLP and John Marshall, and Edward Forman of Marshall and Morrow, LLC as Co-Class Counsel for the Class.
- The Court preliminarily approved the settlement of claims set forth in the Settlement Agreement ("Agreement") (ECF No. 102, Ex. 1) and the settlement reflected in that agreement ("the Settlement").
- The Court approved the issuance of a Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Class Notice," attached to the Agreement as **Exhibit A**), a proposed Opt-Out Statement (attached to the Agreement as **Exhibit B**), and the proposed Settlement Claim Form and Release (attached to the Agreement as **Exhibit C**) (collectively "Notice Materials").
- The Court set this matter for a Fairness Hearing, to be held on May 21, 2012, at which the Court is to consider final approval of the Agreement and Settlement.

The Parties now request that, pursuant to the schedule set by the Court in its February 13, 2012, Order preliminarily approving settlement and in light of the facts and legal arguments articulated in the attached Memorandum in Support, that the Court issue an Order finally certifying the requested settlement class and approving the Settlement (a proposed Final Order is attached as Exhibit C).

A Memorandum in Support of this Motion is attached hereto.

Dated: May 17, 2012

Respectfully submitted,

*/s/ John S. Marshall*
John S. Marshall (0015160)
(jmarshall@marshallandmorrow.com)
Edward R. Forman (0076651)
(eforman@marshallandmorrow.com)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Telephone: (614) 463-9790
Facsimile: (614) 463-9780

Robert E. DeRose (0055214)
Robert K. Handelman (0019589)
Katherine A. Stone (0085600)
BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP
250 East Broad Street
10th Floor
Columbus, OH 43215
Telephone: (614) 221-4221
Facsimile: (614) 744-2300
bderose@barkanmeizlish.com
rhandelman@barkanmeizlish.com
kstone@barkanmeizlish.com

*Counsel for Plaintiffs*

*/s/ Andrew C. Smith*
Andrew C. Smith, (0008136) Trial Attorney
Michael C. Griffaton (0062027)
Daniel J. Clark (0075125)
VORYS, SATER, SEYMOUR and PEASE, LLP
52 E. Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Telephone: (614) 464-5434
Facsimile: (614) 719-4969
acsmith@vorys.com
mcgrifffaton@vorys.com
djclark@vorys.com

*Counsel for Defendants*

## MEMORANDUM IN SUPPORT

## I. INTRODUCTION

After mediation and notwithstanding their adversarial positions in this matter, the Class Representatives, Rick Kritzer, Joshua Pursley, Richard Ruppert, Sharon Ruppert, Jo McIntosh, and Tom Walsh, have, with the assistance of a Mediator, Michael Ungar, negotiated a settlement of this litigation. The terms of the proposed settlement are set forth in the proposed Settlement Agreement (ECF No. 105).

The Settlement is the product of arms-length negotiations between the Parties under the mediation of a private mediator and is a fair, reasonable, and adequate resolution of the claims in this matter. The Notice Materials provide the putative class members with the best notice practical under the circumstances and allow for a full and fair opportunity to consider the Settlement and to develop a response.

The Settlement was structured thusly: Defendants shall provide to the Claims Administrator a check or electronic funds transfer in the amount of $455,000.00, less the gross amount of checks payable to each Qualified Claimant; (2) each Qualified Claimant shall be paid the amount owed to them, described below, less required tax withholding out of the portion of the payment described above; (3) the checks will be prepared by Defendants and normal employer-paid payroll taxes on each check shall be paid by Defendants separate from and in addition to the $455,000.00; (4) Defendants shall deliver the checks to the Claims Administrator within seven (7) business days of Effective Date; (5) the amount of payment will be based on the four (4) minutes each day worked, if that employee worked 39.67 hours or more in that particular week during the Relevant Period, based on that employee's regular hourly rate that week, multiplied by 1.5. (*See* Agreement at ¶¶1.18, 4.1, 4.2).

The notice materials approved by the Court at the preliminary stage have met with approval by this class of plaintiffs. The parties, pursuant to the Settlement Agreement, enlisted the aid of Class Action Administration ("CAA") to administer the settlement, including the mailing of notices and tracking of responses received. To date, 2,761 notice forms were mailed to potential class members with the direction to return either a Settlement Claim Form or a Settlement Opt-Out Form or to file a notice of Objection by April 30, 2012. Out of those 2,761 notices, 452 claim forms were timely returned and accepted by the parties for processing, 42 Opt-out forms were received and filed with the Court, and zero objections were filed. Based on the number of claims forms returned versus the number of Opt-out forms returned and lack of objections filed, the settlement enjoyed a 16.37% return rate. *See* Declaration of Matthew Pohl,

Exhibit A. (As discussed below, these figures demonstrate that the settlement is fair, reasonable, and adequate.)

The Settlement provides for a lump sum payment not to exceed $235,000.00 to Plaintiffs' counsel, which is based on an estimate of the reasonable value of Plaintiffs' counsels' services, costs, and expenses throughout the course of the Civil Action and mediation proceedings (and is less than Plaintiffs' counsels' lodestar). Payment of these amounts will be made upon application by Plaintiffs' counsel and approval of the Court. (See Agreement at ¶4.4). Plaintiffs' Counsel filed their Motion for Approval of Attorney Fees on March 27, 2012. (ECF No.107) The Court deferred ruling on Plaintiffs' Counsels' Motion until the May 21, 2012, Fairness Hearing. (ECF No. 109)

For the following reasons, the Court should find that the settlement is fair, reasonable, and adequate and should approve the same.

## II. LAW AND ARGUMENT

### A. Settlement of Class Action Claims is Favored.

As an initial matter, it is important to note the strong federal policy encouraging settlement of class actions. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 371-72 (S.D. Ohio 2006); *see also UAW, et al. v. General Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007); *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *Airline Stewards and Stewardesses Association v. American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978). Although the district court must approve a court settlement, its role in evaluating a proposed settlement is limited to determining that the agreement is not a product of fraud or collusion and that the settlement, taken as a whole, is fair, reasonable, and adequate. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982). If the Court finds that the settlement is fair, reasonable, and adequate, approval of the settlement is appropriate. *See In re Broadwing, Inc. ERISA Litig.*, 252 F. R.D. at 381-82.

### B. The Settlement is Fair, Reasonable, and Adequate.

**1. The Legal Standard for Determining Fairness, Reasonableness, and Adequacy in Class Action Settlements.**

The determination of whether a proposed class settlement is fair, reasonable, and adequate requires the Court to consider and balance several factors:

- Plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in settlement;
- The complexity, expense and likely duration of the litigation;
- The stage of the proceedings and the amount of discovery completed;
- The judgment of experienced trial counsel;
- The nature of the negotiations;
- The objections raised by the class members; and
- The public interest.

*In re Telectronics Pacing Sys*., 137 F. Supp. 2d 985, 1009 (S.D. Ohio 2001); *Enter. Energy Corp. v. Columbia Gas Transmission Corp*., 137 F.R.D. 240, 245 (S.D. Ohio 1991). In the end, the Court's determinations are no more than "'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (quoting *City of Detroit v. Grinnell*, 495 F.2d 448, 468 (2d Cir. 1974)).

**2. Plaintiffs' Likelihood of Ultimate Success on the Merits Balanced Against the Amount and Form of Relief Offered in Settlement.**

The most important of the factors to be considered in reviewing a settlement is "the probability of success on the merits," particularly as weighed against the recovery provided by the settlement. *See In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984). In this case, the Plaintiffs, in order to maintain the overtime action, will likely be required to show, through extensive evidentiary presentation and an extended and expensive discovery process, the specific hours, times, and dates that they worked. Such discovery, applied to the entire class, might take years and would certainly cost both parties hundreds of thousands of dollars. Rule 23 Class Members are to be paid based on a formula of four (4) minutes each day worked, if that employee worked 39.67 hours or more in that particular week during the

Relevant Period, based on that employee's regular hourly rate that week, multiplied by 1.5. This amount is a fair estimate of the unpaid overtime wages Plaintiffs could possibly recover. Accordingly, although individual plaintiffs might achieve a different level of success in this litigation, that success achieved is likely to be far outweighed by the possibility of minimal recovery and the difficulty expended in order to reach that recovery.

Defendants invoked the *de minimis* exception judicially engrafted onto the FLSA. Motions practice and both lay and expert testimony at trial was anticipated on whether that exception was purely numerical or, instead, functional, depending on whether the minutes per day were recordable. In turn, resolution of that issue involved consideration of prior time-keeping approaches, tracing time through use of building-entry devices or keystrokes, and allotting minutes to work or personal matters, such as securing refreshments or conversing with coworkers. The parties had quite different views of the likelihood of success on the *de minimis* exception.

Beyond that, a sharp controversy existed about whether Defendants had a policy of starting the work day ***before*** the booting-up process had been completed. Before the Court were flatly inconsistent affidavits: Plaintiffs and coworkers swore they were trained to arrive at work as much as 15 minutes early in order to be sure to be ready, booted-up, to take the first call at the start of their shift. Supervisors, trainers, and other coworkers swore that they adhered to a policy of starting their shift when they initiated booting up, not when they took the first call. The use of off-call auxiliary time in this process was also the subject of conflicting testimony.

**3. The Complexity, Expense, and Likely Duration of the Litigation.**

This settlement also serves the laudable goal of eliminating the costs and time attendant to continued litigation. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."); *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 455 (E.D. Pa. 1990) (approving a class action settlement because, in part, the settlement "will alleviate . . . the extraordinary complexity, expense and likely duration of this litigation").

Generally speaking, "[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000).

In this case, as articulated above, the relative age of the claims, the procedural and evidentiary difficulty of defining liability and damages for individual claimants, and the possible miniscule recovery all provide ample justification for the negotiated resolution of this dispute. As mentioned, a trial-within-a-trial was expected on the *de minimis* exception, while the existence of a uniform policy appeared to involve dozens of witnesses for each side giving dramatically different testimony.

**4. The Stage of the Proceedings and the Amount of Discovery Completed.**

To insure that Plaintiffs have had access to sufficient information to evaluate their case and to assess the adequacy of the proposed Settlement, the stage of the proceedings and the discovery taken must be considered. *See Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 502 (E.D. Mich. 2000). The Settlement in this case was reached approximately one year after discovery commenced. During that time, both parties were involved with extensive discovery and motion practice. The Parties exchanged hundreds of documents and conducted several depositions of Named Plaintiffs and Defendants' representatives. Further, the Parties had extensive discussions regarding the legal issues involved in litigating and settling a case of this kind.

Given this extensive discovery, this Court should "defer to the judgment of experienced trial counsel who has evaluated the strength of his case." *Kogan*, 193 F.R.D. at 501 (quoting *Bronson v. Board of Educ.*, 604 F. Supp. 68, 73 (S.D. Ohio 1984) (internal citations omitted).

**5. The Judgment of Experienced Trial Counsel.**

The Court gives significant weight to the belief of experienced counsel that the settlement is in the best interest of the class. *See In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (citing *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab.*

*Litig.)*, 176 F.R.D. 158, 184 (E.D. Pa. 1997)). In this case, experienced trial labor counsel on both sides, after months of negotiation and document review and mediation, have offered their opinion that the settlement is appropriate, given the risks and expenses involved in further litigation.

**6. The Nature of the Negotiations.**

The Court gives significant weight to the belief of experienced counsel that the settlement is in the best interest of the class. *See In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (citing *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.)*, 176 F.R.D. 158, 184 (E.D. Pa. 1997)). Initially, however, the court should determine whether the settlement was non-collusive and ask was it reached through arms-length negotiations. *See id*.; *In re Broadwing, Inc. ERISA Litig.*, 252 F. R.D. at 375.

In the case at bar, the proposed Settlement was negotiated in an adversarial manner after substantial factual investigation and intensive legal analysis. The proposed Settlement negotiations included several exchanges of documents, rounds of correspondence, and, at the end, the mediation by a private mediator. Both parties to the negotiations vigorously attempted to secure the most desirable conclusion for their respective clients. Settlement proposal documents were exchanged back and forth between the parties on numerous occasions in an attempt to resolve the key issues relative to the proposed Settlement. This process resulted in a fair, reasonable, and adequate Settlement. *See TBG, Inc. v. Bendis*, 811 F. Supp. 596, 605 (D. Kan. 1992) (finding a settlement fair in the absence of collusion where the settlement was the result of arm's length negotiations that were hard fought).

**7. The Lack of Objections Raised by the Class Members.**

No class member filed an objection to the settlement. In addition, the 16.37% return rate of settlement claim forms is a strong showing of support for the settlement. Settlements with much lower percentage of class members returning their claim form are frequently approved. *See In Re Packaged Ice Antitrust Litigation*, No. 08-mdl-01952, 2011 WL 6209188 at *14 (E.D. Mich. Dec. 13, 2011) (finding a 1% response rate out of the total number of notices mailed

acceptable); *see also Touhey v. United States*, No. edcv 08–01418, 2011 WL 3179036, at *7–8 (C.D.Cal. July 25, 2011) (finding a 2% response rate acceptable--38 responses out of 1,875 notices mailed--where there were no objections and the overall recovery was fair and reasonable); *In Re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 526 (E.D.Mich. 2003) (finding favorable class reactions in a 6.9% response rate (1800 proofs of claim out of 26,000 notices sent) and a 9% response rate (37,000 proofs of claim out of 400,000+ notices sent)); *In re New Motor Vehicles Canadian Export Antit. Litig.*, MDL No. 1532, 2011 WL 1398485 at *3 (D.Maine Apr. 13, 2011) (finding favorable class reaction in a 3.9% response rate (438,169 claims out of 11.3 million eligible claimants)). Additionally, courts have recognized that many factors affect response rates, especially when the claims settled are relatively modest, as here. *See In re New Motor Vehicles Canadian Export Antit. Litig.*, 2011 WL 1398485, at *3; *In Re Serzone Pdcts. Liability Action*, 231 F.R.D. 221, 235-36 (S.D.W.Va. 2005). Therefore, the 16.37% return rate of Settlement Claim Forms, the very low number of Opt-Outs, and the lack of any objectors is strong objective evidence that the settlement was well received by the Rule 23 Class.

**8. The Public Interest.**

The public interest favors approval of the proposed Settlement. While this case is not of general public interest, there is certainly a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve. In the instant case, the proposed Settlement ends potentially long and protracted litigation and frees the Court's valuable judicial resources. *See In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 372 (S.D. Ohio 1990). In light of this, the Court should conclude that this factor weighs in favor of approving the proposed Settlement because the public interest is served by resolution of this action.

One measure of public interest is the frequency with which litigation over booting-up time has occurred. *See, e.g., Is booting up a computer work, or a work break?* (THE NATIONAL LAW JOURNAL, Nov. 17, 2008); *Call Center Employees*, http://www.overtime-flsa.com/ ; Shaikh,

*Company Pays for Not Paying Employees for Booting Up Computers* (H

271, 275 (6th Cir.1983). At bar, the fees sought by plaintiffs' attorneys are ***below*** what would be a reasonable amount under either method because, as part of the negotiation and in an effort to ensure a sufficiently large pool for current and former employees, that compromise was reached.

10. **Cy Pres**

After _____, CAA may stop payments on any checks issued to the Settlement Class Members that have not been negotiated, and CAA will provide the Parties' Counsel with a list of checks that have not been negotiated. Subject to this Court's approval, CAA will prepare a check for the amount of the unclaimed funds made payable to _____as a *cy pres* award. At present, the parties have not been able to agree to a *cy pres* awardee. The parties will discuss this matter with the Court at the fairness hearing.

11. **The Notice Requirements of the Class Action Fairness Act Have Been Complied With.**

The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715 *et seq.*, requires that "appropriate state and federal officials" be notified of a pending class action settlement in federal court. Defendants served notice pursuant to CAFA on the pending class action settlement via overnight carrier to United States Attorney General Eric Holder, Ohio Attorney General Mike DeWine, Ohio Director of Commerce David Goodman, and the Attorneys General in the 23 states outside Ohio in which class members currently reside. As required by CAFA, the notice was sent along with a CD containing a list identifying the 2,761 class members, their states of residence, and their proportionate share in the settlement as well as the following documents:

- Class and Collective Action Complaint (ECF No. 2) and First Amended Class and Collective Action Complaint (ECF No. 92);
- Joint Motion for Approval of Class Action Settlement Agreement and Proposed Class Notice (ECF No. 102);
- Court Order Conditionally Approving Settlement (ECF No. 103);
- Court E-Notice setting Fairness Hearing for April 16, 2012, at 12:00 P.M.;
- Joint Notice of Filing Corrected Settlement Agreement and Notice to Class (ECF No. 105);

- Court Order Conditionally Approving Settlement and Rescheduling Fairness Hearing (ECF No. 106);
- Court E-Notice rescheduling Fairness Hearing for May 21, 2012, at 12:00 P.M.
- *See* Declaration of Michael C. Griffaton, attached as Exhibit B.

**CONCLUSION**

Because the proposed Settlement is fair, adequate and reasonable, the Court should **GRANT** this Motion for Order Certifying Settlement Class and Approving Class Action Settlement.

Dated: May 17, 2012

*/s/ John S. Marshall*
John S. Marshall (0015160)
(jmarshall@marshallandmorrow.com)
Edward R. Forman (0076651)
(eforman@marshallandmorrow.com)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Telephone: (614) 463-9790
Facsimile: (614) 463-9780

Robert E. DeRose (0055214)
Robert K. Handelman (0019589)
Katherine A. Stone (0085600)
BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP
250 East Broad Street, 10th Floor
Columbus, OH 43215
Telephone: (614) 221-4221
Facsimile: (614) 744-2300
bderose@barkanmeizlish.com
rhandelman@barkanmeizlish.com
kstone@barkanmeizlish.com

*Counsel for Plaintiffs*

Respectfully submitted,
*/s/ Andrew C. Smith*
Andrew C. Smith, (0008136) Trial Attorney
Michael C. Griffaton (0062027)
Daniel J. Clark (0075125)
VORYS, SATER, SEYMOUR and PEASE, LLP
52 East Gay Street
Post Office Box 1008
Columbus, OH 43216-1008
Telephone: (614) 464-5434
Facsimile: (614) 719-4969
acsmith@vorys.com
mcgrifffaton@vorys.com
djclark@vorys.com

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2012, a true and exact copy of the foregoing *Motion for Final Approval of Class Action Settlement* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

By */s/John S. Marshall*
John S. Marshall (0015160)
(*jmarshall@marshallandmorrow.com*)
Edward R. Forman (0076651)
(*eforman@marshallandmorrow.com*)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Telephone: (614) 463-9790
Facsimile: (614) 463-9780

Counsel for Plaintiffs