STANLEY CHASE, Individually and on behalf of those similarly situated,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	NO. 2021 CV 5174
v.	:	
KRIGER CONSTRUCTION, INC.,	:	
Defendant	:	

MEMORANDUM AND ORDER

NEALON, J.

A power equipment operator commenced this class action against a construction company on behalf of himself and similarly situated field construction employees, and alleged that the company improperly excluded cash wages paid in lieu of fringe benefits from the regular rate of pay for overtime purposes on publicly funded construction projects subject to the state minimum wage and prevailing wage statutes. The parties subsequently negotiated a monetary settlement of the class claims, and after securing preliminary (a) approval of the proposed settlement, (b) certification of the class, and (c) appointment of the class representative, counsel, and settlement administrator, plaintiff presented an unopposed motion for final approval of the class action settlement. Court-approved written notice of the settlement was provided to the 190 class members, and in the absence of any requests for exclusion from the class or objections to the proposed settlement, a fairness hearing was conducted pursuant to Pa.R.Civ.P. 1714(a) and (c).

Based upon the parties' affidavits, written submissions, and presentation during the fairness hearing, the requests for final certification of the 190 member class pursuant to Pa.R.Civ.P. 1702, 1708, and 1709 will be granted. Additionally, the requests for final approval of the class action settlement under Pa.R.Civ.P. 1714 will likewise be granted. Last, the requests

for approval of class counsel fees on a 25% contingency fee basis will be approved pursuant to Pa.R.Civ.P. 1717, as will the payment of a service award to the named plaintiff, and the settlement administrator fee.

I. FACTUAL BACKGROUND

On November 29, 2021, plaintiff, Stanley Chase ("Chase"), commenced this class action against defendant, Kriger Construction, Inc. ("Kriger"), and Kriger Pipeline, Inc., but later stipulated to the dismissal of Kriger Pipeline, Inc. as a named defendant on February 15, 2022. (Docket Entry Nos. 1-2). In his "Class Action Complaint," Chase originally alleged that Kriger excessively withheld money for local taxes in its employees' pay in contravention of Section 3(a) of the Pennsylvania Wage Payment and Collection Law ("WPCL"), Act of July 14, 1961, P.L. 637, *as amended*, 43 P.S. §260.3(a).[1] (Docket Entry No. 1 at ¶¶ 15-17, 43-49). He also advanced a cause of action pursuant to Section 4(c) of the Pennsylvania Minimum Wage Act of 1968 ("MWA"), Act of Jan. 17, 1968, P.L. 11, No. 5, *as amended*, 43 P.S. §333.104(c), requiring covered employees to "be paid for overtime not less than one and one-half times" their regular rates of pay. (Id. at ¶¶ 18-26, 51-57). Chase averred that since Kriger's "construction projects on which [he] worked were funded by federal, state, and/or local government moneys, subjecting the projects to prevailing wage laws such as" the Pennsylvania Prevailing Wage Act ("PWA"), Act of Aug. 15, 1961, P.L. 987, *as amended*, 43 P.S. §§165-1 to 165-17, and the federal Davis-Bacon Act, 40 U.S.C. §§3141-3148, Kriger failed to pay overtime wages in compliance with the

[1] During the course of discovery, Chase was furnished with payroll records and other documents reflecting that taxes were not overwithheld by Kriger, as a result of which he voluntarily discontinued his claim under the WPCL for alleged overwithholding of local taxes. (Transcript of Proceedings (T.P.) on 2/2/24 at pp. 6-12).

MWA when it "excluded from the regular rate of pay for overtime purposes, wages paid in lieu of fringe benefits on publicly funded construction projects."[2] (Id. at ¶¶ 14, 52-56).

Chase's argument that the "calculation of overtime compensation owed under the MWA must include cash wages paid in lieu of fringe benefits ('CWILOF') paid pursuant to the PWA" presents an issue of first impression for which "no Pennsylvania or federal court has issued an opinion." (Docket Entry No. 10, Exhibit 1 at ¶¶ 6, 9; T.P. 2/2/24 at pp. 14-17). In response to Chase's argument, Kriger asserted a federal preemption defense based upon the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461, and maintained that requiring employers to pay an overtime premium for CWILOF wages would force, or heavily incentivize, employers to establish ERISA plans. (T.P. 2/2/24 at p. 19; Docket Entry No. 10, Exhibit 1 at ¶ 9). Relying upon the Davis-Bacon Act and the Fair Labor Standards Act of 1938, 29 U.S.C. §§201-219, Kriger alternatively argued that overtime compensation including CWILOF is not owed on federally funded projects when fringe benefits are paid directly to the employee. (T.P. 2/2/24 at pp. 19-20; Docket Entry No. 10, Exhibit 1 at ¶ 9).

Following the close of the pleadings, and the completion of discovery, (Docket Entry Nos. 3-6), Chase and his counsel determined that the potential class consisted of 190 members who performed publicly funded construction work for Kriger during the relevant time period,

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[2] Lacka. Co. R.C.P. 1703-1713 governs class action litigation in Lackawanna County. Local Rule 1703(a) mandates that upon the filing of a class action complaint, "counsel for the plaintiff(s) shall notify the Court Administrator and President Judge that a class action complaint has been filed and shall forward to the President Judge a copy of said complaint." Lacka. Co. R.C.P. 1703(a). Upon the President Judge's receipt of the class action complaint, "the President Judge shall assign a judge of the Court of Common Pleas of Lackawanna County to preside over the case for all purposes in conformity with Pa.R.Civ.P. 1703." Lacka. Co. R.C.P. 1703(b). Since no such notification ever occurred in this case, the President Judge has never assigned this class action litigation to a judge for purposes of discovery under Lacka. Co. R.C.P. 1707, the determination of a class pursuant to Lacka. Co. R.C.P. 1710 after a class action certification hearing, a class action notice conference in compliance with Lacka. Co. R.C.P. 1712 to consider the individual notice to be furnished to the class members and judicial approval of the form of notice, and a pre-trial conference under Lacka. Co. R.C.P. 1713 to address the matters set forth in Pa.R.Civ.P. 1713.

and that the maximum amount of unpaid overtime wage damages, per Chase's methodology and theory of liability, totaled $815,974.35. (T.P. 2/2/24 at pp. 20-21; Docket Entry No. 7, Exhibit 1 at ¶¶ 3-6; Docket Entry No. 10 at pp. 3-4). In light of the uncertainty of the success of the novel legal theory being advocated by Chase under the MWA and the PWA, and the likely appeal(s) by the losing party due to the absence of any applicable decisional precedent, the parties negotiated an amicable resolution pursuant to which Kriger will pay the sum of $475,000.00 in damages, which represents 58% of the total amount that is theoretically recoverable. (T.P. 2/2/24 at pp. 5, 14, 20; Docket Entry No. 7, Exhibit 1 at ¶¶ 7, 9). Between August 23, 2023, and August 31, 2023, the parties executed a 14 page "Class Action Settlement Agreement" memorializing the terms and conditions of their settlement. (Docket Entry No. 7, Exhibit 2; Docket Entry No. 10, Exhibit 4).

The parties' settlement agreement provides for the payment of counsel fees and expenses of $118,750.00 to class counsel, a "service award" of $10,000.00 payable to Chase, and the payment of $7,500.00 to the settlement administrator, RG/2 Claims Administration, LLC ("RG/2"). (T.P. 2/2/24 at pp. 5-6, 21-25; Docket Entry No. 7, Exhibit 2 at ¶¶ 3, 12-13; Docket Entry No. 10, Exhibit 4 at ¶¶ 3, 12-13). Following those deductions for (a) counsel fees and costs, (b) a service award, and (c) settlement administrator expenses, the net settlement proceeds of $338,750.00 represents 41% of the total damages claimed on behalf of the 190 Kriger workers. (T.P. 2/2/24 at p. 6; Docket Entry No. 7, Exhibit 2 at ¶ 3; Docket Entry No. 10 at pp. 1, 4-5; Docket Entry No. 10, Exhibit 1 at ¶ 8). Depending upon the amount of pertinent overtime worked by the class members and their proportionate share of the net settlement proceeds, the 190 members will receive settlement payments ranging between a minimum of $34.01 and a

maximum of $4,795.56, for an average payment of $1,782.89. (Docket Entry No. 7, Exhibit 2, Exhibit B at pp. 1-4).

On September 7, 2023, Chase presented "Plaintiff's Unopposed Motion for Preliminary Approval of the Class Action Settlement" to Judge Margaret Bisignani-Moyle, who served as the assigned Motions Court Judge during the week of September 5, 2023, to September 8, 2023, but for reasons that are not apparent in the record, she failed to entertain Chase's unopposed motion. (T.P. 2/2/24 at p. 3; Docket Entry No. 7). Chase submitted his motion again to the assigned Motions Court Judge, Judge Michael J. Barrasse, on October 17, 2023, but he similarly declined to consider it, and it eventually was forwarded to the undersigned for consideration. (T.P. 2/2/24 at pp. 3-4; Docket Entry No. 8). The motion for preliminary approval was supported by an accompanying memorandum of law, an affidavit executed by class counsel, Ryan P. McCarthy, Esquire, a copy of the signed class action settlement agreement, an itemization of the distribution of the net settlement proceeds to the 190 class members, and a copy of the proposed "Class Action Settlement Notice" to be furnished to the class members in advance of the fairness hearing to be scheduled for final approval of the class action settlement. (Docket Entry No. 8 at pp. 3-72). Following our review of the submitted materials, we entered an Order on October 17, 2023, which: (1) "preliminarily approved" the class action settlement as "facially fair, reasonable, and adequate," subject to a fairness hearing; (2) preliminarily certified the class of 190 members comprised of "all current or former field construction employees of Kriger Construction, Inc. who performed work on publicly funded construction projects subject to the Pennsylvania Prevailing Wage Act, 43 P.S. §165-1, *et seq.*, or other applicable federal, state, or local prevailing wage law, in any workweek in which they worked in excess of forty (40) hours;" (3) preliminary

appointed Chase to serve as the class representative, James E. Goodley and Ryan P. McCarthy of the law firm of Goodley McCarthy, LLC to act as settlement class counsel, and RG/2 to serve as the settlement administrator to perform the notice and administrative services described in the settlement agreement; (4) approved the "Notice Form" to be served upon the putative class members; (5) established deadlines for the filing of any "objections to the settlement" and "requests for exclusion from the settlement; and (6) scheduled a fairness hearing for February 2, 2024 to "consider the parties' arguments in favor of final approval of the settlement, [to] address any objections raised, and [to] hear argument from any individuals who wish to be heard." (Docket Entry No. 8 at pp. 1-3).

In advance of the fairness hearing, Chase filed "Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement" on January 16, 2024. (Docket Entry No. 10). Chase's motion includes a supporting memorandum of law, (Id. at pp. 5-32), the earlier affidavit executed by Attorney McCarthy, (Id. at pp. 34-44), an affidavit signed by RG/2's project manager, Dana Boub, on January 8, 2024, which includes the "Class Action Settlement Notice" that was served upon the class members, (Id. at pp. 46-50), another copy of the executed "Class Action Settlement Agreement," (Id. at pp. 66-79), and the itemization of the individual payments to the 190 class members. (Id. at pp. 81-84). Attorney McCarthy's affidavit sets forth his and co-counsel's educational backgrounds, labor law experience, bar admissions, and class action litigation history in federal and state court proceedings in Pennsylvania, the District of Columbia, New York, Virginia, and Maryland. (Docket Entry No. 10, Exhibit 1 at ¶¶ 16-31). He indicates that counsel "took this case on a purely contingent [fee] basis," and that their "total requested fee and cost payment of $118,750.00 is 25% of the total settlement fund." (Id. at ¶ 13).

Dana Boub's affidavit attests that RG/2 "is a full-service class action settlement administrator" that was retained in this matter to (a) prepare, print, and mail notices to the settlement class members, (b) track the requests for exclusions and objections, (c) handle inquiries from settlement class members, (d) skip-trace undeliverable addresses, (e) re-mail notices to any such addresses, and (f) calculate and issue distribution checks to the settlement class members, including appropriate tax withholdings. (Docket Entry No. 10, Exhibit 2 at ¶¶ 2-3). She states that only one of the 190 class notices was returned as undeliverable, and that after RG/2 "performed a standard skip-trace procedure" and remailed that notice to "an updated address," it received zero notice packets as undeliverable. (Id. at ¶¶ 6-7). Ms. Boub further confirmed that RG/2 "has received zero requests for exclusion from the settlement," and "has not received or been advised of any objections to the settlement." (Id. at ¶¶ 8-9).

As noted above, the motion for final approval of the class action settlement also requests the payment of a "service award" of $10,000.00 to Chase. (Docket Entry No. 10, Exhibit 4 at Sections 3, 12). Class counsel submits that service awards are granted in recognition of the benefits that the named class representative conferred upon the members of the class by expending time and effort to assist counsel in the filing and pursuit of the litigation. (T.P. 2/2/24 at pp. 23-25). The motion states that Chase "was integral to the development and essential settlement of the case" and "provided time and pay records and assisted with preparing the Complaint," and class counsel represented that Chase also subjected himself to interviews and participated in settlement negotiations. (Docket Entry No. 10 at p. 28; T.P. 2/2/24 at pp. 23-25). In support of that request, Chase cites common pleas court orders approving $10,000.00 service awards in other class actions. *See* Chaparro v. All American Home Care, 2021 WL 12152131

(Phila. Co. 2021) (Tucker, J.); Hackman v. J.G. Wentworth Home Lending, LLC, 2019 WL 13202036 (Phila. Co. 2019) (Glazer, J.).

Chase first seeks final certification of the class pursuant to Pa.R.Civ.P. 1702, 1707, 1708, 1709, and 1710.[3] (Docket Entry No. 10 at pp. 11-22). He also requests final approval of the class action settlement in accordance with Pa.R.Civ.P. 1714, including the payment of the requested counsel fees and costs, settlement administrator expenses, and service award, as well as the distribution of the remaining $338,750.00 to the 190 class members. (Id. at pp. 22-28). Following the completion of the fairness hearing on February 2, 2024, and the subsequent filing of the transcript of that proceeding on February 6, 2024, Chase's motions for certification of the class action and approval of the class action settlement were submitted for a decision. (Docket Entry No. 11).

II. DISCUSSION

(A) CLASS ACTION CERTIFICATION

Class certification presents a mixed question of law and fact, and trial courts are "vested with broad discretion" in determining whether an action may proceed on a class-wide basis. Samuel-Bassett v. Kia Motors America, Inc., 613 Pa. 371, 396, 34 A.3d 1, 15 (2001); Cardinale v. R.E. Gas Development, LLC, 154 A.3d 1275, 1286 (Pa. Super. 2017), *app. denied*, 643 Pa. 700, 174 A.3d 574 (2017). "The class action is a procedural device designed to promote

[3] Rule 1707(a) provides that "[w]ithin thirty days after the pleadings are closed or within thirty days after the last required pleading was due, the plaintiff shall move that the action be certified as a class action." Pa.R.Civ.P. 1707(a). Although the pleadings in this matter closed on April 20, 2022, with the filing of "Plaintiff's Reply to New Matter," Chase did not file a motion for certification of a class action within 30 days of April 20, 2022. (Docket Entry No. 4). Nevertheless, Rule 1707 states that "[t]he court may extend the time for cause shown" or "postpone the [class certification] hearing to a later date . . . to permit discovery with respect to the class action issues." Pa.R.Civ.P. 1707(a)-(b).

efficiency and fairness in the handling of large numbers of similar claims, while providing a forum for claims that would otherwise be too small to litigate." Doe 1 v. Franklin County, 272 A.3d 1022, 1033 (Pa. Cmwlth. 2022). When applying the Rules of Civil Procedure governing class certification or decertification, "decisions should be made liberally and in favor of maintaining a class action." Sommers v. UPMC, 185 A.3d 1065, 1075 (Pa. Super. 2018); Kern v. Lehigh Valley Hospital, Inc., 108 A.3d 1281, 1286 n.7 (Pa. Super. 2015).

"In disposing of a motion for class certification, the trial court determines whether the action shall proceed as a class action or as an action with individually named parties." Doe 1, 272 A.3d at 1030. The proponent of certification of the class has the burden of proving the criteria set forth in Pa.R.Civ.P. 1702. Samuel-Bassett, 613 Pa. at 398, 34 A.3d at 16; HTR Restaurants, Inc. v. Erie Insurance Exchange, 260 A.3d 978, 988 (Pa. Super. 2021), *aff'd*, 2023 WL 8518946 (Pa. 2023). The "burden is not heavy at the preliminary stage of the case," and "evidence supporting a *prima facie* case 'will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion.'" Samuel-Bassett, supra (quoting Clark v. Pfizer, Inc., 990 A.2d 17, 24 (Pa. Super. 2010)); In re Sheriff's Excess Proceeds Litigation, 98 A.3d 706, 731 (Pa. Cmwlth. 2014) (quoting Samuel-Bassett, supra), *app. denied*, 631 Pa. 733, 112 A.3d 655 (2015). The issue of class certification is "separate from the merits of the underlying claims raised in the complaint," Doe 1, supra, but the reviewing court "'may need to examine the elements of the underlying causes of action in order to dispose of class issues properly.'" Sommers, 185 A.3d at 1074 (quoting Debbs v. Chrysler Corp., 810 A.2d 137, 154 (Pa. Super. 2002)).

Pennsylvania Rule of Civil Procedure 1702 sets forth the "Prerequisites to a Class Action," and provides:

> One or more members of the class may sue or be sued as representative parties on behalf of all members in a class action only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.Civ.P. 1702. Based upon the foregoing prerequisites, "the trial court may allow a representative to sue on behalf of a class if, the class is numerous ('numerosity'); there are questions of law or fact common to the class ('commonality'); the claims of the representative are typical of the class ('typicality'); the representative will fairly and adequately protect the interests of the class ('adequate representation'); and a class action is a fair and efficient method for adjudicating the parties' controversy, under criteria set forth in Rule 1708." Samuel-Bassett, 613 Pa. at 398, 34 A.3d at 16; Cardinale, 154 A.3d at 1287. "'Rule 1702 is written in the conjunctive, meaning that in order to obtain class action status, *all* prerequisites must be met.'" In re Sheriff's Excess Proceeds Litigation, 98 A.3d at 731 (quoting Keppley v. School District of Twin Valley, 866 A.2d 1165, 1176 (Pa. Cmwlth. 2005) (emphasis in original)).

(1) Numerosity

"In assessing whether the prospective class is so numerous that joinder of all members is impracticable, there is no clear numerical threshold for establishing numerosity." Reimer v. County of Lackawanna, 102 Lacka. Jur. 178, 187-188 (2000), *aff'd*, 778 A.2d 806 (Pa. Cmwlth.

2001), *app. denied*, 572 Pa. 745, 815 A.2d 1044 (2003). "To satisfy this criterion, the class must be numerous and identifiable, and 'whether the class is sufficiently numerous is not dependent upon any arbitrary limit, but upon the facts of each case.'" In re Sheriff's Excess Proceeds Litigation, 98 A.3d at 732 (quoting Dunn v. Allegheny County Property Assessment Appeals & Review, 794 A.2d 416, 423 (Pa. Cmwlth. 2002)). "A class is sufficiently numerous when the number of potential plaintiffs would burden the court and unnecessarily drain the resources of the litigants should plaintiffs sue individually." Doe 1, 272 A.3d at 1033. The proponent of the class need "'not plead or prove the actual number of class members, so long as [s]he is able to define the class with some precision and provide the court with sufficient indicia that more members exist[] than it would be practicable to join.'" In re Sheriff's Excess Proceeds Litigation, supra (quoting Keppley, 866 A.2d at 1171).

Chase cites several federal and state trial court rulings that "have regularly certified classes with 21 or more members." (Docket Entry No. 10 at p. 14). He has defined the class with sufficient precision as all current or former Kriger "field construction employees . . . who performed work on publicly funded construction projects" subject to the PWA "or other applicable federal, state, or local prevailing wage law, in any workweek in which they worked in excess of forty (40) hours," and has determined that the class is comprised of 190 identified members. We have previously concluded that the prospective claims of 113 potential class members are "so voluminous that litigating those cases on an individual basis would unduly burden the limited resources of the court and the putative plaintiffs." Reimer, 102 Lacka. Jur. at 188. Chase has likewise demonstrated that the identified class of 190 workers "is so numerous that joinder of all members is impracticable."

(2) Commonality

"To establish the commonality requirement, [Chase] had to identify common questions of law and fact - - 'a common source of liability.'" Samuel-Bassett, 613 Pa. at 408, 34 A.3d at 22. A common issue of fact or law "'will generally exist if the class members' legal grievances are directly traceable to the same practice or course of conduct on the part of the class opponent.'" Sommers, 185 A.3d at 1076 (quoting Clark, 990 A.2d at 24). The class proponent is "not required to prove that the claims of all class members [a]re identical," and "the existence of distinguishing individual facts is not 'fatal' to certification." Samuel-Bassett, 613 Pa. at 409, 34 A.3d at 23 (quoting Buynak v. Department of Transportation, 833 A.2d 1159, 1163 (Pa. Cmwlth. 2003)); Cardinale, 154 A.3d at 1288 (quoting Samuel-Bassett, supra). The critical inquiry is whether the material facts and issues of law are "substantially the same" for all class members such that "'proof as to the one claimant would be proof as to all'" members of the class. Samuel-Bassett, 613 Pa. at 408-409, 34 A.3d at 22 (quoting Liss & Marion, P.C. v. Recordex Acquisition Corp., 603 Pa. 198, 983 A.2d 652, 663 (2009)); Doe 1, 272 A.3d at 1031 n.7 (quoting Keppley, 866 A.2d at 1173).

The claims asserted by the class members involve an identical issue, to wit, whether overtime wage calculations at 150% of the regular rate of pay for hours worked in excess of 40 hours in a workweek must include, under the MWA, CWILOF paid pursuant to the PWA in the regular rate of pay. Their claims are attributable to the exact same conduct by Kriger in excluding CWILOF from the overtime computations, and except for the individual calculations based upon the amount of hours each class member worked, are premised upon the same proof. Thus, Chase has satisfied the commonality requirement under Rule 1702(2).

(3) Typicality

Rule 1702(3) requires the representative parties' claims or defenses to be "typical of the claims or defenses of the class." Pa.R.Civ.P. 1702(3). It is generally recognized that "'the mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification,'" and that "'atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy.'" In re Sheriff's Excess Proceeds Litigation, 98 A.3d at 734 (quoting Klusman v. Bucks County Court of Common Pleas, 128 Pa. Cmwlth. 616, 564 A.2d 526, 531 (1989), *aff'd*, 524 Pa. 593, 574 A.2d 604 (1990)). As the Supreme Court has observed:

> The purpose of the typicality requirement is to ensure that the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members. [citations omitted]. Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class. [citation omitted]. The requirement ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented. [citations omitted]. But, typicality does not require that the claims of the representative and the class be identical, and the requirement may be met despite the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class. [citations omitted].

Samuel-Bassett, 613 Pa. at 421-422, 34 A.3d at 30-31.

Chase's claim under the MWA and PWA "arise[s] out of the same course of conduct and involve[s] the same legal theories as those of other members of the putative class." There is no conflict between the theory of liability being asserted by Chase and the legal rationale applicable to the claims of the other 189 class members. As such, Chase's claim is "typical of the claims" of the class members for purposes of Rule 1702(3).

(4) Adequate Representation

Per Rule 1702(4), the "representative parties' attorney must be able to 'fairly and adequately assert and protect the interests of the class under the criteria set forth in Pa.R.Civ.P. 1709.'" Doe 1, 272 A.3d at 1031 n.9 (quoting Pa.R.Civ.P. 1702(4)). Rule 1709, entitled "Determination of Fair and Adequate Representation," states:

> In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters:
>
> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
>
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
>
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.Civ.P. 1709.

Chase's counsel of record have sufficient expertise in litigating labor law claims, particularly on a class action basis, and have adequately represented the interests of the entire class in this matter. No conflict of interest on the part of Chase in pursuing this class action has been identified, and class counsel possess sufficient financial resources to properly advance the interests of the class. Therefore, Chase and class counsel have fairly and adequately litigated and protected the class members' interests under the factors delineated in Rule 1709.

(5) Fair and Efficient Method for Adjudication

"In determining fairness and efficiency, 'the court must balance the interests of the litigants, both present and absent, and of the court system.'" Doe 1, 272 A.3d at 1032 n.10 (quoting Dunn, 794 A.2d at 426). To that end, Pennsylvania Rule of Civil Procedure 1708 provides:

> In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).
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> (a) Where monetary recovery alone is sought, the court shall consider
>
> (1) whether common questions of law or fact predominate over any question affecting only individual members;
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> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
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> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
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> (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
>
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.Civ.P. 1708(a).[4]

The "Rule 1702(2) commonality requirement and the Rule 1708(a)(1) predominance requirements are distinct prerequisites for class certification, both of which must be established by the class proponent." Samuel-Bassett, 613 Pa. at 408, 34 A.3d at 22. "The standard for showing predominance is more demanding than that for showing commonality, but is not so strict as to vitiate Pennsylvania's policy favoring certification of class actions." Cardinale, 154 A.3d at 1288 (citing Samuel-Bassett, 613 Pa. at 409, 34 A.3d at 23.) Rather, the "'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" Samuel-Bassett, supra (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997)); Cardinale, supra (quoting Samuel-Bassett, supra).

It is not uncommon for claims challenging an employer's compensation system under the MWA to be litigated on a class action basis. *See, e.g.*, Ford v. Lehigh Valley Restaurant Group, Inc., 47 Pa. D. & C.5th 157 (Lacka. Co. 2015). Common questions of law and fact under the MWA and PWA clearly predominate in this action which presents a manageable class. Assuming full recovery of all conceivable damages of $815,974.35 under Chase's proposed theory of

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[4] Subdivision (b) identifies an additional criterion in cases "[w]here equitable or declaratory relief alone are sought," and in that regard, references "whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief inappropriate with respect to the class." Pa.R.Civ.P. 1708(b)(1)-(2). Subdivision (c) indicates that "[w]here both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b)." Pa.R.Civ.P. 1708(c).

liability, the claim of each class member averages $4,294.60. The minimal sums recoverable by each aggrieved worker make the pursuit of individual claims in separate actions unfeasible and impractical. Upon balancing the respective interests of the class members and the court system, a class action provides a fair and efficient method for adjudicating the instant claims under the MWA and PWA based upon the criteria contained in Rule 1708. Consequently, the motion for final certification of the 190 member class consisting of "all current or former field construction employees of Kriger Construction, Inc. who performed work on publicly funded construction projects subject to the [PWA], or other federal, state, or local prevailing wage law, in any workweek in which they worked in excess of forty (40) hours," will be granted.

(6) Opt-In or Opt-Out Class

A class action may be certified on either an "opt-in" or "opt-out" basis. In an "opt-out" election, "every member of the class is included unless [s]he files a written election by a certain date stating a desire to be excluded from the class." Reimer, 102 Lacka. Jur. at 194. Conversely, with an "opt-in" class, a person is not deemed to be a member of the class unless [s]he "file[s] a timely written election to be included in the class after receiving proper notice of the class action." Guiffrida v. City of Scranton, 67 Pa. D. & C.5th 57, 62 (Lacka. Co. 2017).

Rule 1711(a) generally provides that an order certifying a plaintiff class shall state "that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class." Pa.R.Civ.P. 1711(b). However, if the court finds that either "the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation," or "other special circumstances exist which are described in the order," the order

certifying the class may state "that a person shall not be a member of the plaintiff class or subclass unless by a specified date the person files of record a written election to be included in the class or subclass." Pa.R.Civ.P. 1711(b). Thus, subsection (a) prescribes an "opt-out" class, whereas subsection (b) authorizes an "opt-in" class if either of the two identified situations exist.

The MWA requires prospective plaintiffs to opt-out in order to avoid being parties in a class action seeking monetary relief under those statutes. *See* Lehman v. Legg Mason, Inc., 532 F.Supp.2d 726, 731-732 (M.D. Pa. 2007); Otto v. Pocono Health System, 457 F.Supp.2d 522, 523 (M.D. Pa. 2006); Borcky v. Liberty Travel, Inc., 2002 WL 34100669, at *10-11 (Del. Co. 2002). At the time of the hearing, counsel for the parties stipulated that the class action has to be certified on an opt-out basis due to the relief being sought under the MWA. (T.P. 2/2/24 at p. 22). As a result, the class will be certified on an opt-out basis with all 190 workers being included since no individual filed a timely written election to be excluded from the class in compliance with the deadline fixed by the court.

(B) APPROVAL OF CLASS ACTION SETTLEMENT

Chase also seeks final approval of the parties' negotiated class action settlement, including the payment of counsel fees, settlement administrator costs, and a service award to Chase. Pennsylvania Rule of Civil Procedure 1714 states that no class action may be "settled or discontinued without the approval of the court after a hearing" and following "notice of the proposed compromise, settlement or discontinuance . . . to all members of the class in such manner as the court may direct" if the action "has been certified as a class action." Pa.R.Civ.P. 1714(a), (c). The Order of October 17, 2023, approved the proposed notice form, directed RG/2

to serve that notice upon the 190 class members, and required any objections to the settlement and requests for exclusion from the class to be filed within 30 days of the issuance of the notice. (Docket Entry No. 8 at ¶¶ 5-8). The notices were served upon the class members more than three months prior to the fairness hearing on February 2, 2024, and no objections or requests for exclusion were filed by any class members. (Docket Entry No. 10 at pp. 46-51).

(1) Buchanan Factors

After the court has made a preliminary fairness evaluation of the proposed settlement terms, it must conduct a "formal fairness hearing" at which time "arguments and evidence may be presented in support of and in opposition to the settlement." Brophy v. Philadelphia Gas Works and Philadelphia Facilities Management Corp., 921 A.2d 80, 88 (Pa. Cmwlth. 2007); Guiffrida v. City of Scranton, 2019 WL 1142520, at *4 (Lacka. Co. 2019). "Prior to approving a class settlement, a lower court must conclude that it is fair and reasonable and adequately protects the members of the class." In re Bridgeport Fire Litigation, 8 A.3d 1270, 1285 (Pa. Super. 2010), *app. denied*, 611 Pa. 119, 23 A.3d 1003 (2011). In Buchanan v. Century Federal Savings and Loan Association, 259 Pa. Super. 37, 393 A.2d 704 (Pa. Super. 1978) (*en banc*), the Superior Court of Pennsylvania identified the following relevant criteria, which the Supreme Court of Pennsylvania later adopted as "the appropriate factors to consider in approving or disapproving a class action settlement": (1) the risks of establishing liability and damages; (2) the range of reasonableness of the settlement in light of the best possible recovery; (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation; (4) the complexity, expense, and likely duration of the litigation; (5) the stage of the proceedings and the amount of discovery completed; (6) the recommendations of competent counsel; and (7) the

reaction of the class to the settlement. Dauphin Deposit Bank and Trust Company v. Hess, 556 Pa. 190, 197, 727 A.2d 1076, 1079-1080 (1999) (citing Buchanan, 259 Pa. Super. at 46, 393 A.2d at 709).

Our Supreme Court has instructed "that settlements are favored in class action lawsuits and that the standard of review of the trial court's acceptance or rejection of a settlement proposal is abuse of discretion." Id. at 197, 727 A.2d at 1080. "'In effect, the court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights.'" In re Bridgeport Fire Litigation, 8 A.3d at 1285 (quoting Buchanan, 259 Pa. Super. at 46-47, 393 A.2d at 709). In recognition of the fact that "'there will usually be a difference of opinion as to the appropriate value of a settlement,'" reviewing courts "'should analyze a settlement in terms of a 'range of reasonableness' and should generally refuse to substitute their business judgment for that of the proponents.'" Treasurer of State v. Ballard Spahr Andrews & Ingersoll, LLP, 866 A.2d 479, 484 (Pa. Cmwlth. 2005) (quoting Buchanan, 259 Pa. Super. at 47, 292 A.2d at 709).

"One very significant factor in determining whether a settlement is reasonable is the risk involved in proving liability and damages." Ballard Spahr, supra. "In determining the likelihood of success, the hearing court should not attempt to resolve unsettled issues or legal principles, but should attempt only to estimate the reasonable probability of success." Fischer v. Madway, 336 Pa. Super. 289, 297, 485 A.2d 809, 813 (1984) (citing Buchanan, 259 Pa. Super. at 49, 393 A.2d at 710). In addition, "'the absence of objections'" and the "'unanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight in the court's evaluation of the proposed settlement,'" Ballard Spahr, supra (quoting In re Linerboard Antitrust

Litigation, 296 F.Supp.2d 568, 578 (E.D. Pa. 2003)), and "[t]he opinion of experienced counsel is entitled to considerable weight." Fischer, 336 Pa. Super. at 297, 485 A.2d at 813 (citing Buchanan, 259 Pa. Super. at 56 n.21, 393 A.2d at 714 n.21).

As noted above, no Pennsylvania court has ever adopted the argument being advanced by Chase in this undisputed matter of first impression. Not unlike the class plaintiffs in Fischer, Chase was "attempting to 'break new ground'" with his theory regarding the inclusion of CWILOF pay pursuant to the PWA in the regular rate of pay computation, as a result of which a settlement representing 58% of the maximum damages recoverable under Chase's novel theory falls within a "range of reasonableness." *See* Fischer, 336 Pa. Super. at 297, 485 A.2d at 813 ("Thus, even though the amount proposed in settlement represented only a fraction of the potential recovery, it cannot be said that the settlement was unreasonable, in light of the dim prospects for success.") The docket entries for this case reflect that the parties negotiated a settlement after conducting approximately 18 months of discovery, (Docket Entry Nos. 4-7), in what portended to be complex and lengthy litigation. Moreover, no class member has objected to the settlement or sought exclusion from the class, and Chase's attorneys have strongly recommended approval of the settlement. *See* Fischer, supra ("Even more importantly, plaintiffs' counsel, who had litigated the action for seven years, urged strongly that the settlement was fair, adequate, and reasonable, and recommended approval.").

Consideration of the relevant Buchanan criteria supports the conclusion that the proposed settlement is fair and reasonable and adequately protects the class members. In accordance with the stated policy that "[s]ettlements are favored in class action lawsuits," the gross settlement in the amount of $475,000.00 will be approved.

(2) Counsel Fees and Costs

Chase's counsel seeks approval of the payment of counsel fees and expenses totaling $118,750.00. Pennsylvania Rule of Civil Procedure 1717 sets forth the applicable factors to be considered by the court in determining the amount of counsel fees recoverable by class counsel, and states:

(1) the time and effort reasonably expended by the attorney in the litigation;

(2) the quality of the services rendered;

(3) the results achieved and benefits conferred upon the class or upon the public;

(4) the magnitude, complexity, and uniqueness of the litigation; and

(5) whether the receipt of a fee was contingent on success.

Pa.R.Civ.P. 1717. "The order in which these factors are listed in the Rule is not in any way intended to suggest an order of priority on comparative importance in the determination of the fee." In re Bridgeport Fire Litigation, 8 A.3d at 1289 (citing Pa.R.Civ.P. 1717, Explanatory Comment). It is common in class action litigation to reference the lodestar method, which consists of multiplying reasonable fees by reasonable hours expended, when determining the amount of class counsel fees. *See* Com., Dept. of Environmental Resources v. PBS Coals, Inc., 677 A.2d 868, 874-875 (Pa. Cmwlth. 1996), *app. denied*, 546 Pa. 684, 686 A.2d 1313 (1996).

According to class counsel, they "devoted 156 hours on this matter to date" as of the filing of their motion for final approval on January 16, 2024, "and anticipate spending additional time on the case related to preparation for and attendance at the settlement approval hearing" on February 2, 2024. (Docket Entry No. 10 at p. 23). They indicate that their "lodestar to date totals $54,379.50," and reference federal and state rulings that have approved "lodestar multipliers" of

three to four times. (Id. at pp. 23-24). They also cite other instances where "Pennsylvania courts have approved class counsel fees that range from 32% to 36% of a settlement fund," and submit that they are "only seeking about 2.2x their lodestar (to date) and 25% of the settlement funds." (Id. at p. 24).

The requested fees and costs of $118,750.00 are fair and reasonable under the criteria in Rule 1717. It is noteworthy that class counsel accepted representation on a contingent fee basis, and not only risked being unpaid, but also risked the prospect of losing any money advanced to pay for the costs of this litigation. *See* Hughes v. Wilkes-Barre Hospital Company, 71 Pa. D. & C.5th 208, 215 n.1 (Lacka. Co. 2018) (quoting Romano by Romano v. Lubin, 365 Pa. Super. 627, 631, 530 A.2d 487, 488-489 (1987), *app. discontinued*, 518 Pa. 620, 541 A.2d 747 (1988)). In light of the time and effort expended, the quality of professional services provided, and the results achieved in this innovative suit, the request for counsel fees and expenses of $118,750.00 will be approved.

(3) Service Award for Class Plaintiff

Chase and his counsel also seek approval of the payment of a $10,000.00 "service award" to Chase. (Docket Entry No. 10 at pp. 27-28). Service awards, also known as incentive or enhancement awards, "are common in class actions that result in a common fund for distribution to the class" and are designed "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation." Starnes v. Amazon.com, 2023 WL 3305159, at *12 (E.D. Pa. 2023). Class counsel identified Chase's assistance in furthering and resolving this litigation in their written submissions and subsequent oral presentation during the fairness hearing. Chase's involvement as the named plaintiff could conceivably affect

Kriger's willingness to employ him in the future, and to that extent, he "took on personal risk in bringing this case and deserves compensation for that." Creed v. Banko Dental Supply Co., 2013 WL 5276109, at *7 (M.D. Pa. 2013).

The requested service award of $10,000.00 is in line with other service awards that have been approved in class actions. *See*, *e.g.*, McIntyre v. RealPage, Inc., 2023 WL 2643201, at *4 (E.D. Pa. 2023) ($10,000.00); Copley v. Evolution Well Services Operating, LLC, 2023 WL 1878581, at *4 (W.D. Pa. 2023) ($10,000.00); King v. Mueller Limited Partnership, 2017 WL 11557892, at *1 (Luz. Co. 2017) ($10,000.00); Creed, supra ($15,000.00). Therefore, the request for a service award of $10,000.00 to Chase will be approved.

(4) Settlement Administrator Costs

Finally, Chase seeks approval of the payment of $7,500.00 to RG/2 for services provided as the settlement administrator. *See* Brown v. Rita's Water Ice Franchise Company, LLC, 2017 WL 4102586, at *2 (E.D. Pa. 2017) (approving settlement administrator fees). Based upon the affidavit and submissions of RG/2's project manager, Dana Boub, that request for approval of the reasonable settlement administrator fee will be approved. An appropriate Order follows.

STANLEY CHASE, Individually and on behalf of those similarly situated,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	NO. 2021 CV 5174
v.	:	
KRIGER CONSTRUCTION, INC.,	:	
Defendant	:	

ORDER

AND NOW, this 9th day of February, 2024, upon consideration of "Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement," the exhibits and memoranda of law submitted by plaintiff and class counsel, and the evidence and argument presented during the fairness hearing on February 2, 2024, and based upon the factual findings and legal conclusions set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. "Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement" is GRANTED.

2. The request for certification of a class action pursuant to Pa.R.Civ.P. 1702, 1708, and 1709 is GRANTED, and in accordance with Pa.R.Civ.P. 1710(b), the class is certified as consisting of all current or former field construction employees of Kriger Construction, Inc. who performed work on publicly funded construction projects subject to the Pennsylvania Prevailing Wage Act, 43 P.S. §§165-1 to 165-17, or other applicable federal, state, or local wage law, in any workweek in which they worked in excess of forty (40) hours. In addition, Stanley Chase is appointed to serve as the representative of the settlement class, James E. Goodley, Esquire, Ryan P. McCarthy, Esquire, and the law firm of Goodley McCarthy, LLC are appointed as class counsel

for the settlement class, and RG/2 Claims Administration, LLC, is approved as the settlement administrator.

3. Pursuant to Pa.R.Civ.P. 1714, the gross settlement of $475,000.00 is APPROVED, and following approved deductions for counsel fees and expenses, a service award to the named plaintiff, and settlement administrator costs, the net sum of $338,750.00 shall be distributed to the 190 class members in the amounts set forth in Exhibit A attached to the executed "Class Action Settlement Agreement" that is attached as Exhibit 4 to "Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement."

4. The payment of $118,750.00 to class counsel in full satisfaction of their counsel fees and costs is APPROVED pursuant to Pa.R.Civ.P. 1717.

5. The requests for the payment of a service award of $10,000.00 to plaintiff, Stanley Chase, and settlement administrator fees of $7,500.00 to RG/2 Claims Administration, LLC are APPROVED.

6. Upon the distribution of the class action settlement funds to the class members, class counsel, plaintiff, and settlement administrator, a discontinuance with prejudice shall be filed promptly in compliance with Pa.R.Civ.P. 229(a) and 229.1.

BY THE COURT:

J.

Terrence R. Nealon

cc: Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa.R.Civ.P. 236(a)(2) and (d) by transmitting time-stamped copies via electronic mail to:

James E. Goodley, Esquire — james@gmlaborlaw.com
Ryan P. McCarthy, Esquire — ryan@gmlaborlaw.com
Counsel for Plaintiff and Class

Andrew L. Levy, Esquire — alevy@mcneeslaw.com
Austin W. Wolfe, Esquire — awolfe@mcneeslaw.com
Counsel for Defendant