IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

GINA R. LIPARI-WILLIAMS, MARISSA T. HAMMOND, and LUCINDA M. LAYTON, on behalf of themselves and all others similarly situated, Plaintiffs, v. PENN NATIONAL GAMING, INC., et al. Defendants.	Case No. 5:20-cv-06067-SRB

PLAINTIFFS' UNOPPOSED MOTION
FOR ATTORNEYS' FEES AND EXPENSES TO CLASS COUNSEL
AND SERVICE AWARDS TO NAMED PLAINTIFF AND OPT-IN PLAINTIFF

Plaintiffs respectfully submit this motion for an award of attorneys' fees and expenses to Class Counsel and service awards to Named Plaintiffs and Opt-In Plaintiff. Pursuant to the Settlement Agreement, this motion is unopposed by Defendants. *See* Doc. 139-2, Settlement Agreement at ¶¶ III.C. and III.D.

In support of this motion, Plaintiffs submit Suggestions in Support, the Declaration of Alexander T. Ricke (Class Counsel), the Stueve Siegel Hanson LLP Firm Resume (Ex. 1 to the Ricke Declaration) and the Declaration of Richard W. Simmons of Analytics Consulting LLC (Settlement Administrator).

For the reasons further described in the accompanying Suggestions in Support, this Court should grant Plaintiffs' motion, award thirty-five percent of the common settlement fund ($1,925,000) as attorneys' fees plus $71,577.69 in litigation expenses to Class Counsel, approve service awards to Named Plaintiffs Gina R. Lipari-Williams, Marissa T. Hammond, and Lucinda

M. Layton in the amount of $10,000 each, and approve a service award to Opt-In Plaintiff Tim Hammond in the amount of $7,500.

Dated: May 8, 2023

Respectfully submitted,

STUEVE SIEGEL HANSON LLP

/s/ Alexander T. Ricke

George A. Hanson, MO Bar No. 43450
Alexander T. Ricke, MO Bar No. 65132
Caleb Wagner, MO Bar No. 68458
460 Nichols Road, Suite 200
Kansas City, Missouri 64112
Telephone: (816) 714-7100
Facsimile: (816) 714-7101
hanson@stuevesiegel.com
ricke@stuevesiegel.com
wagner@stuevesiegel.com

McCLELLAND LAW FIRM, P.C.
Ryan L. McClelland, MO Bar No. 59343
Michael J. Rahmberg, MO Bar No. 66979
The Flagship Building
200 Westwoods Drive
Liberty, Missouri 64068-1170
Telephone: (816) 781-0002
Facsimile: (816) 781-1984
ryan@mcclellandlawfirm.com
mrahmberg@mcclellandlawfirm.com

CLASS COUNSEL

CERTIFICATE OF SERVICE

The undersigned certifies that on May 8, 2023, the foregoing document was filed with the Court's CM/ECF system, which served a copy of the foregoing document on all counsel of record.

/s/ *Alexander T. Ricke*

CLASS COUNSEL

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

GINA R. LIPARI-WILLIAMS, MARISSA T. HAMMOND, and LUCINDA M. LAYTON, on behalf of themselves and all others similarly situated, Plaintiffs, v. PENN NATIONAL GAMING, INC., et al. Defendants.	Case No. 5:20-cv-06067-SRB

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS' FEES AND EXPENSES TO CLASS COUNSEL AND SERVICE AWARDS TO NAMED PLAINTIFFS AND OPT-IN PLAINTIFF

STUEVE SIEGEL HANSON LLP
George A. Hanson, MO Bar No. 43450
Alexander T. Ricke, MO Bar No. 65132
Caleb Wagner, MO Bar No. 68458
460 Nichols Road, Suite 200
Kansas City, Missouri 64112
Telephone: (816) 714-7100
Facsimile: (816) 714-7101
hanson@stuevesiegel.com
ricke@stuevesiegel.com
wagner@stuevesiegel.com

McCLELLAND LAW FIRM, P.C.
Ryan L. McClelland, MO Bar No. 59343
Michael J. Rahmberg, MO Bar No. 66979
The Flagship Building
200 Westwoods Drive
Liberty, Missouri 64068-1170
Telephone: (816) 781-0002
Facsimile: (816) 781-1984
ryan@mcclellandlawfirm.com
mrahmberg@mcclellandlawfirm.com

CLASS COUNSEL

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INTRODUCTION

Class Counsel produced an outstanding result—a $5.5 million, non-reversionary common fund—that will make meaningful payments to class members on novel, disputed claims. As compensation for their significant work, Class Counsel request thirty-five percent of the common fund and reimbursement of their advanced expenses. The requested fee and expense awards are justified under the Eighth Circuit's multi-factor analysis, particularly given the outstanding result on unprecedented (at the very least, untested) claims against well-funded Defendants.

This case presented novel, complex claims under the Employee Retirement Income Security Act, Fair Labor Standards Act, and Missouri Minimum Wage Law that Class Counsel navigated through three years of contested litigation to settlement. To Class Counsel's knowledge, Plaintiffs' ERISA claims challenging the validity of Penn National Gaming's tobacco surcharge were unprecedented outside government enforcement actions. Similarly, Plaintiffs' FLSA and MMWL claims challenging the tip pooling and gaming license wage deduction practices against Argosy Casino Riverside and Hollywood Casino St. Louis have been pioneered by Class Counsel in class and collective actions against casino operators for the better part of a decade.

Despite these challenges and because of their significant experience, Class Counsel delivered a $5.5 million settlement representing 62% of class members' alleged unpaid wages under the FLSA and MMWL and 62% of tobacco surcharges alleged to be unlawful under ERISA. The non-reversionary settlement fund will make significant payments to class members. After deducting all fees and costs, the average *per capita* settlement checks will be at least: $378 on average for members of the Nationwide ERISA Class; $3,800 on average for members of the Argosy Casino Riverside Tip Pooling Class; $3,200 on average for members of the Hollywood Casino St. Louis Tip Pooling Class; and $100 on average for members of the MMWL Gaming License Class. In fact, these numbers have actually increased from what Class Counsel projected

at preliminary approval due to deduplication of the class list by the settlement administrator, lower than projected expenses for Class Counsel, and lower than projected cost of settlement administration. Importantly, there is no claims process; class members who do not opt out will simply receive a check in the mail. This is an outstanding result.

Absent Class Counsel's willingness to take this case on a contingency basis, their devotion of time and effort to untested ERISA claims, and their considerable experience in casino wage and hour litigation, this settlement would not have occurred. Results matter, and Class Counsel delivered an excellent result. For their efforts, Class Counsel seek thirty-five percent of the settlement fund as reasonable attorneys' fees plus reimbursement of $71,577.69 in litigation expenses. Class Counsel also request service awards of $10,000 for each of the three Named Plaintiffs and $7,500 for Opt-in Plaintiff Tim Hammond, all of whom were deposed.

As of the date of this filing, none of the 4,840 class members have objected to any aspect of the resolution, and only four individuals have elected to opt out, demonstrating class members' approval of the settlement.[1] The requested attorneys' fees, expenses, and service awards are reasonable and should be approved in connection with final approval of the settlement.

PROCEDURAL HISTORY

This settlement, and the fund it creates, is the product of Class Counsel's extensive investigation into the novel claims, long and hard-fought prosecution of the claims, substantial investment of time and expense, and arm's-length negotiations with Defendants through a third-

[1] The deadline for members of the Nationwide ERISA Class to object or request exclusion passed on April 30, 2023. However, in light of the corrective notice issued to members of the MMWL Gaming License Class, Argosy Casino Riverside Tip Pooling Class, and Hollywood Casino Tip Pooling Class, those class members have up to May 19, 2023 to object or opt out (as permitted by the Settlement Agreement). Doc. 143. To the extent any objection or request for exclusion is received, Class counsel will promptly present it to the Court and address it to the extent necessary.

party mediator. The resulting fund represents a significant recovery for class members that will produce meaningful and much-needed relief.

In support of this motion and Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Plaintiffs submit the Declaration of Alexander T. Ricke ("Ricke Decl."). The declaration summarizes the procedural history of the litigation and the strength of the result obtained. These issues are also discussed at length in Plaintiffs' Suggestions in Support of Unopposed Motion for Final Approval of Class Action Settlement that Plaintiffs are filing contemporaneously herewith. Plaintiffs do not repeat the entire factual history of the litigation in this brief, but instead incorporate it by reference, as that discussion supports the requested award of attorneys' fees, expenses, and service awards in addition to supporting a finding that the settlement is fair, reasonable, and adequate.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES PRESENTED IN THIS CASE.

Pursuant to applicable law, Class Counsel are entitled to a reasonable attorney's fee for their work representing the classes and achieving this $5.5 million, non-reversionary settlement. Upon analysis of the applicable factors endorsed in the Eighth Circuit, a fee equal to thirty-five percent of the fund (or $1,925,000) is appropriate and reasonable and should be approved.

A. CONTINGENT FEES IN CERTIFIED CLASS ACTIONS ARE CUSTOMARILY AWARDED USING THE PERCENTAGE-OF-THE-FUND METHOD.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h) "Under the 'common fund' doctrine" the law authorizes the Court to award "attorneys' fees from the settlement proceeds." *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019)

(Laughrey, J.) (citing Fed. R. Civ. P. 23(h)); *accord Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Courts typically use the "percentage-of-the-fund method" to award attorney's fees from a common fund. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (Laughrey, J.) (quoting *West v. PSS World Med., Inc.*, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the recovery for class members. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations." (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985))).[2] The Court should therefore use the percentage approach to award fees in this case.

[2] In contrast, undue focus on hours or hourly rates "creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up). Although a percentage approach may raise some potential concerns when a class settlement involves a reversionary fund or the claims process is unduly complicated, those concerns are absent here because nothing will revert to Defendants and there is no claims process.

B. THE RELEVANT FACTORS SUPPORT AWARDING CLASS COUNSEL THIRTY-FIVE PERCENT OF THE COMMON FUND AS ATTORNEYS' FEES.

Selecting a reasonable percentage depends on "considering relevant factors from the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719–20 (5th Cir. 1974)." *In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018) (cleaned up). The following are the *Johnson* factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See In re Xcel*, 364 F. Supp. 2d at 993; *Tussey*, 2019 WL 3859763, at *2; *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010); *see also Hardman v. Bd. Of Educ. Of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983).

Class Counsel achieved a remarkable result after three years of hard-fought litigation on novel issues. The *Johnson* factors confirm that a fee of thirty-five percent of the fund is reasonable.

1. The benefits conferred on class members are significant, particularly given the risks of continued litigation (Factor 8).

Through Class Counsel's efforts, the classes are receiving substantial monetary compensation as part of this settlement and, unless they opt out (only four have thus far), they do not have to do anything to receive their settlement allocations. The size of the fund, the size of the

average payments to class members (most of whom are low wage workers), and the ease of receiving payment all support the requested fee.

Based on Class Counsel's damages calculations, the $5,500,000 common fund represents approximately 62% of the actual unpaid wages alleged under the FLSA and MMWL and 62% of the tobacco surcharges Plaintiffs allege were deducted from their wages in violation of ERISA. Net of all fees and costs, the average *per capita* settlement checks will be *at least* : $378 on average for members of the Nationwide ERISA Class; $3,800 on average for members of the Argosy Casino Riverside Tip Pooling Class; $3,200 on average for members of the Hollywood Casino St. Louis Tip Pooling Class; and $100 on average for members of the MMWL Gaming License Class. These are meaningful payments[3] and they compare favorably to settlements in other casino wage and hour class and collective actions and wage and hour class actions generally.[4] Ricke Decl. at ¶ 28.

[3] *See, e.g., James v. Boyd Gaming Corp*., 2022 WL 4482477, at *10 (D. Kan. Sept. 27, 2022) (Crabtree, J.) (finding that an average *per capita* settlement payment of $1,320 "provided considerable relief to collective members" in a settlement of similar casino tip pooling claims negotiated by Class Counsel).

[4] *See, e.g., Bartakovits v. Wind Creek Bethlehem, LLC*, 2022 WL 702300, at *2 (E.D. Pa. Mar. 7, 2022) (finding that a recovery representing "57% of the unpaid minimum wages at issue … is a significant recovery in a wage case" in a settlement of casino tip credit claims negotiated by Class Counsel); *Day v. PPE Casino Resort Maryland LLC*, No. 1:20-cv-01120, ECF No. 43-1 at p. 11-12 (D.Md. Oct. 13, 2021) ($3,050,000 common fund representing 20% of tip credit damages and average settlement payments of $940); *id*. at ECF No. 45 (granting final approval); *Cope v. Let's Eat Out, Inc.*, No. 6:16-cv-03050-SRB, ECF No. 316 at 6, 12 (W.D. Mo. April 17, 2019) (motion for preliminary approval of class action settlement creating $650,000 common fund to resolve tip credit (and other unpaid wages claims) and noting "the settlement provides Opt-in Plaintiffs with 25% of their owed minimum wages."); *see id*. at ECF No. 325 (W.D. Mo. Sept. 6, 2019) (granting final approval of settlement); *see also Black v. P.F. Chang's China Bistro, Inc.*, No. 16-CV-3958, ECF No. 92 at *7 n. (N.D. Ill. May 15, 2017) (motion for final approval of class action settlement creating a $2,650,000 common fund to resolve tip credit claims (and other unpaid wage claims) representing 35.5% of the value of the case and providing an average payment of $608.45 to class members and $715 to opt-in plaintiffs); *see id*. at ECF No. 103 at ¶ 4 (granting final approval of settlement).

In addition, the settlement fund will be distributed without a requirement to file a claim form. Class members who do not request to be excluded from the settlement will be sent a check in the mail for their share of the settlement. And no settlement funds will revert to Defendants; any funds remaining from uncashed checks will be distributed *cy pres* to two charitable organizations. Nor will class members be required to provide a general release to participate in the settlement. Instead, class members who do not request to be excluded from the settlement will release Defendants from claims that were or could have been asserted based on the facts alleged in the Complaint. Thus, the settlement provides for an appropriately limited release tailored to the claims at issue in the Complaint. Settlement Agreement at ¶¶ HH, II. The absence of a broad release likewise shows the strength of the recovery for class members. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1103-04 (D.N.M. 1999) (noting the limited, rather than general, release as further evidence of an exceptional result in favor of class members). This is an exceptional result by any measure and, as explained below, that is particularly true given the novel, untested nature of the claims. Ricke Decl. at ¶¶ 31-35.

2. The claims were novel and difficult to prosecute (Factor 2).

Plaintiffs asserted three types of claims—unlawful tobacco surcharge under ERISA, unlawful wage deductions for gaming licenses under the FLSA and MMWL, and unlawful tip pooling arrangements under the FLSA and MMWL. Each claim was either unprecedented in private litigation, pioneered by Class Counsel, or both.

i. Plaintiffs' ERISA claims were both unprecedented and vigorously disputed.

Every aspect of Plaintiffs' ERISA claim challenging Penn National Gaming's tobacco surcharge as an unlawful wellness plan was unprecedented and faced vigorous opposition. At the outset, Class Counsel is not aware of any other private litigation challenging a tobacco surcharge

as unlawful under ERISA (other than cases brought by Class Counsel). Although the Department of Labor has successfully resolved at least one private enforcement action challenging a tobacco surcharge as an unlawful wellness plan, this Settlement Agreement significantly outpaces that recovery.[5] Ricke Decl. at ¶ 32.

After the parties exhaustively briefed class certification of the tobacco surcharge ERISA claim—an issue Class Counsel is unaware of ever having been litigated prior to this case—the Court granted class action status in a lengthy, reported decision. *Lipari-Williams v. Missouri Gaming Co., LLC*, 339 F.R.D. 515, 520 (W.D. Mo. 2021). In response, Penn National Gaming hired an appellate specialist and former Supreme Court clerk from Morgan Lewis & Bockius, LLP (a respected national law firm) to petition the Eighth Circuit to review this Court's decision under Rule 23(f). In its Petition, Penn National Gaming argued principally that Plaintiffs lacked standing, that Plaintiffs' theory violated Supreme Court precedent, and that DOL regulations underpinning Plaintiffs' claims must be struck down as extending beyond the text of ERISA.[6] Plaintiffs opposed the petition arguing these complicated legal issues of first impression and, ultimately, the Eighth Circuit denied the Petition in its entirety. Ricke Decl. at ¶ 12.

The recovery of 62% of the allegedly unlawful tobacco surcharges representing more than $2.5 million of the $5.5 million settlement fund is an outstanding result. Plaintiffs believe the Court should incentivize Class Counsel's (and other lawyers') courage in advancing these untested, important employment claims by awarding the requested fee. *Tussey v. ABB Inc*., 2015 WL

[5] In November 2018, the DOL obtained a Consent Decree providing for $145,635 repayment of tobacco surcharges to 596 employees at Dorel Juvenile Group. This is a *per capita* recovery of $244. https://www.dol.gov/newsroom/releases/ebsa/ebsa20181130. By comparison, this Settlement Agreement will result in *per capita* settlement payments of more than $378 to members of the Nationwide ERISA Class net of all fees and costs. This is a significant recovery.

[6] *Penn National Gaming, Inc. v. Lipari-Williams, et al*, Case No. 21-8011 (8th Cir. Nov. 30, 2021).

8485265, at *6 (W.D. Mo. Dec. 9, 2015), *reversed on other grounds*, 850 F.3d 951 (8th Cir. 2017) (noting the importance of awarding attorneys' fees as an incentive when "Plaintiffs' counsel took unusual risks in uncharted waters against an extraordinarily well-funded defense team.").

ii. Plaintiffs' wage and hour claims have been pioneered by Class Counsel but remain untested on the merits.

Plaintiffs' tip pooling and gaming license wage deduction claims are not unprecedented, but that is due to Class Counsel's dedication to advancing them. For the better part of a decade, Class Counsel have devoted a large portion of their wage and hour practice to identifying, developing, and winning class and collective wage and hour claims against casino operators on behalf of tipped and minimum wage workers. That said, the ultimate resolution of these claims remained in doubt absent settlement.

With respect to the tip pooling claims, this is not a simple tip pooling theory where a restaurant manager took tips from servers. This claim involved casino employees who worked in multiple capacities and were permitted to participate in the tip pool in some capacities but not in others and required untangling years of tip pooling distributions worth millions of dollars. Plaintiffs argued that the inclusion of dual rate supervisors (*i.e.*, the casino workers who work both as tipped table games dealers and as a non-tipped table games supervisor) in dealers' tip pool violated the FLSA and MMWL when tip pool funds were used to pay these dual rate workers' Paid Time Off. The risks to these claims are numerous.[7] Despite these risks, Class Counsel obtained a stipulation to conditional and class certification of the tip pooling claims due largely to their work

[7] The threshold risk is whether dual rate supervisors qualify as "managers or supervisors" who may not "keep any portion of employees' tips." 29 U.S.C. § 203(m)(1)(B). And even if Plaintiffs prevail on this theory, there is the complicated process of untangling Defendants' tip pooling arrangements to understand whether and to what extent tips were, in fact, distributed to dual rate supervisors for PTO. This settlement avoids that doubt and recovers 62% of the tip credit damages associated with the tip pooling claims as well as 62% of the best-day misappropriated tips damages. Ricke Decl. at ¶ 27

in similar dual rate PTO cases. *See e.g.*, *James v. Boyd Gaming Corp.*, 522 F. Supp. 3d 892, 914 (D. Kan. 2021) (Crabtree, J.) (granting conditional certification of a similar dual rate tip pooling claim brought by Class Counsel over significant opposition); *Lockett v. Pinnacle Ent., Inc.*, 2021 WL 960424, at *5-8 (W.D. Mo. Mar. 12, 2021) (Fenner, J.) (same).

The gaming license deduction claims under the FLSA and MMWL are much the same. Although Class Counsel have obtained class and conditional certification of these claims several times[8] (and, to Class Counsel's knowledge, are the only lawyers who have done so), the claims are untested on the merits and susceptible to a so-called "silver bullet" legal defense. As Judge Young of the Southern District of Indiana noted in certifying a collective premised on gaming license wage deductions in another case brough by Class Counsel, "[w]hether the gaming licenses are ordinary costs one would incur in life outside the workplace is a common question capable of being resolved in one stroke." *Adams v. Aztar Indiana Gaming Co., LLC*, 587 F. Supp. 3d 753, 765 (S.D. Ind. 2022). Because of this uncertainty, there remained significant risk in these claims such that recovery of 62% of the disputed wage deductions is a very strong result and is due, in large part, to Class Counsel's work on these claims in this case and around the country. The nature of these unique claims supports the requested award of attorneys' fees.

3. Class Counsel represented the classes, on a contingent basis, despite numerous and substantial risks, and performed significant labor precluding other employment, even though the cases were undesirable to other lawyers. (Factors 1, 4, 6-7 and 10).

Class Counsel took this case prosecuting largely untested, risky claims on a contingency and faced the real risk of recovering *nothing* for their time and losing their advanced expenses. In

[8] *Lockett v. Pinnacle Ent., Inc.*, 2021 WL 960424, at *8-9 (granting class and conditional certification of the gaming license deduction claims across); *MacMann v. Tropicana Ent., Inc.*, 2021 WL 1105500, at *3 (E.D. Mo. Mar. 23, 2021) (same at Lumiere Casino in St. Louis); *Adams v. Aztar Indiana Gaming Co., LLC*, 587 F. Supp. 3d 753, 764 (S.D. Ind. 2022) (granting conditional certification of gaming license deduction claims at Tropicana Evansville).

the face of these risks, Class Counsel delivered a $5.5 million, non-reversionary settlement that will make meaningful payments to principally low wage workers with no claims process. This merits the requested thirty-five percent fee.

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994); *see also* Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Emp. L. Studies 27, 38 (2004) ("[f]ees are … correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees…[This] is widely accepted in the literature."). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been*, 2011 WL 4478766, at *9.[9] And critically, "[t]he risks plaintiffs' counsel faced must be assessed as

[9] *Accord, In re: Checking Account Overdraft Litig*., 2014 WL 11370115, at *17 (risk embodied by "contingency fee arrangement often justifies an increase in the award of attorney's fees.") (quoting *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1335 (S.D. Fla. 2001)); *see also id*. ("Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee here."); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig*., 2013 WL 12327929, at *32 (C.D. Cal. July 24, 2013) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for contingency cases. This ensures competent representation for plaintiffs who may not otherwise be able to afford it." (cleaned up)); *Barrera v. Nat'l Crane Corp*., 2012 WL 242828, at *4 (W.D. Tex. Jan. 25, 2012) ("The legal profession accepts contingent fees that exceed the market value of the services if rendered on a non-contingent basis as a legitimate way of assuring competent representation for plaintiffs who cannot afford to pay on an hourly basis regardless of whether they win or lose"); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1217 ("Class Counsel has risked millions of dollars in un-reimbursed attorneys' time and additional millions in out-of-pocket costs. Unless that risk is compensated with a commensurate reward, few firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct.").

they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994.

Here, Class Counsel's time and labor invested were significant and necessarily precluded other work. Ricke Decl. at ¶¶ 44-45. Prosecuting this case required well in excess of 2,500 hours from Class Counsel with an expectation of more time after final approval of the settlement. *Id.* Class Counsel bore all the risk of prosecuting the claims. Further, Class Counsel did not tag along on a government investigation or widespread, public condemnation of Defendants' practices. *Id*. Nor did Class Counsel have favorable appellate or district court precedent to rely upon when they began prosecuting these claims. *Id.* Instead, Class Counsel pioneered the claims and ultimately obtained the pivotal class and conditional certification orders that lead to settlement. *Id*. All that work, which precluded other less-risky employment, was the result of their significant efforts undertaken without any guarantee of payment.

Moreover, these cases were undesirable because of the high risk of no recovery. As noted above, Class Counsel is unaware of any private litigation challenging a tobacco surcharge under ERISA (other than litigation brought by Class Counsel). Likewise, Class Counsel is unaware of any successful class or collective settlements of FLSA or MMWL claims premised on the same or similar theories by private litigants (other than those cases settled by Class Counsel). *Id.* at ¶ 45.

The significant risks borne by Class Counsel in prosecuting these claims justify the requested thirty-five percent fee. *See also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming fee award where lower court reasoned, in part, that "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *33 (N.D. Ga. Mar. 17, 2020) ("This action was prosecuted on a contingent basis and thus a larger fee is justified.").

4. Class Counsel's reputation and skillful resolution of the litigation supports the requested fee award (Factors 3, 9, and 11).

Class Counsel has devoted a meaningful part of their wage and hour practice over the last seven years to prosecuting class and collective actions against casino operators. Given the significant defense, this case required all of the skill, reputation, and experience Class Counsel could bring to bear.

Courts often judge class counsel's skill against the "quality and vigor of opposing counsel." *In re Charter Communications, Inc.*, 2005 WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)); *see also Tussey*, 2019 WL 3859763, at *3 (noting fees were warranted because of "daunting risk that Plaintiffs' Attorneys took when they agreed to represent this class" litigating against "well-funded defendants represented by highly-qualified national attorneys"). That was certainly true here. Defendants were represented by very skilled lawyers from two national law firms—Morgan, Lewis, & Bockius LLP and Polsinelli LLP.

To counter these respected adversaries, the classes were represented by Stueve Siegel Hanson LLP and McClelland Law Firm, P.C. As was true in *Tussey*, 2019 WL 3859763, at *3, "[o]ther courts have also recognized the skill and benefits conferred by [Class Counsel]." *See* Ricke Decl. at ¶¶ 36-39; Ex. 1, Stueve Siegel Hanson LLP Firm Resume.

Class Counsel have devoted much of their practice over the last seven years to prosecuting wage and hour cases against casino operators having collectively prosecuted over 20 such cases recovering tens of millions of dollars for tipped and minimum wage workers. Class Counsel have obtained key rulings relevant to and that have informed the settlement value of this case[10] and, as

[10] *See, e.g., James v. Boyd Gaming Corp.*, 522 F.Supp.3d 892, 908-14 (D. Kan. Mar. 2, 2021) (granting conditional certification of the same tip pooling claims at issue in this case (among others) for workers across 13 casino properties); *Adams v. Aztar Indiana Gaming Co., LLC*, 2022

a result, possess a deep knowledge of wage and hour practices in this industry, the type of evidence that typically exists, and how to value these claims. Ricke Decl. at ¶¶ 36-39. Courts have routinely recognized Class Counsel's skill, experience, and reputation in approving comparable casino wage and hour settlements. *See, e.g., Bartakovits v. Wind Creek Bethlehem, LLC,* 2022 WL 702300 (E.D. Pa. Mar. 7, 2022) ("Class Counsel is uniquely skilled and efficient in prosecuting casino wage and hour cases"); *James v. Boyd Gaming Corp*., 2022 WL 4482477, at *15 (D. Kan. Sept. 27, 2022) ("the two law firms representing the collective members have extensive experience in this area of law. This skill and experience most likely contributed to their success in securing conditional certification of the two collectives and resolving the litigation through a settlement that provides significant benefits to collective members."). This factor supports the requested fee.[11]

5. The reaction of class members supports the fee request.

In this case, the settlement administrator sent every class member a detailed, Court-authorized notice at their last known address informing them of the proposed awards of attorneys' fees, expenses, and service awards. As of the date of this filing, no settlement class member has objected to the requested attorneys' fees, expenses, or service awards, and only four (out of 4,840)

WL 593911, at *4-6, 8-12 (S.D. Ind. Feb. 25, 2022) (granting class and conditional certification of four types of wage and hour claims at Tropicana Evansville casino, including gaming license deduction claims); *MacMann v. Tropicana Ent., Inc.,* 2021 WL 1105500, at *2 (E.D. Mo. Mar. 23, 2021) (granting class and conditional certification of four types of wage and hour claims at Lumiere casino in St. Louis, including gaming license deductions); *Lockett v. Pinnacle Ent., Inc.,* 408 F. Supp. 3d 1043, 1049 (W.D. Mo. 2019) (defeating motion to dismiss gaming license deduction claims under FLSA and MMWL in what Class Counsel believe is the first case to address the issue); *Lockett v. Pinnacle Ent., Inc.*, 2021 WL 960424 (W.D. Mo. Mar. 12, 2021) (obtaining class and conditional certification of gaming license deduction claims under the FLSA and MMWL and conditional certification of the tip pooling claims under the FLSA).

[11] The nature and length of the professional relationship (Factor 11) is often not considered (or treated as neutral) as part of the *Johnson* factors analysis. However, in this context, Judge Crabtree of the District of Kansas found that it "favors approving the fee award, but just slightly" given Class Counsel's "commitment to casino workers across the country." *James v. Boyd Gaming Corp.*, 2022 WL 4482477, at *17 (D. Kan. Sept. 27, 2022).

have asked to be excluded from the settlement. This indicates strong support for the result achieved and is further evidence that the requested fee is reasonable. If any objections are filed, Class Counsel will promptly bring them to the Court's attention.

6. The comparison between the requested attorney fee percentage and percentiles awarded in similar cases supports Class Counsel's request (Factors 5 and 12).

The requested thirty-five percent fee is comparable to those awarded in other cases in the Eighth Circuit and other casino wage and hour matters prosecuted by Class Counsel. Eighth Circuit courts often look to similar fee awards in class actions within the Eighth Circuit generally, as well as to fee awards in similar litigation in other circuits. *See In re Xcel*, 364 F. Supp. 2d at 998. In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). Given the high risk and high cost of cases such as this, contingency fee arrangements are the "key to the courthouse" for individuals taking on a large corporation. As a result, Courts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36% of a common fund.[12] A thirty-five percent fee is appropriate here and consistent with awards in other class and collective actions in the Eighth Circuit.

Class Counsel's request for thirty-five percent of the common fund is also consistent with the percentage fees awarded in similar casino wage and hour matters across the country prosecuted

[12] *See, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36% fee award reasonable); *Del Toro v. Centene Management Company, LLC*, 2021 WL 1784368, at *2-4 (E.D. Mo. May 5, 2021) (awarding 35% of settlement fund as attorneys' fees in wage and hour collective action); *Carlson v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (35.5% fee award reasonable); *In re Iowa Ready–Mix Concrete Antitrust Litig*., 2011 U.S. Dist. LEXIS 130180, at *18, 2011 WL 5547159 (N.D. Iowa Nov. 9, 2011) (awarding attorneys 36.04% of $18.5 million common fund in fees, plus separate reimbursement from settlement fund of over $900,000 in expenses); *In re Control Data Sec. Litig.*, No. 85-1341 (D. Minn. Sept. 23, 1994) (awarding 36.96% of $8 million fund).

by Class Counsel. *See, e.g., Stewart v. Rush St. Gaming, LLC*, Case No. 1:20-cv-02566, Doc. 46 (N.D. Ill.) (motion to award Class Counsel 35% of $9,800,000 fund in FLSA collective action against casino operator for tip credit and wage deduction violations); *id*. at Doc. 48 (approving settlement and awarding fees as requested); *Cruz-Perez v. Penn Nat'l Gaming, Inc.*, Case No. 20-cv-02577, Doc. 58 (N.D. Ill. Nov. 16, 2021) (awarding Class Counsel 35% of $580,000 fund in wage and hour class action against casino operator challenging wage deductions).

Finally, Class Counsel executed individual fee agreements with each Plaintiff that entitled Class Counsel to the greater of thirty-five percent of any recovery plus reimbursement of advanced expenses or their lodestar plus expenses. Ricke Decl. at ¶ 44. This further supports the fee request as reasonable given that each Plaintiff previously agreed that thirty-five percent fee was a reasonable percentage. *See, e.g., Del Toro v. Centene Management Company, LLC*, 2021 WL 1784368, at *2-4 (E.D. Mo. May 5, 2021) (awarding 35% common fund fee in wage and hour collective action where the named plaintiff agreed to a 40% contingency fee).

* * *

In sum, every factor that this Court is required to analyze supports the requested fee, which should be approved.[13]

II. CLASS COUNSEL SHOULD HAVE THEIR REASONABLY INCURRED LITIGATION EXPENSES REIMBURSED.

It is commonly recognized that lawyers for a class should have the expenses they incurred to litigate a case reimbursed from the common fund they created. As a leading treatise states:

[13] A lodestar crosscheck is "not required" in the Eighth Circuit. *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017). That said, Class Counsel has expended significant time prosecuting the classes' claims in this case. Class Counsel has spent well in excess of 2,500 hours working on this case and that number will only increase. Class Counsel expect their anticipated thirty-five percent fee to approximate and likely result in a modest negative multiplier on their lodestar by the time settlement administration concludes. That said, to the extent the Court requests Class Counsel's lodestar or timekeeping records, they will provide it *in camera*. Ricke Decl. at ¶¶ 44-46.

> An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit in contrast to the more narrowly defined rules of taxable costs of suit under Fed. R Civ. P. 54 (d) .... The prevailing view is that expenses are awarded in addition to the fee percentage.

Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing a federal court's equity power to award costs from a common fund). "Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), including: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." *Tussey*, 2019 WL 3859763, at *5 (citing Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.)); *In re BankAmerica Corp. Sec. Litig*., 228 F. Supp. 2d 1061, 1066 (E.D. Mo. 2002) (approving reimbursement to class counsel of: "expert witnesses; computerized research; court reporting services; travel expenses; copy, telephone and facsimile expenses; mediation; and class notification"); *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred—which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review are the type for which 'the paying, arms' length market' reimburses attorneys. They are properly chargeable to the Settlement."); *Anwar v. Fairfield Greenwich Ltd*., No. 09-118, 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("Plaintiffs' Counsel seek reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys.")).

Under the settlement, Class Counsel could seek up to $100,000 in expense reimbursement. *See* Doc. 139-2, Settlement Agreement at ¶ III.D. As detailed in the attached declaration, however,

Class Counsel incurred only $71,577.69 in costs and expenses related to the litigation of this matter, including filing fees, service fees, mediation fees, deposition transcript costs, shipping and copying expenses, electronic legal research fees, and the cost of the original notice plan for the certified classes and collectives, among others. Ricke Decl. at ¶¶ 47-50. These expenses are the type that hourly fee-paying clients routinely cover. Class Counsel requests that they be reimbursed from the fund. *See, e.g.*, *Tussey*, 2019 WL 3859763, at *5. The Court should thus approve Class Counsel's expense reimbursement request.

III. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.

Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867. The settlement provides that Plaintiffs may apply for a service award of $10,000 for each of the three Named Plaintiffs and $7,500 for Opt-In Plaintiff Tim Hammond to be paid from the common fund. *See* Doc. 139-2, Settlement Agreement at ¶ III.C.

Here, Named Plaintiffs Lipari-Williams, Hammond, and Layton, and Opt-In Plaintiff Tim Hammond performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the preparation of the complaint, preparing for and sitting for depositions, and reviewing the settlement agreement. Ricke Decl. ¶ 52. That work materially advanced the litigation and protected the settlement class's interests. *Id.* Indeed, their time and effort (including the important act of standing up for what they believed to be right by attaching their name to litigation against a current or former employer) made this unprecedented settlement possible. Finally, the requested service awards are consistent with other awards

approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961 (8th Cir. 2017) (approving $25,000 service awards). The Court should therefore approve the requested service awards of $10,000 for each Named Plaintiff and $7,500 for Opt-In Plaintiff Tim Hammond.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court approve the requested attorneys' fees of thirty-five percent of the settlement fund, reimbursement of litigation expenses in the amount of $71,577.69 and service awards of $10,000 to each of the three Named Plaintiffs and $7,500 to Opt-In Plaintiff Tim Hammond.

Dated: May 8, 2023

Respectfully submitted,

STUEVE SIEGEL HANSON LLP

/s/ Alexander T. Ricke

George A. Hanson, MO Bar No. 43450
Alexander T. Ricke, MO Bar No. 65132
Caleb Wagner, MO Bar No. 68458
460 Nichols Road, Suite 200
Kansas City, Missouri 64112
Telephone: (816) 714-7100
Facsimile: (816) 714-7101
hanson@stuevesiegel.com
ricke@stuevesiegel.com
wagner@stuevesiegel.com

McCLELLAND LAW FIRM, P.C.
Ryan L. McClelland, MO Bar No. 59343
Michael J. Rahmberg, MO Bar No. 66979
The Flagship Building
200 Westwoods Drive
Liberty, Missouri 64068-1170
Telephone: (816) 781-0002
Facsimile: (816) 781-1984
ryan@mcclellandlawfirm.com
mrahmberg@mcclellandlawfirm.com

CLASS COUNSEL

CERTIFICATE OF SERVICE

The undersigned certifies that on May 8, 2023, the foregoing document was filed with the Court's CM/ECF system, which served a copy of the foregoing document on all counsel of record.

/s/ *Alexander T. Ricke*

CLASS COUNSEL