

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

KIRK NELSON and JOHN EVANS, individually and on  
behalf of all other persons similarly situated,

Plaintiffs,

-v-

SABRE COMPANIES LLC and  
SABRE ENERGY SERVICES LLC,

Defendants.

1:15-cv-00314 (BKS/TWD)

**JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT**

**I. INTRODUCTION**

The Parties have reached a settlement with respect to this Fair Labor Standards Act (“FLSA”) case. The settlement was reached after a full-day mediation before Magistrate Judge Dancks near the eve of trial after three years and six months of hard-fought litigation and discovery, including 27 depositions at locations across the country, and including multiple cross-motions for summary judgment. If approved, the settlement will provide the Named Plaintiffs Kirk Nelson and John Evans and opt-in Plaintiffs with a substantial sum of any alleged unpaid overtime wages and an equal amount in liquidated damages.

**II. TERMS OF THE SETTLEMENT**

The Settlement Agreement, attached hereto as Exhibit 1, provides that, once approved, Defendants will pay \$2,100,000 in order to resolve the claims in this case. This sum will be paid into a Qualified Settlement Fund (“QSF”) in monthly equal installments of \$116,666.67 payable on the last calendar day of each month commencing on the last day of the first month following an Order approving this settlement.

The QSF will be administered by an independent and experienced third-party claims administrator, RG/2 Claims Administration LLC (“RG/2”). The QSF will be responsible for paying the costs of notice and claims administration. In addition, the QSF will pay the amount of the participating class members’ W-2 withholdings (and state/local withholdings if applicable) and any employer payroll taxes as defined in the Agreement.

### **III. LEGAL STANDARD**

“Because, under the FLSA, parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date, FLSA collective actions do not implicate the same due process concerns as Rule 23 actions.” *Hanifin v. Accurate Inventory & Calculating Serv.*, 2014 U.S. Dist. LEXIS 115710, \*14-15(N.D.N.Y. Aug. 20, 2014) (internal quotation marks and citations omitted). Therefore, the approval standard of an FLSA settlement is lower than the approval standard for a Rule 23 class action. *Id.* “Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes,” and “regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement.” *Id.*; *see also Heather Siler v. Landry's Seafood House-N.C., Inc.*, 2014 U.S. Dist. LEXIS 90088, at \*19 (S.D.N.Y. June 30, 2014) (internal citations omitted). In short, “[i]f the proposed FLSA settlement reflects a reasonable compromise over contested issues, it should be approved.” *Id.*; *see also Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 304-05 (E.D.N.Y. 2015) (setting forth approval standard for FLSA settlements).

#### **IV. ARGUMENT**

##### **A. The Settlement is a Fair and Reasonable Resolution to a Bona Fide Dispute**

###### *1. A Bona Fide Dispute Existed Between the Parties*

If Plaintiffs' allegations were ultimately correct, Sabre Companies LLC and Sabre Energy Services ("Defendants") would be faced with the prospect of a monetary judgment in favor of Named Plaintiffs Kirk Nelson and John Evans ("Named Plaintiffs") and the Opt-in Plaintiffs (collectively "Plaintiffs"). Defendants would also potentially face the obligation to pay litigation fees and costs incurred by Plaintiffs as well. If Defendants' arguments were correct, then Plaintiffs would not make a recovery, or the recovery would be substantially less than what Plaintiffs sought. The Parties on both sides were represented by able counsel throughout this litigation. Each side has substantial arguments in support of their legal position on issues such as whether Plaintiffs were properly classified as exempt, whether Plaintiffs would be able to establish a willful violation of the FLSA extending the statute of limitations from two years to three years, and the proper calculation of potential overtime damages. Accordingly, the Court should readily conclude a bona fide dispute between the Parties existed under the FLSA.

###### *2. The Proposed Settlement Is a Fair and Reasonable Compromise of the Disputed Issues*

The precise terms of the settlement agreement are filed with the Court. The settlement was the product of arm's length negotiations by experienced counsel and has the salutary effect of (1) providing substantial relief to the Plaintiffs and (2) eliminating the inherent risks both sides would bear if this complex litigation continued to resolution on the merits. Such negotiations allowed the Parties to bridge the significant gap between the Parties' settlement positions and obtain the resolution described. Under these circumstances, a presumption of fairness should attach to the proposed settlement. *See Henry v. Little Mint, Inc.*, 2014 U.S.

LEXIS 72574, at \*15 (S.D.N.Y. May 23, 2014) (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s length negotiation between experienced, capable counsel after meaningful discovery.”) (collecting cases).

The settlement agreement is also fair and reasonable because significant obstacles exist if litigation continues and the settlement provides substantial and immediate relief. “Litigation inherently involves risks.” *In re Painewebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997); *accord Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at \*6 (S.D.N.Y. June 25, 2007). “If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.” *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969).

The Parties disagree about the merits of the Plaintiffs’ claims, the viability of Defendants’ defenses, and the proper calculation of damages. Without settlement, the Parties would have engaged in extensive preparations for a multi-week jury trial on the merits of the claims and proper calculation of damages. Even if the Plaintiffs had prevailed at trial, an appeal to the Second Circuit would have likely resulted. Under such a scenario, Plaintiffs would not see any monetary relief from this case, if any, until years from now. In addition, pursuant to the September 4, 2018 settlement conference between the Parties before Magistrate Judge Dancks, Defendants provided financial data reflecting their current financial position. The amount to be paid by Defendants pursuant to the Settlement Agreement provides certainty and is commensurate with Defendants’ ability to pay. *See Velez v. Majik Cleaning Serv., Inc.*, 2007 U.S. Dist. LEXIS 46223, at \*20 (S.D.N.Y. June 25, 2007) (“Evidence that a defendant will not be able to pay a greater judgment at trial than the amount offered in settlement tends to weigh in

favor of approval of settlement[.]’”). Significantly, the Settlement Agreement brings immediate and certain benefit to the Plaintiffs.

Further, Plaintiffs believe that the amounts provided by the settlement are commensurate to and indeed in excess of comparable wage and hour settlements in the oil and gas industry. For example, the United States Department of Labor recently secured a total of \$4,500,000 in settlements for 5,300 Pennsylvania and West Virginia oil and gas workers, which works out to an average recovery of approximately \$850 per person. *See* WHD News Release dated Dec. 9, 2014, available at <http://www.dol.gov/opa/media/press/whd/WHD20141883.htm> (last accessed on October 17, 2018).

Here, Plaintiffs have obtained a settlement totaling \$2,100,000 for just 59 Plaintiffs. This is a reasonable compromise when considering the risks of the litigation. The terms of the settlement have been approved by the Named Plaintiffs, Plaintiffs’ counsel, Defendants, and Defendants’ counsel. Plaintiffs entered into the Settlement Agreement voluntarily and knowingly and understood fully that they are relinquishing their claims in this matter in exchange for the agreed upon settlement. The Parties agree that the terms of the Settlement Agreement are reasonable, fair and just, and they settle all claims in this lawsuit.

**B. The Named Plaintiffs’ Incentive Awards Should be Approved.**

Plaintiffs also seek, and Defendants do not oppose, the payment of additional service awards of \$10,000 to each of the Named Plaintiffs and \$2,000 to each of the opt-in Plaintiffs who sat for deposition. The Named Plaintiffs stepped forward to place their names on the complaint. The Named Plaintiffs were directly and regularly involved in this litigation and accepted both financial and reputational risks by commencing and supporting it. The Named Plaintiffs and opt-in Plaintiffs who were selected for discovery produced documents to describe

and confirm their claims, assisted with the review of case documents to inform litigation strategy, and responded to written discovery requests. The Named Plaintiffs also assisted in preparations for settlement negotiations and reviewed the fairness of Defendant's settlement proposals. These services will benefit all collective action members through the proposed settlement. Moreover, the Named Plaintiffs and opt-in Plaintiffs who sat for their depositions had to travel great distances to do so, and one of the Named Plaintiffs traveled from Texas to attend the mediation in Syracuse. The total of the incentives awards represents less than 2.5% of the gross settlement and is well within the range of service awards approved in the Second Circuit. *See, e.g., Hyun v. Ippudo USA Holdings*, 2016 U.S. Dist. LEXIS 39115, at \*20 (S.D.N.Y. Mar. 24, 2016) (awarding incentive payments totaling 5.0% of \$580,000.00 settlement); *Johnson v. Brennan*, 2011 U.S. Dist. LEXIS 105775, at \*7, \*61 (S.D.N.Y. Sept. 16, 2011) (awarding incentive payments totaling 9.1% of \$440,000.00 FLSA/NYLL settlement); *DeMunecas v. Bold Food, LLC*, 2010 U.S. Dist. LEXIS 87644, at \*2-3, \*26 (S.D.N.Y. Aug. 23, 2010) (awarding incentive payments totaling 3.1% of \$800,000.00 FLSA/NYLL settlement). Accordingly, the requested service awards are reasonable and should be approved.

**C. Plaintiffs' Requested Costs and Expenses Should be Approved, along with the Cost of Settlement Administration.**

“It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.” *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 (CM), 2014 U.S. Dist. LEXIS 126738, 2014 WL 4401280, at \*18 (S.D.N.Y. Sept. 4, 2014) (citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM), 2010 U.S. Dist. LEXIS 119702, 2010 WL 4537550, at \*1 (S.D.N.Y. Nov. 8, 2010)). Courts in this Circuit “normally grant expense requests in common fund cases as a matter of course” “so long as counsel's documentation of them is adequate.” *In re Sinus Buster Prods. Consumer Litig.*, No.

12-CV-2429 (ADS)(AKT), 2014 U.S. Dist. LEXIS 158415, at \*31 (E.D.N.Y. Nov. 10, 2014) (citations omitted).

Plaintiffs' Counsel respectfully request to be reimbursed for out-of-pocket expenses totaling \$120,129.88. *See* Declaration of Nicholas Migliaccio ("Migliaccio Decl."), ¶ 19; *see also* Declaration of D. Aaron Rihn ("Rihn Decl."), Declaration of Elmer Robert Keach, III ("Keach Decl."), and Declaration of Gary E. Mason ("Mason Decl."), attached hereto respectively as Exhibits 2 - 5. This litigation was undertaken on a wholly contingent basis. Migliaccio Decl., ¶ 23. From the outset, Plaintiffs' Counsel understood that it was embarking on a complex, lengthy, and expensive litigation having relatively limited prospective damages, and with no guarantee of compensation. In determining to pursue this action, Plaintiffs' Counsel was obliged to ensure that sufficient resources were dedicated to the prosecution of this litigation and that funds were available to advance out-of-pocket costs. Plaintiffs' Counsel did in fact advance these costs despite the fact that there was no assurance that the Class would recover against Defendant. Plaintiffs' counsel incurred \$120,129.88 in necessary and incidental costs to the representation of Plaintiffs. *Id.*, ¶ 26. This includes, *inter alia*, the costs of: filing and service; depositions, including retention of court reporters and transcripts from the depositions; transportation, meals and lodging; expert fees and mediation fees. *Id.* All of the costs and expenses advanced by Plaintiffs' Counsel, which have benefited all Collective Action members in this litigation, are of "type normally incurred in a complex litigation such as this one, and which are routinely approved by courts in this Circuit. *See In re Sinus Buster Prods. Consumer Litig.*, 2014 U.S. Dist. LEXIS 158415, at \*31-32 (citations omitted).

Plaintiffs' counsel has also negotiated with an independent and experienced third-party claims administrator, RG/2 Claims Administration LLC to administer the settlement and related

tax and accounting issues for a total of \$12,055. The settlement will be paid out over 18 installment payments, and the Qualified Settlement Fund will need to be held open for at least 18 months, if not longer. Multiple payments may be made to collective action members.

Accordingly, the requested expense reimbursement is reasonable and should be approved by the Court.

**D. Plaintiffs' Requested Attorneys' Fees Should be Approved.**

The FLSA mandates payment of attorneys' fees to prevailing plaintiffs. *See Santos v. Yellowstone Props., Inc.*, U.S. Dist. LEXIS 61994, at \*10 (S.D.N.Y. May 10, 2016) ("Where plaintiffs obtain a favorable settlement in an action brought pursuant to the FLSA, they constitute prevailing parties and are entitled to attorney's fees."). As part of the Settlement, the Defendants have agreed not to oppose Plaintiffs' counsel application for reasonable attorney's fees and costs. Here, Plaintiffs' counsel was successful in certifying the collective action and obtaining relief for collective action members who otherwise would not have recovered or even been aware of their entitlement to relief.

The settlement provides that Defendants will not oppose Plaintiffs counsel's request for one-third (1/3) of the gross settlement for attorneys' fees in the amount of \$700,000. As detailed below, the requested award of fees, costs, and expenses is reasonable and should be approved. The trend in this Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases such as this one. *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2003); *Reyes v. Altamarea Group*, 2011 U.S. Dist. LEXIS 115984, at \*19 (S.D.N.Y. Aug. 16, 2011). Although a court has the discretion to award attorneys' fees based on the lodestar method or the percentage-of-recovery method, *McDaniel*, 595 F.3d at 417, in wage and hour class and collective action



lawsuits, public policy favors a common fund attorneys' fee award. *Sewell v. Bovis Lend Lease LMB, Inc.*, 2012 U.S. Dist. LEXIS 53556, at \*28-29 (S.D.N.Y. Apr. 16, 2012); *Reyes*, 2011 U.S. Dist. LEXIS 115984, at \*20. Fee awards in wage and hour cases are meant to “encourage members of the bar to provide legal services to those whose wage claims might otherwise be too small to justify the retention of able, legal counsel.” *Sand v. Greenberg*, 2010 U.S. Dist. LEXIS 1120, at \*9 (S.D.N.Y. Jan. 7, 2010). The FLSA is a remedial statute, the purposes of which is served by adequately compensating attorneys who protect wage and hour rights. *Reyes*, 2011 U.S. Dist. LEXIS 115984, at \*20; *Sand*, 2010 U.S. Dist. LEXIS 1120, at \*9.

Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by “private attorneys general,” attorneys who fill the private attorney general role must be adequately compensated for their efforts. *Reyes*, 2011 U.S. Dist. LEXIS 115984, at \*20; *Sand*, 2010 U.S. Dist. LEXIS 1120, at \*9. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk. *Reyes*, 2011 U.S. Dist. LEXIS 115984, at \*20; *Sand*, 2010 U.S. Dist. LEXIS 1120, at \*9 (“But for the separate provision of legal fees, many violations of the Fair Labor Standards Act would continue unabated and uncorrected.”). Plaintiffs’ counsel’s request for one-third of the common fund is reasonable and “consistent with the norms of class litigation in this circuit.” *See, e.g., Taylor v. Delta-Sonic Car Wash Sys.*, 2017 U.S. Dist. LEXIS 14394, at \*26 n.2 (W.D.N.Y. Jan. 31, 2017) (“awarding attorney fees of one third of a settlement fund in FLSA actions has been viewed as ‘consistent with the norms of class litigation’ in the Second Circuit.”); *see also Zeltser v. Merrill Lynch & Co.*, 2014 U.S. Dist. LEXIS 135635, at \*20 (S.D.N.Y. Sept. 23, 2014) (awarding 33.3% of \$6.9 million maximum settlement); *Sewell*, 2012 U.S. Dist. LEXIS 53556, at \*36 (awarding 33.3% of \$2.35 million settlement); *Capsolas v. Pasta Res. Inc.*, 2012 U.S. Dist. LEXIS 144651,

at \*24 (S.D.N.Y. Oct. 5, 2012) (awarding 33.3% of \$5.25 million settlement); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 U.S. Dist. LEXIS 27899, at \*16 (S.D.N.Y. Mar. 31, 2009) (awarding 33% of \$3.265 million settlement); *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 U.S. Dist. LEXIS 23016, at \*15 (S.D.N.Y. Mar. 24, 2008) (same).

**E. The *Goldberger* Factors Support an Award of 33 and 1/3% of the Settlement Fund**

In *Goldberger*, the Second Circuit articulated six factors for courts to consider in determining the reasonableness of fee applications: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger v. Integrated Red.*, 209 F.3d 43, 50 (2d Cir. 2000). All of the *Goldberger* factors weigh in favor of granting approval of Plaintiffs' Counsel's fee application.

1. *Plaintiffs' Counsel Expended Significant Time and Labor*

Since Plaintiffs' counsel began its investigation and evaluation of Plaintiffs' claims, Plaintiffs' counsel has expended significant effort to achieve the \$2,100,000 settlement with Defendants. Indeed, this settlement was only reached near the eve of trial after three years and six months of hard-fought litigation and discovery, including 27 depositions at locations across the country, multiple cross-motions for summary judgment, and preparations for trial. Migliaccio Dec. ¶¶ 2 – 18; 22. In completing these tasks, Plaintiffs' counsel has expended approximately 2,359.78 litigating this matter. Plaintiffs' counsel calculated these hours using time records maintained by the attorneys that participated in this litigation. As such, this factor strongly supports the reasonableness of Plaintiffs' counsel's attorneys' fee request.

2. *The Magnitude and Complexity of the Litigation Support an Award of Plaintiffs' Counsel's Requested Attorneys' Fees*

This collective action settlement will bring final resolution to the claims of 59 individuals. Under the second *Goldberger* factor, the size and difficulty of the issues in a case are significant factors to be considered in making a fee award. *See Goldberger*, 209 F.3d at 50; *In re Prudential Sec. Inc. Ltd. P'ship. Litig.*, 912 F. Supp. 97, 100 (S.D.N.Y. 1996). Here, the size of the class and the complexity of the factual and legal questions involved further support the reasonableness of the fee award. *See Johnson*, 2011 U.S. Dist. LEXIS 105775, at \*48 (“Courts have recognized that wage and hour cases involve complex legal issues.”); *Febus v. Guardian First Funding Grp., LLC*, 870 F. Supp. 2d 337, 340 (S.D.N.Y. 2012) (“[C]ourts have recognized that FLSA cases are complex . . . .”) (quoting *Johnson*, 2011 U.S. Dist. LEXIS 105775, at \*49); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) (“FLSA claims typically involve complex mixed questions of fact and law”). Moreover, the parties heavily contested nearly every motion in this case, from Section 216(b) conditional certification notice, through multiple motions for summary judgment on the merits and damages calculations. Thus, this case presented multiple complex issues. The second *Goldberger* factor strongly supports the reasonableness of Plaintiffs' counsel's attorneys' fee request.

3. *The Risks of Litigation Support an Award of Attorney's Fees*

The risk of litigation is “perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees.” *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 374 (S.D.N.Y. 2005) (quoting *Goldberger*, 209 F.3d at 54 (internal quotation marks omitted)). The uncertainty that an ultimate recovery will be obtained is highly relevant in determining the reasonableness of an award. *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). “[D]espite the most vigorous and competent of efforts, success is never guaranteed.” *Id.* at 471.

Plaintiffs' Counsel prosecuted this action without any assurance of payment for their services, litigating this case on a wholly contingent basis in the face of tremendous risk. Large-scale wage and hour cases of this type are, by their very nature, complicated and time-consuming. Any lawyer undertaking representation of large numbers of affected employees in such actions inevitably must be prepared to make a tremendous investment of time, energy and resources. Due also to the contingent nature of the customary fee arrangement, lawyers are asked to be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee at all. Plaintiffs' Counsel stood to gain nothing in the event the case was unsuccessful, despite having advanced a very significant amount of costs and expenses in prosecuting this litigation. To date, Plaintiffs' counsel has not received any compensation for services rendered in this litigation. As such, Plaintiffs' Counsel should be awarded attorneys' fees that recognize the significant assumptions of risk associated with representing employees of relatively modest-sized companies in niche fields, where concerns over collectability are often significant. Migliaccio Decl. at ¶ 24. Given Plaintiffs' counsel's experience, Plaintiffs' counsel is realistic and understands that the outcome of a trial and inevitable appeals process are inherently uncertain in terms of outcome and duration. *Id.*

Despite these risks, Plaintiffs' counsel secured a substantial settlement that represents a significant percentage of the potential total class-wide recovery calculated by Plaintiffs' counsel. Accordingly, the third *Goldberger* factor strongly supports a finding that Plaintiffs' counsel's attorneys' fee request is reasonable.

4. *Plaintiffs' Counsel's Quality of Representation Supports Granting the Requested Fee Award*

"To determine the quality of the representation, courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Raniere v.*

*Citigroup Inc.*, 310 F.R.D. 211, 221 (S.D.N.Y. 2015) (citations omitted). Plaintiffs' counsel are experienced in wage and hour litigation and collective actions. *See* Migliaccio Decl. at ¶¶ 28-30. In this case, the results speak to the quality of the representation.

The Settlement Amount of \$2,100,000 for just 59 plaintiffs represents a good value to the Collective Action Members given the attendant risks of litigation and is commensurate with Defendants' ability to pay. The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 164, 178 (S.D.N.Y. 2000)). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Com.*, 688 F.2d 615, 628 (9th Cir. 1982); *see also Cagan v. Anchor Sav. Bank FSB*, 1990 U.S. Dist. LEXIS 11450, at \*34 (E.D.N.Y. May 2, 1990) (approving \$2.3 million class settlement where "best possible recovery would be approximately \$121 million").

Further, Plaintiffs believe that the amounts provided by the settlement are commensurate to and indeed far in excess of comparable wage and hour settlements. For example, the United States Department of Labor recently secured a total of \$4,500,000 in settlements for 5,300 Pennsylvania and West Virginia oil and gas workers, which works out to an average recovery of approximately \$850 per person. *See* WHD News Release dated Dec. 9, 2014, available at

<http://www.dol.gov/opa/media/press/whd/WHD20141883.htm> (last accessed on November 14, 2018).

As such, the Parties' agreement to the \$2,100,000 settlement amount for a collective action of only 59 plaintiffs - reached after extensive and adversarial arm's-length negotiations between the Parties, and after Plaintiffs' counsel was able to account for the relative strengths and weaknesses of the claims, and the work that would be needed to ultimately secure judgments against Defendants - was a good and substantial result. Migliaccio Decl. at ¶¶ 31-32.

Plaintiffs' counsel's skill and experience were directly responsible for the favorable settlement, which was achieved after it committed significant resources to the resolution of this matter and to promote the interests of Named Plaintiffs and Opt-ins. The diligent work performed by Plaintiffs' counsel in litigating and settling this matter demonstrates their commitment to the Collective Action Members and their interests. Denying Plaintiffs' counsel's fee request would, in effect, punish and disadvantage Plaintiffs' counsel for aggressively and efficiently litigating this case and bringing it to a highly favorable resolution.

Therefore, the fourth *Goldberger* factor strongly supports Plaintiffs' Counsel's attorneys' fee request. *See, e.g., Frank*, 228 F.R.D. at 189 (citing plaintiffs' counsel's experience as one factor supporting an attorneys' fee award of 40% of a settlement fund).

*5. The Requested Fee in Relation to the Settlement Favors granting the Requested Fee Award*

Courts also consider the size of the settlement to ensure that the percentage award does not constitute a "windfall." *See, e.g., In re Gilat Satellite Networks, Ltd.*, 2007 U.S. Dist. LEXIS 68964, at \*50 n.41 (E.D.N.Y. Sept. 18, 2007).

Plaintiffs' request \$700,000 of the settlement fund to be awarded in fees. This amount consists of one-third of the settlement fund. Courts in this Circuit have routinely granted requests

of one-third of the fund in similar cases. *See, e.g., Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (“Plaintiffs’ Counsel is requesting 33% of the \$4.9 million settlement... the requested amount is ‘consistent with the norms of class litigation in this circuit.’”); *Khait v. Whirlpool Corp.*, 2010 U.S. Dist. LEXIS 4067, at \*22 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of \$9.25 million settlement fund in FLSA and multi-state wage and hour case). Further analysis of Plaintiffs’ counsel’s expended resources and labor demonstrates that the requested attorneys’ fees are not a windfall. Thus, the fifth *Goldberger* factor strongly supports Plaintiffs’ counsel’s attorneys’ fee request.

6. *Public Policy Weighs in Favor of Granting the Requested Fee Award*

Public policy considerations weigh in favor of granting Plaintiffs’ counsel’s requested fees. In rendering awards of attorneys’ fees, “the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.” *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999).

The FLSA is a remedial statute designed to protect the wages of workers. Fair compensation for attorneys who prosecute those rights by taking on such litigation furthers the remedial purpose of those statutes. *See, e.g., Prasker v. Asia Five Eight, LLC*, 2010 U.S. Dist. LEXIS 1145, at \*17 (S.D.N.Y. Jan. 6, 2010) (“Attorneys who fill the private attorney general role must be adequately compensated for their efforts. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk.”); *Goldberger*, 209 F.3d at 51 (commending “sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.”).

Courts have recognized that fee awards in cases like this one serve the dual purposes of encouraging “private attorneys general” to seek redress for violations and discourage future misconduct of a similar nature. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Class and collective actions are also an invaluable safeguard of public rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964). Courts, therefore, look with favor upon awarding attorneys’ fees in class and collective actions that “encourage the vigilance of private attorneys general to provide corporate therapy protecting the public investor who might otherwise be victimized.” *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir. 1973). In this case, public policy considerations weigh heavily in favor of awarding Plaintiffs’ counsel’s requested fee award. Plaintiffs complain of alleged long-standing violations that affected oil and gas employees who Plaintiffs allege were generally requested to work over 100 hours per week in the weeks they were on duty. Due to the value of the individual claims at issue here, litigating these claims on a contingency fee basis is an efficient mechanism for vindicating their rights as established by the FLSA. The award of the requested fees will encourage the prosecution of similar claims and further a significant public interest goal. Therefore, the seventh *Goldberger* factor strongly supports Plaintiffs’ counsel’s attorneys’ fee request. For all of these reasons, the Court should grant Plaintiffs’ Counsel’s attorneys’ fees request.

**F. Plaintiffs’ Counsel’s Attorneys’ Fee Request is Reasonable Under a Lodestar Cross-Check.**

Courts also occasionally engage in a so-called lodestar cross-check to ensure the reasonableness of the requested fee award. *Goldberger*, 209 F.3d at 50. The lodestar analysis is performed by “multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate and totaling the amounts for all



timekeepers.” *Fleisher v. Pheonix Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at \*60 (S.D.N.Y. Sept. 9, 2015). “[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Goldberg*, 209 F.3d at 50. The court is not required to scrutinize every billing record, as reasonableness may instead “be tested by the court’s familiarity with the case.” *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) (citing *Goldberger*, 209 F.3d at 50 and *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-307). In so doing, the court may rely on summaries submitted by attorneys. *See Id.* Plaintiffs’ counsel has produced summaries here.

Here, Plaintiffs’ counsel expended 2,359.78 hours on this case, resulting a lodestar of \$1,336,121.78 using Plaintiffs’ counsel’s usual rates. *See* Migliaccio Decl., ¶ 20; *see also* Keach Decl. ¶ 3; Rihn Decl, ¶ 3; Mason Decl., ¶ 4. The geographical areas in which Plaintiffs’ Counsel practices are taken into account in determining reasonable hourly billing rates where, as here, the case calls for special expertise outside of this judicial district. *See Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany*, 522 F.3d 182, 191 (2d Cir. 2007) (“[A] district court may use an out-of-district rate...if it is clear that a reasonable, paying client would have paid those higher rates”); *Trudeau v. Bockstein*, 2008 U.S. Dist. LEXIS 61758, \*18-19 (N.D.N.Y. Aug. 7, 2008) (approving rates of out of district attorneys referencing “the extensive experience and expertise of the lawyers retained by [plaintiff] – both local and out-of-district...”).

As detailed herein, this case presented complex legal and factual issues, and for this reason, Plaintiffs’ Counsel in Washington, D.C. were retained who have extensive and special expertise in collective action wage and hour litigation. As further example of Plaintiffs’ need for representation from attorneys with specialized expertise, Defendants also did not seek counsel local to this district, and instead retained attorneys from New York City, Houston, and

Washington, D.C. Furthermore, the bulk of the time and labor committed by the Parties did not take place in the forum district, but at locations across the country. Accordingly, the Court should credit the rates consistent with the Legal Services Index-Updated Laffey Matrix for Washington, D.C. counsel's lodestar for purposes of the cross-check. *See, e.g., Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100, 116 (D.D.C. 2017) ("LSI Laffey Matrix properly reflects a reasonable, and conservative, estimate of the prevailing market rates, for complex federal litigation in the Washington, D.C. area.") (collecting authority).

"Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (collecting authority). Here, the multiplier using Plaintiffs' Counsel's regular rates will be negative multiplier of approximately .52, which certainly falls well within the range of multipliers approved in this Circuit. Even if the Court were to use local rates approved in the Northern District, *see, e.g. Deferio v. City of Syracuse*, No. 5:16-CV-361 (LEK/TWD), 2018 U.S. Dist. LEXIS 103596, at \*8 (N.D.N.Y. June 21, 2018) (noting that rates of \$350 have been approved) and *Rodriguez v. Berryhill*, Civil Action No. 5:15-CV-1000 (DEP), 2017 U.S. Dist. LEXIS 105803, at \*7-8 (N.D.N.Y. July 10, 2017) (noting rates of between \$400 and \$700 have been approved in contingency cases), the multiplier would still be still be a negative multiplier of approximately .75, and would still be within the range of multipliers approved in this Circuit.

In addition, in Plaintiffs' Counsel's experience, administering settlements of this nature and size requires ongoing commitment. For example, Collective Action members have already had questions regarding the Settlement, and, based upon experience, such calls will continue through and beyond the 18-month period during which the settlement will be funded. Migliaccio

Decl. ¶ 25. There will, in addition, also be time spent overseeing the finalization of the claims process with the Claims Administrator. *Id.*

Plaintiffs' Counsel respectfully suggest that the counsel fee requested is reasonable in light of the time and labor expended, the magnitude of the litigation, the risks taken in the litigation, the monetary results achieved for the class, and the amount of the fee in proportion to the monetary settlement achieved.

## **V. CONCLUSION**

The Parties and their counsel agree that the Agreement is a reasonable compromise of the claims alleged by the Plaintiffs in light of the procedural posture of the case, the litigations risks, and the costs applicable to both sides. The Parties engaged in arm's-length settlement negotiations after discovery and years of hard-fought litigation. Because the Agreement is a reasonable compromise and adequately compensates the participants for all the alleged unpaid overtime hours by the Plaintiffs, the Parties seek entry of the enclosed Agreed Order of Approval.

Respectfully submitted,

Dated: November 30, 2018

**Counsel for Plaintiffs:**

/s/ Nicholas A. Migliaccio

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**Counsel for Defendants:**

/s/ Thomas J. McCormack

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*Attorneys for Defendants Sabre Companies  
LLC and Sabre Energy Services LLC*

**CERTIFICATE OF SERVICE**

On November 30, 2018, the foregoing was served on all parties via the Court's ECF system.

/s/ Nicholas A. Migliaccio

Nicholas A. Migliaccio

## SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Settlement Agreement and Release of All Claims (“**Agreement**”) is made and entered into by Kirk Nelson and John Evans (“**Named Plaintiffs**”), on behalf of themselves and on behalf of all other Opt-in Plaintiffs who have filed their Consents to join this lawsuit (collectively “**Opt-in Plaintiffs**”) on the one hand, and Defendants Sabre Companies LLC and Sabre Energy Services LLC (the “**Defendants**”) on the other hand. Collectively the Named Plaintiffs and the Opt-in Plaintiffs shall be referred to as “**Plaintiffs**.” The Named Plaintiffs, Opt-in Plaintiffs, and the Defendants shall be referred to jointly as the “**Parties**” and singularly as “**Party**.”

**WHEREAS**, the Named Plaintiffs have brought a civil collective action against the Defendants, captioned, *Kirk Nelson, Individually and on behalf Others Similarly Situated v. Sabre Companies LLC and Sabre Energy Services LLC*, No. 1:15-cv-00314, filed in the Northern District of New York (the “**Lawsuit**”), alleging violations of the Fair Labor Standards Act (29 USC §§ 201 et. seq., hereinafter “**FLSA**”) and Arkansas Minimum Wage Act (Ark. Code § 11-4-218 “**AMWA**”);

**WHEREAS**, the Named Plaintiffs, through their counsels, Elmer R. Keach, III, Maria Dyson, Law Offices of Elmer Robert Keach, III, P.C., One Pine West Plaza – Suite 109, Albany, NY 12205; Nicholas A. Migliaccio, Jason S. Rathod, Migliaccio & Rathod LLP, 412 H Street NE, Suite 302, Washington, DC 20002; Daniel A. Rihn, Robert Peirce Associates PC, 707 Grant Street, Suite 2500 Pittsburgh, PA 15219; Danielle L. Perry, Gary E. Mason, Whitfield, Bryson Law Firm, 5101 Wisconsin Avenue, NW – Suite 305, Washington, DC 20016, filed claims asserted in the Lawsuit pursuant to the FLSA and AMWA on behalf of themselves and other persons who either currently or formerly work/worked for the Defendants;

**WHEREAS**, the Parties agree that there are bona fide disputes between them with respect to (a) the legal entitlement to the amounts claimed in the Lawsuit; and (b) the facts that are the basis for the allegations made in the Lawsuit;

**WHEREAS**, the Defendants deny that they have committed any wrongdoing or violated any state or federal law pertaining to the payment of wages and has defended the claims asserted in the Lawsuit;

**WHEREAS**, the Parties, in view of the costs, risks, and delays of continued litigation and appeals balanced against the benefits of settlement believe that the settlement as provided in this Agreement is in each of their best interests, and counsel for Plaintiffs specifically and separately agree that the settlement as provided in this Agreement is in the best interests of the Plaintiffs and is a fair, reasonable, and adequate resolution of the Lawsuit;

**WHEREAS**, the Parties desire and intend to seek Court approval of the settlement of the Lawsuit as set forth in Section 1 of this Agreement and to seek an entry of final dismissal from the Court, dismissing with prejudice the claims of the Plaintiffs as set forth herein;

**NOW, THEREFORE**, in consideration of the covenants and mutual promises and agreements herein contained, and other valuable consideration, the sufficiency of which is

hereby acknowledged, the Parties agree to terminate past, present, and potential controversies between the Parties to the extent stated in greater detail below, and covenant and agree as follows:

**1. Approval of Settlement:** All terms of this Agreement are contingent upon the approval of the Court, and this Agreement is entered into voluntarily by the Parties for settlement purposes only.

a. The Parties agree to cooperate and present to the Court, if necessary, for its consideration in connection with the approval of the Agreement competent evidence as may be requested by the Court subject to the appropriate standards for approving a settlement under the FLSA.

b. The Parties and their counsel will, contemporaneously with their execution of this Agreement, execute a Joint Motion for Final Approval of Settlement to be filed with the Court, seeking final approval of their proposed settlement, as set forth in this Agreement.

**2. Settlement Approval Procedure:** This Agreement will become final and effective upon occurrence of all of the following events:

a. Entry of an Order by the Court granting approval of this settlement;

b. Execution of this Agreement by the Named Plaintiffs, the Defendants, and their respective counsel of record;

c. Entry of an Order dismissing the case with prejudice;

d. The Defendants shall tender to the Settlement Fund the \$2,100,000 in 18 monthly equal installments of \$116,666.67 payable on the last calendar day of each month commencing on the last day of the first month following an Order approving this settlement which will cover the payments specified in Section 4.

**3. Effect of Non-Approval:** In the event that any of the conditions specified in this Agreement are not satisfied, or in the event that this Agreement does not obtain approval of the Court for any reason, all matters covered by the Agreement, shall, for all purposes, be null and void. In such event, nothing in this Agreement shall be used or construed by or against any Party as a determination, admission, or concession of any issue of law or fact in the Lawsuit and the Parties do not waive, and instead expressly reserve their respective and all rights with respect to the prosecution and defense of the Lawsuit as if the Agreement never existed. If voided, the Parties further agree to extend any necessary deadlines in the Lawsuit, or where necessary, request the Court to do so.

**4. Settlement Sum and Allocation:** The Plaintiffs and their counsel will have the right to, as consideration for the settlement of this Lawsuit, **TWO MILLION ONE HUNDRED THOUSAND DOLLARS AND ZERO CENTS (\$2,100,000)** (the “**Settlement Payment**”). The Settlement Payment shall be divided as follows:

- a. Attorneys' Fees: \$700,000;
- b. Costs and Expenses: \$ 120,129.88;
- c. Administration: \$12,055;
- d. Named Plaintiff Kirk Nelson: \$10,000;
- e. Named Plaintiff John Evans: \$10,000;
- f. Opt-in Plaintiffs who provided deposition: \$2,000 each;
- g. The remaining \$1,215,815.12 will be divided among all Plaintiffs according to settlement payment amounts provided by Plaintiffs' Counsel to the Settlement Administrator as described in Section 6 of this agreement.

**5. Release.**

**a. Mutual General Release by Named Plaintiffs Only:** In exchange for the considerations recited in Section 4 of this Agreement, the Named Plaintiffs and Defendants do hereby and forever mutually release, acquit, and discharge each other, which includes their attorneys and past, present, and future divisions, affiliates, predecessors, successors, shareholders, officers, directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns, subrogees, executors, partners, parents, subsidiaries, and privies from any and all claims, causes of action, demands, debts, obligations, damages, or liability of any nature whatsoever, known or unknown, that were alleged, could have been alleged, may be based in whole or in part upon, do or may arise out of, or are or may be related to or in any way connected with the services he provided to Defendants as well as the claims or the facts, matters, transactions, or occurrences referred to in the lawsuit captioned, *Kirk Nelson, Individually and on behalf Others Similarly Situated v. Sabre Companies LLC and Sabre Energy Services LLC*, No. 1:15-cv-00314, filed in the Northern District of New York and any other claims under the FLSA, under the AMWA, and all other local, state, or federal laws relating to wage and hour compensation up to the execution of this Agreement, including, but not limited to, alleged claims of unpaid wages and all derivative claims under the Employee Retirement and Income Security Act, 29 U.S.C. §§ 201, et. seq. arising or accruing prior to September 4, 2018. All such claims, if any and including any and all claims for attorneys' fees, costs, expenses and the like, are hereby compromised, settled, and extinguished in their entirety.

**b. Release As To All Opt-in Plaintiffs:** In exchange for the considerations recited in Section 4 of this Agreement, each Opt-in Plaintiff who filed a consent form in this case does hereby and forever release, acquit, and discharge the Defendants, which includes its attorneys and past, present, and future divisions, affiliates, predecessors, successors, shareholders, officers, directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns, subrogees, executors, partners, parents, subsidiaries, and privies from any and all wage and



hour claims, causes of actions, demands, debts, obligations, damages or liability, known or unknown, which concern or relate in any way to the payment of wages or bonuses or any other form of compensation under the FLSA, AMWA, or any other federal, state or local wage-and-hour law and any and all claims for retaliation under the FLSA or state wage-and-hour statutes, whether those claims exist, or allegedly exist, at law or in equity under the common law, contract law, statutory law, the Fair Labor Standards Act, 29 U.S.C. §§201, et seq., and state wage laws, as well as any and all derivative claims under the Employee Retirement Income Security Act, 29 U.S.C. §§201, et seq. arising or accruing prior to September 4, 2018. The released claims are intended to include any and all claims that were raised in the Lawsuit, and any and all claims for attorneys' fees, costs, and expenses and the like, including but not limited to, any claims for attorneys' fees related to services rendered by the Plaintiffs' counsel of record in the Action and/or any other counsel who has provided services to the Plaintiffs.

**6. Settlement Administration:** A Settlement Fund will be established with a Settlement Administrator selected by Plaintiffs who will be responsible for: researching and updating addresses through skip-traces and similar means; reporting on the status of the administration of the Settlement to the Parties; resolving any settlement payment dispute, in concert with the counsel for the Parties; providing the Parties with all necessary data; setting up, administering and making payments from the settlement fund; distributing settlement payments and withholding therefrom the Opt-in Plaintiffs' share of payroll taxes and remitting such funds to the appropriate taxing authorities, along with any associated tax reporting, return and filing requirements, and performing such additional duties as the Parties may mutually direct. All disputes relating to the Settlement Administrator's performance of its duties shall be referred to the Court, if necessary, which will have continuing jurisdiction over the terms and conditions of this Settlement until all payments and obligations contemplated by this Settlement have been fully carried out. The administration costs will be paid from the Settlement Payment Amount, and shall include all costs necessary to administer the Settlement. The actions of the settlement administrator shall be governed by the terms of the Settlement Agreement. Defendants will provide Class Counsel and the settlement administrator with, as to each Opt-in Plaintiff: 1) name; 2) last known home address; 3) last known personal email address; 4) social security number; and 5) last known telephone number. Plaintiffs' Counsel will provide to the Settlement Administrator the settlement payment for each Opt-in Plaintiff.

The total administrative costs of the Settlement Administrator, including payment for all services and mailings, shall be paid from the Gross Settlement Amount. The Administrator shall: (a) set up and administer a qualified settlement fund to disburse settlement payments ("Settlement Fund"); (b) distribute all settlement checks; (c) address questions from Settlement Plaintiffs; (d) prepare and mail all necessary IRS W-2 and 1099 forms; (e) calculate the employer's share of payroll taxes to the appropriate federal, state and local taxing authorities; (f) collect and timely remit withholdings and the employer's share of payroll taxes to the appropriate federal, state and local taxing authorities; and (g) perform any other duties necessary to effectuate the Agreement.

**7. Settlement Payment Procedure and Individual Release:**

- a. Defendants shall deposit the \$2,100,000 in 18 monthly equal installments of \$116,666.67 payable on the last calendar day of each month commencing on the last day of the first month following an Order approving this settlement. Upon deposit, the Settlement Administrator shall be immediately authorized to distribute the amount based on a method to be determined by Plaintiffs' Counsel. Defendants' consent to the allocation method shall not be unreasonably withheld. The computation of the payments to Collective Action Members will be based on data provided by Defendants. Defendants represent and warrant that to the best of its knowledge and belief, the data supplied accurately reflects the dates of employment and compensation paid to the Collective Action Members. The distribution method shall be subject to the following limitations. The Settlement Administrator shall distribute settlement award checks to all Opt-in Plaintiffs with a release on the back of the check. The release will state: "Receipt of this check is a full and final release." If an Opt-in Plaintiff does not negotiate their check within 180 days of mailing, the amount shall remain in the Settlement Fund for discretionary use by the Parties for the next 90 days, including to pay individuals who are not part of the settlement but who have made allegations of the same kind as those that the settlement claimants have. After the 90 days has passed, all amounts remaining in the Settlement Fund will revert back to Defendants.
- b. For avoidance of doubt, upon the court approval of this settlement, there is a full and final settlement of all claims referenced in Section 5 of this Agreement for all Plaintiffs (Named and Opt-in Plaintiffs) regardless of whether or not a plaintiff cashes his settlement check or signs any of the other settlement documentation.

#### **8. Tax Issues and Indemnification:**

For income and payroll tax purposes, the Parties agree that 50% of each Collective Action Member's settlement payment shall be allocated as wages (which shall be subject to required withholdings and deductions and reported as wage income as required by law), and the remaining 50% of each settlement payment shall be allocated as penalties, interest and other non-wage recovery (which shall not be subject to required withholdings and deductions and shall be reported as non-wage income as required by law). Other than the withholding and reporting requirements herein, Collective Action Members shall be solely responsible for the reporting and payment of their share of any federal, state and/or local income or other taxes on payments received under this Settlement. Defendants will be responsible for the employer's share of payroll taxes. The settlement administrator will provide an IRS Form 1099 for the service payments.

Each Plaintiff releases the Defendants from, and agrees to assume full responsibility to, any federal, state or local taxing authorities for any tax consequences of the Defendants under this Agreement except for proper withholding and payment of employment taxes. **EACH PLAINTIFF COVENANTS AND AGREES TO INDEMNIFY AND HOLD HARMLESS**

**THE DEFENDANTS FROM AND AGAINST ANY TAXES, FINES, PENALTIES, INTEREST, SUITS, CLAIMS, DEMANDS, LIENS, PROCEEDINGS, AND ANY OTHER LIABILITY ARISING OUT OF SUCH TAX CONSEQUENCES.** Each Plaintiff acknowledges and agrees that the Defendants and its legal counsel have made no representations regarding the proper tax treatment of the payments set forth in Sections 4 and 7 of this Agreement.

**9. Terms of Settlement and Representation by Counsel:** As a result of the arm's-length negotiations, a settlement of the issues raised in this action was reached as memorialized herein in this Agreement. All of the Parties acknowledge that they have been appropriately and adequately represented by counsel throughout all negotiations which preceded the execution of this Agreement and that this Agreement has been executed with the consent and the advice of such counsel.

**10. Nonadmission:** The Parties acknowledge and agree that liability for the actions which are the subject matter of this Agreement is disputed by the Parties. The Parties agree that this Agreement represents a fair and reasonable settlement of this bona fide dispute as to the facts and the law that apply to this matter. This Agreement and the settlement are a compromise and shall not be construed as an admission of liability at any time or for any purpose, under any circumstances, by the Parties to this Agreement. The Parties further acknowledge and agree that this Agreement, the settlement, and any part of the negotiations shall not be used to suggest an admission of liability in any dispute the Parties may have now or in the future with respect to any person or entity.

**11. Modification of Agreement:** This agreement must be approved in its entirety and without modifications to be effective. This Agreement may not be modified or amended except in writing, signed by the respective counsel of record for the Parties.

**12. Further Cooperation:** The Parties and their respective counsel shall proceed diligently to prepare and execute all documents, to seek the necessary Court approval(s), and to do all things reasonably necessary or convenient to consummate the Agreement and settlement as expeditiously as possible.

**13. Entire Agreement:** This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements and understandings, oral or written, relating to the subject matter of this Agreement. Except as expressly provided herein, this Agreement has not been executed in reliance upon any other oral or written representations or terms. This Agreement shall not be modified, amended or terminated unless such modification, amendment or termination is executed as required by Section 11 above.

**14. Construction:** This Agreement shall be construed as a whole according to its fair meaning and intent, and not strictly for or against any Party, regardless of who drafted or who was principally responsible for drafting this Agreement, or any specific term or condition thereof. The Plaintiffs and the Defendants participated in the negotiation and drafting of this Agreement and had available to them the advice and assistance of independent counsel. As such, neither the Plaintiffs nor the Defendants may claim that any ambiguity in this Agreement should be construed against the other.

**15. Enforcement:** This Agreement shall be subject to, governed by, construed, enforced, and administered in accordance with the laws of the State of New York, both in its procedural and substantive aspects, and without regard for the principle of conflict of laws, or, in the event the choice of New York law is deemed inapplicable, in accordance with U.S. federal law. The application of the laws of the State of New York, or U.S. federal law if New York law is deemed inapplicable, shall exclude in all cases any choice of law or conflict of law rules or provisions (whether of the State of New York or any other jurisdiction) that may direct or would cause the application of the laws of any other state, country or jurisdiction.

**16. Continuing Jurisdiction:** The United States District Court for the Northern District of New York will have continuing jurisdiction to hear and adjudicate the issues of law and facts asserted in the Lawsuit until a final order of dismissal is signed by this Court.

**17. Execution of Agreement:** The Parties agree that this Agreement shall be executed in multiple original counterparts, each having the same force and effect as if all Parties executed a single instrument. Facsimile, Portable Document Format (pdf) or other electronic signature shall be considered valid signatures. Delivery of an executed signature page of this Agreement by facsimile, pdf or other electronic means shall be as effective as delivery of a manually executed counterpart hereof.

**NAMED PLAINTIFFS**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Kirk Nelson

\_\_\_\_\_  
Date

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
John Evans

\_\_\_\_\_  
Date

**DEFENDANTS:**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Steven D. Oesterle  
Sabre Energy Services LLC, Sabre Companies LLC

\_\_\_\_\_  
Date


**APPROVED AS TO FORM BY:**

\_\_\_\_\_  
Nicholas A. Migliaccio  
Attorney for Plaintiffs

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Seth Kruglak

Attorney for Defendants

  
\_\_\_\_\_  
Date

**NAMED PLAINTIFFS**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Kirk Nelson

\_\_\_\_\_  
Date

**ACCEPTED AND AGREED:**

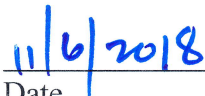
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John Evans

\_\_\_\_\_  
Date

**DEFENDANTS:**

**ACCEPTED AND AGREED:**

  
\_\_\_\_\_  
Steven D. Oesterle  
Sabre Energy Services LLC, Sabre Companies LLC

  
\_\_\_\_\_  
Date

**APPROVED AS TO FORM BY:**

\_\_\_\_\_  
Nicholas A. Migliaccio  
Attorney for Plaintiffs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Seth Kruglak  
Attorney for Defendants

\_\_\_\_\_  
Date

**NAMED PLAINTIFFS**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Kirk Nelson

*Kirk Nelson*

\_\_\_\_\_  
11/13/2018

Date

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
John Evans

\_\_\_\_\_  
Date

**DEFENDANTS:**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Steven D. Oesterle  
Sabre Energy Services LLC, Sabre Companies LLC

\_\_\_\_\_  
Date

**APPROVED AS TO FORM BY:**

\_\_\_\_\_  
Nicholas A. Migliaccio  
Attorney for Plaintiffs

\_\_\_\_\_  
Date

\_\_\_\_\_  
Seth Kruglak  
Attorney for Defendants

\_\_\_\_\_  
Date

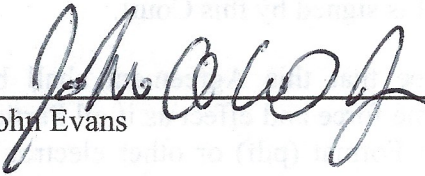
**NAMED PLAINTIFFS**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Kirk Nelson

\_\_\_\_\_  
Date

**ACCEPTED AND AGREED:**

  
\_\_\_\_\_  
John Evans

11-7-2018  
Date


**DEFENDANTS:**

**ACCEPTED AND AGREED:**

\_\_\_\_\_  
Steven D. Oesterle  
Sabre Energy Services LLC, Sabre Companies LLC

\_\_\_\_\_  
Date

**APPROVED AS TO FORM BY:**

  
\_\_\_\_\_  
Nicholas A. Migliaccio  
Attorney for Plaintiffs

11-7-2018  
Date

\_\_\_\_\_  
Seth Kruglak  
Attorney for Defendants

\_\_\_\_\_  
Date



**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

KIRK NELSON and JOHN EVANS, individually and on  
behalf of all other persons similarly situated,

Plaintiffs,

-v-

SABRE COMPANIES LLC and  
SABRE ENERGY SERVICES LLC,

Defendants.

1:15-cv-00314 (BKS/TWD)

**DECLARATION OF NICHOLAS A. MIGLIACCIO IN SUPPORT OF  
THE JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT**

I, Nicholas A. Migliaccio, make the following declaration based on my personal knowledge of the facts contained herein and, if called as a witness, could competently testify to such facts.

1. I, with co-counsel, represent the Plaintiffs and the Collective as putative Settlement Counsel. I am fully familiar with the facts and circumstances set forth herein, and I submit this Declaration in Support of the parties' Joint Motion to Approve Settlement Agreement .

2. Plaintiffs filed their original Complaint on March 18, 2015, alleging violations of the Fair Labor Standards Act of 1938 ("FLSA") on behalf of employees of Defendants Sabre Companies LLC and Sabre Energy Services LLC (collectively "Defendant" or "Sabre"), who worked in the field, performing on-site water treatment for Sabre and its customers. On August 28, 2015, the Plaintiffs moved for leave to amend the complaint to add claims under Arkansas state law.

3. Pursuant to an agreed scheduling order, the parties initially engaged in first-phase conditional certification discovery, in which the Plaintiffs served interrogatories and document

requests, and took three depositions of Sabre's corporate witnesses, including two Rule 30(b)(6) witnesses. During this time, Sabre also took the depositions of the two named Plaintiffs in Albany, NY.

4. On November 10, 2015, the Plaintiffs moved for conditional certification, which Sabre opposed.

5. On November 12, 2015, the Parties participated in a full-day mediation before Hunter Hughes in Atlanta, Georgia, which did not result in settlement.

6. On September 30, 2016, the Court granted Plaintiffs motion for conditional certification, and also granted a toll for the period of time during which the motion was pending.

7. The Plaintiffs thereafter disseminated notice to the putative collective action members, and 58 opt-in Plaintiffs joined this lawsuit.

8. After the close of the opt-in period the Court again instructed the parties to explore settlement. The parties did so over the course of several months, but efforts were again unfruitful.

9. After the close of the opt-in period, the parties disagreed on the scope of opt-in discovery. The parties briefed their dispute, and the Court ultimately ruled in favor of the Plaintiffs in limiting written discovery and depositions to a sample of 16 opt-ins. The parties agreed depositions would be limited to a representative sample of 16 opt-in Plaintiffs – with each party selecting eight – and that only the Named Plaintiffs and the deposed plaintiffs would testify at trial.

10. The parties thereafter exchanged written discovery for all 16 opt-ins, and all 16 opt-ins responded to the discovery requests.

11. Plaintiffs served additional discovery requests upon Defendants, including for

electronically stored information (“ESI”). After significant negotiations on the parameters to be used for ESI searches, including search terms and custodians, Defendants produced approximately 20,000 pages of additional documents which Plaintiffs reviewed. Plaintiffs later relied on many of these documents in depositions and in briefing.

12. Defendants noticed the depositions of all 16 opt-ins in the sample, and all 16 opt-ins appeared for their depositions. The depositions took place at various locations across the country including Houston, TX, Odessa, TX, Little Rock, AR, and Auburn, AL.

13. Plaintiffs took an additional six depositions of other current and former employees of Defendants. These depositions took place at various locations in Arkansas and Texas.

14. In total, Plaintiffs took or defended 27 depositions in this action at locations across the country.

15. All told, Defendants produced approximately tens of thousands of pages of documents in first and second phase discovery, including personnel files and driving logs for the sample, corporate documents and emails relating to Defendants’ pay methodology, and payroll records for the FLSA collective members.

16. During the applicable time period, Defendants paid its operators an annual salary and scheduled them predominantly on two-week on and two-week off rotation. The rotation did not necessarily correspond with Defendants’ workweek, and Defendant was unable to produce a large portion of its pay records in a native form. In addition to its inherent complexity, Sabre’s payroll data contained data challenges because Sabre changed computerized payroll providers during the applicable time period. Plaintiffs therefore hired accounting firm Citrin Cooperman to help tabulate and summarize Sabre’s payroll records. Plaintiffs spent a great deal of time, money,

and effort to understand Sabre's payroll records, and to create a viable damages model.

17. After the close of discovery, with the record well-developed on all aspects of the case, the Parties filed a fusillade of motions, including cross-motions for summary judgment on damages, and Plaintiffs' motion for summary judgment on liability defenses. The briefs raised intricate and contested issues of law. During the course of briefing, Defendants dropped three of their overtime exemption defenses.

18. The Court largely denied the parties' cross-motions for summary judgment, and Plaintiff's motion for summary judgment on the exemption defenses. Thereafter, Plaintiffs also moved to compel, which was granted, forcing Defendant to withdraw their good faith defense. After that, Plaintiffs began to prepare for trial, including by preparing an exhibit list, witness list, motions *in limine*, and jury instructions.

19. Plaintiffs' Counsel ask the Court to approve payment of (1) an award of attorneys' fees in the amount of \$700,000 (one-third of the Settlement); (2) reimbursement of Plaintiffs' Counsel's reasonable out-of-pocket costs and expenses in the amount of \$120,129.88; and (3) a service enhancement award payments in the amount of \$10,000 to the Named Plaintiffs Kirk Nelson and John Evans, and service enhancement award payments of \$2,000 to Plaintiffs who were deposed, , all of which Defendant does not oppose.

20. With respect to the attorneys' fee request for one-third of the Settlement amount, the total number of hours spent on this litigation so far by the three firms who are Plaintiffs' Counsel has been 2,359.78 hours of lawyer and legal assistant time, consisting of 1,183.83 hours by Migliaccio & Rathod LLP, for a lodestar of \$819,971.78; 709.5 hours by Robert Peirce & Associates, P.C. for a lodestar of \$295,990; 253.7 hours by the Law Offices of Elmer Robert Keach III, P.C., and Robert Peirce & Associates, P.C. for a lodestar of \$135,685; 212.75 hours

by Whitfield Bryson & Mason LLP for a lodestar of \$84,475.00. The total lodestar for all the firms is \$1,336,121.78. The time this reflects was time actually spent, in the exercise of reasonable judgment by the lawyers and staff involved and detailed time records of my firm and co-counsel, which are available for *in camera* submission to the Court upon request. A summary of my firm's hours is below, and each firm has submitted declarations detailing a summary of their respective hours:

Timekeeper	Hourly Rate	Hours Worked	Lodestar
Nicholas A. Migliaccio (partner)	\$742	650.75	\$482,856.50
Jason S. Rathod (partner)	\$658	500	329,000.00
Erick Quezada (associate)	\$371	8.48	3,146.08
Bruno Ortega (legal assistant)	\$202	24.60	\$4,969.20
Migliaccio & Rathod LLP Totals		1,183.83	\$819,971.78

21. My firm uses the Legal Services Index-Updated Laffey Matrix for its rates, and courts have overwhelmingly adopted the Laffey Matrix as the most equitable way to determine appropriate legal fees for fee petitions against both public- and private-sector defendants in the Washington-Baltimore area. *See, e.g., Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100, 116 (D.D.C. 2017) (“LSI Laffey Matrix properly reflects a reasonable, and conservative, estimate of the prevailing market rates, for complex federal litigation in the Washington, D.C. area.”) (collecting authority). This Court should credit counsel’s Washington D.C. rates because Washington, D.C. counsel were hired into the case for their extensive experience in, and in-depth knowledge of, litigating collective wage and hour cases that are in national in scope. A copy of

my firm's resume is attached hereto as Ex. A.

22. The work performed for these rates includes, but is not limited to: (1) investigating the facts and law relating to Plaintiffs' claims, and those of the putative collective, before initiating this action; (2) drafting a well-pleaded Complaint and Amended Complaint; (3) meeting and conferring with Defendants' counsel at the start of the case pursuant to Rule 26(f), and assisting in preparing a Rule 26(f) Report to the Court; (4) engaging in significant discovery related to conditional certification of this case as a collective action, including in relation to taking depositions of three of Defendant's corporate representatives and defending the deposition of the two named Plaintiffs; (5) sharing with co-counsel in the briefing of, and prevailing on, a motion for conditional certification; (6) assisting with the drafting of collective action notice, and communicating with collective action members about their claims; (7) crafting, with Defendant, a discovery plan for the merits and final certification phase of discovery; (8) briefing, and succeeding on, a sampling plan for conducting discovery as to a representative sample of 16 collective action members, which Defendant opposed; (9) crafting extensive, but targeted, discovery requests; (10) negotiating an ESI protocol as well as search terms and custodians over several months; (11) reviewing thousands of documents produced by Defendants in this case; (12) serving a Rule 30(b)(6) notice and four deposition notices for individual corporate witnesses, and taking each deposition; (13) producing full responses to document requests for 16 collective action members who were chosen as the representative sample; (14) defending the depositions of the 16 collective action members who were chosen as the representative sample; (15) working with an expert certified public accountant to analyze and tabulate Defendants' payroll records when confronted with a complex pay methodology containing data challenges; (16) preparing lengthy mediation statements; (17) attending two full days of mediation; (18) drafting and responding to multiple

motions for summary judgment, which resulted in Defendants withdrawing three of their exemption defenses; (19) briefing a letter motion to compel, which was granted, resulting in Defendant withdrawing its good faith defense; (20) preparing an exhibit list, witness list, motions *in limine*, and jury instructions; (21) negotiating the details of a comprehensive Settlement Agreement over a period of over six months and drafting the Settlement Agreement; (22) preparing a motion for approval of the Settlement; (23) creating and reviewing the language and content of the case website; and (24) communicating with Collective Action members throughout the litigation.

23. The work undertaken represents the work addressed above in connection with the investigation and filing of the lawsuit, the work undertaken in conjunction with the discovery of the case and the work involved in negotiating and effectuating the Settlement and is detailed in the time records. Each of the firms involved in the case had expertise and knowledge with respect to aspects of the litigation, including extensive and successful records in class action and wage hour litigation, as is set forth below. This enabled us to prosecute the case efficiently despite the fact that this case involved complex issues. We also communicated regularly so as to ensure that there was not unnecessary time incurred, nor duplication of effort. All of this time was expended on a contingency fee basis in a difficult and unsettled area of the law.

24. Plaintiffs' Counsel's request for payment of fees in the amount of \$700,000 represents a negative multiplier of .52. Given the risk presented by this litigation and the results obtained, a negative multiplier, which represents a negative enhancement, is decidedly reasonable.

25. Finally, based on our experience, we also expect that there will be not insignificant time spent in the future administering the Settlement, resolving issues with the

Settlement Administrator and Defendants' counsel, and speaking with Collective Action members about the administration and the Settlement, including numerous telephone calls and correspondence from Collective Action members in the coming months wanting to know about the status of the settlement, to ask where their checks are, to inquire why they were not paid (usually because they failed to submit the claims forms or failed to submit them properly or timely), to request reissued checks, and so forth. There will, in addition, also be time spent overseeing the finalization of the claims process through RG/2. Based upon experience, such time could easily run to hundreds of hours.

26. As to reimbursement of litigation expenses, Plaintiffs' Counsel requests reimbursement in the total amount of \$120,129.88, which are the unreimbursed costs and expenses incurred in connection with the prosecution of this litigation. My firm has incurred \$38,359.70, as detailed in the chart below, and our co-counsel from Robert Peirce & Associates, P.C., Law Offices of Elmer Robert Keach III, P.C., and Whitfield Bryson & Mason LLP, have respectively incurred \$61,877.20, \$13,143.77, and \$6,749.21 in unreimbursed costs and expenses as detailed in their respective declarations.

Migliaccio & Rathod LLP

Deposition Transcripts	\$4,871.85
Notice Expense	\$2,400
Expert / Professional Services	\$16,083.00
Travel, Mileage, Transp., Meals	\$14,846.65
Copies	\$27.90
Postage/Express Mail/Messenger/Similar	\$130.30
<b>Migliaccio &amp; Rathod LLP TOTAL</b>	<b>\$38,359.70</b>



27. The expenses incurred in the prosecution of this case are reflected on the books and records of my firm and other Plaintiffs' Counsel, which are available for submission to the Court upon request. These books and records are prepared from expense vouchers, receipts, and check records, and are accurate regarding all the expenses incurred. These expense items are not duplicated in our time or billing rates. As to these expenses, which constitute hard, out-of-pocket monetary expenses from the beginning of the case, we were aware that we might not recover any of these expenses, and, at the very least, would not recover anything until the litigation was successfully resolved.

28. With respect to the standing of counsel in this case, my firm has extensive experience in wage and hour litigation. This includes serving on the trial team in *Stillman v. Staples, Inc.*, 07-cv-849 (D.N.J.), in which, after a six-week jury trial, a unanimous jury returned a verdict for almost \$2.5 million against Staples on behalf of 342 current or former Staples "sales managers" for unpaid overtime under the FLSA. After the verdict, I played a central role in the nearly one dozen wage and hour cases against Staples that were consolidated into a single multidistrict litigation, *In re: Staples, Inc., Employment Practices Wage & Hour Litigation*, MDL No. 2025 (D.N.J.), which later settled for \$42 million.

29. My partner Jason Rathod and I also recently served as co-counsel in *Snodgrass v. Bob Evans*, Civil No. 12-cv-768 (S.D. Ohio), which involved class and collective action claims brought on behalf of assistant managers against Bob Evans. After extensive litigation, the *Snodgrass* action settled on a collective and class-wide basis for \$16.5 million. In issuing the order granting final approval, the court took special note of the "competence of class counsel in prosecuting this complex litigation, and the risks associated with the prosecution of the claims of

the settlement class.”

30. My partner Jason Rathod and I additionally recently served as co-counsel along with D. Aaron Rihn and Gary Mason in *Bland v. Calfrac*, Civil No. 2:12-cv-1407 (W.D. Pa.), which involved class and collective action claims brought on behalf of field operators who worked in the oil and gas industry. After extensive litigation, the *Bland* action settled on a collective and class-wide basis for \$6 million.

31. As a result of the extensive discovery, and the extensive settlement negotiations, the parties here were in an exceedingly favorable position to evaluate the merits of their claims and defenses. As Plaintiffs’ Counsel, I can unequivocally state that the proposed settlement is the product of two fully informed sides negotiating intensely at arm’s length. The settlement offers a fair and reasonable resolution of the litigation and incorporates and recognizes the substantial risks each side faced, whether at trial or upon appeals, had the litigation continued. By the time the parties agreed to discuss settlement, there can be no question whatsoever that both sides were well versed in the facts, circumstances, and law applicable to the disputed issues and had a comprehensive knowledge of what a potential trial record would look like.

32. I am convinced that this settlement is fair and reasonable both standing on its own and when viewed against similar overtime settlements.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of November 2018, in Washington, D.C.

/s/ Nicholas A. Migliaccio  
Nicholas A. Migliaccio

## Exhibit A



MIGLIACCIO&RATHODLLP

### SUMMARY

The attorneys at Migliaccio & Rathod LLP (“M&R”) have been collectively practicing for over 30 years and have successfully prosecuted a number of noteworthy consumer protection, environmental contamination, civil rights, privacy, and wage and hour cases. The firm’s attorneys, located in Washington D.C. and California, focus primarily on class or collective actions and take all of their cases on a contingent basis. The attorneys at the firm have litigated cases leading to recoveries of hundreds of millions of dollars in recoveries for consumers, workers, and other victims of corporate misconduct. M&R has a track record of investing the time, energy, and resources necessary to develop cases which implicate significant economic, societal, and health concerns.

### NOTABLE CURRENT MATTERS AND SUCCESSES

- *Matthews v. TCL Communications et al.*, Case No. 3:17-cv-95 (W.D.N.C.). Represented plaintiffs in a class action brought on behalf of purchasers of Alcatel OneTouch Idol 3 smartphones who alleged that a firmware update removed Band 12 LTE functionality from their phones, greatly reducing their functionality. Served as Court-appointed class counsel in a class action settlement which provided class members with either the reinstatement of Band 12 LTE functionality on their phones, or new phones with LTE Band 12 functionality.
- *Colgate et al. v. JUUL Labs, Inc.* Case No. 3:18-cv-02499 (N.D. Cal.) M&R was appointed as co-lead interim class counsel in action brought on behalf of a nationwide class arising from JUUL’s marketing and sale of electronic cigarettes.
- *Wheeler et al. v. Lenovo (United States) Inc.*, Case No. 13-0007150 (D.C. Sup. Ct.) and *Kacsuta v. Lenovo (United States), Inc.*, Case No. 13-00316 (C.D. Cal.). Represented plaintiffs in a class action brought on behalf of purchasers of Lenovo laptops that suffered from Wi-Fi connectivity problems. Served among the Court-appointed class counsel in a nationwide settlement where Lenovo agreed to refund \$100 cash or issue a \$250 voucher (which required no purchase to use) to owners of the laptops.
- *In Re: Apple Inc. Device Performance Litigation*, 18-md-2827 (N.D. Cal.). M&R is serving in an advisory role to a member of the Plaintiff’s Steering Committee on this action arising out of Apple’s alleged reduction of iPhone performance in order to conceal a latent hardware defect.
- *Beture v. Samsung Electronics America*, Case No. 17-cv-05757 (D.N.J.). M&R was appointed as co-lead interim class counsel in action brought on behalf of a nationwide class arising from a hardware defect affecting hundreds of thousands of Samsung Galaxy Note 4 smartphones.



- *Restaino et al. v. Mario Badescu, Inc.*, Case No. MID-L-5830-14 (N.J. Super. Ct.). Represented 36 individuals who had become physically addicted to undisclosed corticosteroids in a purportedly botanical face cream, and sought damages for personal injuries arising from the symptoms of topical steroid withdrawal. After three years of litigation, the case settled for significant relief to the plaintiffs.
- *Peppler, et al. v. Postmates, Inc.*, Case No. 2015 CA 006560 (D.C. Sup. Ct.) and *Singer, et al. v. Postmates, Inc.*, 4:15-cv-01284-JSW (N.D. Cal.). Represented plaintiffs in a wage theft class action against application-based courier startup company, alleging that the couriers were misclassified as independent contractors. M&R was named class counsel in the settlement agreement providing for \$8.75 million in relief to a nationwide class.
- *Bland v. Calfrac Well Services*, Case No. 2:12-cv-01407 (W.D. Pa.). Represented oil field workers in a nationwide collective and class action lawsuit against Defendant Calfrac Well Services for its alleged failure to properly pay overtime to its field operators. After extensive litigation, the case settled for \$6 million, which provided a gross recovery per class member of between \$250 and approximately \$11,500.
- *Walsh et al. v. Globalstar, Inc.*, Case No. 3:07-cv-01941 (N.D. Cal.), represented Globalstar satellite telephone service customers who brought claims that Globalstar knew that it was experiencing failures in its satellite constellation and its satellite service was rapidly deteriorating and was no longer useful for its intended purpose, yet failed to disclose this information to its potential and existing customers. Served as Court-appointed class counsel in a nationwide settlement that provided an assortment of benefit options, including, but not limited to, monetary account credits, free minutes, or cash back for returned equipment.
- *Snodgrass v. Bob Evans*, Case No. 2:12-cv-768 (S.D. Ohio). Represented Bob Evans' Assistant Managers in a case alleging that Bob Evans, a restaurant chain with hundreds of locations predominantly in the Midwest, had misclassified its Assistant Managers as exempt from federal and state overtime laws. After a landmark ruling on the application of the so-called "fluctuating workweek" method of payment, the lawsuit settled for \$16.5 million. The gross recovery per class member was approximately \$6,380. In issuing its order approving the settlement, the court took special note of the "competence of class counsel in prosecuting this complex litigation."
- *Delandro v. County of Allegheny*, Case No. 06-927 (W.D. Pa.). Represented pre-trial detainees who were subjected to unlawful strip searches prior to their admission at Allegheny County Jail, located in Pittsburgh, PA. After winning class certification, partial summary judgment on liability, and an injunction, the case settled for \$3 million.
- *Nnadili v. Chevron*, Case No. 02-1620 (D.D.C.). Represented owners and residents of properties in the District of Columbia that were contaminated with gasoline



- constituents from leaking underground storage tanks that were installed by Chevron. The plaintiffs, who resided in over 200 properties in the Riggs Park neighborhood of Northeast Washington, D.C., alleged that Chevron’s contamination interfered with the use and enjoyment of their property, impacted their property values, constituted a trespass on their land, and caused fear and emotional distress. The United States Environmental Protection Agency conducted an extensive investigation into the contamination. After approximately five years of litigation, the case settled for \$6.2 million.
- *Corbin v. CFRA, LLC*, Case No. 1:15-cv-00405 (M.D.N.C.). Represented 1,520 servers in collective action against major IHOP franchise for wage theft violations, culminating in \$1.725 million settlement.
  - *Craig v. Rite Aid*, Case No. 4:08-CV-2317 (M.D. Pa.). Represented Rite Aid Assistant Managers in a case alleging that Rite Aid had misclassified its Assistant Managers as exempt from federal and state overtime laws. Plaintiffs alleged that their primary duties involved manual labor such as loading and unloading boxes, stocking shelves, cashiering and other duties which are not exempt under federal and state overtime laws. After extensive litigation, the case settled for \$20.9 million, covering over 1,900 current and former assistant store managers. In issuing its order approving the settlement, the court stated that the settlement “represents an excellent and optimal settlement award for the Class Members” resulting from “diligent, exhaustive, and well-informed negotiations.”
  - *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 535 (6th Cir. 2012). Represented classes of insureds against several major insurance companies for the failure to use technological advances in verifying the addresses of insureds, leading to overcharges. Litigation culminated in multi-million dollar settlements.
  - *Ousmane v. City of New York*, Case No. 402648/04 (NY Sup. Ct.). Represented New York City street vendors in a pro bono class action suit against the City of New York for excessive fines and helped secure a settlement with a value of over \$1 million.
  - *Stillman v. Staples*, Case No. 07-849 (D.N.J.). Represented Staples Assistant Managers in Fair Labor Standards Act Claims for unpaid overtime. Served as a member of the trial team where the plaintiffs won a nearly \$2.5 million verdict against Staples for unpaid overtime on behalf of 342 sales managers after a six-week jury trial. After the verdict, nearly a dozen wage and hour cases against Staples from across the country were consolidated in a multi-district litigation. Served in a central role in the consolidated litigation, which lasted nearly two years after the *Stillman* verdict. The consolidated litigation ultimately settled for \$42 million.
  - *In re National Security Agency Telecommunications Records Litigation*, Case No. 3:06-md-01791 (N.D. Cal.). Represented Sprint subscribers in privacy suit against



telecom companies to enjoin the alleged disclosure to the National Security Agency of telephone calling records. Appointed, with co-counsel, interim lead counsel for the Sprint subscriber class in the MDL proceedings. The litigation was ultimately dismissed after Congress granted retroactive immunity to the telecom companies.

### ATTORNEYS

#### *Nicholas A. Migliaccio*

Nicholas Migliaccio has been practicing for over 16 years, and litigates across the firm's practice areas. He has successfully prosecuted numerous noteworthy class and mass action cases over the course of his career, and has been appointed class counsel in both litigation and settlement classes. He has been recognized by his peers as a Superlawyer in 2016, 2017, and 2018.

Mr. Migliaccio graduated from the State University of New York at Binghamton in 1997 (B.A., *cum laude* in Environmental Studies and Philosophy) and received his law degree from Georgetown University Law Center in 2001, where he was an Editor of the Georgetown International Environmental Law Review. Mr. Migliaccio played a significant role in the prosecution of the following notable cases:

- Represented assistant managers in a Fair Labor Standards Act misclassification case and served as a member of the trial team for a six-week jury trial that resulted in a \$2.5 plaintiffs' verdict. After the verdict, nearly a dozen wage and hour cases against the defendant from across the country were consolidated in a multi-district litigation. Served in a central role in the consolidated litigation, which ultimately settled for \$42 million.
- Represented worker class in wage theft assistant manager misclassification case against national restaurant chain that culminated in a \$16.5 million settlement
- Represented worker class in wage theft rate miscalculation case against multinational fracking company, resulting in \$6 million settlement
- Represented plaintiffs in a consumer class in defective laptop case against multinational computer manufacturer, resulting in a nationwide settlement where defendant agreed to refund \$100 cash or issue a \$250 voucher (which required no purchase to use) to owners of the laptops.
- Represented pre-trial detainees who were subjected to unlawful strip searches prior to their admission at Allegheny County Jail, located in Pittsburgh, PA. After winning class certification, partial summary judgment on liability, and an injunction, the case settled for \$3 million.
- Represented owners and residents of properties in the District of Columbia that were contaminated with gasoline constituents from leaking underground storage tanks that were installed by a major oil company. The plaintiffs alleged that the contamination interfered with the use and enjoyment of their property, impacted their property values, constituted a



trespass on their land, and caused fear and emotional distress. After extensive litigation, the case settled for \$6.2 million.

- Represented New York City street vendors in a pro bono class action suit against the City of New York for excessive fines and helped secure a settlement with a value of over \$1 million.

**Admissions:**

- New York
- Washington, D.C.
- United States Court of Appeals for the Third Circuit
- United States Court of Appeals for the Fourth Circuit
- United States Court of Appeals for the Sixth Circuit
- United States District Court for the District of Colorado
- United States District Court for the District of Columbia
- United States District Court for the District of Maryland
- United States District Court for the Eastern District of Michigan
- United States District Court for the Eastern District of New York
- United States District Court for the Northern District of New York
- United States District Court for the Southern District of New York
- United States District Court for the Western District of New York
- United States District Court for the Western District of Pennsylvania

**Education:**

- Georgetown University Law Center, J.D., 2001
- State University of New York at Binghamton, BA, 1997

**Publications and Speaking Engagements:**

- Co-authored “Environmental Contamination Treatise: Overview of the Litigation Process,” in R. Simons, Ph.D, *When Bad Things Happen to Good Property* (Environmental Law Institute, 2005).
- Presentation on *The Motor Carrier Act Exception to the FLSA’s Overtime Provisions - 13(b)(1) and the SAFETEA-LU Amendments*, Worker’s Injury Litigation Group / Ohio Association of Justice Meeting, Winter 2014.
- Presentation on *Litigating Fair Labor Standards Act Collective Action Cases*, Worker’s Injury Litigation Group / Ohio Association of Justice Convention, Fall 2011.

**Awards:**

- SuperLawyers, 2016, 2017 and 2018





*Jason S. Rathod*

Jason Rathod litigates class actions across the firm's areas of practice, including consumer protection, worker rights, and civil rights. Mr. Rathod has been appointed class counsel in a number of noteworthy class actions and has been the principal brief writer in several critical submissions, before trial and appellate courts, that resulted in favorable rulings concerning class certification and summary judgment.

Mr. Rathod has been recognized as a leader in his field beyond the courtroom. He is the author of several published works, including a law review article on aggregate litigation in poor countries. Another recent law review article that he co-authored, comparing public and private enforcement in the United State and Europe, was cited by the Consumer Financial Protection Bureau in its proposed rule prohibiting class action waivers in the fine print of consumer contracts.

Mr. Rathod graduated from Grinnell College in 2006 (B.A. with honors in Political Science and Religious Studies). After college, he traveled to Fiji, Mauritius, South Africa, Trinidad & Tobago, Guyana, and Suriname on a Watson Fellowship, studying the Indian Diaspora. He graduated law school from the Duke University School of Law in 2010, where he was an Articles Editor of the Duke Law Journal. In law school, he also worked for the Self-Employed Women's Association in Ahmedabad, India on behalf of street vendors seeking an injunction against the city government for unlawful harassment and evictions.

**Notable Cases Include:**

- Representing consumers at trial in product defect class action;
- Represented consumer classes in insurance overcharge cases, including by drafting appellate briefs about the propriety of class certification. The Sixth Circuit Court of Appeals affirmed order for the classes 3-0, leading to several multi-million-dollar settlements;
- Represented worker class in wage theft assistant manager misclassification case against national restaurant chain that culminated in a \$16.5 million settlement;
- Represented worker class and collective against multinational startup company for Independent contractor misclassification claims, resulting In \$8.75 million settlement;
- Represented worker class in wage theft rate miscalculation case against multinational fracking company, resulting in \$6 million settlement;
- Represented over 1,500 servers In multistate collective action, resulting n \$1.72 million settlement;
- Represented consumer class in defective laptop case against multinational computer manufacturer; and
- Represented consumer class in defective construction case against multinational home builder, drafting key briefs leading to class certification and maintenance of suit in court, rather than arbitration.



**Education:**

- Duke University School of Law, J.D. 2010
- Grinnell College, B.A., 2006

**Admissions:**

- Illinois
- Washington D.C.
- United States District Court for the District of D.C.
- United States District Court for the District of Maryland
- United States District Court for the Western District of Pennsylvania
- United States District Court for the District of Colorado
- United States District Court for the Eastern District of Michigan

**Publications and Speaking Engagements:**

- *Trying the Class Action: Practical Tips from the Pros* (June 4, 2015) (panelist)
- *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. Rev. 303 (2016) (co-authored)
- *Emerging Markets, Vanishing Accountability: How Populations in Poor Countries Can Use Aggregate Litigation to Vindicate Their Rights*, 24 Transnat'l L. & Contemp. Probs. 69 (2014)
- *Note: Not Peace, But a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 Duke L.J. 595 (2009)

**Awards:**

- SuperLawyers Rising Stars, 2017 and 2018

***Esfand Y. Nafisi***

Esfand Nafisi worked for several years at a corporate law firm before joining the plaintiffs' bar. During that time, he quickly demonstrated an aptitude for high-stakes trial work and innovation in complex electronic discovery, including the development of statistical sampling models, database discovery, and marshaling these tools to develop trial theory. As part of a trial team in an antitrust matter brought on behalf of a small corporation, Esfand was responsible for managing a team of seven attorneys, preparing witness examinations, creating trial demonstratives, and developing case theory and themes. Esfand also represented a Fortune 100 company in parallel criminal investigations from the U.S. Department of Justice, U.S. Postal Inspectors, numerous states' attorneys general, and FinCEN. In that matter, he played an extensive role, including managing a group of 32 attorneys, developed technology-assisted



review protocols that were vetted and approved by DOJ officials, and developing and drafting presentations for high-ranking meetings in a matter that resulted in \$100,000,000 settlement.

Now, as an advocate for consumers and others impacted by corporate misconduct, Esfand's practice focuses on class actions, with a focus on corporate misconduct arising from emerging or new technologies.

**Notable Cases Include:**

- Represented corporate plaintiff in antitrust litigation that settled at trial for \$125,000,000. *Insignia Sys. V. News America Marketing In-Store*, Case No. 04-cv-4213 (D. Minn.).
- Represented Fortune 500 company in parallel wire fraud and money laundering investigations by federal authorities, which settled on favorable terms.
- Represented consumers in case alleging unlawful concealment of defective graphical processing units that led to nationwide repair and reimbursement program. *Book v. Apple*, Case No. 14-cv-04746 (N.D. Cal.).
- Represented three dozen individuals in consolidated personal injury action arising from undisclosed corticosteroids in an over-the-counter face cream. Worked closely with leading experts to develop theory of injury arising from topical steroid withdrawal. After three years of litigation, achieved more than \$16,000,000 in relief to 36 plaintiffs. *Restaino et al. v. Mario Badescu, Inc.*, Case No. MID-L-5830-14 (N.J. Super. Ct.).
- Represented consumers in case against NVIDIA, Inc. related to misrepresentations concerning performance of graphics cards.

**Education:**

- Northwestern University School of Law, J.D. 2009
- George Mason University, B.S., 2006

**Admissions:**

- California
- New York
- Washington D.C.
- United States District Court for the Northern District of California
- United States District Court for the Eastern District of California
- United States District Court for the District of Columbia

**Publications and Speaking Engagements:**

- *Daubert and its Discontents* 76 BROOK. L. REV. 131 (2010) (co-authored)
- *Developing Case Theory in Complex Litigations*, New York (2011)
- *Of Wheat and Chaff: Predictive Coding in Federal Biomet Case*, 159 Chicago Daily Law Bulletin 101 (May 22, 2013)



***Erick Quezada***

Prior to joining Migliaccio & Rathod, LLP, Erick Quezada worked as Legal Fellow at a plaintiff-side employment litigation firm where he served as an advocate for employees facing discrimination, retaliation, and wage theft. Erick has written briefs resulting in favorable summary judgment rulings and examined witnesses in arbitration. As part of Migliaccio & Rathod LLP, Erick strives to represent those marginalized and exploited by unlawful corporate practices.

Erick graduated from Washington State University in 2013, receiving a B.A., *magna cum laude*, in Political Science and Criminal Justice System Studies. He received his J.D. from the Georgetown University Law Center in 2017, where he served as an editor for the *Tax Lawyer*, Georgetown's tax focused journal published by the ABA. While attending law school, Erick worked as a research assistant with a focus in consumer protection and critical race theory literature. Throughout his second and third years of law school, Erick provided litigation support to his professor working on the General Motors Ignitions Switch Defect litigation.

**Notable Cases:**

- Assisted in the representation of consumers in the ongoing General Motors Ignitions Switch MDL

**Education:**

- Georgetown University Law Center, J.D., 2017
- Washington State University, B.A., 2013

**Admissions:**

- Washington D.C.

**UNITED STATE DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK**

Kirk Nelson, Individually and on Behalf of  
All Other Persons Similarly Situated,

Civil Action No.: 15-cv-0314-BKS-TWD

Plaintiff,

v.

SABRE Companies, LLC and  
Sabre Energy Services, LLC,

Defendants.

**DECLARATION OF D. AARON RIHN IN SUPPORT OF THE JOINT MOTION FOR  
FINAL APPROVAL OF SETTLEMENT AND PLAINTIFF'S UNOPPOSED MOTION  
FOR AN AWARD OF FEES AND COSTS AND NAMED PLAINTIFF AND  
SETTLEMENT CLASS REPRESENTATIVE'S ENHANCEMENT**

I, D. Aaron Rihn, make the following declaration based on my personal knowledge of the facts contained herein and, if called as a witness, could competently testify to such facts.

1. I, with co-counsel, represent the Plaintiff and the Class as putative Settlement Class Counsel. I am fully familiar with the facts and circumstances set forth herein, and I make this Declaration in support of the parties' Joint Motion for Final Approval of Settlement Agreement and also in support of Plaintiff's Unopposed Motion for An Award of Fees and Costs and Class Representative Enhancement.

2. I am a Partner at the law firm of Robert Peirce & Associates, P.C., where I run the law firm's wage and hour practice and litigate complex class actions. Although I have experience in wage and hour litigation, I reached out to my co-counsel in Washington D.C. because of the complexity and potential national character of the case, which is similar to cases I knew they had successfully prosecuted in the past.

3. Robert Peirce & Associates has spent 709.5 hours for a lodestar of \$295,990. The hours, rates and lodestar for each timekeeper is broken down below:

Timekeeper	Hourly Rate	Hours Worked	Lodestar
Robert F. Daley (partner)	\$500	55.5	\$27,750
D. Aaron Rihn (partner)	\$500	494	\$247,000
Michele Rossi (legal assistant)	\$125	60	\$7,500
Emme Ciardi (legal assistant)	\$125	40	\$5,000
Angela Capelety (law clerk)	\$60	4	\$240
David Martin (law clerk)	\$60	5	\$300
Maggie Cooney (associate)	\$250	10.5	\$2,625
Danielle Daley (paralegal)	\$125	6	\$750
Cindy Howell (law clerk)	\$60	20	\$1,200
Cindy Howell (associate)	\$250	14.5	\$3,625

4. Robert Peirce & Associates has also incurred \$61,877.20 in unreimbursed client expenses. These expenses are related to experts, court fees, photocopying, court reporters, postage and other mailing costs, travel, and legal research. The expenses incurred in the prosecution of this case are reflected on the books and records of this firm, which are available for submission to the Court in camera upon request. These books and records are prepared from expense vouchers, receipts, and check records, and are accurate regarding all the expenses incurred.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30<sup>st</sup> day of November 2018 in Pittsburgh, PA.

Respectfully submitted,

/s/ D. Aaron Rihn

D. Aaron Rihn, Esquire

Pa. I.D. No.: 85752

Robert Peirce & Associates, P.C.

707 Grant Street

Suite 2500

Pittsburgh, PA 15219-1918

Telephone: 412-281-7229

E-mail: arihn@peircelaw.com

**UNITED STATE DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK**

Kirk Nelson, Individually and on Behalf of  
All Other Persons Similarly Situated,

Civil Action No.: 15-cv-0314-BKS-TWD

Plaintiff,

v.

SABRE Companies, LLC and  
Sabre Energy Services, LLC,

Defendants.

**DECLARATION OF ELMER ROBERT KEACH, III IN SUPPORT OF THE JOINT  
MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAINTIFF'S  
UNOPPOSED MOTION FOR AN AWARD OF FEES AND COSTS AND NAMED  
PLAINTIFF AND SETTLEMENT CLASS REPRESENTATIVE'S ENHANCEMENT**

Elmer Robert Keach, III, an attorney duly licensed to practice law before the Courts of the State of New York and before this Honorable Court, hereby affirms as follows under penalty of perjury:

1. I, together with co-counsel, represent the Plaintiff and the Class as putative Settlement Class Counsel. I am fully familiar with the facts and circumstances set forth herein, and I make this Declaration in support of the parties' Joint Motion for Final Approval of Settlement Agreement and also in support of Plaintiff's Unopposed Motion for An Award of Fees and Costs and Class Representative Enhancement.

2. I am a Partner of the Law Offices of Elmer Robert Keach, III, PC in Albany, New York, and my practice concentrates on complex civil rights and class action litigation. A copy of my firm resume is attached to this affirmation as Exhibit A. I served as local counsel in this action, and have some experience in Wage and Hour Litigation, having also served in a similar capacity in a collective action against Ruby Tuesday.



3. The Law Offices of Elmer Robert Keach, III, PC has spent 307.5 hours working on this litigation, for a lodestar of \$ 135,685.00. Of these hours, 253.7 were spent by the affiant, and 53.8 were spent by my associate, Maria Dyson. I am an attorney with over twenty years of litigation experience, primarily before this and other Federal courts. My associate, Maria Dyson, graduated from the CUNY Law School in 2013, and despite her limited years of practice, she is a highly experienced civil rights attorney, having participated in four trials before this Court, one trial in the Northern District of Texas, and three trials before the New York Court of Claims. My office seeks the rate hourly rates established in similar litigation before this Court. See *Universal Instruments Corp. v. Micro Sys. Eng'g, Inc.*, 2018 WL 2604817, at \*3 (N.D.N.Y. June 4, 2018). My office seeks an hourly rate of \$450.00 per hour for my time, and \$400.00 per hour for Attorney Dyson's time. My firm's lodestar is reflected in the table below.

Timekeeper	Hourly Rate	Hours Worked	Lodestar
Elmer Robert Keach, III (partner)	\$ 450	253.7	\$ 114,165
Maria K. Dyson (associate)	\$ 400	53.8	\$ 21,520

4. Robert Peirce & Associates has also incurred \$13,143.77 in unreimbursed client expenses. These expenses are as follows: Court Filings: \$100.00; Service of Process: \$200.00; Court Reporters and Deposition Expenses: \$8,238.49; Travel, Lodging, Mileage and Meals: \$4,560.55; and Postage: \$44.73. These expenses are prepared from expense vouchers, receipts, and check records maintained by my firm and are accurate regarding all the expenses incurred.

Respectfully Submitted and Affirmed By:

/s Elmer Robert Keach, III

Dated: November 30, 2018

---

Elmer Robert Keach, III, Esquire  
LAW OFFICES OF ELMER ROBERT  
KEACH, III, PC  
One Pine West Plaza, Suite 109  
Albany, NY 12205  
518.434.1718  
bobkeach@keachlawfirm.com

**ATTORNEY FOR PLAINTIFFS**

# EXHIBIT A

Firm Resume

Law Offices of Elmer Robert Keach, III, PC  
One Pine West Plaza, Suite 109  
Albany, NY 12205  
Telephone: 518.434.1718  
Telecopier: 518.770.1558  
Electronic Mail: bobkeach@keachlawfirm.com  
Website: www.keachlawfirm.com

Principal: Elmer Robert Keach, III, Esquire

Education: Pennsylvania State University, University Park, Pennsylvania  
B.S. *with High Distinction and with Honors* in Economics, 1993  
B.S. *with High Distinction and with Honors* in Geography, 1993

New York University School of Law, New York, New York  
J.D., 1996

Temple University, Beasley School of Law, Philadelphia, Pennsylvania  
LL.M. In Trial Advocacy, 2014

Undergraduate Honors: University Scholar  
Phi Kappa Phi, Mortar Board  
Army ROTC Four Year Scholarship Winner  
Commissioned Second Lieutenant, USAR, 1993

Law School Honors: High Grade, Civil & Criminal Trial Practice

Bar Admissions:

State Courts:

New York State, 1997, Maryland, 1998, New Jersey, 1998

Federal Courts:

U.S. District Court, Northern District of New York, 1997  
U.S. District Court, District of Maryland, 1998  
U.S. District Court, District of New Jersey, 1999  
U.S. District Court, Western District of New York, 2003  
U.S. District Court, Western District of Pennsylvania, 2007  
U.S. District Court, Northern District of Ohio, 2010  
U.S. District Court, Southern District of New York, 2010  
U.S. District Court, Northern District of Florida, 2010  
U.S. District Court, District for District of Columbia, 2010

U.S. District Court, Northern District of Illinois (Trial Bar), 2012  
U.S. District Court, Eastern District of New York, 2012  
U.S. District Court, Northern District of Texas, 2016  
U.S. Court of Appeals, Fourth Circuit, 1998  
U.S. Court of Appeals, Second Circuit, 1998  
U.S. Court of Appeals, Third Circuit, 2007  
U.S. Court of Appeals, Ninth Circuit, 2009  
U.S. Court of Appeals, Sixth Circuit, 2013  
United States Supreme Court, 2008

Professional Designations:

Master Advocate Designation, National Institute of Trial Advocacy

Member, Multi-Million Dollar Advocates Forum

Formal Legal Training/CLE Presentations:

Graduate, National Institute of Trial Advocacy, Trial Skills Course, New England Regional, 2007

Graduate, National Institute of Trial Advocacy, Deposition Skills Course, New England Regional, 2008

Graduate, National Institute of Trial Advocacy, Trial Advocacy-Articulate Advocate Course, National Session, 2008

Graduate, National Institute of Trial Advocacy, Advocacy Teacher Training Course, New York Regional, 2009

Graduate, National Institute of Trial Advocacy, Advanced Trial Advocacy Course, Washington DC Regional, 2009

Instructor, Police Liability Claims from Start to Finish, National Business Institute, May 2018

Instructor, Police Misconduct and Liability in New York, Lorman Education Group, August 2005

Instructor, Technology in the Courtroom, Albany County Bar Association, May 2007

Publications:

Litigating Claims Against Private Corrections Health Providers, *Trial Magazine*, Medical Malpractice Issue, May 2018 (with Maria K. Dyson)

Professional Experience:

Attorney, Cohen, Milstein, Hausfeld & Toll, Washington, DC, 1997 – 1999, associated in consumer rights and product liability group

Attorney, Law Offices of Elmer Robert Keach, III, 1999 to present, Albany and Amsterdam, New York. Two attorney practice concentrating in complex civil rights and class action litigation. Areas covered in civil rights litigation include illegal strip searches (cases litigated on both a class wide basis and for individuals), freedom of speech, freedom to petition, freedom of association, freedom of religion, PLRA, excessive force, lethal force, privacy, false arrest, malicious prosecution, warrantless entry to home, access to courts, failure to protect from harm, illegal wiretapping, deprivation of medical treatment, substantive/procedural due process and cruel and unusual punishment. Cases covered in television and print news over one hundred times since 1999, including over ten times on front page of New York Law Journal. Favorable appellate decision covered as Decision of the Day in New York Law Journal.

Complex Litigation Experience:

Fairfax Mantua Environmental Litigation, U.S. District Courts for the Eastern District of Virginia and District of Columbia. JAMS/Endispute.

Lead Counsel, Winnebago Rialta Consumer Fraud Litigation, N.Y. Supreme Court, Otsego County. (Injunctive Relief Settlement on Nationwide Basis.)

Lead Counsel, Rensselaer County Jail Civil Rights Class Action Litigation, U.S. District Court, Northern District of New York (Settled for \$ 2.7 million fund.)

Local Counsel, Entran II Class Action Litigation, U.S. District Courts for the Northern District of New York, District of New Jersey and Middle District of Pennsylvania (Settled for \$ 300 million common fund).

Lead Counsel, Montgomery County Jail Civil Rights Class Action Litigation, U.S. District Court, Northern District of New York. (Settled for \$ 2.0 million common fund.)

Lead Counsel, Schenectady County Jail Civil Rights Class Action Litigation, U.S. District Court, Northern District of New York. (Settled for \$2.5 million common fund.)

Lead Counsel, Clinton County Jail Civil Rights Class Action Litigation, U.S. District Court, Northern District of New York. (Settled for \$1.15 million common fund)

Lead Counsel, Erie County Jail Civil Rights Class Action Litigation, U.S. District Court, Western District of New York. (Class Certified)

Lead Counsel, Niagara County Jail Civil Rights Class Action Litigation, U.S. District Court, Western District of New York (Class Certified)

Lead Counsel, Philadelphia Prison System Civil Rights Class Action Litigation, U.S. District Court, Eastern District of Pennsylvania (Settled for \$5.9 million common fund.)

Lead Counsel, Allegheny County, Pennsylvania Civil Rights Class Action Litigation, U.S. District Court, Western District of Pennsylvania (Preliminary Injunction Granted, Settled for \$3.0 million common fund)

Co-Counsel, Dauphin County, Pennsylvania Civil Rights Class Action Litigation, U.S. District Court, Middle District of Pennsylvania (Settled for \$ 2.16 million common fund)

Lead Counsel, McCormick Island Mass Arrest Litigation, U.S. District Court, Middle District of Pennsylvania

Co-Counsel, Camden County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Settled for \$7.5 million Common Fund)

Co-Counsel, Gloucester County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Settled for \$4.0 million Common Fund)

Co-Counsel, Mercer County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Settled for \$1.8 million Common Fund)

Co-Counsel, Cumberland County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Settled for \$4.5 million Common Fund)

Co-Counsel, Salem County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Settled for \$650,000 Common Fund)

Co-Counsel, Bexar County Civil Rights Class Action Litigation, U.S. District Court, Western District of Texas (Settled for \$4.5 million Common Fund)

Lead Counsel, *Hill v. County of Montgomery* Conditions of Confinement Class Action, U.S. District Court, Northern District of New York (Class Certification Pending)

Lead Counsel, Essex County Civil Rights Class Action Litigation, U.S. District Court, District of New Jersey (Class Certification Pending)

Lead Counsel, City of Cleveland Workhouse Class Action Litigation, U.S. District Court, Northern District of Ohio (Summary Judgment for Plaintiff Granted, Pending Appeal to the Sixth Circuit)

Lead Counsel, Franklin County Ohio Workhouse Class Action, U.S. District Court, Southern District of Ohio (Class Certified, Summary Judgment Pending)

Co-Counsel, BSH Washing Machine Class Action, U.S. District Court, Central District of California (Settled for Common Fund).

Co-Counsel, Hyundai Santa Fe Defective Brakes Class Action, U.S. District Court, Western District of New York (Pending).

Co-Counsel, Hyundai Sonata Defective Brakes Class Action, U.S. District Court, Southern District of New York (Pending)

Co-Counsel, Chrysler Tire Pressure Monitoring System Class Action, U.S. District Court, Northern District of New York (Pending)

Co-Counsel, Sabre Energy FLSA Collective Action, U.S. District Court, Northern District of New York (Conditional Certification Granted)

Co-Counsel, Ruby Tuesday FLSA Collective Action, U.S. District Court, District of Connecticut (Settled, \$3 million collective fund)

Lead Counsel, *Thompson v. Johnson* Custodial Death Action, U.S. District Court, Northern District of New York (\$3.5 million settlement).

Lead Counsel, *Gabriel v. County of Herkimer* Custodial Death Action, U.S. District Court, Northern District of New York (\$500,000 settlement on third day of trial).

Lead Counsel, *Schultz v. Allegheny County* Custodial Death Action, U.S. District Court, Western District of Pennsylvania (\$410,000 settlement).

Lead Counsel, *Cirino-Rodriguez v. William George Agency* Custodial Death Action, U.S. District Court, Northern District of New York (Individual Settlement—Confidential Amount).



Lead Counsel, *Carter v. Commonwealth of Pennsylvania Custodial Death Action*, U.S. District Court, Middle District of Pennsylvania (Settlement Pending).

Lead Counsel, *Haag-Morris v. County of Tioga Custodial Death Litigation*, U.S. District Court, Northern District of New York (Confidential Settlement)

Lead Counsel, *Chase v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Confidential Settlement)

Lead Counsel, *Helijas v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Confidential Settlement)

Lead Counsel, *Cannon v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (\$1.1M Settlement).

Lead Counsel, *Revels v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Pending)

Lead Counsel, *Sanchez v. Correct Care Solutions Custodial Death Litigation*, U.S. District Court, Western District of New York (Pending)

Lead Counsel, *Barton v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Pending)

Lead Counsel, *Carroll v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Pending)

Lead Counsel, *Richardson v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Pending)

Lead Counsel, *Duncan v. Correctional Medical Care Custodial Death Litigation*, U.S. District Court, Northern District of New York (Pending)

Counsel, *Wallace v. Powell Judicial Corruption Class Action Litigation*, U.S. District Court, Middle District of Pennsylvania (Partial Settlement Pending).

Reported Decisions of Significance:

*Hancock v. County of Rensselaer*, --- F.3d ---, 2018 WL 798471 (2d Cir. 2018)

*Iacovangelo v. Correctional Medical Care*, 624 Fed. Appx. 10 (2d Cir. 2015)

*Williams v. City of Cleveland*, 771 F.3d 945 (6<sup>th</sup> Cir. 2014)

*Swartz v. Insogna*, 704 F.3d 105 (2d Cir. 2013)

*Countryman v. Farber*, 340 Fed. Appx. 703 (2d Cir. 2009)

*Sealed Plaintiff v. Farber*, 2007 WL 98278 (2d Cir. 2007)

*Hoyt v. Andreucci*, 433 F.3d 320 (2d Cir. 2006)

*Marriott v. County of Montgomery*, 2005 WL 3117194 (2d Cir. 2005)

*Curry v. City of Syracuse*, 316 F.3d 324 (2d Cir. 2003)

*Hill v. County of Montgomery*, 2018 WL 3979590 (N.D.N.Y. August 20, 2018)

*Nelson v. Sabre Companies*, 2018 WL 3543523 (N.D.N.Y. July 23, 2018)

*Nourse v. County of Jefferson*, 2018 WL 2185504 (N.D.N.Y. May 11, 2018)

*Revels v. Correctional Medical Care*, 2018 WL 1578157  
(N.D.N.Y. March 28, 2018)

*Richardson v. Correctional Medical Care*, 2018 WL 1580316  
(N.D.N.Y. March 28, 2018)

*Rock v. Blaine*, 2018 WL 1415202 (N.D.N.Y. March 20, 2018)

*Montgomery v. Town of Colonie*, 2017 WL 4990627  
(N.D.N.Y. October 30, 2017)

*Spratley v. FCA US*, 2017 WL 4023348 (N.D.N.Y. September 12, 2017)

*Vibert v. County of Rensselaer*, 2017 WL 3948455 (N.D.N.Y. September 7, 2017)

*Helijas v. Correctional Medical Care*, 2016 WL 5374124  
(N.D.N.Y. September 26, 2016)

*Sanchez v. County of Essex*, 2016 WL 4577008 (D.N.J. September 1, 2016)

*Hoit v. Capital District Transportation Authority*, 2016 WL 3947613  
(N.D.N.Y. July 19, 2016)

*McConville v. Montrym*, 2016 WL 3212093 (N.D.N.Y. June 9, 2016)

*Momrow v. County of Rensselaer*, 2016 WL 1261106 (N.D.N.Y. March 30, 2016)

*Trostle v. State of New York*, 2016 WL 1175215 (N.D.N.Y. March 24, 2016)

*Kenney v. Clay*, 172 F.Supp.3d 628 (N.D.N.Y. 2016)

*Smith v. Roberson*, 2016 WL 1056588 (N.D.N.Y. March 16, 2016)

*Nelson v. Plumley*, 2015 WL 4326762 (N.D.N.Y. July 14, 2015)

*Tomassini v. FCA US LLC*, 2015 WL 3868343 (N.D.N.Y. June 23, 2015)

*Rock v. Blaine*, 2015 WL 3795886 (June 17, 2015)

*Mori v. Allegheny County*, 51 F.Supp.3d 558 (W.D. Pa. 2014)

*Torres v. Amato*, 22 F.Supp.3d 166 (N.D.N.Y. 2014)

*Boles v. County of Montgomery*, 2014 WL 582259 (N.D.N.Y. February 13, 2014)

*Haag v. Hyundai Motor America*, 969 F.Supp.2d 313 (W.D.N.Y. 2013)

*Gabriel v. County of Herkimer*, 889 F.Supp.2d 374 (N.D.N.Y. 2012)

*Cirino-Rodriguez v. William George Agency for Children Services*, 2012 WL 3704960 (N.D.N.Y. August 27, 2012)

*Shultz v. Allegheny County*, 835 F.Supp.2d 14 (W.D.Pa. 2011)

*Delandro v. County of Allegheny*, 2011 WL 2039099 (W.D. Pa. May 24, 2011)

*Pantalone ex. rel. Pantalone v. County of Fulton*, 2011 WL 1457935 (N.D.N.Y. April 15, 2011)

*Pritchard v. County of Erie*, 269 F.R.D. 213 (W.D.N.Y. 2010)

*Barcomb v. Sabo*, 2009 WL 5214878 (N.D.N.Y. 2009)

*Delandro v. County of Allegheny*, 2009 WL 4723206 (W.D. Pa. 2009)

*Boone v. City of Philadelphia*, 668 F. Supp.2d 692 (E.D. Pa. 2009)

*Bizzaro v. Ocean County*, 2009 WL 1617887 (D.N.J. 2009)

*Wilson v. County of Gloucester*, 256 F.R.D. 479 (D.N.J. 2009)

*Lukowski v. County of Seneca*, 2009 WL 467075 (W.D.N.Y. 2009)

*Williams v. County of Niagara*, 2008 WL 4501918 (W.D.N.Y. 2008)

*Mitchell v. County of Clinton*, 2007 WL 1988716 (N.D.N.Y. 2007)

*Kelsey v. County of Schoharie*, 2007 WL 603406 (N.D.N.Y. 2007)

*Marriott v. County of Montgomery*, 426 F. Supp.2d 1 (N.D.N.Y. 2006)

*Gryzwna v. Schenectady City School District*, 2006 WL 659512 (N.D.N.Y. 2006)

*Kelsey v. County of Schoharie*, 2005 WL 1972557 (N.D.N.Y. 2005)

*Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y. 2005)

*Lewis v. Gagne*, 281 F. Supp.2d 429 (N.D.N.Y. 2003).

*Selah v. Goord*, 255 F. Supp.2d 42 (N.D.N.Y. 2003).

*Selah v. Goord*, 2002 WL 73231 (N.D.N.Y. 2002).

*Santalucia v. Sebright Transportation*, 184 F. Supp.2d 224 (N.D.N.Y. 2002).

*Flaherty v. Seroussi*, 209 F.R.D. 295 (N.D.N.Y. 2001).

*Hohenforst v. DeMagistris*, 44 A.D.3d 1114, 884 N.Y.S.2d 450 (3d Dep't 2007).

*Ziamba v. City of Troy*, 295 A.D.2d 693, 743 N.Y.S.2d 199 (3d Dep't 2002).

*Michaels v. Travelers Indem. Co.*, 257 A.D.2d 828, 683 N.Y.S.2d 640 (3d Dep't 1999).

Favorable Jury Verdicts:

*Sealed Plaintiff v. Farber*, No. 02-CV-1449, Civil Rights - Right to Privacy, USDC, NDNY, Utica (David N. Hurd, U.S. District Judge)

\$350,000 plus attorneys' fees

*People v. Cartegena*, Indictment Number 2010-094, B Felony Criminal Trial, New York County Court, Fulton County (Richard Giardino, County Court Judge)

B Felony Count Dismissed Before Grand Jury, C Felony Count (Gang Assault) Subject to Trial Order of Dismissal, Acquittal of all Remaining Counts, including Class D Felony Assault Charge

Favorable Bench Trials:

*Coleman v. United States of America*, Federal Tort Claims Act, USDC, ND Texas, Fort Worth (Reed O'Connor, U.S. District Judge)

\$82,000

Associate: **Maria K. Dyson, Esquire**

Education: Saint John's University, Bachelors of Science, Physics, 2009  
City University of New York Law School, J.D. 2013

Law School Honors: Malave Student Leadership Award, Nassau County Women's Bar Scholarship, National BLSA Most Outstanding Student Award, Faith O'Neal Diversity Scholar, Catholic Guild Scholar.

Bar Admissions:

State Courts:

New York State, 2013, New Jersey, 2013

Federal Courts:

U.S. District Court, Northern District of New York, 2013

U.S. District Court, Northern District of Texas, 2016

Formal Legal Training:

Graduate, National Institute of Trial Advocacy, Trial Skills Course, New York Regional, 2016

Graduate, National Institute of Trial Advocacy, Deposition Skills Course, New York Regional, 2015

Complex Litigation Experience:

Co-Counsel, Franklin County Ohio Workhouse Class Action, U.S. District Court, Southern District of Ohio (Class Certified, Summary Judgment Pending)

Co-Counsel, Sabre Energy FLSA Collective Action, U.S. District Court, Northern District of New York (Certification Pending)

Co-Counsel, Ruby Tuesday FLSA Collective Action, U.S. District Court, District of Connecticut (Pending)

Co-Counsel, *Schultz v. Allegheny County* Custodial Death Action, U.S. District Court, Western District of Pennsylvania (\$410,000 settlement).

Co-Counsel, *Haag-Morris v. County of Tioga* Custodial Death Litigation, U.S. District Court, Northern District of New York (Confidential Settlement)

Co-Counsel, *Chase v. Correctional Medical Care* Custodial Death Litigation, U.S. District Court, Northern District of New York (Confidential Settlement)

Co-Counsel, *Helijas v. Correctional Medical Care* Custodial Death Litigation, U.S. District Court, Northern District of New York (Confidential Settlement)

Co-Counsel, *Cannon v. Correctional Medical Care* Custodial Death Litigation, U.S. District Court, Northern District of New York (Pending).

Co-Counsel, *Revels v. Correctional Medical Care* Custodial Death Litigation, U.S. District Court, Northern District of New York (Pending)

Co-Counsel, *Sanchez v. Correct Care Solutions* Custodial Death Litigation, U.S. District Court, Western District of New York (Pending)

Reported Decisions of Significance, as Lead Counsel:

*Hoit v. Capital District Transportation Authority*, 2016 WL 3947613  
(N.D.N.Y. July 19, 2016)

*McConville v. Montrym*, 2016 WL 3212093 (N.D.N.Y. June 9, 2016)

*Momrow v. County of Rensselaer*, 2016 WL 1261106 (N.D.N.Y. March 30, 2016)

*Trostle v. State of New York*, 2016 WL 1175215 (N.D.N.Y. March 24, 2016)

*Simmons v. City of Syracuse*, 2015 WL 12513461 (N.D.N.Y. March 11, 2015)

*Smith v. Roberson*, 2016 WL 1056588 (N.D.N.Y. March 16, 2016)

*Nelson v. Plumley*, 2015 WL 4326762 (N.D.N.Y. July 14, 2015)

*Rock v. Blaine*, 2015 WL 3795886 (June 17, 2015)

*Torres v. Amato*, 22 F.Supp.3d 166 (N.D.N.Y. 2014)

Favorable Bench Trials:

*Coleman v. United States of America*, Federal Tort Claims Act, USDC, ND  
Texas, Fort Worth (Reed O'Connor, U.S. District Judge)

\$82,000

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK**

\_\_\_\_\_  
KIRK NELSON and JOHN EVANS,  
Individually and On Behalf of All Other  
Persons Similarly Situated,

Plaintiffs,

v.

SABRE COMPANIES LLC and  
SABRE ENERGY SERVICES LLC,

Defendants.

Civil Action No.:  
1:15-CV-0314-BKS-TWD

**DECLARATION OF GARY E. MASON IN SUPPORT OF  
PLAINTIFFS MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

I, Gary E. Mason, being competent to testify, make the following declaration based on my personal knowledge and the records of my law firm. I declare:

1. I am a member in good standing of the bar of this Court and I have been admitted to practice before this Court. I am submitting this declaration in support of Whitfield Bryson & Mason, LLP's (hereinafter, "WBM") application for an award of reasonable attorneys' fees in connection with services rendered on behalf of Plaintiffs and Opt-Ins and for reimbursement of expenses incurred by my firm in the course of this litigation. This declaration sets out the time and expenses of WBM in support of the fee motion.

2. My firm, as counsel to Plaintiffs Kirk Nelson and John Evans (along with co-counsel Migliaccio & Rathod LLP, Law Offices of Elmer Robert Keach, III, P.C., and Robert Peirce Associates PC) commenced this lawsuit in this Court on March 18, 2015. Thereafter, with the co-counsel firms, my firm has litigated this action on behalf of Plaintiffs, Opt-Ins and the members of the settlement class.



3. The work undertaken by my firm has consisted of the following: assisting in drafting and revising the complaint; prepping discovery responses; prepping for and defending depositions; attending hearings; and meeting and conferring with counsel on multiple litigation issues.

4. WBM spent a total of 212.75 hours on this litigation, as reflected in the time records kept and maintained by WBM. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this figure. The total lodestar of attorney and paralegal time based on the firm's current rates is \$84,475.00 and is broken down as follows:

Timekeeper	Hourly Rate	Hours Worked	Lodestar
Gary E. Mason (Partner)	\$875.00	15	\$13,125.00
Nicholas A. Migliaccio (Partner)	\$650.00	11	\$7,150.00
Jason S. Rathod (Associate)	\$450.00	73.5	\$33,075.00
Danielle L. Perry (Associate)	\$350.00	63.25	\$22,137.50
Monica C. Diccoco (Paralegal)	\$190.00	5.25	\$997.50
Jean M. Jones (Paralegal)	\$190.00	4.5	\$745.00
Shannon B. Kelly (Paralegal)	\$180.00	40.25	\$7,245.00

The rates used are the rates that are charged by the firm to clients who pay on an hourly, non-contingent basis. The lodestar figures do not include charges for expense items, which are billed separately. Copies of the time records for all of these individuals as contemporaneously recorded on the Coyote Analytics Complete Time Slips program are maintained by my firm. I certify that the above-referenced lodestar figures are fair and were reasonably required for the effective prosecution and resolution of this case.

5. WBM expended a total of \$6,427.23 in unreimbursed expenses in connection with the prosecution of this case. The expenses incurred in the prosecution of this case are reflected on the books and records of the firm. These books and records are prepared from expense vouchers, receipts, and check records, and are accurate regarding all the expenses occurred. The total spent in unreimbursed expenses in connection with this case is broken down as follows:

Filing	\$200.00
Pacer/Lexis/Westlaw Research	\$1,398.36
Notice Expense	\$0.00
Mediation	\$6.08
Deposition Transcripts	\$0.00
Expert	\$0.00
Travel, Mileage, Transportation, Meals	\$4,822.79
Copies	\$0.00
Court Reporters	\$0.00
Postage/Express Mail/Messenger	\$0.00
<b>TOTAL:</b>	<b>\$6,427.23</b>

6. With respect to the standing of this firm as counsel in this case, attached hereto as Exhibit A is a copy of my firm's resume.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 29 th day of November, 2018, at Washington, D.C..

November 29, 2018



Gary E. Mason

# EXHIBIT A



WHITFIELD BRYSON  
& MASON LLP  
ATTORNEYS AT LAW

**FIRM RESUME**

## **FIRM PROFILE**

With offices located in Washington, D.C., Raleigh, North Carolina, Madisonville, Kentucky, and Nashville, Tennessee, Whitfield Bryson & Mason LLP is dedicated to representing plaintiffs in class actions, mass torts and individual actions in courts throughout the United States. Founded in January 2012, the firm was created by a merger of three firms with decades of experience representing plaintiffs.

## **FIRM RESUME Attorney Profiles**

### **John C. Whitfield Founding Partner**

For nearly 30 years, John has been one of Kentucky's premier trial attorneys. He has represented numerous injured parties in the Paducah, Ohio Valley and Western Kentucky areas. He has concentrated primarily on complex civil litigation cases, and over his career has brought to settlement or judgment over 30 cases in excess of a million dollars each.

John is certified as a civil trial specialist by the National Board of Trial Advocacy\* and has represented individuals in all walks of life against negligent workplace practices, reckless physicians, predatory businesses, and inattentive automobile and truck drivers.

Throughout his career, John has represented scores of patients who have been the victims of medical negligence, obtaining verdicts and settlements in both state and federal courts. He has handled cases for landowners victim to fraudulent mine royalty practices, for homeowners whose homes and business contained defective concrete, and for Kentucky residents who were overcharged for premium insurance taxes. In addition, John's trial experience extends to the defense of individuals in criminal cases.

John is a frequent lecturer of litigation subjects with the Kentucky Justice Association and American Association for Justice, and has been recognized as a Kentucky Super Lawyer. He is AV rated by the Martindale-Hubbell rating service.

### **Daniel K. Bryson Founding Partner**

Dan is one of the nation's most respected and experienced attorneys in the area of construction product defect litigation involving mass torts, class actions or individual lawsuits (condominiums and multi-family).

For over 25 years, Dan has focused his practice on complex civil litigation, successfully representing thousands of owners in a wide variety of defective construction product suits, class actions, and various mass torts and recovering more than \$1.25 billion for his clients in numerous states throughout the country. He frequently collaborates with other attorneys in order to assemble the most effective team possible. Dan has also been lead or co-lead or steering committee member in a number of successful MDL or class actions.

Dan is a frequent lecturer and writer on a variety of defective construction products, insurance, and consumer mass tort related disputes. See his attorney profile at [www.wbmlp.com](http://www.wbmlp.com) for a partial listing. He has been quoted by a variety of media outlets over the years including the Wall Street Journal, Washington Post, New York Times and Lawyers Weekly to name a few. He has been named as a member of the Legal Elite and Super Lawyers in North Carolina on numerous occasions. Dan is the past chair of the [NC Bar Association, Construction Law Section](#).

Dan's recent experience includes serving as co-lead counsel in MDL No. 2514 against Pella Windows & Doors in Federal Court in Charleston, SC before the Honorable Judge David Norton. Dan has also served as lead counsel in MDL No. 2333 against MI Windows and Doors in Federal Court in Charleston, SC before the Honorable Judge David Norton. He is co-lead counsel in a MDL 2495 against Atlas Roofing Corporation in Federal Court in Atlanta, GA before the Honorable Judge Thomas Thrash, Jr. He has also served as a member of the Plaintiffs' Steering Committee (Co-chair Science and Expert Committee) for the MDL 2047 involving Chinese Drywall. A settlement valued at over [\\$1 billion](#) was approved in 2013 involving one of the primary defendants, Knauf Plasterboard Tianjin and hundreds of other defendants and insurance companies. Dan served on the trial team in Federal Court in Louisiana before the Honorable Eldon Fallon for each of the three Chinese Drywall bellwether cases.

He has also won a number of impressive jury and trial verdicts in building defect cases through the years involving windows and numerous other building products. Earlier in his career, Mr. Bryson also secured substantial sums for thousands of homeowners throughout the country who had a synthetic stucco on their homes called Exterior Insulation Finish System ("EIFS"), which caused water damage. On another occasion, he secured substantial sums for thousands of homeowners throughout Western Kentucky who had cracking concrete as a result of alkali carbonate reaction.

Dan is an 1983 graduate of the University of North Carolina at Chapel Hill, and received his law degree, with honors, from Wake Forest University in 1988.

**Gary E. Mason**  
**Founding and Managing Partner**

Gary is a nationally recognized leader of the class action bar. Focusing on consumer class actions and mass torts, Gary has recovered more than \$1.5 billion in the 22 years he has represented plaintiffs.

With his broad experience, Gary is nationally known for representing consumers in class actions involving a wide range of defective products, including Chinese drywall, fire retardant plywood, polybutylene pipe, high-temperature plastic venting, hardboard siding, pharmaceutical products, consumer electronics and automobiles.

Gary has served in leadership positions in many consumer class actions in State and Federal Courts nationwide as well as in Multi-District Litigation. Gary writes and speaks frequently on topics related to class action litigation. He was the 2014-2014 Co-Chair of the

Class Action Litigation group for the American Association for Justice. He has repeatedly been named as a Washington, DC Superlawyer for Class Actions.

Gary graduated magna cum laude, Phi Beta Kappa, from Brown University in 1984 and earned his law degree from Duke University Law School. He then clerked for the Honorable Andrew J. Kleinfeld, U.S. District Court Judge, in Anchorage, Alaska.

**Scott C. Harris**  
**Partner**

Scott's practice is focused on fighting for individuals and homeowners in complex litigation, including construction defect, mass tort, product liability, and wrongful death litigation. Scott has played a key role in securing substantial verdicts and settlements in a variety of cases, including a multi-million dollar verdict in favor of homeowners for a developer's unfair and deceptive advertising and shoddy road construction, a legal malpractice case, and several defective condominium construction cases.

Scott earned his law degree from Wake Forest University School of Law in 2006 and his Bachelor of Arts from Hampden-Sydney College, in 2001. While at Hampden-Sydney College, Scott was Chairman of the Honor Committee and a member of the national leadership honor Society, Omicron Delta Kappa. Scott was named to the *Super Lawyers' Rising Stars* list as one of the top up-and-coming attorneys in North Carolina for 2010, 2012, 2013 and 2014 and selected for inclusion in *Business North Carolina Legal Elite* for 2013.

**Matthew Lee**  
**Partner**

Matt's practice is focused on fighting for individuals and homeowners in complex litigation, including construction defect, mass tort, product liability, and wrongful death cases. Matt has played a key role in securing substantial verdicts and settlements in a variety of matters, including obtaining multi-million dollar verdicts for homeowners associations in construction defect cases and substantial settlements in wrongful death actions.

Matt earned his law degree from Wake Forest University School of Law in 2006 and his Bachelor of Arts from The Catholic University of America, cum laude, in 2001. While at Wake Forest, Matt was the 2005 Zeff Trial Competition Champion, a regional finalist at the 2006 American Association for Justice (AAJ) Trial Advocacy Competition, the AAJ Student Chapter President, and was selected as a member of the Order of Barristers. Matt is a graduate of Leadership Raleigh 25 with the Greater Raleigh Chamber of Commerce and serves on the North Carolina Advocates for Justice (NCAJ) Legal Affairs Committee and Communications Committee. Matt was named to the *Super Lawyers' Rising Stars* list as one of the top up-and-coming attorneys in North Carolina for 2012, 2013 and 2014 and selected for inclusion in *Business North Carolina Legal Elite* for 2014.

**Natasha C. Camenisch**  
**Attorney**

Natasha is an associate who focuses on complex civil litigation and personal injury, as well as criminal and family law. She obtained her law degree from the University of Kentucky College of Law, where she received the “best brief” award for her work on Moot Court and served as a staff member of the Journal of Equine, Agriculture and Natural Resources Law. Natasha was elected as a Student Bar Association representative, Moot Court Board social chair, and Phi Alpha Delta vice justice. Natasha completed her undergraduate studies at the University of Kentucky, where she graduated summa cum laude with a bachelor’s degree in political science. She was a Kentucky Governor’s Scholar and a member of Alpha Delta Pi sorority.

Prior to joining WBM, she served as a staff attorney to the Honorable James C. Brantley of the Hopkins Circuit Court. Natasha is licensed to practice in Kentucky and Tennessee. She was named to the *Super Lawyers’ Rising Stars* list as one of the top up-and-coming attorneys Kentucky for 2016.

Natasha is a member of the Kentucky Justice Association, American Association for Justice, and the Kentucky Bar Association. She is also treasurer of the Hopkins County Bar.

**Caroline Ramsey Taylor**  
**Attorney**

Caroline is an associate focusing her practice on complex civil litigation and personal injury. She is a member of the American Association of Justice and is currently the Newsletter Chair for the Railroad Section of AAJ. She is also an active member of the Tennessee Association for Justice.

After clerking for Whitfield Bryson & Mason during the summer of 2012, she officially joined the firm in March 2013, and actively practices in both the firm’s Nashville and Kentucky offices. Caroline graduated magna cum laude from the University of Louisville Brandeis School of Law, where she completed law school in just two and a half years. While in law school she was on the University of Louisville Law Review (Volume 50) and was also a member of Law Students for Justice (law school division of AAJ). Caroline received her bachelor's degree from Western Kentucky University, where she graduated summa cum laude with a bachelor’s degree in Corporate and Organizational Communication and a minor in Marketing. She was president of her sorority, Alpha Delta Pi, involved in many other leadership roles on campus, and did an internship with the Cincinnati Bengals.

Caroline is admitted to practice in Tennessee, Florida, and Kentucky.



**Benjamin S. Branda**  
**Attorney**

Benjamin is an associate in WBM's litigation practice, concentrating on consumer products and antitrust violations. His primary focus is on market competition violations and the unfair and deceptive trade practices involving a wide range of products, including foods, building materials, and consumer electronics companies.

Additionally, Benjamin has primary responsibility for the management of WBM's social media and digital content, developing strategic plans to effectively integrate existing marketing systems. His scholarly work in the area of digital copyright has received recognition for encouraging relaxed legal standards to protect emerging new technologies and facilitate greater access to information (*see Up in the Airwaves: Technological Determinism, the Public Performance Right, and Aereo's Uncertain Future*, 14 Wake Forest J. Bus & Intell. Prop. L. \_\_\_\_ (forthcoming Winter 2014)).

Benjamin joined the firm in 2013 as a law clerk while completing his law degree. He graduated from The George Washington University Law School in 2014. He received his bachelor's degree in criminal justice from Michigan State University in 2009.

**Jeremy R. Williams**  
**Attorney**

Jeremy is an associate in WBM's litigation practice, with a focus on defective construction products and construction defect claims. He primarily focuses on representing owners who have been the unfortunate victims of poor manufacturing processes, as well as homeowners and commercial developers whose properties have been subjected to shoddy construction practices.

More specifically, Jeremy has played an integral role in MDL No. 2495, against Atlas Roofing Corp., and MDL No. 2577 against Building Materials of America, d/b/a GAF. In both cases, Jeremy has drafted pleadings, briefs, memorandums, taken and defended depositions, and has worked directly with expert witnesses regarding the inspections and testing of the defective products at issue.

Jeremy joined the firm in 2013 as a law clerk while completing a dual degree program that enabled him to earn his law degree and his MBA. He graduated law school from Campbell University School of Law and earned his MBA from N.C. State University as one of the first members of the dual degree program offered between the two schools. He received his bachelor's in sport and event management in 2010 from Elon University. Jeremy is also a member of the American Association for Justice as well as the North Carolina Advocates for Justice.

**Patrick M. Wallace**  
**Attorney**

Patrick is an associate in WBM's litigation practice, with a focus on defective construction products and construction defect claims. He aims his practice on representing individuals who have been the unfortunate victims of shoddy construction and manufacturing practices.

Patrick joined the firm in 2015 after completing a judicial clerkship with the Hon. Catharine R. Aron, Chief Judge for the United States Bankruptcy Court for the Middle District of North Carolina. He received his law degree from Wake Forest University School of Law, where he was a member of Moot Court and competed on the American Association for Justice trial team for two years. He received his Bachelor of Arts degree from the University of Illinois at Urbana-Champaign in 2009.

**Jennifer S. Goldstein**  
**Attorney**

Jennifer Goldstein is an associate in WBM's litigation practice, with a focus on national employment, consumer protection, and privacy class action lawsuits.

Jennifer worked for WBM as a summer associate and law clerk while completing her degree. She then joined the firm in 2016 after serving as Special Assistant to the Office of the Attorney General for the District of Columbia, where she defended the District and District agencies against employment, personal and intention tort, Section 1983, and constitutional law claims. She received her law degree from Georgetown University Law Center, where she edited and published an article in the Georgetown Journal of Gender and the Law and won the 2014 UCLA School of Law Williams Institute Moot Court Competition on behalf of the Georgetown University Law Center Barrister's Counsel. She received her Bachelor of Arts degree from The George Washington University.

Jennifer's pro bono work has included: briefing and arguing a federal inmate's appeal before the U.S. Court of Appeals for the District of Columbia; drafting name and gender change requests for transgender individuals in need; and submitting U-Visa applications and civil protection orders for indigent survivors of violence.

**Danielle L. Perry**  
**Attorney**

Danielle is an associate in WBM'S litigation practice, with a focus on protecting employee and consumer rights through class action lawsuits.

Danielle joined WBM in 2016, after practicing in a Plaintiff's class action firm in Los Angeles, where she worked as an advocate for both victims of consumer fraud and for employees who were being deprived of pay and not provided with legally required meal and rest periods.

Focusing on California's complex wage and hour laws, Danielle spent much of her time working on lawsuits brought to recover lost wages and penalties for banking, manufacturing, retail, and property management employees.

Danielle received her law degree from Loyola Law School, while holding an externship as a law clerk for the Honorable Victoria Chaney of the California Court of Appeals, worked with the Labor Division of the Los Angeles Office of the City Attorney, and was a Board Member for the Public Interest Law Foundation. She received her Bachelor of Arts degree from the University of California

### **Hunter Bryson Attorney**

Hunter is an associate in WBM's litigation practice, with a focus on defective construction products and construction defect claims. He primarily focuses on representing owners who have been the unfortunate victims of poor manufacturing processes, as well as homeowners and commercial developers whose properties have been subjected to shoddy construction practices.

Hunter joined WBM in 2016, after working as a law clerk for the firm, where he assisted in standing up for the rights of injured consumers on a daily basis.

Hunter earned his law degree from Campbell University School of Law in 2016. While at Campbell Law, he was elected as a justice to the honor court, a group leader for the peer mentor program, and a participant in the Campbell Law Connections program. Hunter earned his Bachelor of Arts degree from the University of North Carolina Chapel Hill, double majoring in Political Science and Economics. During the summer, Hunter interned for Themis Law Chambers in Cape Town, South Africa.

### **Notable WBM Class Action Cases**

#### **Antitrust**

*In re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. 3:07-cv-01827, MDL No. 1827 (N.D. Cal.) (combined settlement totaling nearly \$1.1 billion in suit alleging the illegal formation of an international cartel to restrict competition in the LCD panel market) (2012).

#### **Appliances**

*Ersler, et. al v. Toshiba America et. al*, No. 07- 2304 (D.N.J.) (settlement of claims arising from allegedly defective television lamps) (2009).

*Maytag Neptune Washing Machines* (class action settlement for owners of Maytag Neptune washing machines).

*Turner v. General Electric Company*, No. 2:05-cv-00186 (M.D. Fla.) (national settlement of claims arising from allegedly defective refrigerators) (2006).

*Stalcup, et al. v. Thomson, Inc.* (Ill. Cir. Ct.) (\$100 million class settlement of claims that certain GE, PROSCAN and RCA televisions may have been susceptible to temporary loss of audio when receiving broadcast data packages that were longer than reasonably anticipated or specified) (2004).

*Hurkes Harris Design Associates, Inc., et al. v. Fujitsu Computer Prods. of Am., Inc.* (settlement provides \$42.5 million to pay claims of all consumers and other end users who bought certain Fujitsu Desktop 3.5" IDE hard disk drives) (2003).

### **Automobiles**

*In re General Motors Corp. Speedometer Prods. Liability Litig.*, MDL 1896 (W.D. Wash.) (national settlement for repairs and reimbursement of repair costs incurred in connection with defective speedometers) (2007).

*Baugh v. The Goodyear Tire & Rubber Company* (class settlement of claims that Goodyear sold defective tires that are prone to tread separation when operated at highway speeds; Goodyear agreed to provide a combination of both monetary and non-monetary consideration to the Settlement Class in the form of an Enhanced Warranty Program and Rebate Program) (2002).

*Lubitz v. Daimler Chrysler Corp.*, No. L-4883-04 (Bergen Cty. Super. Ct, NJ 2006) (national settlement for repairs and reimbursement of repair costs incurred in connection with defective brake system; creation of \$12 million fund; 7th largest judgment or settlement in New Jersey) (2007).

### **Civil Rights**

*In re Black Farmers Discrimination Litigation*, Case No. 1:08-mc-00511 (D.D.C.) (\$1.25 billion settlement fund for black farmers who alleged U.S. Department of Agriculture discriminated against them by denying farm loans) (2013).

*Bruce, et. al. v. County of Rensselaer et. al.*, Case No. 02-cv-0847 (N.D.N.Y.) (class settlement of claims that corrections officers and others employed at the Rensselaer County Jail (NY) engaged in the practice of illegally strip searching all individuals charged with only misdemeanors or minor offenses) (2004).

### **Construction Materials**

*Cordes et al v. IPEX, Inc.*, No. 08-cv-02220-CMA-BNB (D. Colo.) (class action arising out of defective brass fittings; court-appointed member of Plaintiffs' Steering Committee) (2011).

*In re: Pella Corporation Architect and Designer Series Windows Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2514 (D.S.C.)(class action arising from allegedly defective windows; Court-appointed Co-Lead Counsel).

*In re MI Windows and Doors, Inc., Products Liability Litigation*, MDL No. 2333 (D.S.C) (class action arising from allegedly defective windows; Court-appointed Co-Lead Counsel; settlement valued at \$20 million) (2015).

*In re: Atlas Roofing Corporation Chalet Shingle Products Liability Litig.*, MDL No. 2495 (N.D. Ga.) (class action arising from allegedly defective shingles; Court-appointed Co-Lead Counsel).

*Helmer et al. v. Goodyear Tire & Rubber Co.*, No. 12-cv-00685-RBJ (D. Colo. 2012) (class action arising from allegedly defective radiant heating systems; Colorado class certified, 2014 WL 3353264, July 9, 2014); defense verdict at trial).

*In re: Zurn Pex Plumbing Products Liability Litigation*, No. 0:08-md-01958, MDL No. 1958 (D. Minn.) (class action arising from allegedly plumbing systems; member of Executive Committee; settlement) (2012).

*Hobbie, et al. v. RCR Holdings II, LLC, et al.*, No. 10-1113 , MDL No. 2047 (E.D. La.) (\$30 million settlement for remediation of 364 unit residential high-rise constructed with Chinese drywall) (2012).

*In re: Chinese Manufactured Drywall Products Liability Litigation*, No. 2:09-md-02047, MDL No. 2047 (E.D. La.) (litigation arising out of defective drywall; \$1 billion settlement) (appointed Co-Chair, Insurance Committee) (2012).

*Galanti v. Goodyear Tire & Rubber Co.*, No. 03-209 (D.N.J. 2003) (national settlement and creation of \$330 million fund for payment to owners of homes with defective radiant heating systems) (2003).

*In re Synthetic Stucco Litig.*, Civ. Action No. 5:96-CV-287-BR(2) (E.D.N.C.) (member of Plaintiffs' Steering Committee; settlements with four EIFS Manufacturers for North Carolina homeowners valued at more than \$50 million).

*In re Synthetic Stucco (EIFS) Prods. Liability Litig.*, MDL No. 1132 (E.D.N.C.) (represented over 100 individuals homeowners in lawsuits against homebuilders and EIFS manufacturers).

*Posey, et al. v. Dryvit Systems, Inc.*, Case No. 17,715-IV (Tenn. Cir. Ct) (Co-Lead Counsel; national class action settlement provided cash and repairs to more than 7,000 claimants) (2002).

*Sutton, et al. v. The Federal Materials Company, Inc., et al*, No. 07-CI-00007 (Kty. Cir. Ct) (\$10.1 million class settlement for owners of residential and commercial properties constructed with defective concrete).

*Staton v. IMI South, et al.* (Ky. Cir. Ct.) (class settlement for approximately \$30 million for repair and purchase of houses built with defective concrete).

### **Environmental**

*Nnadili, et al. v. Chevron U.S.A., Inc.*, No. 02-cv-1620 (D.D.C.) (\$6.2 million settlement for owners and residents of 200 properties located above underground plume of petroleum from former Chevron gas station) (2008).

*In re Swanson Creek Oil Spill Litigation*, No. 00-1429 (D. Md.) (Lead Counsel; \$2.25 million settlement of litigation arising from largest oil spill in history of State of Maryland) (2001).

### **Fair Labor Standards Act/Wage and Hour**

*Howard Bland, Jr. and David Rupp v. CalFrac Well Services Corp.*, No. 2:12-cv-1407 (W.D. Pa.) (FLSA collective action and class action settled for \$6 million) (2016).

*Snodgrass v. Bob Evans Farms, Inc.*, No: 2:12-cv-768 (S.D. Ohio) ((FLSA collective action and class action settled for \$16.5 million) (2016)

*Craig v. Rite Aid Corporation*, Civil No. 08-2317 (M.D. Pa.) (FLSA collective action and class action settled for \$20.9 million) (2013).

*Stillman v. Staples, Inc.*, Civil No. 07-849 (D.N.J. 2009) (FLSA collective action, plaintiffs' trial verdict for \$2.5 million; national settlement approved for \$42 million) (2010).

*Lew v. Pizza Hut of Maryland, Inc.*, Civil No. CBB-09-CV-3162 (D. Md.) (FLSA collective action, statewide settlement for managers-in-training and assistant managers, providing recompense of 100% of lost wages) (2011).

### **Financial**

*Roberts v. Fleet Bank (R.I.), N.A.*, Civil Action No. 00-6142 (E. D. Pa.) (\$4 million dollar settlement on claims that Fleet changed the interest rate on consumers' credit cards which had been advertised as "fixed.") (2003).

*Penobscot Indian Nation et al v United States Department of Housing and Urban Development*, N. 07-1282 (PLF) (D.D.C. 2008) (represented charitable organization which successfully challenged regulation barring certain kinds of down-payment assistance; Court held that HUD's promulgation of rule violated the Administrative Procedure Act) (2008).

### **Insurance**

*Young, et al. v. Nationwide Mut. Ins. Co, et al.*, No. 11-5015 (E.D. Ky.) (series of class actions against multiple insurance companies arising from unlawful collection of local taxes on premium

payments; class certified and affirmed on appeal, 693 F.3d 532 (6th Cir., 2012); settlements with all defendants for 100% refund of taxes collected) (2014).

*Nichols v. Progressive Direct Insurance Co., et al.*, No. 2:06cv146 (E.D. Ky.) (Class Counsel; class action arising from unlawful taxation of insurance premiums; statewide settlement with Safe Auto Insurance Company and creation of \$2 million Settlement Fund; statewide settlement with Hartford Insurance Company and tax refunds of \$1.75 million ) (2012).

### **Personal Injury**

*Mary Restaino, et al. v Mario Badescu, Inc., et al.*, No. L-005830-14 (N.J. Super. Ct.) (confidential settlement on behalf of 35 consumers injured by undisclosed steroid in cosmetic products) (2017).

### **Privacy/Data Breach**

*In Re: U.S. Office of Personnel Management Data Security Breach Litigation*, No. 15-1393 (ABJ), MDL No. 2664 (D.D.C.) (court appointed interim Liaison Counsel).

*In re Google Buzz Privacy Litigation*, No. 5:10-cv-00672 (N.D. Cal.) (court-appointed Lead Class Counsel; \$8.5 million cy pres settlement) (2010).

*In re: Dept. of Veterans Affairs (VA) Data Theft Litig.*, No. 1:2006-cv-00506, MDL 1796 (D.D.C.) (Co-lead counsel representing veterans whose privacy rights had been compromised by the theft of an external hard drive containing personal information of approximately 26.6 million veterans and their spouses; creation of a \$20 million fund for affected veterans and a cy pres award for two non-profit organizations) (2009).

*In re: Adobe Systems Inc. Privacy Litigation*, No. 5:13-cv-05226 (N.D. Cal. 2015) (settlement requiring enhanced cyber security measures and audits) (2015).

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

KIRK NELSON and JOHN EVANS, individually and on  
behalf of all other persons similarly situated,

Plaintiffs,

-v-

SABRE COMPANIES LLC and  
SABRE ENERGY SERVICES LLC,

Defendants.

1:15-cv-00314 (BKS/TWD)

**ORDER APPROVING SETTLEMENT AND FINAL  
JUDGMENT DISMISSING LAWSUIT WITH PREJUDICE**

Plaintiffs Kirk Nelson and John Evans, on behalf of themselves and all Opt-In Plaintiffs (collectively, “Plaintiffs”), and Defendants Sabre Companies LLC and Sabre Energy Services LLC (“Defendants” and, together with Plaintiffs, the “Parties”), jointly moved for approval of the settlement reached between Plaintiffs and Defendants (the “Settlement”).

The Court hereby finds that the proposed Settlement is fair and reasonable. Therefore, the Court approves the Settlement and orders that it be implemented according to the terms and conditions set forth in the Settlement and in the Parties’ Joint Motion to Approve Settlement Agreement.

The Court dismisses this case with prejudice.

**SO ORDERED.**

SIGNED on \_\_\_\_\_, 2018.  
Syracuse, New York

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Brenda K. Sannes  
United States District Judge